MIRREM

Measuring Irregular Migration

www.irregularmigration.eu

EU Policy Framework on irregular migrants

MIrreM Working Paper 8/2024

AUTHORS:

Martin Wagner

Alan Desmond

Albert Kraler

Funded by the European Union

Co-funded by: UK Research and Innovation

Toronto Metropolitan University — Canada Excellence Research Chair in Migration & Integration

Deliverable Information:

Project Acronym:	Measuring irregular migration and related policies (MIrreM)
Project No.	101061314
WP	WP3 - Politics: Understanding legal and policy contexts
Deliverable Type:	Report
Deliverable Name	EU Policy Framework on irregular migrants
Version:	1
Date:	22/04/2024
Responsible Partner:	International Centre for Migration Policy Development (ICMPD)
Contributing Partners:	University of Leicester; University for Continuing Education Krems (Danube University Krems)/ UWK
Authors	Martin Wagner (ICMPD), Alan Desmond (University of Leicester), Albert Kraler (UWK)
Reviewers:	Michele Levoy (Picum)
Dissemination Level:	Public

Revision History:

Version	Date	Author	Organisation	Description
1	17/03/2024	Martin Wagner Alan Desmond, Albert Kraler	ICMPD; University of Leicester; UWK	Initial draft
1	18/03/2024	Martin Wagner Alan Desmond	ICMPD; University of Leicester	Draft for Review
1	22/03/2024	Michele Leyoy	PICUM	Review
1	03/04/2024	Martin Wagner Alan Desmond	ICMPD; University of Leicester	Draft for Final Review
1	15/04/2024	Michele Leyoy	PICUM	Final Review
1.0	21/04/2024	Martin Wagner Alan Desmond, Albert Kraler	ICMPD; University of Leicester; UWK	Version 1

Executive Summary

This Working Paper traces the development of EU law and policy on irregular migration. The starting point for our analysis is the entry into force of the Treaty of Amsterdam in 1999 in which the EU set itself the objective of becoming an area of freedom, security and justice (AFSJ), securing its external borders while ensuring freedom of movement for its citizens internally. The European Council's 1999 Tampere Conclusions, the first multi-annual programme for creating an AFSJ, laid the ground for criminalisation of irregular migration and externalisation of migration control as a way of deterring and preventing irregular migration, and identified return as an important tool in the management of migration flows, a tool that has come to be the main instrument in EU efforts to deal with the presence of irregular migrants. This policy agenda has become a legal reality thanks to the law-making powers conferred on the EU in the field of immigration and asylum by the Treaty of Amsterdam.

In order to identify the main ways in which EU law and policy operate to both produce irregularity and create routes out of irregularity, we refer to the pathways in and out of irregularity elaborated as part of a broader conceptualisation of migrant irregularity in the MIrreM project.

We identify EU policy and legislative efforts to prevent and reduce irregular migration as a consistent theme of EU activity in the field of irregular migration. This restrictive approach has intensified with time, and has arguably reached a fever pitch with the adoption of the New Pact on Migration and Asylum in 2023. In parallel with measures to prevent arrival and remove irregular migrants, however, we identify a pattern of rights-expansive rulings by the two supranational European courts that is oftentimes in direct opposition to the migration control efforts of the EU and individual EU Member States (MSs).

At the same time, however, when the question of numbers of irregular arrivals takes on particular political salience, we suggest that Europe's supranational courts become more receptive to migration control efforts that impinge on migrants' rights and show a greater willingness to relieve the EU and its MSs of human rights obligations owed to irregular migrants.

While we identify return as the main focus of the EU's response to the presence of irregular migrants in the EU, we also highlight the potential for regularisation to be more meaningfully employed by the EU and its MSs. We argue that under the Return Directive there is an obligation on states to either issue a return decision to an irregular migrant, or to regularise her/him. In light of how ineffective EU return policy currently appears, with just one third of return decisions implemented, greater use of regularisation would reduce the glaring gap between the number of return decisions issued and the number effected. Embracing regularisation would transform current return policy from one that is grossly ineffective to one which would have a greater likelihood of achieving the aim of lowering the number of migrants unlawfully present in the EU.

We close this Working Paper with a spotlight on three current issues that have the potential to significantly impact arrival of irregular migrants to the EU, and migrants' entry into and exit out of irregularity over the coming years.

Table of contents

LIST OF TABLES

LIST OF FIGURES

ACRONYMS

AFSJ	Area of Freedom, Security and Justice
APD	Asylum Procedures Directive
BTP	Beneficiary of Temporary Protection
CEAS	Common European Asylum System
CIREFI	Centre for Information, Discussion, and Exchange on the Crossing of Borders and Immigration
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoO	Country of Origin
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
ECHR	European Convention on Human Rights
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EES	Entry and Exit System
EMN	European Migration Network
EMPACT	European Multidisciplinary Platform Against Criminal Threats
EMSC	European Migrant Smuggling Centre
EP	European Parliament
ETIAS	European Travel Information and Authorisation System
EUAA	European Union Asylum Agency
FRA	EU Agency for Fundamental Rights
IOM	International Organization for Migration
IP	International Protection
JHA	Justice and Home Affairs
JPSG	Joint Parliamentary Scrutiny Group
LTR-D	Long Term Resident Directive

MIrreM	Measuring irregular migration and related policies
MMC	Mixed Migration Centre
MS	Member State
PACE	Parliamentary Assembly of the Council of Europe
QD	Qualification Directive
SBC	Schengen Borders Code
SIS	Schengen Information System
TCN	Third Country National
TFEU	Treaty on the Functioning of the European Union
TP	Temporary Protetcion
TPD	Temporary Protection Directive
VIS	Visa Information System
WA	Withdrawal Agreement (UK-EU)

THE MIRREM PROJECT

MIrreM examines estimates and statistical indicators on the irregular migrant population in Europe as well as related policies, including the regularisation of migrants in irregular situations.

MIrreM analyses policies defining migrant irregularity, stakeholders' data needs and usage, and assesses existing estimates and statistical indicators on irregular migration in the countries under study and at the EU level. Using several coordinated pilots, the project develops new and innovative methods for measuring irregular migration and explores if and how these instruments can be applied in other socio-economic or institutional contexts. Based on a broad mapping of regularisation practices in the EU as well as detailed case studies, MIrreM will develop 'regularisation scenarios' to better understand conditions under which regularisation should be considered as a policy option. Together with expert groups that will be set up on irregular migration data and regularisation, respectively, the project will synthesise findings into a Handbook on data on irregular migration and a Handbook on pathways out of irregularity. The project's research covers 20 countries, including 12 EU countries and the United Kingdom.

TO CITE:

Wagner, M., Desmond, A. & Kraler, A. 2024. EU Policy Framework on irregular migrants. MIrreM Working Paper No. 8. Krems: University for Continuing Education Krems (Danube University Krems). https://doi.org/10.5281/zenodo.10875942

KEYWORDS

Irregular Migration, EU Law, Policy, Case Law

ACKNOWLEDGEMENTS

FUNDING ACKNOWLEDGEMENT

Funded by the European Union. Views and opinions expressed are, however, those of the author(s) only and do not necessarily reflect those of the European Union or the Research Executive Agency. Neither the European Union nor the granting authority can be held responsible for them.

In addition, MIrreM benefit from funding provided by UK Research and Innovation (UKRI) under the UK government's Horizon Europe funding guarantee. The Canadian research component of this project is undertaken, in part, thanks to funding from the Canada Excellence Research Chairs Program of the Government of Canada.

1. INTRODUCTION

1.1 BACKGROUND

In recent decades, irregular migration has persistently been portrayed as one of the main challenges for the European Union (EU), posing complex legal, social, and humanitarian dilemmas. As EU Member States (MSs) grapple with the arrival of irregular migrants, the response has often been shaped by political imperatives rather than a principled protection of individual rights. References to numbers play an important part in the politicisation of irregular migration. This paper critically examines the EU's approach to irregular migration, arguing that policies driven solely by numerical targets fall short in guaranteeing fundamental human rights of irregular migrants.

Historically, the EU's response to irregular migration has been characterised by a patchwork of policies, often guided by the imperative to manage migration by securitising the EU's external borders. While this objective is important for ensuring security, it often comes at the expense of the rights and dignity of individuals undertaking perilous journeys in search of safety and opportunity.

Central to the EU's approach has been an emphasis on deterrence and containment, manifesting in strategies such as border controls, detention, and deportation. These measures, while intended to regulate migration flows, have often resulted in the violation of migrants' rights, including the right to seek asylum. In this context, EU policies have frequently set broad numerical targets, such as reducing irregular arrivals or increasing return rates[1], prioritising meeting these targets over the holistic consideration of migrants' circumstances and vulnerabilities. This fixation on numbers has led to a dehumanizing

[1] Currently, just one third of return decisions are implemented (European Commission, 2020a, pp36-38). See also Fabian Lutz, (Lutz, 2018) who suggests that less than 50% of irregular migrants in the EU are issued with return decisions, and less than 50% of those who receive such decisions are removed from the EU. It should be noted that return rate calculated as the ratio of return decisions and the number of confirmed returns in a given year is a highly deficient indicator, for a number of reasons including that mandatory returns following an obligation to leave are not comprehensively recorded, that the number of returns does not necessarily correspond to return decisions issued in the same year but often includes decisions on previous years, and, if aggregated on the European level, that individuals may have been issued multiple return decisions from different countries. The latter may also mean that a decision on return of the same person may not have been implemented in country A, but a separate decision issued in country B may have been. This said, there is wide consensus that a 'deportation gap', i.e. a gap between return decisions issued and effected return exists (Gibney, 2008).

discourse that portrays migrants as mere statistics and threats that comes in "waves", "mass influxes" or "flows", obscuring the individual stories of hardship, resilience, and aspiration that underpin their journeys, and perhaps most important, ignoring their entitlements as right holders.

The paper argues that this high degree of securitisation not only fails to reduce irregular migration, but to the contrary, fuels it. Accordingly, the paper provides a glimpse into how EU law that supposedly is crafted to prevent irregular migration and "combat" smuggling and human trafficking in fact creates pathways into irregularity. The paper further introduces the reader to decisions from the European courts, namely the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU), and how their judgements frame, guide, and shape EU law but also the rights of irregular migrants in their daily struggle to navigate within rights-restrictive EU laws, created to deter them from reaching and staying within the EU.

By examining key EU laws and policies and their implications for migrants, this paper aims to provoke critical reflection on migration governance – with a special lens on the treatment of irregular migrants – in the EU. Ultimately, it calls for a recalibration of priorities, whereby the pursuit of numerical targets is balanced with a genuine commitment to upholding the rights and dignity of third country nationals (TCNs), regardless of their migration status.

1.2. SCOPE OF THIS WORKING PAPER

This working paper analyses EU policies, legal categories, rights and the options for and limits to returning irregular migrants. It involves the analysis of EU legal and policy frameworks on irregular migration, including the nexus with other policy areas (such as asylum, labour migration, trafficking). In line with MIrreM's conceptual framework it clusters EU policies into those that are deemed to prevent irregular migration, but in fact create pathways into irregularity and it describes the EU legal options for pathways out of irregularity. As such the paper is focussed on EU policies and laws and does not delve into the national laws and policies of EU MSs. The latter is covered and complemented by the MIrreM working paper "Comparing national laws and policies addressing irregular migrants" (see Hendow & Qaisrani, 2024).

While EU policies concerning the employment of irregular migrants is a central focus of EU policy and law on irregular migration, this is only covered to a limited extent. This is for reasons of space constraints and the avoidance of overlap with recent publications that exhaustively address EU policies on irregular migrant work. First, (Fox-Ruhs & Ruhs, 2022) have elaborated on the "Fundamental Rights of Irregular Migrant Workers in the EU" in a study for the European Parliament. Second, the MIrreM sister project DignityFirm has recently published a working paper mapping the EU-level legislative and policy frameworks that shape conditions and vulnerabilities of irregular migrant workers (see Neidhardt et al., 2024). To broadly avoid duplication, this specialised policy area is only covered in as far as it contributes to questions addressed in this paper.

1.3. TERMINOLOGY

MIrreM adopts the terminology of regular versus irregular migrants and uses irregular immigration rather than 'illegal immigration'. The question of 'legality' or 'illegality' might at first glance and from a legal point of view appear to be straightforward (Thym, 2023, p. 812), pointing to the fact that TCNs (partially also non-national EU citizens (see Kraler & Ahrens, 2023a, p 14)) who reside within an EU MS without the necessary authorisation are 'illegal' (unlawful) whereas those with the necessary permits are 'legal' (lawful). From a linguistic (Gambino, 2015) but also from a political (Johnston, 2019; PICUM, n.d.) point of view the term 'illegal migrant' has generated much criticism. Thus, a shift in terminology is favoured by human rights advocates, organisations such as the UN and the Council of Europe and has reached the academic and partly the public debate. Indeed, the EMN glossary states that the European Commission favours the term 'irregular entry' instead of 'illegal entry' (EMN, n.d.). Much EU legal and policy terminology still lags behind, however. As the legal language in this context has its basis in EC treaty Art 63(3)(b), as amended by the Treaty of Amsterdam (Thym, 2023), legal definitions often use 'legal' and 'illegal'. This paper uses irregular if we use it as an analytical concept. When using the language of EU primary and secondary law, we are quoting the language used in EU law.

While we are aware that the terms deportation, repatriation, expulsion, removal, and return can have different meanings, we use them interchangeably throughout the paper.

1.4. DEFINITIONS

There is no explicit definition of the term irregular migration in EU law as such. In addition, the legal framework on irregular migration is stretched across various EU legal acts and refers to various situations, including unauthorised entry, overstaying visas, and lacking proper documentation. The treatment of irregular migration is outlined in a range of directives, regulations, and agreements within the EU framework.

Several laws, including but not limited to the Return Directive, the Employers Sanctions Directive, the Migration Statistics Directive and the ETIAS Regulation provide definitions of 'illegal stay' and/or 'illegal entry'. These are reproduced in table 1, below.

Table 1: Overview of definitions on irregular migration

Return Directive 2008/115/EC	Art 3(2): **'illegal stay'** means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Art 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State
Employers Sanction Directive 2009/52/EC	Art 2/b: **'illegally staying third-country national'** means a third country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State;
Migration and IP Statistics	Art 2/1r: **'third-country nationals found to be illegally present'** means third country nationals who are officially found to be on the territory of

Regulation (EC) No 862/2007	a Member State and who do not fulfil, or no longer fulfil, the conditions for stay or residence in that Member State";
ETIAS Regulation (EU) 2018/1240	Art 3/1(7): '**illegal immigration risk'** means the risk of a third-country national not fulfilling the conditions of entry and stay as set out in Art 6 of Regulation (EU) 2016/399

The definitions refer to 'illegal entry' or 'illegal presence', sometimes with a reference to the Schengen Borders Code (SBC) and sometimes not. While these definitions are not uniform, they provide a consistent, if abstract frame of reference.

On the global level, the International Organisation of Migration (IOM) defines irregular migration as "[m]ovement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the state of origin, transit or destination" (IOM, no date). IOM notes that while a universally accepted definition of irregular migration does not exist, the term is generally used to identify persons moving outside regular migration channels. Importantly, IOM also points to the fact that while they migrate irregularly this does not relieve states from the obligation to protect their rights, further clarifying that also categories of migrants who may not have any other choice but to use irregular migration channels can also include refugees, victims of trafficking, or unaccompanied migrant children (ibid).

2. DEVELOPMENT OF EU POLICY ON IRREGULAR MIGRATION

2.1 BACKGROUND

Attempts to harmonise EU policies on irregular migration go back to the 1970s, when the European Commission presented a first – abortive – proposal for a Council Directive on the harmonisation of Member States' laws to combat irregular migration and illegal employment. The adoption of the Single European Act in 1985 and the Schengen Treaty triggered renewed attempts to put migration on the European agenda, initially dealt with largely through informal intergovernmental cooperation. This intensified in the early 1990s, but it was not until the Amsterdam Treaty of 1997 entering into force in 1999 that the EU gained a formal mandate on migration (Kraler & Rogoz, 2011). The Treaty articulated the goal of progressively establishing the EU as an area of freedom, security and justice (AFSJ). A central feature of this AFSJ was facilitation of free movement of persons within the EU while activating the law-making powers newly conferred on the EU by the Treaty to adopt a common EU asylum and migration policy. The priorities in the development of the AFSJ have been set out in a series of multi-annual frameworks, discussed in section 2.2. Efforts to forge a common EU migration policy as part of the wider AFSJ have been pursued in three main policy areas, namely, regular migration, irregular migration and asylum.

Unlike the more coherent Common European Asylum System (CEAS) that regulates the system for international protection in the EU, the EU policy on irregular migration is more of a patchwork of regulations, directives, and bilateral or multilateral agreements that address one or more aspects of irregular migration. Irregular migration is addressed as the flip side of regulated or regular migration.

Despite the lack of a coherent legal framework on irregular migration, EU policy on asylum and migration is dominated by irregular migration and the 'fight' against it. The EU's duty to prevent "illegal immigration and trafficking in human beings" is enshrined in Art 79 TFEU that also aims for efficient management of migration flows, and fair treatment of TCNs residing legally in MSs. The primary response of the EU to the issue of irregular migration is thus to try to prevent arrival of irregular migrants and to deport those who have managed to enter or remain in the EU. This response, coupled with the EU's tendency to treat the issue of irregular migration as a law enforcement and security issue, has led to legislation aimed at preventing and controlling such migration without due regard to the protection of the human rights of such migrants. An important feature of this migration control agenda by the EU is the criminalisation of irregular migration (Mitsilegas, 2015), which has generated trenchant criticism by academics and civil society (Cholewinski, 2007; PICUM, 2013), with some measures adopted in the "fight" against irregular migration even drawing censure from the UN and governments outside the EU (Acosta, 2009; OHCHR, 2008).

The EU's migration policy thus concentrates on prevention and deterrence of irregular migration. Irregular entry and irregular stay are criminalised. Only more recently does one find references to address irregular and uncontrolled migratory flows through safe and well-managed pathways as objectives of the Union policy in the field of migration (see for example Immigration Liaison Network Regulation, 2019, recital 3). However, the regular migratory routes that EU MS offer to TCNs remain scarce, often come with a numerical cap, or require conditions of entry such as language knowledge, qualifications, experiences, etc that many migrants irregularly arriving would not be able to meet. Equally scarce are humanitarian pathways for people in need of international protection (resettlement and complementary pathways)[2] or other vulnerable TCNs.

2.2 POLICY DOCUMENTS

A framework for the realisation of the mandate of the Treaty of Amsterdam to create an AFSJ was set out in the **Tampere Conclusions** (European Council, 1999). Tampere, the first multi-annual programme for creating an AFSJ, identified four key elements of a common EU migration and asylum policy (partnership with countries of origin; a Common European Asylum System (CEAS); fair treatment of TCNs; and management of migration flows) and inaugurated an EU policy approach to irregular migration that has become increasingly entrenched. It reveals a desire for outsourcing and externalising migration control through partnerships with third countries, and explicitly links "illegal migration" with organised crime, calling for criminalisation of trafficking and smuggling. It views "management of migration flows" as reliant on the tools of return and readmission, closer cooperation between MSs' border control services, and a common policy on visas and false documents. While the Tampere conclusions do not define how to approach 'illegal migration' in detail, the Commission does so in 2001 in more detail, by also stating that "[i]llegal entry or residence should not lead to the desired stable form of residence" (European Commission, 2001, p6).

The development of the AFSJ since Tampere has seen the Commission cast irregular migration as an important crime and security issue. Tampere was succeeded by the **Hague Programme** (The Hague Programme, 2005), adopted just over three years after the 9/11 attacks and a year after the March 11, 2004 attack in Madrid. It accordingly displays a strong concern with security and anti-terrorism measures. The Hague Programme adds terrorism to the phenomena of "illegal migration" and organised crime that the EU needs to combat. In addition to partnerships with third countries and a common visa policy, it identifies the fight against irregular employment as an important element in tackling 'illegal migration'. Hague evinces a more rights-conscious approach to treatment of irregular migrants, however, insofar as it calls for an effective common returns policy that ensures individuals

[2] Only recently the European Commission announced that 14 EU Member States provided 61,000 pledges for resettlement and humanitarian admission for 2024-2025 under the EU Resettlement and Humanitarian admission scheme. A rather moderate number of the protection needs world-wide. (see European Commission, Dec 2023, Pledges submitted by the Member States for 2024-2025).

are “returned in a humane manner and with full respect for their human rights and dignity” (p 6).

The **Stockholm Programme** (European Council, 2010), covering the period 2010-2014, noted the “increasing pressure from illegal migration flows” facing the EU and called for intensification in the deployment of previously identified tools in the fight against ‘illegal migration’, namely, visa policy, externalisation of migration control, return of unlawfully present migrants, sanctions against employers, and effective border control. Stockholm is noteworthy for its explicit mention of regularisation, with the Council calling on MSs “to improve the exchange of information on developments at national level in the area of regularisation, with a view to ensuring consistency with the principles of the European Pact on Immigration and Asylum”. The European Pact on Immigration and Asylum, a 2008 political agreement championed by French President Nicolas Sarkozy, sought to shape a common EU approach to both regular and irregular migration. Initial efforts to secure a commitment in the 2008 Pact to an outright ban on mass regularisation in the EU was abandoned at the insistence of Spain in favour of a compromise agreement that states use only case-by-case, rather than generalised, regularisation under national law for humanitarian or economic reasons (Euractive, 2012).

Stockholm re-committed the EU to the Hague principle that the Union’s return policy must be implemented with full respect “for the fundamental rights and freedoms and the dignity of the individual returnees”. Equally significant, Stockholm highlighted the centrality of human rights to the development of the AFSJ following the entry into force of the Treaty of Lisbon in December 2009, stating that EU citizens “and other persons must be able to exercise their specific rights to the fullest extent”. The consequences of Lisbon for irregular migration were significant and included the competence of the CJEU to receive requests for preliminary rulings from any national court or tribunal on the validity of acts in the AFSJ by EU institutions and the conferral of binding effect on the Charter of Fundamental Rights. The implications of these developments for the rights of irregular migrants will be illustrated in chapter 3.

Stockholm was succeeded by the **Ypres Guidelines** (Strategic Guidelines for Justice and Home Affairs, 2014). Though ‘short, vague and general’ by comparison to earlier multi-annual frameworks for the AFSJ (Léonard & Kaunert, 2016), Ypres continues the call for irregular migration to be tackled in a “robust” and “resolute” manner through an effective common return policy, cooperation with third countries, and more efficient management of the EU’s external borders with a greater role for Frontex in securing borders against unwanted arrivals. Even more ‘short, vague and general’ is the ‘**New Strategic Agenda 2019-2024**’ in which the Council commits the EU to ‘continue and deepen our cooperation with countries of origin and transit to fight illegal migration and human trafficking and to ensure effective returns’ (European Council - A New Strategic Agenda 2019 - 2024, 2019).

Following the 2015 migration crisis, the AFSJ multi-annual programmes have been eclipsed by dedicated migration-related Commission Communications focused on accelerating the elaboration of an effective common asylum and migration policy. The Commission’s **European Agenda on Migration** (European Agenda on Migration, 2015) proposed 4 pillars for structural reforms to manage migration included “reducing the incentives for irregular migration”. The 2015 Agenda was followed by the **New Pact on Migration and Asylum**, first

proposed by the Commission in September 2020 (New Pact on Migration and Asylum, 2020) and agreed between the European Parliament and the Council in December 2023 (European Commission, 2023d). The Pact, discussed briefly in section 4, furthers the rights-restrictive and control-expansive thrust of EU policy towards irregular migrants and asylum-seekers.

2.3 EU LEGAL ACTS

The fragmented nature of the legal and policy response to irregular migration means that the presentation of the legal framework depends heavily on the research focus. The following list is therefore not an exhaustive list of legislation that creates or addresses, directly or indirectly irregular migrants. It presents a selected list of relevant secondary EU legislation that creates pathways into and out of irregularity, be it intentionally or as a consequence of its use by states or individuals navigating between those laws.

Overall secondary EU law on irregular migration is based on Art 79/1 TFEU which mandates the EU to develop a common immigration policy that ensures, amongst other things, the "prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". In this respect, the European Parliament and the Council shall adopt measures on "illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation" (Art 79/2/c TFEU). As a consequence, EU legislators created over the years a broad web of legislation (see the illustration below in Figure 1) with the purpose to prevent irregular entry and stay of TCN, such as those listed in Table 2.

Table 2: Table of laws addressing irregular migration

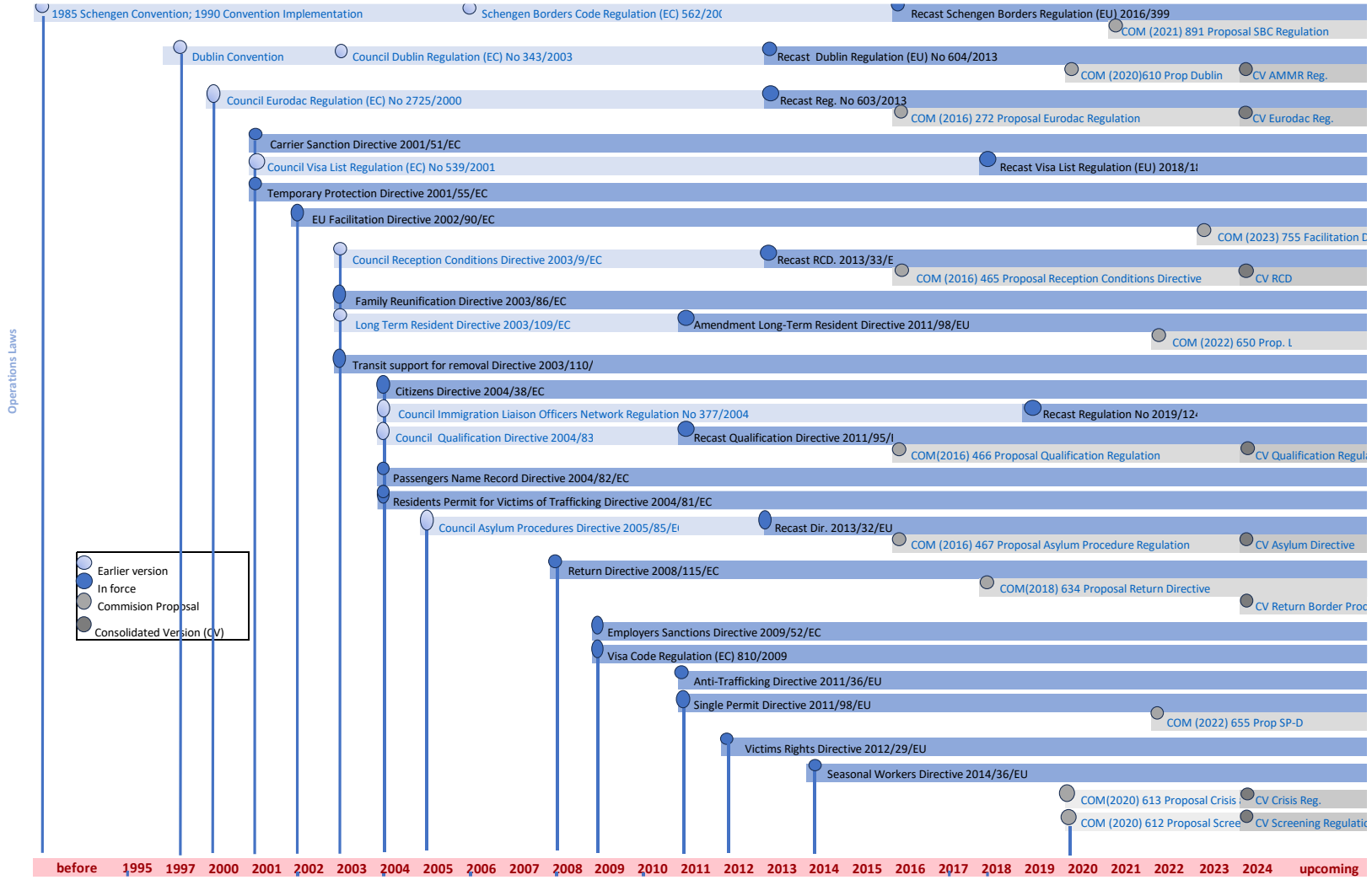
Prevention of Entry			
Carrier Sanctions Directive	2001	Council Directive 2001/51/EC	The Directive introduces penalties for carriers of irregular migrants.
EU Facilitation Directive	2002	Council Directive 2002/90/EC	The Directive imposes on MS the duty to penalise the assistance of irregular entry or transit of TCN, with or without financial gain; MS are given discretion to either penalize or not penalize humanitarian activities.
Obligation to communicate passenger information	2004	Council Directive 2004/82/EC	The Directive obligates the transmission of passenger data by carriers to national authorities aiming at improving the "combat" against "illegal migration"
Visa Code	2009	Regulation 810/2009	This Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the MSs not exceeding three months in any six-month period (Art 1).
Schengen Borders Code	2016	Regulation (EU) 2016/399	The SBC lays down rules governing border control of persons crossing the external borders of the MSs of the Union.
Visa list	2018	Regulation (EU) 2018/1806	The Regulation lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from visa requirements.

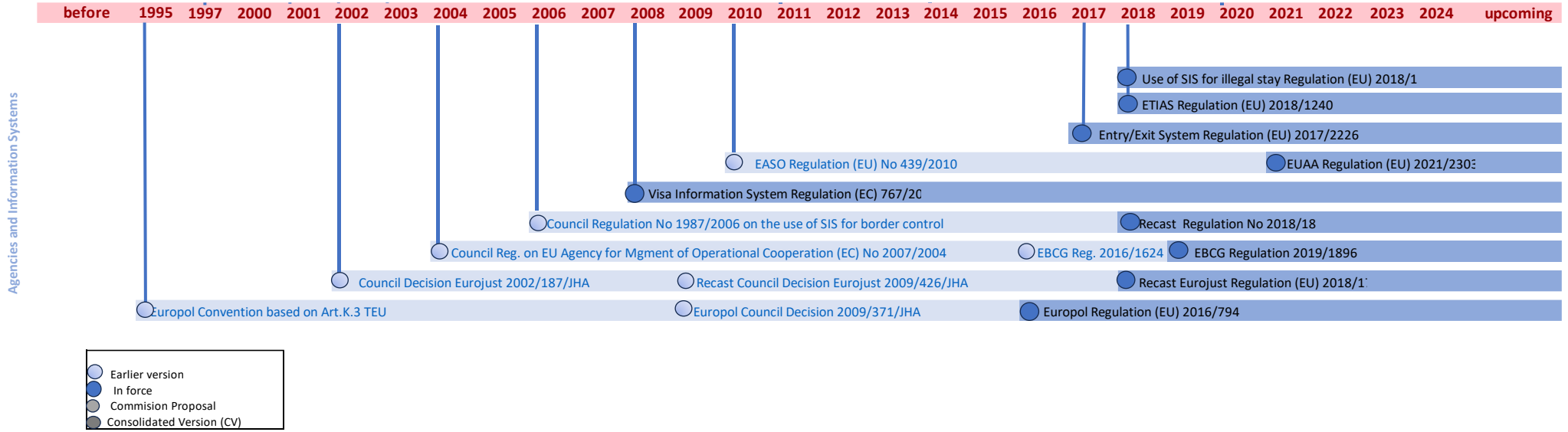
Immigration Liaison Officers Network Regulation	2019	Regulation (EU) 2019/1240	This Regulation creates a European network of immigration liaison officers to enhance cooperation and coordination among immigration liaison officers deployed to TC by MS, the EC and Union agencies – among others - to prevent irregular immigration originating from or transiting through their territories;
Stay and employment			
Long-Term Resident Directive	2003	Directive 2003/109/EC	While the Directive determines the terms for long-term resident status granted by MS to TCN residing 'legally' in its territory, it – in turn – also secures the status for long term residents preventing loss of status for reasons such as unemployment, welfare dependency, etc.
Family Reunification Directive	2003	Directive 2003/86/EC	While the right to family reunification by TCN according to this Directive depends on a lawful residence in the MS, the right to family and private life (Art 8 ECHR) opens the scope for family reunification to irregular migrants (see below under 3.3.2).
Residence Permit for Victims of Trafficking Directive	2004	Directive 2004/81/EC	The Directive defines the conditions for granting residence permits of limited duration, to TCNs who cooperate in the fight against trafficking in human beings or against action to facilitate irregular immigration.
Employers Sanctions Directive	2009	Directive 2009/52/EC	The Directive prohibits and sanctions employers for employing irregular migrants in order to fight irregular migration while also recognising the rights of irregular migrant workers to access remedies as well as residence permits in cases of severe exploitation.
Single Permit Directive	2011	Directive 2011/98/EU	The Directive simplifies the procedure for issuing a single permit for residence and work to TCN and, at the same time enhances the rights of TCN workers.
Anti-Trafficking Directive	2011	Directive 2011/36/EU	As part of the fight against trafficking in human beings, this Directive defines criminal offences and sanctions in the area of trafficking in human beings. It takes the gender perspective into account, to strengthen the prevention of this crime and the protection of the victims thereof.
Victims Rights Directive	2012	Directive 2012/29/EU	The Directive strives to ensure that victims of crime, regardless of residence status, receive appropriate information, support and protection and are able to participate in criminal proceedings.
Return			
Transit support for removal	2003	Council Directive 2003/110/EC	The Directive defines mutual assistance among MS with regard to unescorted and escorted removals by air taking into account "the common objective of ending the illegal residence of TCNs who are the subject of removal orders".
Return Directive	2008	Directive 2008/115/EC	This Directive is at the centre of EU's measures to fight irregular migration as it applies to TCNs staying irregularly on the territory of a MS. As a solution, irregular migrants are either to be returned or issued a national status. It also details procedures for voluntary and forced return, pre-removal detention and safeguards for returnees.
EU citizens			
EU Citizens Directive	2004	Directive 2004/38/EC	The Directive governs (a) the exercise of the right of free movement and residence within the territory of the MS by EU citizens and their family members; (b) the right of permanent

			residence in the territory of the MS for Union citizens and their family members; (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health. The Directive gains importance with irregular migration at the interplay between TCN and EU citizens, having given rise to case law that effectively regularises certain TCNs on the basis of their family ties with EU citizens. It is also relevant to the question of EU citizens' irregular residence.
Common European Asylum System			
Temporary Protection Directive	2001	Directive 2001/55/EC	This Directive provides a specific form of temporary protection in the case of a "mass influx" into the EU. As the first legal act under the CEAS, it was never activated until it gained prominence as the EU response to large number of people arriving from Ukraine since Russia's invasion in Feb. 2022.
Qualifications Directive (recast)	2011	Directive 2011/95/EU	This Directive determines who qualifies for international protection, encompassing refugee status and subsidiary protection status. Those two together with temporary protection form the exclusive three EU protection statuses.
Dublin Regulation (recast)	2013	Regulation (EU) No 604/2013	The Dublin Regulation determines the responsibility for an asylum application based on a set of hierarchical criteria.
Eurodac Regulation (recast)	2013	Regulation (EU) No 603/2013	Eurodac supports the Dublin procedure by storing fingerprints of applicants for IP and irregular migrants for the purpose of determining the responsible MS for the procedure to follow.
Asylum Procedures Directive (recast)	2013	Directive 2013/32	This Directive sets common rules for the procedure once a TCN declared to seek international protection.
Reception Conditions Directive (recast)	2013	Directive 2013/33/EU	The Reception Conditions Directive applies to applicants for international protection and determines the material reception conditions and the rights and requirements on reception.
Information Systems			
Visa Information System	2008	Regulation (EC) 767/2008	The Visa Information System sets up the conditions and procedures for the exchange of data between MS on applications for short-stay visas and on the decisions taken in relation thereto, including the decision whether to annul, revoke or extend the visa, to facilitate the examination of such applications and the related decisions (Art 1).
Entry/Exit System Regulation	2017	Regulation (EU) 2017/2226	The EES regulates the recording and storage of data, time and place of entry and exit of TCN crossing EU MS borders. Importantly its one of the key purposes is to detect and alert on 'overstaying' of permits, the largest pathway into irregularity identified by the EU.
Use of SIS for Irregular Stay	2018	Regulation (EU) 2018/1860	The Regulation lays down the conditions and procedures for the entry and processing of alerts on TCN subject to return decisions issued by the MS in the SIS (Art 1). It should 'increase the effectiveness of the Union system to return illegally staying third-country nationals' (Recital 2).
Use of SIS for border control	2018	Regulation (EU) 2018/1861	This Regulation lays down the conditions for the establishment, operation and use of the (SIS).
ETIAS Regulation	2018	Regulation (EU) 2018/1240	ETIAS establishes for visa exempted TCN considerations of whether the presence of those TCN in the EU MS would pose a

			security, irregular immigration or high epidemic risk. For this purpose, ETIAS introduces a travel authorisation and the conditions and procedures to issue or refuse it.

Figure 1: Overview of the development of EU secondary legislation related to irregular migration.




before
1995
1997
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
upcoming
Agencies and Information Systems
Use of SIS for illegal stay Regulation (EU) 2018/1
ETIAS Regulation (EU) 2018/1240
Entry/Exit System Regulation (EU) 2017/2226
EASO Regulation (EU) No 439/2010
EUAA Regulation (EU) 2021/230
Visa Information System Regulation (EC) 767/20
Council Regulation No 1987/2006 on the use of SIS for border control
Recast Regulation No 2018/18
Council Reg. on EU Agency for Mgment of Operational Cooperation (EC) No 2007/2004
EBCG Reg. 2016/1624
EBCG Regulation 2019/1896
Council Decision Eurojust 2002/187/JHA
Recast Council Decision Eurojust 2009/426/JHA
Recast Eurojust Regulation (EU) 2018/1
Europol Convention based on Art.K.3 TEU
Europol Council Decision 2009/371/JHA
Europol Regulation (EU) 2016/794
Earlier version
In force
Commision Proposal
Consolidated Version (CV)

2.4 DEVELOPMENT OF CASE LAW

The treatment of irregular migrants in the EU has been significantly influenced by judgments from the two supranational European courts. The Court of Justice of the EU (CJEU) is a Luxembourg-based institution responsible for ensuring uniform application and interpretation of EU law and since the entry into force of the Lisbon Treaty in 2009 it has the power to provide preliminary rulings to any national court or tribunal on acts in the AFSJ by EU institutions. This has led to an increase in the number of CJEU rulings concerning irregular migrants' rights.

The European Court of Human Rights (ECtHR) is a Strasbourg-based institution responsible for monitoring states' compliance with the European Convention on Human Rights (ECHR), a treaty binding on all 46 MSs of the Council of Europe (CoE), including all 27 EU MSs. The ECHR is widely accepted as the world's most effective human rights treaty due to its supervision by a Court.

Both institutions have been responsible for securing and expanding the protection of irregular migrants' rights against states' efforts to dilute or ignore such rights. The CJEU, for example, in *Tümer (CJEU, Tümer, 2014)* confirmed the applicability of EU employment law to irregular migrants. Since the entry into force on 13 January 2009 of the Return Directive (Return Directive, 2008), the Court has delivered over 30 judgments interpreting the Directive's provisions so as to advance the rights of irregular migrants while restricting the scope of state activity in detaining and criminalising such migrants. In rulings concerning EU citizenship, such as the famous (*CJEU, Zambrano, 2011*) case, and EU free movement rights in cases like *Metock* (*CJEU, Metock et al*, 2008) the CJEU has vindicated the rights of irregular migrants to remain lawfully in the EU on the basis of family ties to EU citizens (on both see also further below under chapter 3). It is important to note, however, that such rulings are often grounded not so much in a judicial concern for human rights protection as in attempts to ensure the effectiveness of EU law.

The ECtHR's main contributions to the protection of irregular migrants' rights include its application to such migrants of the right to be free from torture and inhuman and degrading treatment enshrined in Art 3 ECHR and the right to respect for private and family life codified in Art 8 ECHR. In the 2012 ruling in *Hirsi* (*ECtHR, Hirsi*, 2012), which concerned migrants intercepted by the Italian authorities on the high seas as part of the push-back campaign initiated in 2009 to return migrants to Libya, the Grand Chamber dealt a heavy blow to EU efforts to avoid ECHR obligations through externalizing immigration control by requiring compliance with ECHR duties including Art 3 ECHR even in the case of migrants intercepted in the high seas. In May 2012, the Italian Government announced that, in the light of the ruling, it would no longer seek to return migrants to Libya (remarks of Interior Minister to a committee of the Senato della Repubblica (2012)). Similarly, Art 3 ECHR has been deployed by the Court to prevent expulsion of seriously ill immigrants where the absence of necessary

health care in their country of origin would expose them to a real risk of a significant reduction in life expectancy or a rapid and irreversible decline in their health causing intense suffering. The high point of judicial protection for such immigrants was reached in the 2016 *Paposhvili* ruling (*ECtHR, Paposhvili*, 2016; see further below under chapter 3).

The ECtHR first deployed the Art 8 ECHR right to family life to prevent deportation of an irregular migrant in the *Rodrigues* case (*ECtHR, Rodriguez*, 2006). It has gone on to find that the Art 8 right to private life may also act as a bar to deportation (for example, *ECtHR, A.W. Khan v UK*, 2000). The principle of the best interests of the child has also led the Court to find that expulsion of an irregular migrant parent would violate Art 8 (for example, *ECtHR, Jeunesse v Netherlands*, 2014). Such positive outcomes for migrants are, however, the exception rather than the rule, and it is important to note that ECHR-based obligations on states to refrain from removal of migrants do not entail a right to any particular type of residence permission (Dembour, 2015).

While both supranational courts have delivered important rulings roundly vindicating the rights of irregular migrants, there has been a discernible shift in the approach of both institutions since the arrival of large numbers of migrants in 2015-2016 towards a greater receptiveness to states' efforts to restrict rights and make it easier to prevent entry or effect removal of irregular migrants (e.g., Heschl & Stankovic, 2018). From the perspective of the post-2015 so called 'migration crisis', *Hirsi* appears to be a high-water mark for protection of the rights of migrants seeking to irregularly enter the EU. Despite repeated insistence that the challenges posed by migration arrivals cannot justify practices that are incompatible with states' ECHR obligations (e.g., *ECtHR, Hirsi*, 2012, paras. 122, 176, 179; *ECtHR, Khlaifia et al vs Italy*, 2016, para 241), the ECtHR seems increasingly willing to interpret and apply those obligations in a way that relieves states of onerous potential duties. The Grand Chamber in *Khlaifia* (2016) for example, overturned the Chamber finding and held that failure to provide irregular migrants with an individual interview prior to their deportation from Italy did not violate the prohibition of collective expulsion codified in Art 4 of Protocol 4 to the ECHR. While there is a requirement under Art 4 for a migrant to have a genuine and effective possibility of submitting and having examined in an appropriate manner arguments against expulsion, this requirement does not necessarily entail an individual interview. In the same case the Grand Chamber also found, in what has been characterized as an unfortunate setback for migrants' rights (de Albuquerque, 2018) that the detention conditions endured by the irregular migrants in question did not constitute inhuman or degrading treatment for the purposes of Art 3 ECHR, essentially because of the 'situation of extreme difficulty facing the Italian authorities at the relevant time' (para 185).

The ECtHR's willingness to countenance the EU's pushback policies coheres with the reluctance of that same institution, and the CJEU in Luxembourg, to impose any obligation on states to issue humanitarian visas at diplomatic posts outside the EU to migrants fleeing persecution. In two remarkably similar cases, *CJEU, X and X*, 2017) and *ECtHR, M.N et al vs (2020*), both supranational bodies spurned the opportunity to develop an obligation for states under EU law or the ECHR to issue a visa that would allow a family to travel to an EU or Council of Europe MS in order to make an application for asylum. It is noteworthy that the CJEU ruling

had been preceded by an Opinion from AG Mengozzi who, taking a strict approach to the prohibition on torture and inhuman and degrading treatment, argued that Belgium was obliged to issue a short-term visa under the EU Visa Code where there were serious grounds to believe that refusal would directly result in the applicants being subjected to a treatment prohibited by Art 4 of the Charter and would prevent them from their only legal route to enjoy their right to apply for international protection (*Opinion AG Mengozzi, X and X vs Belgium*, 2017).

Times of 'migration crisis', therefore, seem to turbo-charge the rate at which supranational courts, 'influenced by the current political sentiments' (Lingaas, 2019) loosen the human rights obligations imposed on states vis-à-vis migrants.

2.5 EUROPEAN INSTITUTIONS DEDICATED TO IRREGULAR MIGRATION

Over time, different bodies were tasked with handling migration matters at community level. Before the 1992 Maastricht Treaty a loose intergovernmental cooperation existed on irregular migration. It, however, "did not prevent the responsible ministers to adopt a number of recommendations on irregular migration and the establishment of the Centre for Information, Discussion, and Exchange on the Crossing of Borders and Immigration (CIREFI) to exchange on irregular migration (Peers 2016, p445).

2.5.1 EU INSTITUTIONS

While the **European Council** has a Treaty-based prerogative to define the strategic guidelines for legislative and operational planning within the AFSJ, the key players in setting and adopting the EU's migration agenda – are the **Council of the European Union**, the **European Parliament** and the **European Commission** interact through a process of negotiation, consultation, and decision-making known as the "ordinary legislative procedure". This procedure involves the Commission proposing legislation, the Council and the European Parliament deliberating on the proposal and reaching a compromise through negotiations. Ultimately, decisions on migration policies are made through a combination of interinstitutional cooperation, political dialogue, and democratic decision-making processes involving the Commission, the Council, and the European Parliament.

So, which institution is most decisive in setting the agenda on migration policy making? Both the Council and the Commission take crucial roles that can be regarded as the prime agenda-setters at the level of the EU: the Council has much power as it represents the thematically relevant parts of national governments and may set the agenda via its 'conclusions'. In turn, the Commission bears the exclusive right of initiative of EU migration legislation. In that aspect the latter plays an initiating role in EU law but also policy making. For those reasons,

the question of how the two institutions relate to each other in setting the EU's agenda is particularly relevant especially when both, the Council and the Commission seek to set the agenda when it comes to migration and more specifically to irregular migration.

While traditionally the objectives of the three main institutions – also in relation to irregular migration – differ, Petroni (2020) identified a shift of the Commission's rather asylum-seeker's rights-based stance to one that better satisfied the political interest of the Council following the high numbers of arrivals and transit of irregular migrants in 2015. Likewise, the European Parliament (EP) was already early diagnosed of 'going backwards' in terms of migrants' rights (Lopatin, 2013). In addition, the rise of right-wing populist parties in many national states as well as expectedly within the EP after the 2024 elections influences EU policy choices of those institutions, latest diagnosis with the EP endorsing most of the Council's positions on the Pact on Migration and Asylum (Neidhardt, 2024, p 6).

But certainly, there is also the European Council that takes a stance on important and strategic issues such as migration. The stance of agenda setting is illustrated by former president Tusk's ending of his speech at the European Council 2018 where he stated that "(...) the European Council is building the common European solution for migration policy but in the centre of this approach is the strengthening of cooperation with third countries, a fight against human smugglers, external border protection and not mandatory quotas. The real progress in the European Council is that today almost everybody understands that our priority should be stopping the inflow of irregular migrants and not their distribution." (Tusk, 2018).

2.5.2 EU AGENCIES

Frontex

Frontex, the European Border and Coast Guard Agency is governed by Regulation (EU) 2019/1896 (Frontex Regulation, 2019). The agency plays a crucial role in the EU's efforts to 'combat irregular migration' and ensure the security of its external borders. Frontex was established to strengthen coordination and cooperation among EU MSs in managing their borders. Frontex's portfolio to address irregular migration consists among others of border control and joint operations with MS.

Frontex coordinates and conducts joint operations, including surveillance activities at the EU's external borders. This involves monitoring and patrolling land, sea, and air borders to detect and prevent irregular border crossings (Art 3/1/a Frontex Regulation). In the context of border controls, Frontex also conducts Search and Rescue Operations for persons in distress at sea (Art 3/1/b Frontex Regulation). Allegations of fundamental rights violations and illegal pushbacks involving Frontex have given rise to sharp criticism (Del Monte & Luyten, 2023), and in response to the Adriana shipwreck off the coast of Greece in June 2023 which took the lives of over 600 migrants, the European Ombudsman initiated an investigation into the role played by Frontex (European Ombudsman, 2024). While the

Ombudsman found that Frontex had followed the applicable rules in its response to the Adriana shipwreck, her inquiry demonstrated shortcomings in how Frontex reacts in maritime emergency situations in which it becomes involved, either in the context of joint maritime operations or its separate multipurpose aerial surveillance activities.

Frontex also coordinates joint operations, bringing together personnel and resources from multiple MSs to address specific challenges. The agency also assists in the organization of joint return operations, facilitating the return of TCNs without legal right to stay in the EU (Art 3/1/i Frontex Regulation). This part of Frontex's mandate recently raised the question of liability for human rights violations when Syrian nationals claimed that their expulsion from Greece to Türkiye was unlawful. Since the transport to Turkey was conducted as a joint operation by Greece and Frontex, also Frontex was sued for compensation for the returnees' damage. However, the General Court determined that "since Frontex has no competence either as regards the assessment of the merits of the return decisions or as regards applications for international protection, the direct causal link[3] alleged by the applicants between the damage allegedly suffered and the conduct of which Frontex is accused cannot be established" (*CJEU, WS vs Frontex*, 2023).

Furthermore, Frontex provides training to national border guards and conducts risk analyses to assess potential threats and vulnerabilities at the EU's external borders. The latter has increasingly – especially since the 2015/2016 arrivals of migrants, among them many asylum-seekers, in large numbers – become an authoritative source of data and statistics (Savatic et al., 2024, p10) through their risk analysis reports. Particularly the capture of 'flows' often visualised trough red arrows or bubbles of different size demonstrate urgency or even the level of threat of (mostly irregular) migration (see for example Frontex, 2023, p10).

Europol

Europol was fully integrated into the European Union by Council Decision 2009/371/JHA of 6 April 2009 which replaced the Europol Convention (Europol Convention, 1995) and established Europol as an EU agency which was further on replaced by the Europol Regulation, 2016. Europol is tasked to support and strengthen mutual cooperation among MSs in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more MSs (recital 1 Regulation 2016/794). As the European Union Agency for Law Enforcement Cooperation, Europol does not have the mandate to directly enforce laws or make arrests. It facilitates collaboration among EU MSs' law enforcement agencies. The decision on which crimes to prioritise is shaped by EMPACT, the European Multidisciplinary Platform Against Criminal Threats (Europol, 2023).

As one of its top priorities, Europol mentions "trafficking in human beings" and "facilitated illegal immigration" as its top crime areas. Europol launched its European Migrant Smuggling

[3] The Court reviews the cumulative nature of the conditions for incurring non-contractual liability on the part of the institutions, bodies, offices and agencies of the European Union which include: 1) the conduct must be unlawful, 2) actual damage must have been suffered and there 3) must be a causal link between the alleged conduct and the damage pleaded.

Centre (EMSC) in 2016. The goal of the Centre is to proactively support EU MSs in dismantling criminal networks involved in organised migrant smuggling and human trafficking. The EMSC focuses on geographical criminal hotspots, and on building a better capability across the European Union to fight people smuggling networks.

Since both the Lisbon Treaty and the Europol Regulation No. 2016/794 contain an obligation for politically monitoring of Europol a joint parliamentary scrutiny over Europol was established by the decision of the EU Speakers Conference. The Presidents of the EU's national parliaments and the European Parliament set up the Joint Parliamentary Scrutiny Group for Europol (JPSG) in April 2017 (Kreilinger, 2017).

Eurojust

Eurojust is the European Union Agency for Criminal Justice Cooperation, coordinating investigations of serious cross-border crime in Europe and beyond. It works with MSs in a wide range cross-border crimes involving two or more countries. The discussion to establish Eurojust started in the realm of the Tampere European Council Meeting on 15-16 October. Eurojust was then set up in 2002 by Council Decision 2002/187/JHA with a view to reinforcing the fight against serious crime, which was later amended (Council Decision 2009/426/JHA). Finally, the European Parliament and the Council adopted the Regulation on the European Union Agency for Criminal Justice Cooperation in November 2018 (Eurojust Regulation, 2018). Among Eurojust's top crime areas are trafficking in human beings and migrants smuggling. In the last available annual report for 2022, Eurojust reports 342 cases of trafficking in human beings (124 new cases, 218 ongoing from previous years); 42 joint investigation teams; 55 case-specific coordination meetings and 4 coordinated action days. On migrant smuggling, Eurojust reports 323 cases (132 new cases, 191 ongoing from previous years); 14 joint investigation teams; 33 case-specific coordination meetings; 4 coordinated action days.

European Asylum Agency (EUAA)

In 2008, the European Commission proposed the creation of the European Asylum Support Office (EASO) with the aim to strengthen cooperation among MSs on asylum-related matters and assist MSs in implementing their obligations under the Common European Asylum System. EASO was established by Regulation (EU) No 439/2010 (EASO Regulation, 2010) and it took up its responsibilities on 1 February 2011. EASO also supports MSs whose asylum and reception systems are under particular pressure. Following the arrival of large numbers of migrants in 2015/2016 one way to strengthen the migration and asylum system was to provide more tasks, staffing and an upgrade of the status of EASO and the Commission proposed to transfer EASO into a full fletched Asylum Agency. The EU Asylum Agency (EUAA) was created by Regulation (EU) 2021/2303 (EUAA Regulation, 2021).

While the Agency has no specific mandate on irregular migration its tasks include the reinforcement and contribution to ensuring the efficient functioning of the asylum and reception systems of the MSs (Recital 5). This also includes supporting MSs at the external borders to swiftly identify people in need of international protection versus those without a

valid claim (see for example Recital 33 or the EC 10-point plan for Lampedusa from September 2023 (European Commission, 2023c)).

Fundamental Rights Agency (FRA)

The EU founded the FRA as an independent body in 2007 through Regulation (EC) No. 168/2007 (FRA Regulation, 2007) which was amended in April 2022. The revised Regulation strengthens the Agency's mandate. While having a much broader mandate, FRA's work in the area of asylum and migration includes regular overviews of migration-related fundamental rights concerns. Among others it published in 2011 a comparative report on the fundamental rights of migrants in an irregular situation in the European Union (FRA, 2011). It also regularly reports on Search and Rescue Operations, border control, and many other related issues.

EU-LISA

The European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (EU-LISA) was created in 2011 (EU-LISA Establishing Regulation, 2011) and its mandate expanded in 2018 (EU-LISA Amending Regulation, 2018). The agency is responsible for managing a series of databases established with an exclusive or primary focus on migration such as Eurodac, the Schengen Information System (SIS II) and the Visa Information System (VIS). It will also be responsible the Entry-Exit-System (EES) and the European Travel Information and Authorisation System (ETIAS), both established with a major focus on addressing overstaying. While the technical focus of the agency renders it less visible, its importance is growing, notably in the light of the increasing interoperability of different systems and reduced legal barriers for combining data from different sources.

2.5.3 COUNCIL OF EUROPE

All EU MSs are members of the CoE, and the EU is obliged under Art 6 TEU to ratify the ECHR, the flagship treaty of the CoE. Indeed, rulings from the European Court of Human Rights (ECtHR), which supervises the ECHR, have had far-reaching implications for the treatment of irregular migrants in Europe, as well as their right to resist removal from EU MS. The European Committee on Social Rights, which monitors the Council of Europe's Social Charter (which indicates in its annex that the scope of the charter extends to foreigners only if they are "lawfully resident or working regularly" (Council of Europe, 1996)), has made important findings that some of the rights enshrined in the Charter are applicable to irregular migrants.

The Parliamentary Assembly of the Council of Europe (PACE) takes the view that there is no single international agreement that would cater for the rights of irregular migrants. It notes that the most relevant international instrument is the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), and that a number of other international and European instruments contain provisions that can be used to identify minimum rights of irregular migrants. These include:

- the Universal Declaration of Human Rights (1948),
- the International Covenant on Civil and Political Rights (1966),
- the International Covenant on Economic, Social and Cultural Rights (1966),
- the Convention on the Rights of the Child (1989),
- the International Convention on the Elimination of All Forms of Racial Discrimination (1965),
- the ILO Convention No. 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975),
- the European Convention on Human Rights (1950) (ETS No. 5),
- the European Social Charter (1961) (ETS No. 35),
- the revised European Social Charter (1996) (ETS No. 163) and
- the Council of Europe Convention on Action against Trafficking in Human Beings (2005) (CETS No. 197). (CoE Resolution on Human Rights of Irregular Migrants, 2006, point 9)

However, the Assembly also admits that the large number of disparate instruments and the varying number of signatures and ratifications leave a web of uncertainty as to the minimum rights to be applied to irregular migrants (ibid, point 10).

It is important to note in the context of irregular migration that the PACE has highlighted the human rights enjoyed by irregular migrants (e.g., Parliamentary Assembly Recommendation 1755 (2006) on the human rights of irregular migrants) and has endorsed regularisation of such migrants (e.g., Parliamentary Assembly Recommendation 1807 (2007) on regularisation programmes for irregular migrants).

2.6. DATA AND STATISTICS

At EU level, several databases are operating to control the flows of migrants and asylum-seekers. The **Schengen Information System (SIS)**[4] provides information on people wanted for arrest or extradition, missing persons, stolen vehicles, firearms and other objects and TCNs to be refused entry in the Schengen area. The SIS has been defined as a tool for use by police, border and immigration officials from its inception (Boswell, 2007). It thus

[4] The new SIS legal framework consists of three regulations: Regulation (EU) 2018/1860 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2018/1861 on the establishment, operation and use of the SIS in the field of border checks; and Regulation (EU) 2018/1862 on the establishment, operation and use of the SIS in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

constituted a database that explicitly linked migrants and potential asylum-seekers with crime (Schlentz, 2010).

Eurodac (EURODAC Regulation, 2013) and the **Dublin system** were introduced to provide a means to control unwanted onward (or secondary) movements of irregular migrants and applicants for international protection, establishing the responsibility of states for adjudicating applications. Additional databases provide further information about migratory movements.

Moreover, as Mouzourakis argues, the Dublin system implies a degree of blame on the country which allowed an individual to enter the Union and engage in irregular movement' (Mouzourakis, 2014, p11). And indeed, the more a country opens its doors to a TCN, the more responsibility it undertakes for that TCN's potential engagement in asylum (Hurwitz, 1999, Noll, 2000, p189) but also irregular movements. The Dublin responsibility mechanism thus signals a degree of fault on the part of the responsible MS, for it comes as 'a burden and a punishment for the MS which permitted the individual to arrive in the Union' (Guild, 2006, p637; Mouzourakis, 2014, p11).

Both, the Dublin and the Eurodac Regulation see significant changes under the Pact on Asylum and Migration. The Dublin system emerges as part of the Asylum and Migration Management Regulation (European Commission, 2020b) in a slightly adapted form but under the same premise of determining the responsibility for asylum applicants as the Dublin Regulation did. The reform of Eurodac (see Amended Eurodac Proposal, 2020) aims to identify those arriving at EU territory more effectively, adding facial images to fingerprints, including for children from six years old. Authorities will be able to record if someone could present a security threat, if the person is violent or unlawfully armed.

Further, the Council adopted the **Entry/Exit (EES)** Regulation (EES Regulation, 2017) in November 2017 and the **European Travel Information and Authorisation System (ETIAS)** Regulation (ETIAS Regulation, 2018) in September 2018. ETIAS and EES are IT systems which are designed to increase security and protect the EU's borders, reduce 'illegal' immigration and improve the systematic identification of overstayers. The EES will electronically register the time and place of entry and exit of TCNs and calculate the duration of their authorised stay. It will replace the obligation to stamp the passports of TCNs which is applicable to all MSs. The ETIAS is a pre-travel authorisation system for visa free travellers. Its key function is to verify if a TCN meets entry requirements before travelling to the Schengen area. As such the automatic application process checks available data on the identity and the travel document against a range of databases, such as SIS, the Visa Information System (VIS), Europol data and Interpol data (SLTD) or the European Criminal Records Information System (ECRIS). The information submitted, via an online application ahead of their arrival at borders enabling pre-travel assessment of irregular migration risks, security or public health risk checks. A similar system is operating in the US, Canada and Australia, among others (ETIAS Proposal, 2016, p3). Air, sea and international carriers shall verify the travel authorisation of TCNs subject to it (Art 45/1). Should they carry a TCN without a valid travel authorisation, they will be subject to a penalty (Carriers Sanctions Directive, 2001).

More recently, Savatic et al. reviewed the use of data on irregular migration (Savatic et al., 2024). They emphasise that irregular stays are not directly connected to irregular entries. Many of the irregular entries are in fact people in need of international protection who apply for asylum and regularise their stay, but also because a significant number of irregularity happens after overstaying and original legal entry. Despite this, unauthorized flows of migrants across borders are spotlighted in public narratives given that they are more spectacular than demographic (i.e., births) or status-related changes (i.e., falls into irregularity) and are typically accompanied with pictures of capsizing boats and lines of individuals along walls and barbed-wire fences, as Savatic et al argue (Savatic et al., 2024, p7).

And indeed, data and statistics are used to justify migration policies. The use of data in the political discourse is, however, often misleading. Genuinely, policy makers like to underscore the lack of sustainable links between rejections of asylum applications and return rates. Accordingly, a "seamless link between asylum and return procedures" has been requested for the new Regulation on the Asylum Procedure because, according to the Commission, "[a]n average of 370,000 TCNs every year see their application for international protection rejected and they need to be channelled into the return procedure, which represents around 80% of the total number of return decisions issued every year" (Amended Asylum Procedure Proposal, 2020, p 2).

At times, politicians also make correlation between different data sets such as when the German Federal Minister Nancy Faser argued that fighting irregular migration has direct impact on lower asylum applications.[5]

If the statistics are not enough, the will of the population is pulled in to justify new legal proposals. The proposal for the ETIAS Regulation (ETIAS Proposal, 2016) for example refers to a Eurobarometer survey, which indicated that 71% of respondents called for more EU action in relation to external borders and 82% in relation to counter-terrorism (European Parliament, 2016, p 20).

As Schmalz aptly put it (Schmalz, 2024), "the governance of migration is caught in the contrast between the political relevance of numbers, and the individuum-based structure of the law". And indeed, for politics, it matters how many persons arrive, and how many of those arrive irregular or are irregularly present in the EU. For the legal assessment, however and continuing with Schmalz argument, numbers matter less as the rights such as the right to ask for asylum, the right to liberty, the right to not face inhuman or degrading treatment, etc are individual rights that are independent from the overall number of arrivals. In this vein, the paper is situated between the political numbers game and the rights of irregular migrants. The latter, however, are often only clarified and defended against political wishes to stem irregular migration by national or European courts.

[5] „Die Asylzahlen für 2023 zeigen, dass wir unseren Kurs zur Begrenzung der irregulären Migration konsequent fortsetzen müssen", Federal Minister Nancy Faeser (SPD) in ZDFheute, 09.01.2024

3. IRREGULAR MIGRATION ADDRESSED IN EU LAW

As shown above and will be shown further below, EU policies addressing irregular migration developed following a control and sanction-oriented approach (Desmond, 2016, p255-256). Visa restrictions, especially for countries whose citizens are apprehended from irregular border crossing, fences, stricter surveillance, and border procedures all aim at stopping irregular migrants from arriving in the first place. Expelling (or threatening to expel) irregular migrants to third or countries of origin – even including applicants for international protection, who are increasingly threatened with removal to third countries (so-called externalisation or third country processing) – shall enforce the removal of TCNs while at the same time sending a deterrent message to other TCNs not to even start to move irregularly towards the EU. Finally, the 'fight against irregular migration' is also extended to third parties such as facilitators, carries or employers. Summarised, the EU policy on irregular migration is focussed on preventing irregular arrivals, and left largely to the discretion of EU MS.

However, even if secondary EU law only in a limited way regulates the rights of irregular migrants present within the EU, all migrants are entitled to a minimum standard of rights protection in line with treaties such as the ECHR and the EU Charter of Fundamental Rights, irrespective of their nationality or legal migratory status. Still, EU migration policy understands an irregular status of TCNs as a situation that is not accepted. Accordingly, the effectiveness of the EU migration (return) system demands that irregular migrants shall either be removed from EU territory or granted some sort of legal status (*CJEU, Zaizoune*, 2015, see below). And still, although EU migration policies are executed in order to affect a certain behaviour of the target population (Czaika & De Haas, 2013, p489), TCNs continue to arrive or end up irregularly within EU MS.

In an effort to better capture irregular migration, the MIrreM project developed a conceptual framework for the identification of the population in an irregular situation. This is done for the purpose of estimating and quantifying this population. To this end, MIrreM defines in different pathways into irregularity and pathways out of irregularity as well as different 'classes' of migrants in an irregular situation staying on the territory (stocks of irregular migrants) and related classes, notably migrants with a provisional legal recognition of their stay (Kraler & Ahrens, 2023a, p27).While this conceptualisation does not necessarily mirror categories that can be clearly traced back to EU law and policy, the following chapter still attempts to follow MIrreM's conceptual framing distinguishing 1) *pathways into irregularity*, 2) the situation of TCNs staying irregularly in the EU as well as 3) *pathways out of irregularity*. Each section summarises the relevant EU law and the entailed rights of affected people and how those rules relate to each other.

3.1 PATHWAYS INTO IRREGULARITY

3.1.1. Introduction

While the direct correlation of migration policies to migration outcomes is difficult to measure (Triandafyllidou et al., 2019; Czaika & De Haas, 2013) research suggests that such measures have spillover effects from one policy area to another (De Haas, 2023). For example, research over the years pointed out that the introduction of visa restrictions since the 1990s led to increasing irregular border crossings (Koser, 2000, p 95 and 103; Czaika & Hobolth, 2014; De Haas, 2008, p 32; European Commission, 2017, p24). This in turn led to stricter border regimes, which is why smuggling grew. Consequently, EU policy identified smugglers as the main opponent in its fight against irregular migration. This ultimately made the smuggling routes longer, more dangerous and more expensive. Summarised, each new policy at the same time led to increases in irregular migration which in turn the policy countered again with new instruments to curb it. But restrictive policies not only lead to detrimental effects, but they also increasingly and immanently collide with rights of migrants.

Restrictions on immigration can create various pathways into irregularity. Kraler and Ahrens distinguish between demographic, geographic and status related pathways into irregularity (Kraler & Ahrens, 2023, p27-28). **Demographic inflows** relate to births, either as the transmission of an irregular status from the parents or the failure to obtain a residence status for a child even if parents are legally residing. As **geographic inflows** Kraler and Ahrens refer to irregular entries of persons who either do not meet the entry conditions such as valid passport or visas or the necessary means to stay in the EU or who enter a MS in the EU bypassing the regular border crossing points via a green border clandestinely or hiding in a truck when crossing a border crossing point. Finally, **status-related inflows** are meant to cover situations where people overstay the duration of a visa or residence permit, the withdrawal of a residence status, or a negative decision of a review of what we call a 'provisional status' (Kraler & Ahrens, 2023).

In the following the pathways into irregularity identified above will be further explored, starting with EU law regulating the border and entry of the EU, followed by status related pathways into irregularity.

3.1.2. Geographic pathways into irregularity circumventing entry conditions

- **Visa Code** EC 810/2009 of 13 July 2009
- **Schengen Borders Code** REGULATION (EU) 2016/399 of 9 March 2016

- **Carrier Sanctions Directive –** Council Directive 2001/51/EC of 28 June 2001
- **Facilitation Directive** Council Directive 2002/90/EC of 28 November 2002

At European level, the most prominent role of geographic restriction of migration can be attributed to the establishment of the Schengen area of free movement, the largest area of free movement in the world, which is considered one of the greatest achievements of the European integration process (Back to Schengen - A Roadmap, 2016, p 2). However, the internal freedom of movement stands in stark contrast to the strict external border regime.

The main goal of the Schengen system is to "compensate" for the removal of internal border controls, through increased focus in the field of police and judicial cooperation, external border controls, and the establishment of the SIS. Today, the Schengen area encompasses all EU countries, except for Cyprus and Ireland, and also includes Iceland, Norway, Switzerland and Liechtenstein.

The Schengen system was originally established outside of the EU's legal order and institutional arrangements. By virtue of the Amsterdam Treaty the legal framework for Schengen became a matter of EU competence. Since then, most Schengen provisions have been replaced or built upon by EU legislation. Key examples include the Schengen Borders Code (SBC), the Community Code on Visas and the SIS II Regulation. The SBC regulates the control of external borders of Schengen to ensure the free movement of people within the Schengen area.

While the SBC and the Visa Code broadly determine what constitutes a regular entry of the external borders, a number of legal acts penalise facilitation of the irregular entry of migrants, most notably through the Carrier Sanctions Directive (Carriers Sanctions Directive, 2001) and the EU Facilitation Directive (Facilitation Directive, 2002).

Schengen Border Code

When defining "illegal stay", the Return Directive (2008/115/EC) directly refers to the SBC stipulating when a TCN present on the territory of a Schengen State does not fulfil, or no longer fulfils the conditions of entry. Consequently, the regular stay depends on the regular entry at dedicated border crossing points (Art 5) under the entry conditions, such as valid travel documents, valid visa, sufficient means for stay and return, or not being considered a threat to a MS, etc. listed in Art 6. To this end, the SBC also regulates border controls "to combat illegal immigration and trafficking in human beings and to prevent any threat to the MSs' internal security, public policy, public health and international relations" (recital 6 SBC). The Return Directive in connection with the SBC thus define the main pathways into irregularity.

In Air Baltic Corporation AS v Valsts robežsardze (*CJEU, Air Baltic*, 2014) the CJEU clarified that (based on a proper construction of Arts 24(1) and 34 of the Visa Code) the cancellation of a travel document such as a passport by an authority of a third country does not mean that the uniform visa affixed to that document is automatically invalidated [36]. Further, in analogy with the *Koushkaki case* (*CJEU, Koushkaki*, 2013), the court argued that the standard form

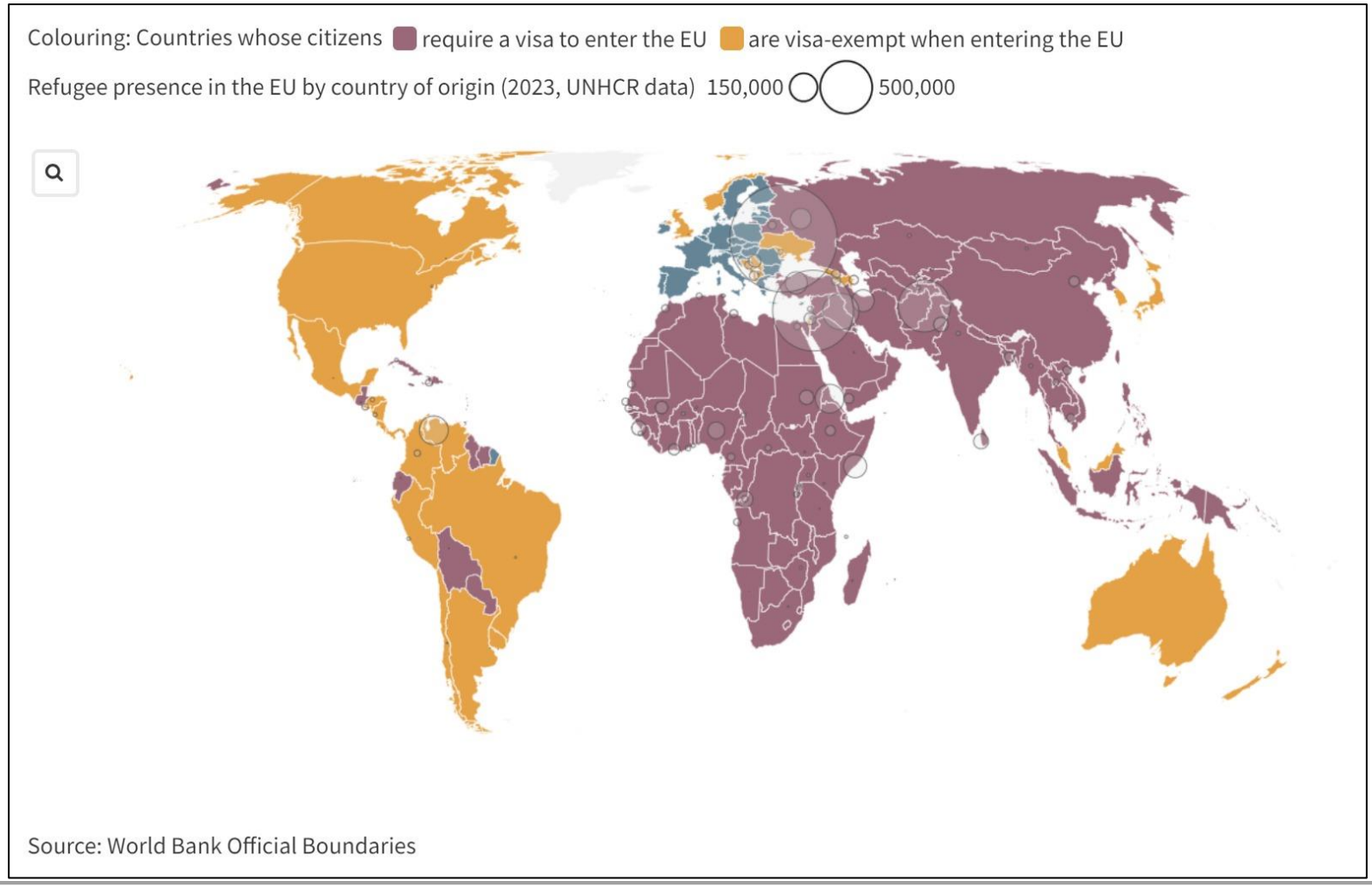
for refusal of entry at the border (see Annex V part B of the border code) is to be understood as exhaustive as regards to reasons for denial of entry. As there is no 'box to tick' in the form that would justify refusing entry if the valid visa is not attached to a valid passport, there is no grounds for refusing entry.

Visa Code

The EU common visa policy is an important pillar of the Schengen area. All 29 Schengen States apply the same visa rules for TCNs' entry into Schengen for short stays of a maximum of 90 days in any 180-day period. Visas for stays exceeding 90 days remain subject to national procedures. A Schengen visa is generally valid for every state of the Schengen Area. The procedures and conditions for issuing a visa are set out in the Visa Code (Visa Code, 2009, Regulation (EC) No 810/2009). Regulation (EU) 2018/1806 (Visa List, 2018) establishes which TCNs must be in possession of a visa (annex 1 lists 104 counties) and which third countries are exempted from visa requirements (Annex 2 lists 60 countries plus the administrative regions of Hong Kong and Macao). Visa freedom in the Schengen area brings economic, social and cultural benefits for the Schengen States and third countries while simultaneously addressing the core Schengen objective of addressing security and irregular migration risks for the Schengen area. To this end the Commission is tasked with monitoring the functioning of the EU visa free regime according to Art 8(4) of the Visa List Regulation 2018/1806 and may suggest suspension of visa freedom for reasons including a spike in irregular arrivals through overstays by visa-free travellers, or in asylum applications lodged by nationals from visa-free third countries with low recognition rates (see Monitoring Report by the European Commission, 2023a).

The Commission has also identified 'threats' of TCNs who enter visa-free into another third country such as in the Western Balkans and move irregularly into the EU. For the EU, however, they require a visa, which ultimately contributed to the increased number of irregular arrivals to the EU in 2022. Consequently, the Commission proposed that Western Balkan partner countries align their visa policies with those of the EU as a matter of priority in an EU Action Plan on the Western Balkans (ibid, p4).

Figure 2: Map of visa countries and major countries of origin of asylum applicants in the EU.



In 2019 the Visa Code was amended introducing a leverage mechanism in its new Art 25a, which introduced a negative conditionality between a third country's cooperation on readmission and the conditions for issuance of Schengen visas to its nationals (Andrade, 2020). While some commentators consider such measures a form of collective punishment of citizens of third countries, unfair and counterproductive for EU international relations (Guild, 2019), the European Commission considered it a significant improvement of EU leverage in its relations with countries of origin (Return Directive Proposal, 2018, p1). In February 2021, the Commission presented a first report on Art 25a (European Commission, 2021). While the report does not provide details on specific third countries, it ascertains well-functioning cooperation with one third of the assessed countries, another one third with cooperation level as average with improvements needed and more than one third with a cooperation level requiring improvement with most MSs concerned.

More importantly for the present context, however, is to highlight as an interim conclusion that 1) with the exception of Venezuela and Ukraine all major countries of origin of people in need of international protection require visa; 2) visa liberalisation is used by the EU as the carrot and stick for the return of irregular migrants; 3) the EU monitors irregular movements from visa-free countries and suspends visa liberalisation if third countries do not cooperate on curbing irregular migration; 4) despite all efforts on curbing irregular entries through visa requirements, nationals of visa free or visa required countries enter regularly and overstay, thus become irregular staying within the EU.

- **Exhaustive list of grounds for refusal to issue a visa**

In the Koushkaki case (*CJEU, Koushkaki*, 2013) the CJEU held that MS can refuse to issue a "Schengen visa" to an applicant only if one of the grounds for refusal, listed in the Visa Code apply. The Court further confirms that *reasonable doubt* that the applicant would return before its validity ends is enough for refusal - certainty of non-return before validity ends is not necessary for refusal. For Peers this judgement indicates that there is a right to a visa, if none of the exhaustive reasons for denial exist. More importantly, Peers suggests the Visa Code may also entitle potential asylum applicants to a visa because the Visa Code Art 21(1) only allows denial if an applicant poses a risk of 'illegal migration'. Applicants for international protection, however, are not 'illegally staying' (see Peers, 2014) and thus would not pose such a risk.

Sanctioning carriers and facilitators of irregular migration

- **Smuggling**

In 2022, MSs reported 15,000 migrant smugglers to Frontex (Frontex, 2023, p9). And according to Europol more than 90 % of the migrants travelling in an irregular manner to the EU used facilitation services which – the EU agency noted - in most cases are offered and provided by criminal groups (Europol, n.d.). EU policies on smuggling are based on data from its agencies and thereby enforce an understanding that the facilitation of irregular migration is largely in the hands of organised transnational criminal networks. Such understanding neglects – according to many commentators – the evidence which points to the equal importance of small-scale facilitation processes often without criminal intent (see among others recently Alagna & Sanchez, 2024, De Haas, 2023, Forin, 2023).

The European Commission has recently identified a number of drivers for the demand for smuggling networks such as population growth, lack of job opportunities, discrimination, conflicts, climate change, and the perception of the EU (EU Action Plan against Migrant Smuggling, 2021, p3). The lack of regular pathways to the EU, EU visa restrictions and the overall efforts to deter migrants from arriving at EU shores are not mentioned as reasons fuelling the demand for smuggling services.

This perception of the drivers also reflects the focus on 'combatting' or 'fighting' the criminal networks which has long dominated EU migration policy. The Facilitation Directive from 2002 (Facilitation Directive, 2002) obliges MSs to sanction a person assisting the unlawful entry or transit of TCNs. MSs, however, *may* not impose sanctions if the assistance was for humanitarian reasons. On the basis of a 2017 evaluation of the Facilitation Directive, the Commission proposed – as part of the New Pact on Asylum and Migration – in 2023 to make the penalisation of smugglers dependent on

- financial or material benefit;
- cases when the facilitation is highly likely to cause serious harm to a person even though conducted without financial or material benefit; and
- cases of public instigation of TCNs to enter, transit across or stay irregularly in the European Union (Facilitation Directive Proposal, 2023).

Pending adoption of these changes, some MSs like Italy and Germany (Trevisan & Moeller, 2019) allow penalisation of non-commercial assistance of irregular border-crossing. The CJEU is currently examining whether European and Italian legislation on the facilitation of irregular migration is in line with EU Charter of Fundamental Rights in a case concerning criminal proceedings against a Congolese woman who travelled to Italy by air with her minor daughter and niece using forged documents to apply for asylum (*CJEU, Kinshasa*, pending; for a discussion see Costello & Zirulia, (2024); Quadt (2024); earlier analysis Carrera et al. (2016)).

The Facilitation Directive was accompanied by a Framework Decision (Facilitation Framework Decision, 2002; jointly referred to as the facilitators package) that requires MSs to adopt criminal sanctions for the facilitation of irregular migration.

The EU's campaign against smuggling has also led it to sign the UN Protocol against Smuggling of Migrants by Land, Air and Sea (Council Decision 2006/616/EC, 2006); to reinvigorate the European Network of Immigration Liaison Officer ((Immigration Liaison Network Regulation (Recast), 2019), initially established in 2004 (Immigration Liaison Network Regulation, 2004), to combat irregular migration and related cross-border criminality, such as migrant smuggling; to include migrant smuggling as one of the priorities in the fight against organised crime including transnational crimes in the Security Strategy of the European Union 2020 – 2025. The Action Plan against migrant smuggling (2021-2025), renewed in 2021 (EU Action Plan against Migrant Smuggling, 2021), was complemented with a Toolbox addressing the use of commercial means of transport to facilitate irregular migration to the EU and the Regulation to reinforce Europol's role in the fight against migrant smuggling and trafficking in human beings (see above 2.5.2).

The results of these efforts to 'combat' smuggling are disputed. De Haas – among others – argue that it is a myth that smuggling is the cause of irregular migration. But to the contrary, policies combatting smuggling presumably impact smuggling routes and increase the prices while a blind eye is turned to irregular work (De Haas, 2023, pp 291-308).

- **Criminalisation of Humanitarian Assistance**

EU efforts to address smuggling have had a far-reaching spillover effect and have been used to justify criminalisation of various forms of humanitarian assistance to migrants such as Search and Rescue operations conducted by NGOs and private actors (International Commission of Jurists, 2022). A 2018 report produced for the European Parliament noted that in some MS such criminalisation goes beyond cases of formal prosecution in the criminal justice context and extends to intimidation and harassment of humanitarian actors and professionals including lawyers, doctors and journalists (Carrera et al., 2018). Since 2018, FRA has been publishing regular updates on NGO ships involved in SAR operations in the Mediterranean. Such ships face seizure and their crews face arrest. FRA monitors the status of legal proceedings that have been initiated, and of rescue vessels kept at sea for more than 24 hours while waiting for a safe port (FRA, 2023). Such obstacles to performing SAR operations inevitably increases the risk of migrant fatalities. There is strong support for the view that the criminalisation of humanitarian assistance breaches international and EU law obligations including the duty to respect the right to life and to rescue persons in distress at sea (Carrera et al., 2018); (FRA, 2023). A recent report from the International Commission of Jurists makes a number of recommendations to the EU and its MS to bring its approach to humanitarian assistance into line with international obligations. These include revision of the 2002 Facilitation Directive to make the intention of gaining profit a requirement for criminal prosecution of persons who facilitate entry of irregular migrants. In addition to this exemption from prosecution for persons providing humanitarian assistance, such assistance should be defined broadly to include associations and individuals who help migrants access health care, housing, food, water and legal assistance (International Commission of Jurists, 2022).

- **Carriers**

With globalisation and advances in international air travel migrants and asylum-seekers can travel great distances, including from outside Europe without the necessary documents to arrive at European countries' frontiers. This has given rise to efforts to make airlines – thus private companies – liable for the transportation of irregular migrants. The duty to return TCNs was established by Art 26 Schengen Convention of 14 June 1985. The Carrier Sanction Directive (Directive 2001/51/EC) supplemented this provision and further introduced penalties which should be dissuasive, effective, and proportionate (Art 4). In addition, Council Directive 2004/82/EC introduced the obligation of carriers to share passenger data. Both for the transport of insufficiently documented migrants as well as in case of passenger data not being communicated appropriately, MSs can introduce penalties on the carriers. Under the Carrier Sanctions Directive states may thus impose fines (up to losing landing privileges), alongside the assumption of responsibility for accommodating and repatriating migrants without papers, or with incorrect papers, upon airlines and shipping companies.

UNHCR warned as early as 1995, in its position on Visa Requirements and Carriers Sanctions, that should they interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries, then states act inconsistently with their international obligations towards refugees (UNHCR, 1995). More concretely, deterrence measures like the above discussed border control measures, anti smuggling measures, and visa regimes ultimately – as Hathaway emphasised already back in 2000 – render "illusory the formal guarantee to refugees of immunity from immigration penalties consequent to their search for protection" (Hathaway, 2008, p6), leaving little alternatives to irregular means of entry.

3.1.3. Status related pathways into irregularity

Status related pathways into irregularity occur when the initial residence ends but the person concerned does not leave the MS. This can happen when the residence permit or the previous status expires or is withdrawn. Importantly, the entry and stay has been regular at some point but turned irregular. Although the EC recently attested that the majority of irregular migrants initially arrived regularly and then became irregular by means of overstaying a visa or a residence permit (European Commission, 2024b), this phenomenon received much less place in securitisation discussion on migration (Hansen & Pettersson, 2022, p118) than irregular arrivals, or arrivals supported by facilitators. Up to around 2015 a number of authors note that by far the vast majority of irregularly staying migrants arrived regularly. This narrative is also kept on until now, with the European Commission recently pointing to this fact and thereby stressing the importance of IT systems such as the Entry/ Exit system (EES). The Schengen Borders Code is not recording border crossings. Currently the stamping of the travel document indicating the dates of entry and exit is the sole method available to border guards and immigration authorities to calculate the duration of stay of TCNs and to verify if someone is overstaying (EES Proposal, 2016, p2). To fill this gap is exactly the purpose of the EES as part of a broader interoperable IT system to check and track the right to stay of all TCNs, whether visa-free or visa holders, arriving in a legal manner on EU territory, helping the work of identifying cases of overstaying (New Pact on Migration and Asylum, 2020, p12).

- **Irregularity supposedly promises more opportunities.**

A rather specific case of status change into irregularity concerns cases where irregularity is accepted if it promises a better situation for those affected. Research by Roman et al. (2021) revealed that TCNs who for a long time await the decision on their asylum claim with restrictions in their mobility, move on to another country irregularly. Accordingly, people face "situations and choices whereby 'regularity' restricts mobility whilst 'irregularity' allows for it." (ibid p43). Roman et al contested that "the constrained mobility strategies displaced people follow may help them to satisfy immediate needs or overcome grim conditions 'here and now'." (ibid, p43).

- **Brexit as a special case of loss of citizen rights**

UK citizens exercising free movement rights in an EU MS before 1 January 2021 have the right to remain in the host state after that date, in accordance with the provisions in the 2019 UK-EU Withdrawal Agreement (WA). The protections in the WA only apply in the British

citizen's EU country of residence. Such British citizens do not enjoy onward free movement rights throughout the rest of the EU under the Agreement. The Agreement in Art 15 confirms that UK nationals and their family members acquire rights of "permanent residence" after accumulating five years' continuous lawful residence in accordance with EU law, before or after the end of the transition period (31 December 2020), while Art 16 allows those who have not yet resided in the host state for five years to acquire permanent residence under Art 15 when they meet the temporal requirement. While 14 EU states have adopted a declaratory system for verifying British citizens' rights to remain after Brexit, the other 13 have implemented constitutive systems, meaning that UK residents must successfully apply by a set deadline for a new residence status to have the protections set out in the WA. Those who failed to apply by the deadline set by their EU state of residence will have become undocumented (Benson, 2021).

3.2 SITUATION OF TCN STAYING IRREGULARLY IN THE EU

3.2.1. Introduction

EU legislation explicitly recognises that irregular migrants, including those who have been issued with a return decision, enjoy a minimum level of rights protection. Some of this legislation has been interpreted by the CJEU to constrain efforts by states to detain and expel irregular migrants at the expense of human rights protection. The Return Directive, in particular, has given rise to a rich body of case law that clarifies the scope and substance of the rights of irregular migrants facing expulsion from the EU. This subsection highlights some of the key legislative protections afforded specifically to irregular migrants, as well as case law generated by migrants' reliance on that legislation.

- **Return Directive 2008/115/EC** of 16 December 2008
- **Employers Sanctions Directive 2009/52/EC** from 18 June 2009
- **Anti-Trafficking Directive 2011/36/EU** of 5 April 2011
- **Residence Permit for Victims of Trafficking Directive 2004/81/EC** of 29 April 2004
- **Victims of Crime Directive 2012/29/EU** of 25 October 2012

Irregular Migrant Workers

Irregular migrant workers enjoy a number of employment protections under EU law. As noted in section 2.4, the CJEU in *Tümer* (*CJEU, Tümer, 2014*) confirmed the applicability of EU employment law to irregular migrants. The Court rejected arguments that such migrant workers were excluded from the scope of the Directive protecting employees in the event of employer insolvency. It made this finding on the basis that the legislation in question did not expressly exclude TCNs from its scope, nor permit Member States to do, and that such an

exclusion would be contrary to the social objective of the Directive to secure a minimum level of protection to employees in the event of employer insolvency.

Explicit acknowledgement of irregular migrants' labour rights is also to be found in the Employer Sanctions Directive, adopted in 2009 in response to the view that one of the key "pull factors" for irregular migrants to the EU is the possibility of obtaining work without a legal status, obliges MS to introduce a system of financial penalties and criminal sanctions for employers who hire unlawfully present TCNs. Despite its penal focus, however, the Directive also contains a number of important human rights safeguards for irregular migrants. It provides that irregular TCN workers, including those who have left or been removed from the EU, are to be reimbursed any outstanding pay, for the purposes of which an employment relationship of at least three months duration is to be presumed unless the employer or employee can prove otherwise. Member States are obliged both to put in place effective mechanisms for irregularly employed migrants to lodge complaints against their employers, either directly or via third parties, and to provide for the conferral of residence permits of limited duration in situations of particularly exploitative employment conditions (Arts 6 and 13). The protective potential of the Directive remains, however, largely unlocked (de Lange & Groenendijk, 2021), p 17; (PICUM, 2021), eclipsed by the EU's focus on migration control activities.

Victims of Crime and Trafficking

The (Victims of Crime Directive, 2012) has the objective of ensuring that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Crucially, it provides that the rights set out in the Directive apply to victims regardless of their residence status. Amongst the many obligations imposed on MS by the Directive are the requirements that victims of crime can understand proceedings and be understood from their first contact with the competent authority, that particularly vulnerable victims are offered specific protection measures and that the police, judges and other professionals are trained to deal with victims in a sensitive and appropriate manner. Given that the very status of irregular migrants makes them particularly vulnerable to becoming victims of crime, the potential that this Directive holds for such migrants is significant. A recent evaluation of the Directive's implementation by the Commission noted that irregular migrant victims of crime were among those facing difficulties in accessing the rights set out in the Directive (European Commission, 2022c). Significantly, the Commission endorsed the firewall principle for the purpose of improving the effectiveness of the Directive, took the view that such a measure would be "especially important for all migrants, whether in work or undocumented".

The framework for protection of victims of trafficking illustrates the EU focus on crime prevention at the expense of rights protection. The 2004 Directive on residence permits for trafficking victims makes such permits fully conditional upon victims' cooperation with the authorities in prosecution of traffickers (Art 8). The 2011 Anti-Trafficking Directive, however, takes a more progressive victim-centred approach. It forbids prosecution of trafficking victims for criminal activities they have been forced to commit, requires assistance be

provided to victims irrespective of their willingness to cooperate in criminal prosecution, and outlines additional protections for child victims of trafficking. There has been criticism, however, of inadequate MS compliance with the Directive, and numerous commentators have highlighted the conflict between the 2004 Directive making residence permits dependent on cooperation, and the principle of unconditional assistance to victims affirmed by the 2011 Directive (e.g., (Marchetti & Palumbo, 2022).

Irregular Migrants facing Expulsion

- **Limiting the detention of irregular migrants**

The first decision of the CJEU on the Return Directive dealt with detention under Art 15 of the Directive and was delivered in *Kadzoev* (*CJEU, Kadzoev*, 2009). The Court held, firstly, that a TCN detained pending removal must be immediately released once there is no reasonable prospect of removing him (para 63). A reasonable prospect of removal will not exist where the TCN in question is not likely to be admitted to a third country within the period of detention set out in the Directive. Secondly, the Court found that detention beyond the maximum 18-month period sanctioned by the Directive is prohibited. Furthermore, time spent in detention, even when deportation is suspended pending appeal, counts toward the Directive's time limit. *Kadzoev* is therefore an important confirmation of detention safeguards for unlawfully present TCNs and illustrates how the Directive protects migrants' rights (Cornelisse, 2011).

- **Limiting (but not eliminating) the criminalisation of irregular entry and irregular stay by reference to the effectiveness of the Return Directive**

The CJEU has interpreted the Return Directive in a number of rulings to limit states' efforts to criminalise irregular migration (Mitsilegas 2015). In *El Dridi* (*CJEU, El Dridi*, 2011) the CJEU found that states may not provide for a custodial sentence solely because an unlawfully staying TCN has not complied with an order to leave their territory within the time limit specified in the order. Under EU law MSs are obliged to refrain from measures which could jeopardise the attainment of Directives' objectives. The criminal penalty in *El Dridi* would conflict with the Return Directive's objective of establishing an effective policy of removal of irregular TCNs, as it would delay enforcement of the return decision.

The Court in *El Dridi* did find, however, that, where the application of the measures set out in the Directive to facilitate enforcement of a return decision has not led to the removal of a TCN, then states are free to adopt criminal law measures aimed at dissuading such migrants from remaining unlawfully. This is an issue on which the CJEU elaborated in *Achughbabian* (*CJEU, Achughbabian*, 2011), which concerned French legislation criminalising irregular stay. Here the Court found that the Return Directive does not preclude the imposition of penal sanctions on irregular TCNs to whom the Directive's return procedure has been applied but who nonetheless remain unlawfully 'without there being any justified ground for non-return'. The Court in *Achughbabian* did not elaborate on what may constitute a 'justified ground for non-return' but it seems safe to assume that such grounds include a lack of cooperation from the country to which return is sought, a lack of capacity on the part of the expelling state and human rights obstacles such as a real risk of inhuman or degrading treatment in the receiving state (Costello, 2016, pp.305–06; Raffaelli, 2012, p.183). On the other hand, where removal under the Directive has not been possible because of a TCN's 'aggressive behaviour' or other

form of non-cooperation and his detention under the Directive has therefore ceased, he may be criminally prosecuted as there is no justified ground for his non-return.

The *El Dridi* and *Achughbabian* rulings, severely curtailing states' power to criminalise migration law transgressions, are important achievements from the perspective of the protection of migrants' rights. The Court's reasoning, however, was grounded in the effectiveness of EU law, specifically the return procedures, rather than in protection of migrants' rights or any ethical concern about the criminalisation of migration (Majcher, 2020, p.369; Raffaelli, 2011). Indeed, the CJEU appears to view the criminalisation of irregular migration per se as unobjectionable. Hence its finding that if application of the measures under the Return Directive has not secured removal of a TCN, states may impose a criminal sentence to dissuade that TCN from remaining irregularly on its territory (*CJEU, El Dridi*, 2011, paras 52 and 60; *CJEU, Achughbabian*, 2011, paras 46 and 48).

Similarly, the Court in the *Sagor* (*CJEU, Sagor*, 2012) and *Mbaye* (*CJEU, Mbaye*, 2013) cases found that the Directive does not preclude criminal fines for irregular stay which may be replaced by an expulsion order, as such penal sanctions will not delay removal and therefore will not undermine the effectiveness of the Directive (ECJ, 6 December 2012, 21 March 2013). In *Celaj* (*CJEU, Celaj*, 2015) the Court found that the Return Directive does not preclude criminal incarceration for violation of an entry ban. Application of the effectiveness-based logic deployed in *El Dridi* may have led to the conclusion that the Return Directive precludes a prison sentence for an entry ban violation as it would clearly delay the (re)removal of the TCN in question, thereby frustrate the effectiveness of the Directive. The CJEU, however, found that there was no incompatibility between the Italian legislation in question and EU law.

The Court distinguished *Celaj* from earlier cases by noting that TCNs such as Hassen El Dridi and Alexandre Achughbabian had been subject to 'a first return procedure'. Skerdjan Celaj, on the other hand, had already been subjected to a first return procedure and now came within the category of irregular TCNs for whose non-return there was no justified ground, thereby opening the door to criminal incarceration. The endorsement of criminalisation by CJEU in *Celaj* is possibly explained by reference to the wider context in which the judgment was delivered in October 2015. The 'migration crisis', then at its peak, may have influenced the Court to take a more deferential approach to states' efforts to punish (repeat) irregular migration (Kosinska, 2016).

- **The right to be heard prior to the adoption of a return decision and to a decision to extend detention under the Directive**

The CJEU has found that irregular migrants have a right to be heard prior to the adoption of a return decision. In *Mukarubega* (*CJEU, Mukarubega*, 2014) the CJEU held that a TCN must have the opportunity to effectively submit his views as part of the procedure relating to a residence application or the legality of stay and to put forward reasons as to why he should be allowed to remain in the host state. If, however, the outcome of such a procedure is the adoption of a return decision, the right to be heard does not require that a TCN be heard specifically on the subject of the return decision. To find otherwise would be to 'needlessly prolong the administrative procedure'.

The Court in *Boudjlida* (*CJEU, Boudjlida*, 2014) found that the right to be heard entails an opportunity for a TCN to effectively submit his point of view on the irregularity of his stay and reasons which may prevent the adoption of a return decision (*Boudjlida*, para 47). The TCN in question must also be heard as to whether factors such as his state of health or family life in the host state may influence the state's implementation of the Return Directive, as required by Art 5 of the Directive (paras 48–49).

The *Mukarubega* and *Boudjlida* rulings at first glance appear favourable from the perspective of the rights of prospective deportees. Indeed, there is evidence from a number of states that these judgments have secured important protections for irregular TCNs (Moraru & Renaudiere, 2016). The Court, however, significantly limited the scope and content of the right by finding that it does not include an obligation on a state to warn a TCN 'that it is contemplating adopting a return decision with respect to him, or to disclose to him the information on which it intends to rely as justification for that decision, or to allow him a period of reflection before seeking his observations'. Furthermore, there is no right to free legal assistance, and any legal advice may be accessed only to the extent that it 'does not affect the due progress of the return procedure and does not undermine the effective implementation' of the Directive.

These two rulings have, therefore, been criticised for evincing a concern about the effectiveness of EU return policy at the expense of migrants' rights (Majcher, 2020, p.158). It is, however, important to highlight the Art 13 safeguard that, after adoption of a return decision, TCNs have the right to appeal and to obtain legal advice, representation and, where necessary, linguistic assistance for the purposes of such an appeal.

In *G. and R.* the CJEU found that where the initial six-month detention of a TCN under the Return Directive is extended by a further 12 months without hearing from the TCNs concerned, the detention measure may be lifted only if the non-infringement of rights would have resulted in a different outcome or, in other words, if a proper hearing would have led to a decision not to extend the detention (*CJEU, G. and R.*, 2013 para 45). The automatic suspension of detention on the basis of a procedural irregularity, which might in fact have had no impact on the outcome of the extension decision, would run the risk of undermining the effectiveness of the Directive (*CJEU, G. and R.*, 2013, para 41).

The ruling in *G. and R*. illustrates an important feature of the criminalisation of irregular migration whereby the criminal law-type enforcement mechanisms deployed to control and manage migration are decoupled from the procedural safeguards that traditionally accompany criminal law sanctions.

- ***Mahdi*: requiring robust judicial supervision of detention**

The *Mahdi* case (*CJEU, Mahdi*, 2014) concerned a TCN without identity documents being held in an immigration detention centre in Sofia, Bulgaria, pending removal to Sudan. The CJEU made a number of important findings concerning the judicial supervision of the extension of detention under the Directive. The Court found that any decision on an extension of the detention period must, as in the case of the initial detention order, be in writing, with reasons being given in fact and in law. This is to allow the TCN to defend his rights and to allow the judicial authority to effectively carry out the review of the legality of the decision (*CJEU, Mahdi*, 2014, paras 44–45).

When considering an application for an extension of the initial period of detention, the judicial authority must engage in an in-depth case-by-case examination to ensure that one of the two grounds permitting extension – namely, the risk of absconding or lack of cooperation – are made out. The national court must consider whether detention should be extended or instead replaced with a less coercive measure or, indeed, whether the TCN concerned should be released if there is no longer any 'reasonable prospect of removal'.

As regards the grounds permitting an extension of detention, the CJEU found that an absence of identity documents does not in and of itself automatically entail a risk of absconding. This is instead a factor to be taken into account when conducting an individualised, case-specific examination of the request for extension. Similarly, the Court found that an absence of identity documents does not automatically amount to a lack of cooperation on the part of the TCN, justifying extension of detention. Instead, the national court must undertake an examination of the TCN's conduct during the period of detention to ascertain whether he has cooperated in the implementation of the removal operation and whether 'it is likely that that operation lasts longer than anticipated because of that conduct'.

- ***Abdida*: extending minimum safeguards for suspensive appeals against return**

The basic minimum safeguards outlined in Art 14 of the Return Directive – family unity; emergency health care; children's access to education; respect for situations of vulnerability – are to be enjoyed by migrants whose return is postponed due technical reasons, poor health, or risk of refoulement. Such individuals should be provided with written confirmation of their situation for use in the event of administrative controls or checks, which will presumably remove the risk of being (re)detained as a consequence of a check or administrative control. The CJEU in *Abdida* (*CJEU, Abdida*, 2014) confirmed that such safeguards also apply migrants who cannot be removed owing to an appeal against expulsion. Such safeguards, however, fall far short of the rights to which irregular migrants are entitled under international human rights law. It is unclear if these safeguards apply to migrants who cannot be returned due to factors such as, for example, lack of cooperation from the country of origin. Importantly, the CJEU in *Abdida* found that where removal is suspended following an appeal, Art 14 requires states to provide as far as possible for the basic needs of a TCN "suffering from a serious illness where such a person lacks the means to make such provision for himself." Otherwise, the Art 14 requirement to provide emergency health care and essential treatment of illness could be rendered meaningless.

3.3 PATHWAYS OUT OF IRREGULARITY

3.3.1. Introduction

EU law basically knows two pathways out of irregularity, namely removal or regularisation, which are provided for in Art 6 Return Directive. Art 6(1) determines that any 'illegally' present TCN shall be issued a return decision. Art 6(2)-(5) sets out exceptions to Art 6(1) which include the right under Art 6(4) for the MS where the irregular migrant has been apprehended to 'at any moment' grant an autonomous residence permit. In all other cases the irregular migrant must be issued with a return decision. The CJEU in *Zaizoune* (*CJEU,*

Zaizoune, 2015) confirmed this understanding. Similarly, in the judgment *BZ v Westerwaldkreis* (*CJEU, BZ v Westerwaldkreis*, 2021) the court considered that it is contrary to the Return Directive to tolerate the existence of an intermediate status of TCNs who are on the territory of a MS without any right of stay or any residence permit without any valid return decision subsisting in relation to them.

The MIrreM project applies a broader understanding of possible pathways out of irregularity. Kraler and Ahrens distinguish various situations of pathways out of irregularity (Kraler & Ahrens, 2023a, p27-28). **Demographic outflows** relate to the death of a person in an irregular situation which consists of deaths not related to migration and migration-related deaths such as border deaths, deaths in detention or deaths during removal, or death as a consequence of lack of access to health care. **Geographic outflows** capture mandatory return, voluntary return and onward migration to another destination. Finally, **status related outflows** distinguishes between different variations of regularisation measures, such as exceptional in-country application for residence permits, collective regularisation programmes in exceptional circumstances such as EU accession or temporary protection, regularisation following changes of personal circumstances which create an independent right to stay (e.g. family creation) as well as the transition to a provisional status, e.g. by lodging an asylum claim or being identified as a victim of trafficking, etc.

In the following subsections, various geographic and status-related pathways out of irregularity are presented, with a focus on grey areas and situations that are discussed in literature or became relevant in court with respect to EU policies and law.

3.3.2. Geographic and status related outflow

- **EU Return Directive 2008/115/EC** from 16 December 2008
- **Qualification Directive 2011/95/EU** from 13 December 2011
- **Asylum Procedure Directive 2013/32/EU** from 26 June 2013
- **Dublin Regulation 604/2013** from 26 June 2013
- **Eurodac Regulation 603/2013** from 26 June 2013
- **Family Reunification Directive 2003/86/EC** from 22 September 2003

Non-removable

On average, only approx. one third of TCNs for whom a return decision has been issued are reported as leaving the EU (European Commission, 2020a, pp36-38).[6] The Return Directive recognises different legal, practical, or technical reasons (Art 9 (2)(b)) why people issued with

6 However, this number does not present an accurate picture, as it refers only to those people reported as leaving the EU member state issuing the return order. It does not cover those who, for example, moved on to another member state or left by their own means. See also footnote 1.

a return decision cannot be returned. There is, however, little information or data on their status or particular situation, with some entering a situation of prolonged irregular stay.

At EU level, there is neither a common definition nor a common approach on how to deal with such situations of legal limbo. A 2020 paper on "addressing challenges relating to migrants in a situation of prolonged irregular stay", from the Croatian Presidency of the EU, estimates that **300,000 migrants annually do not return** following a return decision (Council of the European Union, 2020, p3).

EU law, however, only knows three protection statuses, all deriving from a protection logic where the country of origin persecutes the individual or does not/ cannot provide the necessary protection. These statuses are international protection (consisting of the refugee and subsidiary protection status - both regulated in the Qualification Directive (Qualification Directive (Recast), 2011) - and the temporary protection status in cases of 'mass influx' of displaced persons – regulated in the Temporary Protection Directive (2001). These statuses, however, are very specific in their use and do therefore not provide a solution for the many different situations where migrants are irregular but cannot return for various reasons.

The European Commission proposed in its 2019 brainstorming paper to introduce a "may" clause allowing regularisation by MSs for in loco applications after a minimum factual stay of 18 months and a 'shall' clause for regularisation after 5-10 years of factual stay. The Commission further linked this with social integration, good conduct and the impossibility of return within a foreseeable time (Commission Staff Working Document: Fitness Check on EU Legislation on Legal Migration, 2019, p59). However, MS did not accept the proposal, but preferred national solutions and a focus on improving return rates.

In the absence of EU wide solutions for regularisation, a patchwork of national statuses provides some sort of solutions for individuals concerned. Those who do not leave are either tolerated in the MSs (because there are practical or legal obstacles to their return), regularised through the granting of a particular national protection or residence status, or may abscond and remain irregularly within EU territory (Commission Staff Working Document: Fitness Check on EU Legislation on Legal Migration, 2019, p58). These individuals benefit from the safeguards listed in Art 14 of the Return Directive, such as maintenance of the unity with family members within the EU territory, emergency health care, basic education for minors and measures taking into account special needs of vulnerable people.

- **No return decision due to prohibition of refoulement**

The strict binary understanding of the EU Return Directive of either return decision or residence permit has been challenged in several court cases concerning beneficiaries of international protection whose status has been revoked as a consequence of their criminal behaviour in accordance with Art 14(4)(b) Qualification Directive (see *CJEU, Bundesamt für Fremdenwesen und Asyl v AA,* 2023; *CJEU, XXX v Commissaire général aux réfugiés et aux apatrides*, 2023); *CJEU, Staatssecretaris van Justitie en Veiligheid v M.A.*, 2023). Upon revocation, the TCNs are staying 'illegally' (*CJEU, Bundesamt für Fremdenwesen und Asyl v AA,* 2023, 47). However, Art 5 of the Return Directive precludes adoption of a return decision in respect of such TCNs where it is established that their removal is, by reason of the principle of non-refoulement, precluded for an indefinite period (ibid, 52).

- **Application for international protection**

The CEAS creates – at least temporarily – several pathways out of irregularity for people in need of international protection. Different instances can be thought of here:

For individuals arriving to the EU in an irregular manner, an application for asylum is per se probably the most relevant and frequent pathway out of irregularity. The territorial asylum regime demands from people in need of IP to apply for asylum on national territory – at borders, airport transit zones or within the country. On average, 600,000 TCNs apply for asylum at the borders or in EU MS each year. As the international instrument – the 1951 Refugee Convention – as well as the CEAS are silent about how a refugee arrives in a potential country of asylum, this movement is mostly irregular, unless it is facilitated through resettlement programmes which allow refugees to regularly move from the first country of asylum to a permanent host country.

Persons seeking international protection are to go through a refugee determination procedure, which has to be started at the latest within three days after submission of the application (Art 6 APD). During the procedure, people concerned are no longer irregularly staying but they are registered and have the status of an applicant for international protection until a final decision has been taken. This migration status is determined by a residence permit for the duration of the procedure and access to a range of rights, which are set in the Reception Conditions Directive (Reception Conditions Directive (Recast), 2013) and encompass access to material reception conditions and socio economic rights such as, education (Art 14), (after a waiting period of maximum 9 months) the right to access the labour market (Arts 15-16), health care (Arts 17, 19, 25). This reception is granted to TCNs 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 MS, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law” (Art 3 RCD).

- **Irregular stay in case of exhausting legal remedies against negative asylum decisions?**

But the relation between asylum and return is also disputed for other reasons. In *Gnandi v Etat Belge* (*CJEU, Gnandi*, 2018) the CJEU held that a TCN “is staying illegally, within the meaning of Directive 2008/115, as soon as his application for international protection is rejected at first instance by the determining authority, irrespective of the existence of an authorisation to remain pending the outcome of an appeal against that rejection.” Consequently, a return decision may, in principle, be adopted against such a TCN after that rejection decision or aggregated together in a single administrative act (ibid, 59). As a result, a TCN who appealed a first instance negative asylum decision remains an applicant for international protection as no final decision has been issued yet (see Art 2(i) Qualification Directive 2011/95/EU, 2(c) Asylum Procedure Directive 2013/32/EU) but is also considered ‘illegal’ according to the Return Directive Art 6 despite the fact that an applicant for international protection is usually not considered ‘illegal’ (explicitly mentioned in recital 9 Return Directive) and thus excluded from the Return Directive. With this judgement the Court departed from its earlier determination in Arslan (*CJEU, Arslan*, 2013). Despite criticism (e.g. the Opinion by the Fundamental Rights Agency FRA Opinion No1/2019, p 32) the European Commission used the Gnandi judgement and proposed to amend the Return Directive (Art

8/6 Return Directive Proposal (2018) for a speedy one-step return procedure (Moraru, 2019).

- **Medical cases**

Seriously ill TCNs may successfully resist removal. The ECtHR first interpreted the prohibition of inhuman and degrading treatment in Art 3 ECHR to prevent removal of a seriously ill migrant in 1997 in *D v UK* (*ECtHR, D v UK*, 1997; see also Desmond, 2022, p5). The Court in *D* established a very high threshold for medical cases, which it subsequently entrenched in *N v UK* (*ECtHR, N v UK*, 2008), ruling that Art 3 would prevent expulsion only in "very exceptional circumstances" such as in *D* where "the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and no family willing or able to care for him or provide him with even a basic level of food, shelter or social support." In 2016, however, in *Paposhvili v Belgium* (*ECtHR, Paposhvili*, 2016) the Court lowered somewhat the threshold. It is now no longer necessary for TCNs to be close to death in order to rely on Art 3, and the Court also found that seriously ill immigrants may be expelled only if the medication they require is not only "available" but also "accessible" upon return.

The CJEU in M'Bodj v Belgium (*CJEU, M'Bodj*, 2014) found that where Art 3 ECHR is successfully invoked in medical expulsion cases, such inhuman and degrading treatment does not constitute serious harm for the purposes of Art 15 QD. Therefore, TCNs cannot be granted subsidiary protection as this "would be contrary to the general scheme and objectives of Directive 2004/83 to grant refugee status and subsidiary protection status to TCNs in situations which have no connection with the rationale of international protection (ibid, para 44)." This means that TCNs with medical conditions that impede return must rely on national protection statuses and are not, for the purposes of EU law, "persons with subsidiary protection status to whom social welfare and health care would apply (ibid, para 46)."

- **Family ties**

The Family Reunification Directive (Family Reunification Directive, 2003) regulates the right to family reunification, but does not apply to international protection applicants, or to beneficiaries of temporary protection and subsidiary protection. The Directive also does not apply to TCN family members of an EU citizen. Similarly, neither does it apply to irregularly staying TCNs as only TCNs lawfully residing in the territory of a MS are covered (Art 1). Despite these exceptions, the right to family life and family reunification is set out for some of the above-mentioned excluded groups in other EU secondary law (such as the EU Qualification Directive (Qualification Directive (Recast), 2011) or the EU Citizens Directive (EU Citizens Directive, 2004).

However, more importantly, the right to family life is guaranteed by Art 7 FRC and Art 8 ECHR. As it has been pointed out, Art 8 ECHR can bring a human right to regularisation in exceptional circumstances (Thym 2023, p 821) such as in cases where, for example, the return of a mother would infringe the best interests of her children (*ECtHR, Nunez vs Norway*, 2011). In this context also the two landmark CJEU decisions, *Metock* (*CJEU, Metock et al*, 2008) and *Zambrano* (*CJEU, Zambrano*, 2011), can be considered as 'powerful vindication[s] of

irregular migrants' rights, sanctioning their right to remain in the EU and removing the ever-present threat of deportation' (Desmond, 2016, p 263). In both cases the Court imposed EU law obligations on states to regularise the irregular TCNs' stay because of their family ties with EU citizens (spouses in the *Metock* ruling and children in the *Zambrano* ruling), who otherwise would not be able to enjoy their EU citizen rights.

There is also a right to family reunification with siblings or with parents for minors who turn 18 during the asylum procedure and before the asylum decision. In *CJEU, A, S v Staatssecretaris van Veiligheid en Justitie* (2018) an Eritrean minor asylum applicant turned 18 before she was granted refugee status. She subsequently applied for admission of her parents and siblings under the Family Reunification Directive which allows for family reunification of parents of a minor refugee but not of an adult refugee. The CJEU held that only by determining eligibility by reference to the date of submission of the asylum application would "enable identical treatment and foreseeability to be guaranteed for all applicants who are in the same situation chronologically" (para 60). In the recent judgment in *CJEU, CR, GF, TY v Landeshauptmann von Wien* (2024) the court built on the A and S ruling and extended the right to family reunification also to siblings if they are dependent on the parents enjoying family reunification with a minor refugee who turned 18 during proceedings.

- **Regular Status for Irregular Migrant Spouses of (Mostly) Mobile EU Citizens**

EU free movement law applies to TCN family members of EU citizens who have exercised their EU law rights by moving to another MS. It is in this context that the CJEU has delivered a number of landmark rulings in which it essentially accepted that the conjugal ties of irregular migrants to mobile EU citizens oblige MSs to confer a regular status on such migrants, allowing them to reside lawfully in the EU. Arguably motivated more by EU law considerations than human rights principles, the Court is keen to ensure that EU citizens do not suffer interference with their family life as a result of exercising their EU law rights and, conversely, that they should not be deterred from enjoying such rights by potential restrictions on their ability to live with their spouse.

The case of *Carpenter* (*CJEU, Carpenter*, 2002) had the effect of regularising the TCN spouse of an EU citizen on the basis of free movement of services. Mrs. Carpenter, a Philippine citizen married to a UK citizen, received a deportation order in 1997 following unlawful residence in the UK. Though established in the UK, Mr. Carpenter provided services to private parties in other EU countries and for that purpose travelled to other MSs. Deportation of Mrs. Carpenter, who cared for her husband's children, would result either in family separation or collective relocation to the Philippines, thereby interfering with Mr. Carpenter's Art 56 TFEU right to provide services, one of the four fundamental freedoms conferred on EU citizens by the Treaties. While the Court accepted that states may restrict these freedoms in the public interest, such restrictions must be compatible with fundamental rights, including the right to family life as set out in Art 8 ECHR and protected in EU law. Deportation of Mrs. Carpenter would have violated her husband's Art 8 right to respect for family life, thereby interfering with his Art 56 TFEU right to provide services, and as such would have been a disproportionate measure for the achievement of the legitimate aim of maintenance of public order and safety. The CJEU rejected the UK's position that because he was resident in the UK

Mr. Carpenter could not be considered to be exercising freedom of movement within the meaning of EU law.

Metock (*CJEU, Metock et al*, 2008) concerned four unsuccessful asylum-seekers who had married mobile EU citizens resident in Ireland. Rejection by the Irish authorities of the TCNs' applications for residence cards as spouses of EU citizens led to the groundbreaking ruling that a MS cannot prevent entry or continued stay of a TCN spouse of an EU citizen who is exercising her right of free movement, regardless both of when and where the marriage took place and of how the TCN spouse first entered the host state. Such prevention would discourage that citizen from moving to or residing in the MS in question and may encourage departure so as to lead a family life in another MS or outside the EU.

The limitation of *Carpenter* and *Metock* from the perspective of irregular migrants is that they apply only to those who have married EU citizens who are exercising their right to provide services under Art 56 TFEU or their right to free movement within the EU under Directive 2004/38. The upshot is that the reverse discrimination suffered by static or non-mobile EU citizens means that marriage to an irregular migrant will not oblige the home state to grant irregular migrant spouses a right of lawful residence. This instead falls to be decided by reference to the domestic legal framework. Marriage to a non-mobile EU citizen will therefore not necessarily act as a bar to deportation. The Court's response to this issue, when raised in *Metock*, was to observe curtly that any difference in treatment between mobile and non-mobile EU citizens in this regard did not fall within the scope of EU law.

The rulings in *Carpenter* and *Metock* might be viewed in the broader context of EU integration and efforts to establish an internal market without frontiers, and best appreciated as part of a line of rulings where the CJEU acts to safeguard and promote EU citizens' enjoyment of the four fundamental freedoms of the EU. Indeed, the CJEU noted in both cases the importance of ensuring EU citizens can lead a normal family life in a host state as otherwise their exercise of the fundamental freedoms may be obstructed. From this perspective, the human rights success occasioned by *Carpenter* and *Metock* might be viewed as an incidental by-product of CJEU concern with securing the effective functioning of EU law and its primacy over national law.

Case law developments since *Carpenter* and *Metock* concerning mobile EU citizens seeking to return to their home state with TCN family members may also benefit irregular migrant spouses. Of particular note is *O. & B.* (*CJEU, O. & B.*, 2014). Here the CJEU found that where a mobile EU citizen creates or strengthens family life with a TCN during genuine residence in a host MS in conformity with Directive 2004/38, the effectiveness of Art 21(1) TFEU on EU citizens' right to move and reside freely within the EU mandates the continuation of such family life upon return to a citizen's home state through the grant of a derived right of residence to the TCN family member. Obstacles to a citizen's desire to return to a home state may deter her from leaving in the first place, thereby undermining the exercise of EU law rights. This ruling may benefit the irregular migrant spouses of EU citizens in a manner similar to the rulings in *Carpenter* and *Metock*. Amongst the limitations to the right for returning EU citizens to be joined by their TCN family members, the Court highlights that residence in the host state must have been sufficiently genuine and that the scope of EU law cannot be extended to cover abuses. These limitations will not necessarily operate to exclude irregular migrant spouses from the scope of *O. & B.* given the Court's finding in *Metock* that the benefit

of rights under Directive 2004/38 cannot depend on the prior lawful residence of a TCN spouse in another MS.

- **Family ties do not guarantee regular status.**

The boundaries of drifting into irregularity after overstaying despite having family ties are rather slim when analysing the case law on Art 8 ECHR of the ECtHR. This especially refers to cases where the family life was formed at a time when those involved knew that the migration status of one of them was such that their family life would be precarious in the contracting state. Where this is the case, the principle is that the expulsion of the non-national family member will amount to an Art 8 violation "only in exceptional circumstances" (*ECtHR, Rodriguez*, 2006, para. 39 and *ECtHR, Nunez vs Norway*, 2011, para. 70). In the *ECtHR, Jeunesse v Netherlands* (2014) ruling the Court considered as exceptional circumstances that "a fair balance had not been struck between the competing interests at stake, namely the interest of the applicant, her husband and their children in continuing their family life in the Netherlands, on the one hand, and the interest of the state in controlling immigration, on the other (paras. 121 and 122).

- **Release from detention when a reasonable prospect of removal no longer exists and regularisation**

The Court has made clear in cases such as *Kadzoev* (*CJEU, Kadzoev*, 2009) and *Mahdi* (*CJEU, Mahdi*, 2014) that irregular TCNs must be immediately released from detention once there is no longer any reasonable prospect of removing them from the EU. What, however, is to happen to such migrants upon release? The CJEU provides little guidance, noting in *Mahdi* that the purpose of the Return Directive is not to regulate the conditions of residence of such irregular migrants.

The Directive itself provides in the Preamble and Art 14 that irregular TCNs who cannot be removed should be provided with written confirmation of their situation for use in the event of administrative controls or checks. Similarly, Art 14 provides that where a removal has been postponed, states must take into account 'as far as possible' the following principles: (a) maintaining a TCN's family unity with family members present in the state; (b) provision of emergency health care and essential treatment of illness; (c) providing minors with access to the basic education system subject to the length of their stay; (d) the special needs of vulnerable persons.

This situation gives rise to a number of problems. Firstly, the Art 14 'safeguards' fall short of the rights to which irregular migrants are entitled under international human rights law (EU Agency for Fundamental Rights, 2011) and do not eliminate the state of precarity in which non-removable, non-detainable migrants may find themselves. Secondly, it is unclear if the safeguards apply to migrants who cannot be returned due to factors such as a lack of cooperation from the country of origin. The Directive does, however, provide a framework to address the state of legal limbo in which such migrants find themselves, namely, the possibility under Art 6(4) that, instead of issuing or enforcing a return decision, a state may 'at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay' to an irregular TCN. It is possible to argue that the Directive not only permits states to regularise irregular migrants but, in fact, obliges states to either issue and enforce a return decision or to confer a legal status on unlawfully present TCNs. We deal in

turn with the two main, complementary grounds on which such an argument might be advanced – firstly an effectiveness-based argument and, secondly, a human rights-based argument.

The aim of the Return Directive to eliminate the presence of irregular migrants in the EU is inferable from the text of the Directive itself. Art 6(1) requires states to issue a return decision to any unlawfully staying TCN, a provision that has been interpreted by the CJEU to mean that states must 'explicitly make provision in their national law for the obligation to leave the national territory in cases of illegal stay' (*CJEU, Mukarubega*, 2014). The aim is also evident in the view of the Commission that the Directive ensures that 'a person is either legally present in the EU or is issued with a return decision' (European Commission, 2011, p.9). Both the Commission and the CJEU have repeatedly referred to the need to ensure the effectiveness of the EU's return policy generally and of the Return Directive in particular. Both are demonstrably lacking in effectiveness, as evidenced by the fact that the majority of unlawfully present migrants are not issued with return decisions and the majority of those who do receive return decisions do not leave the EU ((European Parliamentary Research Service, 2019; Lutz, 2018).

Regularisation, unconditionally open to states under Art 6(4), would allow TCNs who are not or cannot be deported to remain in the EU on a legal basis, thereby reducing the ongoing gap between the number of return decisions issued and the number effected. Embracing regularisation would transform current return policy from one that is largely ineffective to one with a greater likelihood of achieving the aim of lowering the number of irregular migrants unlawfully present in the EU.

The human rights-based argument for regularisation is anchored in the belief that human rights considerations require a TCN to be allowed to remain lawfully in the EU instead of being expelled. These considerations include any family life a TCN may have in the host state, with which deportation would inevitably interfere. Similarly, the principle of the best interests of the child might mean that a child migrant should not be expelled to a country where her quality of life would be drastically lower than in the expelling state or that a TCN parent should not be expelled where expulsion would result in a separation of parent and child or removal of a child so as to accompany the deportee parent. Such considerations are, in fact, expressly acknowledged in the Directive and should, as set out in the Preamble, be primary considerations of states when implementing the Directive.

The CJEU explicitly held in *Mahdi* that there is no obligation on states under Art 6(4) to regularise TCNs for whom there is no longer a reasonable prospect of removal. Nonetheless, the explicit reference to human rights considerations in the Directive, the CJEU's increasing reference to the EU Charter for Fundamental Rights and human dignity in its case law on the Return Directive and the wide concern with ensuring the effectiveness of the Directive and EU return policy all combine to produce a compelling argument for regularisation.

- **Duty for a proportionality test before expulsion of long-term residents who commit a crime**

The Long-Term Residents Directive (LTR-D) allows individuals staying longer than 5 years permanently and regularly in a MS the opportunity for a more secure, long term resident permit. The main purpose is to foster their integration (see *CJEU, Staatssecretaris van Justitie*

v Mangat Singh, 2012, para 45 or *CJEU, Commission v Netherlands*, 2016, para 66) and access to rights for such individuals and reinforced protection against expulsion. The protection against expulsion is based on the criteria determined by the decisions of the European Court of Human Rights (LTR-D recital 16). Art 12 of the Directive details the protection against expulsion limiting it to "actual and sufficiently serious threats to public policy or public security". In addition, the expelling authority must take a number of factors into account such as the duration of residence, the age of the person, the family relations as well as the links to the country of residence or the absence of links with the country of origin.

In Wilber López Pastuzano v Delegación del Gobierno en Navarra (*CJEU, López Pastuzano,* 2017) the Court was asked about interpreting a provision of Spanish law which foresaw the expulsion of a TCN if s/he is sentenced for an offence sanctioned by prison for more than one year. The court in essence determined that the LTR-D prohibits the automatic expulsion without taking the personal circumstances of the person concerned into account. The court thus emphasises the duty of a proportionality test according to Art 12 LTR-D in cases where long term residents commit a crime (see also Acosta, 2017).

4. SPOTLIGHT

4.1 OUTLOOK: THE PACT ON ASYLUM AND MIGRATION

European Commission President Ursula von der Leyen announced the New Pact on Migration and Asylum during her State of the Union address to the European Parliament on 23 September 2020. The Pact replaced Juncker's Agenda on Migration and continued the reform process that started and got stuck under the Agenda on Migration. Differently than the Agenda on Migration, the Pact embraced further policy areas beyond the further development of the CEAS. Against all odds and most commentators' prognosis, the Council and the European Parliament reached political agreement– after long negotiation process – on the Pact in December 2023.

The Pact constitutes a "labyrinth of procedural rules, byzantine in their complexity and based on trying to limit the number of people who are granted international protection in Europe" as Woollard has put it so pointedly (Woollard, 2023). In essence the Pact consists of a range of legislative files, centering around the Screening Regulation, the Eurodac Regulation, the Asylum Procedures Regulation, the Asylum Migration Management Regulation and the Crisis and Force Majeure Regulation as well as Border Procedure Regulation. At the time of writing all these legislative files were yet not formally adopted.

Table 3: Overview of central instruments under the Pact

Instrument	Brief description
Screening Regulation	This new piece of legislation introduces a screening procedure at the borders for TCN who 1) crossed the border without authorisation, 2) applied for IP during a border check, 3) have been disembarked after search a rescue operation and 4) TCN staying 'illegally' in the territory. The screening shall be conducted at the at or in proximity to the external borders and last no longer than 7 days.
Asylum Procedures Regulation	This Regulation establishes a common procedure for granting and withdrawing international protection. The previous Directive shall include a border procedure, which comes directly after the screening procedure. The border procedure shall be mandatory for 1) TCN who intentionally mislead the authorities, 2) the applicant is a danger to national security and public order, 3) the applicant comes from a CoO with a recognition rate for IP of 20% or less. The border procedure is to be conducted close to the border or in transit and shall last no longer than 12 weeks (exceptionally up to 16 weeks).
Asylum and Migration	This Regulation 1) sets out a common framework for the management of asylum and migration in the EU, and the functioning of the CEAS; 2) establishes a

Management Regulation	mechanism for solidarity; and 3) lays down the criteria and mechanisms for determining the MS responsible for examining an application for IP.
Crisis and Force Majeure Regulation	The Regulation addresses exceptional situations of crisis, including instrumentalisation, and force majeure in the field of migration and asylum within the Union.

While the EU praised the breakthrough of negotiations between the Council and the European Parliament in reforming the EU asylum and migration system as a historic agreement (European Council, 2023), the assessment by academics and civil society is less enthusiastic. The concerns are not only about the byzantine character and its hardly ever implementation prospect but also more substantial concerns regarding human rights of people concerned, namely TCN and people in need of international protection. Among the plethora of concerns (see as some examples (Woollard, 2024, Neidhardt, 2024, (Amnesty International, 2023; Tsourdi, 2023), the following points may be briefly mentioned due to their expected impact on irregular migrants.

- The Asylum Procedure Regulation follows the underlying presumption of irregularity (instead of a person in need of protection) for applicants from a country of origin with less than 20% recognition rate for IP. As a consequence, all such applicants are brought under the Border Procedure.
- The whole screening process of maximum 6 days plus the subsequent up to 12 weeks border procedure is designed to result in more detention in the future. In addition, the detention is also set to be located under precarious conditions, namely at the border zones and in transit entailing the widely unclear non-entry fiction with unclear impact on rights of detainees.
- The safe third country concept enshrined in the Asylum Procedures Regulation (Art 60 of the consolidated proposal) may (as opposed to previously 'shall') require a connection of the TCN with the safe third country. In addition, the EU and MS at national level can designate a country as safe. As this was one of the stumbling blocks during negotiations, this may further open externalisation of asylum processes to third countries in the future.

The Pact is entirely designed to deter and combat irregular migration. Again, numerical targets are more important than the individual rights of those affected. Without going further into details, it can only be expected that the implementation of the Pact will see many complaints or requests to the European Courts. Again, the CJEU and the ECtHR will play important roles in defining the borders of the Pact as much as this will be also an increasing role of the EUAA and the Commission.

4.2 TEMPORARY PROTECTION

On 24 February 2022 Russia started its unprovoked invasion in Ukraine, which led to the largest displacement in Europe since the WWII. Based on initial estimates shortly after the

invasion, the Union expected in the beginning of March 2022 that between 2,5 million and 6,5 million people may potentially flee Ukraine as a consequence of the armed conflict (Council Implementing Decision (TP), 2022, recital 6). However, despite these estimates the high number of people who were expected to enter the block, led to the opposite reaction to the usual closing of borders and deterrence policy. In fact, the EC states that the "situation in Ukraine, provoked by the Russian aggression and leading to an intense movement of persons fleeing or returning from the war zone," would "justif[y] the temporary relaxation of border controls at the Ukrainian border to the EU." (European Commission, 2022, p3). For people arriving from Ukraine[7] not only the border controls were to relax but the block also continued to allow visa free travels and even granted far reaching – though temporary – rights by swiftly triggering the temporary protection directive (Council Implementing Decision (TP), 2022).

Remarkably, the Council in this case and detrimental to other similar cases of displacement considered high benefits in visa-free travels and immediate protection through the TPD. Specifically, the Council stressed that "they [beneficiaries of temporary protection] are able to choose the MS in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union." This, as further emphasised by the Council "will in practice facilitate a balance of efforts between MSs, thereby reducing the pressure on national reception systems." (Council of the EU 2022, recital 16).

And in fact, after 2 years of ongoing war in Ukraine MS remain determined, upholding the temporary protection of approximately 4 million people within the MS of the EU. Moreover, MS agreed in the Implementing Decision (recital 15) not to apply Art 11 of the TPD, which would have required that MS would need to return BTP to the country that had initially granted them this status. Therefore, once an EU country provides temporary protection, beneficiaries may still change their country of destination (Wagner et al., 2023, p10). Beneficiaries of temporary protection are in fact able to not only move on to other MS but also to return short term home to Ukraine without fearing consequences on their status. While the rights attached to temporary protection may be withdrawn during their absence, the status continues, or is being re-activated by MS once the person returns to the host MS state.

In fact, all these practices are in strong opposition to usual EU asylum and migration policies, creating in essence irregularity (see above under chapter 3.1.) rather than offering pathways to regularity. The Mixed Migration Centre (MMC) in this context bluntly labelled the triggering of temporary protection in the context of Ukraine as "[t]he biggest anti-smuggling operation ever" (Forin, 2023). And indeed, the more than 5 million who fled the war in Ukraine to EU MS only exceptionally made (or needed to make) use of the services of smugglers. The ability of Ukrainians to freely move across the borders, and the Temporary Protection Directive allowed people's mobility. There was (mostly) no need to rely on smugglers and notable, in many instances, even the transportation from Ukraine to MS was free of charge – at least at the beginning of the displacement from Ukraine. Surveys conducted between January and March 2023 by the MMC with 1,413 people displaced from Ukraine revealed that only 4,4%

[7] See the definition of who was to benefit from temporary protection in Art 2 of the Council Implementing Decision.

used smugglers to cross a border while nearly all Afghans and Iraqis interviewed between 2019 and 2023 had used one or multiple smugglers to enter the EU (Forin, 2023). Even more, not only the movement was allowed but also the residence in another MS than the one where the beneficiary is registered for TP. MS in that respect agreed early on to not apply Art 11 TPD, which would have allowed MS to return the BTP to the first country responsible (similarly to the Dublin logic). Thus, both, mobility and residence has effectively been legalised for people displaced from Ukraine as a result of the invasion of Russia.

Numbers have played a crucial role to develop the policy response in the context of displacement from Ukrainian. However, different from other policy responses, in this case the numbers were used to trigger and grant far reaching mobility and (temporary) residence rights instead of mobility restrictions and irregularity. Notably the concerned policies were based on UNHCR data predictions and estimates that were made at the beginning of the Russian invasion and then taken up by the European Commission when proposing to trigger the temporary protection directive (European Commission, 2022a).

But an even more urgent question is linked to what will happen when temporary protection will end on 04 March 2025 (see Wagner, Seges Frelak, et al., 2023) p4-5). So far there have been no tangible proposal put on the table ((Wagner, 2023)) and the directive only provides very little guidance referring to the general laws on protection and on aliens in the MSs (Art 20 Temporary Protection Directive, 2001). Despite the referral to national laws, there is no common European solution envisaged in the TPD for when temporary protection ends on 4 March 2025. Without a European solution, beneficiaries of temporary protection are dependent on rather diverse national residence regimes and the interpretation of international protection in the Ukrainian context. Many may not fulfil the very high demands for residence permits. Without a prospect of return a probably significant number of the 4 million beneficiaries of temporary protection might end up in an irregular migratory situation.

4.3 THIRD COUNTRY PROCESSING AND EXTERNALISATION

4.3.1. Why externalisation?

The above described pathways into irregularity encompass a number of policies that aim at deterring TCN from arriving at the border of the EU. The visa system, the immigration liaison network, the carriers sanctions, etc., all just aim at avoiding to establish responsibility of EU MSs. But the EU deterrent strategy of the visa regime was almost undermined in the much-debated X and X v État Belge (*CJEU, X and X*, 2017; see Brouwer, 2017; Zoeteweij & Progin-Theuerkauf, 2017). It concerned a Syrian family that travelled to the Belgian embassy in Beirut to submit a visa for limited territorial visa according to Art 25 Visa Code with the intention to apply for asylum in Belgium. The CJEU held that the Visa Code regulates the procedure and issuing of visas for a period not exceeding 90 days within a 180-day period. As the applicants intended for a stay longer than 90 days, they fell outside the scope of the Visa Code (para 43) and solely within the scope of national law (para 44). Following the conclusion that humanitarian visas are a national issue outside EU law, they do not engage the Charter of Fundamental Rights (para 45). A later judgement – this time by the ECtHR – of very similar content came to the same conclusion: in MN and Others V Belgium (*ECtHR, M.N*

et al vs Belgium, 2020) the Court held that the process of applying for a visa in person at the Belgian embassy in Beirut did not bring the Syrian applicants within the scope of the European Convention on Human Rights (ECHR). The Court declared this case inadmissible. With the negative decision of the ECtHR, the visa regime remained one of the most important EU instruments to pre-select who shall arrive regularly in the EU and whose pathway must turn irregularly.

All of these deterrent instruments have in common that - at least in the opinion of the EU and its MSs – they do not create any responsibility of the EU MS for TCNs. This assumption is important because once responsibility is established, this entails a whole package of rights and guarantees as well as practical reasons that do not easily allow MSs to send TCN back to their places of origin. Thus, the ultimate goal of contemporary migration management is actually to not assume responsibility for TCN in the first place.

However, despite all of these measures, TCNs do arrive in EU MS. With assumed responsibility the gap between return decisions and actual returns is ever widening. As a consequence, MS and increasingly also the EU (in form of the Council and the Commission) debate and experiment with alternative measures to push away the already assumed responsibilities. In essence, EU MS look for ways to hand over the responsibility for TCN to other countries, either completely, temporarily or for certain procedural matters. In the following these attempts are briefly clustered and described.

4.3.2. Examples of externalisation

- **Externalising asylum (and migration) processes to air, land, or sea borders**

A more classical attempt of states to decline responsibility for irregularly arriving TCN are airport procedures. Until countries do not admit TCN to the national territory, air carriers can be charged with returning not properly documented migrants. More complex the situation gets if the TCN requests asylum at the airport. The application is then processed under specialised procedures at the airport, in the transit area or areas that are declared as transit zones. Mostly, MS only conduct an admissibility procedure, checking in essence whether another country is responsible and whether the claim is not manifestly unfounded but without entering the substance of the claim.

Similar consideration of preventing to assume responsibility are the recent proposal for border procedures as part of the Screening Regulation and the Asylum Procedures Regulation which are based on a ‘non-entry fiction’ (see also under chapter 4.1.).

- **Externalising asylum (and migration) processes to third countries**

The core examples of externalisation, however, are initiatives or agreements that transfer the responsibility for migration and/or asylum procedures from one country to another. In the EU context this means the transfer of a TCN from an EU country to another non-EU country, even though the EU country already assumed responsibility for the asylum claim. Such externalisation ideas encompass therefore practices where an EU country assumed responsibility for a person in need of international protection, but this responsibility is shifted to a safe third country, because there has been previously established a connection to this country (e.g. 1:1 arrangement under the **EU-Turkey Statement** (European Council, 2016) and broadly in line with Art 38 APD) or to a country without any prior connection (e.g. the **UK-Rwanda** idea, which would contradict current Art 38 APD due to the lack of the ‘connection

criteria'). A more nuanced agreement is currently in the making between **Italy and Albania**, where equally the EU country (here: Italy) assumed responsibility for an individual through a search and rescue operation in the Mediterranean (compare Hirsi case (*ECtHR, Hirsi*, 2012) but transfers the rescued person for the migration procedure not to Italian main land but to Albania, however, by Italy remaining responsible for the procedure. To date only the EU/Turkey statement has been practically implemented, while the latter two are (so far) only ideas.

- **Externalising through multilateral or bilateral partnership agreements**

Such externalisation agreements are the most traditional examples. They date back to Italy Libya arrangements, the attempts of the EU to create Regional Protection Programs such as in the horn of Africa or in Ukraine, Moldova. In such agreements, third countries are promised support to build up their national migration capacity to create an area where refugees can safely stay and enjoy asylum without the need to travel to far away countries such as Europe. The agreements are often also connected with development programmes and the need to take back irregular migrants that arrived in the EU.

More recent examples are the Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia (European Commission, 2023b) or the even more recent Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic of Egypt and the European Union (European Commission, 2024a). Both foresee broad cooperation programmes, among them a pillar on migration, supporting the countries in border management and return their nationals from the EU. These envelopes come at 7.4 bln Euros in the case of Egypt (The Guardian, 2024) and an unclear amount in the case of Tunisia.

- **Externalisation for humanitarian reasons**

While usually not addressed under the heading of externalisation, also transfers for humanitarian reasons shift responsibility from one country (in this case for reasons of lacking capacity to provide protection) to another country (that provides the necessary protection). Examples for such humanitarian externalisations are resettlement, humanitarian protection programmes, transit centres or evacuation programmes.

4.3.3. Impact on irregularity

While the debate has recently taken up speed and intensity, Crisp reminded that externalisation is not a particularly new policy field in migration, referring to the 1930s maritime interceptions to prevent the flight and arrival of Jews escaping from the Nazi regime or the 1980s US interdiction and offshore processing for asylum-seekers from Cuba and Haiti (Crisp, 2019). Later, Italy applied a practice of externalisation by transferring intercepted boats in the international waters of the Mediterranean and transferring them back to Libya, based on the Treaty of Friendship between Italy and Libya. The treaty was signed by Berlusconi and Ghaddafi in 2008 (Marchesi, 2019).

While politicians put in significant efforts to make externalisation a reality, the academic and civil society rejects such ideas all together. Feith Tan contextualises externalisation practices as results of governments' strategic avoidance of their obligations under the 1951 Refugee Convention or other international or regional human rights instruments (Feith Tan, 2021). And UNHCR makes a clear distinction between externalisation measures and lawful

arrangements for transfer of responsibility for international protection (Garlic, 2021, UNHCR, 2021, etc.). In this understanding, externalisation seems to be understood as the flip side of "lawful arrangements" and seem therefore to be not in line with international obligations. Most recently, the German SWP quashed such ideas claiming that the externalisation proposals that are so far on the table would violate existing law and raise unrealistic political expectations.

But also for the EU's 'fight' against irregular migration, the externalisation ideas do not promise much results. It won't prevent TCN to move and those who arrived ultimately irregularly, they will remain irregularly and be further exposed to exploitation. And it will also not impact those who arrive regularly and turn irregularly – supposedly the biggest number of irregular migrants.

5. Conclusions

Since its inception with the Tampere Conclusions, EU asylum and migration policy has consistently focused on preventing and reducing irregular migration. This emphasis is underscored by a policy rhetoric that frequently employs confrontational language, such as 'fighting irregular migration,' 'combating illegal arrivals,' or 'disrupting the business model of smugglers.' However, while the EU's aim to minimize irregular migration is apparent, the strategies employed to achieve this objective are questionable from a human rights perspective, and their efficiency is at best subject to significant controversy and at worst leads to the creation of ever more pathways into irregularity for individuals.

Ambiguous quantitative evidence vis-a-vis well-evidenced qualitative protection gaps. In its justification of policy measures, the EU often relies on a limited range of quantitative indicators - including statistics on border apprehensions; return; asylum applications and decisions; return and recognition rates - largely covering and therefore putting the focus on geographic inflows. These are often inadequate - they can neither capture the true extent of irregular migration, nor are they suitable for evaluating the effectiveness of the policy measures taken. Little is therefore actually known on whether preventive measures such as border controls, visa regimes and carrier sanctions are actually suitable for curbing irregular migration, or whether they rather force more people into irregularity. Relevant studies tend to support the latter assumption. In a similar vein, the combination of increasing restrictions in access to asylum, a policy focus on return despite significant challenges in enforcing it and a lack of options for regularisation may lock migrants into an irregular situation Furthermore, the jurisprudence of national and supranational courts on matters related to irregular migrants' rights and the interpretation of relevant EU law points towards precarity of affected people's statuses and rights and qualitative protection gaps.

Increased receptiveness of supranational European courts to EU and MS migration control activities. Despite the aforementioned judicial scrutiny of EU laws and practices impacting on migrants' rights, an analysis of recent case law shows that also the courts cannot escape the larger debates in the area of migration. Particularly since the arrival of large numbers of migrants in 2015/2016, the courts have repeatedly deviated from earlier more migrant-centred approaches. In this vein the CJEU took for example a deferential approach to states' efforts to punish (repeat) irregular migration in *CJEU, Celaj* (2015). So did the ECtHR when qualifying the asylum transit centres at the Hungarian/ Serbian border as not in breach of Art 5 ECHR stating that "its approach should be practical and realistic, having regard to the present-day conditions and challenges" (*ECtHR, Ilias and Ahmed*, 2017). Both the CJEU and the ECtHR denied the responsibility of Belgium for Syrian citizens in need of

international protection who applied for a visa for Belgium in order to request asylum in Belgium (*CJEU, X and X*, 2017).

Pathways out of irregularity not an EU domain. For possible pathways out of irregularity, EU states have so far prevented the EU from gaining regulatory jurisdiction. The EU therefore has very limited scope for action to offer EU-wide regularisation measures that go beyond the very limited scope that is offered by the EU wide harmonised international protection status. The creation of alternative - often precarious - residence permits therefore remains largely at the discretion of the individual member states.

A complicated web of rules covers different facets of irregular migration. At EU level, there is no coherent comprehensive set of rules regulating the various facets of irregular migration. The Return Directive plays a central role, but direct or indirect aspects that affect irregular migration can be identified across EU legal acts such as border and visa regimes, carriers sanctions, residence and employment related legal acts, asylum legislation or the various EU wide information systems.

Three reasons for a gloomy prospect of migration and irregularity in the future. Immediate prospects for the EU migration policy and its influence on irregular migration are bleak. For *one*, while so far kept broadly separated, the recently agreed New Pact on Migration and Asylum expectedly will interweave asylum and irregular migration for efficiency reasons. This, however, will lead to increased mixing of asylum and irregular migration in practice, policy discussions as well as public perception. *Secondly*, if EU MS cannot agree on a coherent exit strategy from temporary protection for Ukrainians, this could quickly lead to increased levels of irregularity of the population concerned. And *thirdly*, despite legal as well as practical concerns, EU MS will further push forward discussions on externalisation. This more likely than not will – once put in practice – lead people increasingly into irregularity to avoid being sent to and processed in distant dedicated 'safe third countries'.

References

Acosta, D. (2009). *Latin American Responses to the Adoption of the Returns Directive*. CEPS.

Acosta, D. (2017, December 14). The Security of the Status of Long-Term Non-EU Residents in the EU: Some Thoughts on Case C-636/16 López Pastuzano. *EU Law Analysis*. https://eulawanalysis.blogspot.com/2017/12/the-security-of-status-of-long-term-non.html

Alagna, F., & Sanchez, G. (2024, January 8). The persisting challenges of the new European Commission's smuggling directive proposal. *Faculty of Law Blogs / University of Oxford*. https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2024/01/persisting-challenges-new-european-commissions

Amended Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, COM(2020) 611 final (2020). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611

Amended Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the Establishment of "Eurodac" for the Comparison of Biometric Data for the Effective Application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for Identifying an Illegally Staying Third-Country National or 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 Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final (2020). https://eur-lex.europa.eu/resource.html?uri=cellar:267d38e8-ff62-11ea-b31a-01aa75ed71a1.0001.02/DOC_1&format=PDF

Amnesty International. (2023, December 20). *EU: Migration Pact agreement will lead to a "surge in suffering."* https://www.amnesty.org/en/latest/news/2023/12/eu-migration-pact-agreement-will-lead-to-a-surge-in-suffering/

Andrade, P. G. (2020, December 8). EU cooperation on migration with partner countries within the New Pact: New instruments for a new paradigm? *EU Immigration and Asylum Law and Policy*. https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/

Benson, M. (2021, June 2). British citizens in the EU: the other side of the citizens' rights coin. *UK in a Changing Europe*. https://ukandeu.ac.uk/british-citizens-in-the-eu-the-other-side-of-the-citizens-rights-coin/

Boswell, C. (2007). Migration Control in Europe After 9/11: Explaining the Absence of Securitization. *Journal of Common Market Studies*, *45*(3), 589–610.

Brouwer, E. (2017, March 16). The European Court of Justice on Humanitarian Visas: Legal integrity vs. Political opportunism? *CEPS Commentary - Thinking Ahead for Europe*. https://www.ceps.eu/wp-

content/uploads/2017/03/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf

Carrera, S., Guild, E., Aliverti, A., Allsopp, J., Manier, M. G., LeVoy, M., & Gutheil, M. (2016). *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*. European Parliament; DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS. https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf

Carrera, S., Vosyliute, L., Smialowski, S., Allsopp, J., & Sanchez, G. (2018). *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update*. Policy Department for Citizens' Rights and Constitutional Affairs European Parliament. https://cadmus.eui.eu/bitstream/handle/1814/60998/IPOL_STU%282018%2960 8838_EN.pdf?sequence=1&isAllowed=y

Cholewinski, R. (2007). The Criminalisation of Migration in EU Law and Policy. In *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Anneliese Baldaccini et al, p. 301).

CJEU, López Pastuzano, Case C-636/16 (Court of Justice of the European Union December 7, 2017). https://curia.europa.eu/juris/document/document.jsf?text=&docid=197528&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3144709

CJEU, A, S v Staatssecretaris van Veiligheid En Justitie, C-550/16 (CJEU April 12, 2018). https://curia.europa.eu/juris/document/document.jsf?text=&docid=200965&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8874815

CJEU, Achughbabian, C-329/11 (CJEU December 6, 2011). https://curia.europa.eu/juris/document/document.jsf?text=&docid=115941&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7313416

CJEU, Air Baltic, Case C-575/12 (September 4, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=157346&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=324998

CJEU, Arslan, Case C-534/11 (CJEU (Third Chamber) May 30, 2013). https://curia.europa.eu/juris/document/document.jsf?text=&docid=137831&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10306427

CJEU, Boudjlida, C-249/13 (December 11, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=160563&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7318278

CJEU, Bundesamt Für Fremdenwesen Und Asyl v AA, C-663/21 (CJEU July 6, 2023). https://curia.europa.eu/juris/document/document.jsf?text=&docid=275243&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5277838

CJEU, BZ v Westerwaldkreis, C-546/19 (CJEU (Fourth Chamber) June 3, 2021). https://curia.europa.eu/juris/document/document.jsf?text=&docid=242022&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4645412

CJEU, Carpenter, C-60/00 (CJEU July 11, 2002). https://curia.europa.eu/en/actu/communiques/cp02/aff/cp0266en.htm

CJEU, Celaj, C-290/14 (CJEU October 1, 2015). https://curia.europa.eu/juris/document/document.jsf?text=&docid=168941&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7315284

CJEU, Commission v Netherlands, C-508/10 (Court of Justice of the EU June 2, 2016). https://curia.europa.eu/juris/document/document.jsf?text=&docid=122161&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3160119

CJEU, CR, GF, TY v Landeshauptmann von Wien, C-560/20 (CJEU January 30, 2024). https://curia.europa.eu/juris/document/document.jsf?text=&docid=282262&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1

CJEU, El Dridi, C-61/11 PPU (CJEU April 28, 2011). https://curia.europa.eu/juris/document/document.jsf?text=&docid=82038&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7312373

CJEU, G. and R., C-383/13 PPU (CJEU September 10, 2013). https://curia.europa.eu/juris/document/document.jsf?text=&docid=140861&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8860275

CJEU, Gnandi, Case C-181/16 (CJEU (Grand Chamber) June 19, 2018). https://curia.europa.eu/juris/document/document.jsf?text=&docid=203108&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4809535

CJEU, Kadzoev, C-357/09 PPU (CJEU November 30, 2009). https://curia.europa.eu/juris/document/document.jsf?text=&docid=72526&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7310680

CJEU, Kinshasa, Case C-460/23 (CJEU pending). https://curia.europa.eu/juris/fiche.jsf?id=C%3B460%3B23%3BRP%3B1%3BP%3B1%3BC2023%2F0460%2FP&nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-460%252F23&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=en&lg=&cid=4348765

CJEU, Koushkaki, Case C-84/12 (December 19, 2013). https://curia.europa.eu/juris/document/document.jsf;jsessionid=B77643B58BA80FA0120EF68156D3CF9C?text=&docid=145915&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1099368

CJEU, Mahdi, C-146/14 PPU (CJEU June 5, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=153314&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8861405

CJEU, Mbaye, C-522/11 (March 21, 2013). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CO0522

CJEU, M'Bodj, C-542/13 (CJEU December 18, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=160947&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5921671

CJEU, Metock et Al, Case C-127/08 (CJEU (Grand Chamber) July 25, 2008). https://curia.europa.eu/juris/document/document.jsf?text=&docid=68145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6894204

CJEU, Mukarubega, C-166/13 (CJEU November 5, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=159241&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7317633

CJEU, O. & B., C-456/12 (CJEU March 12, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=149082&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8883798

CJEU, Sagor, C-430/11 (CJEU December 6, 2012). https://curia.europa.eu/juris/document/document.jsf?text=&docid=131495&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7316169

CJEU, Staatssecretaris van Justitie En Veiligheid v M.A., Case C-402/22 (CJEU (FIrst Chamber) July 6, 2023). https://curia.europa.eu/juris/document/document.jsf?text=&docid=275247&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5281407

CJEU, Staatssecretaris van Justitie v Mangat Singh, C-502/10 (Court of Justice of the EU October 18, 2012). https://curia.europa.eu/juris/document/document.jsf?text=&docid=128643&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7274731

CJEU, Tümer, Case C-311/13 (November 5, 2014). https://curia.europa.eu/juris/document/document.jsf?text=&docid=159243&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7270765

CJEU, WS vs Frontex, Case T-600/21 (Grand Chamber (Sixth Chamber) September 6, 2023). https://curia.europa.eu/juris/document/document.jsf?text=&docid=277021&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4410545

CJEU, X and X, C-638/16 PPU (CJEU (Grand Chamber) March 7, 2017). https://curia.europa.eu/juris/document/document.jsf?docid=188626&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=125328

CJEU, XXX v Commissaire Général Aux Réfugiés et Aux Apatrides, Case C-8/22 (CJEU (First Chamber) July 6, 2023). https://curia.europa.eu/juris/document/document.jsf?text=&docid=275244&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5279941

CJEU, Zaizoune, Case C-38/14 (CJEU (Fourth Chamber) April 23, 2015). https://curia.europa.eu/juris/document/document.jsf?text=&docid=163877&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4645076

CJEU, Zambrano, Case C-34/09 (CJEU March 8, 2011). https://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6892524

Commission Staff Working Document: Fitness Check on EU Legislation on Legal Migration, SWD(2019) 1055 final (2019). https://home-affairs.ec.europa.eu/system/files/2019-03/swd_2019-1055-staff-working-part2.pdf

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 (2015). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0240

Communication from the COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - A Renewed EU Action Plan against Migrant Smuggling (2021-2025), COM(2021) 591 final (2021). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0591

Communication from THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum, COM(2020) 609 final (2020). https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF

Communication from THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL - Back to Schengen - A Roadmap, COM(2016) 120 final (2016). https://eur-lex.europa.eu/resource.html?uri=cellar:cff8990a-e1ee-11e5-8a50-01aa75ed71a1.0007.02/DOC_1&format=PDF

Cornelisse, G. (2011). *Case C-357/09 PPU, proceedings concerning Said Shamilovich Kadzoev (Huchbarov), Judgment of the European Court of Justice (Grand Chamber) of 30 November 2009*. *48 (3)*, 925–945.

Costello, C. (2016). *The Human Rights of Migrants and Refugees in European Law*. Oxford University Press.

Costello, C., & Zirulia, S. (2024, February 29). Pushing Back. How to Limit Overcriminalisation of Assistance to Those in Need of Protection. *Verfassungsblog on Matters Constitutional*. https://verfassungsblog.de/pushing-back/

Council Act of 26 July 1995 Drawing up the Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), 95/C 316/01 (1995). https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1995:316:0001:0032:EN:PDF

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 This Protocol Fall within the Scope of Articles 179 and 181a of the Treaty Establishing the European Community, 2006/616/EC (2006). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0616

Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985, Council Directive 2001/51/EC (2001). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0051&from=EN

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 Thereo, 2001/55/EC (2001). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055

Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence, Council Directive 2002/90/EC (2002). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090

Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 2003/86/EC (2003). https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF

Council Framework Decision of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence, 2002/946/JHA (2002). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946

Council Implementing Decision (EU) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection, Council Implementing Decision (EU) 2022/382 (2022). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D0382

Council of Europe. (1996). *European Social Charter (Revised)—Appendix*. European Treaty Series - No. 163. https://rm.coe.int/168007cde4

Council of the European Union. (2020). *Presidency paper on addressing challenges relating to migrants in a situation of prolonged illegal stay. Council document 7560/20, LIMITE, 27 April 2020.* https://www.statewatch.org/media/documents/news/2020/may/eu-council-unremovable-migrants-7560-20.pdf

Council Regulation (EC) No 168/2007 of 15 February 2007 Establishing a European Union Agency for Fundamental Rights, Council Regulation (EC) No 168/2007 (2007). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0168

Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network, EU (2004). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0377&qid=1713304288049

Crisp, J. (2019, November 25). *Externalization and the erosion of refugee protection* [The University of Melbourne]. https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/externalization-and-the-erosion-of-refugee-protection

Czaika, M., & De Haas, H. (2013). *On the Effectiveness of Immigration Policies*. *39 (3)*, 487–508.

Czaika, M., & Hobolth, M. (2014). *Deflection into irregularity? The (un)intended effects of restrictive asylum and visa policies* (DEMIG project paper 15). International Migration Institute, University of Oxford. https://ora.ox.ac.uk/objects/uuid:a8ee4ee9-ca03-4c7a-bf5c-4c02cefd41d3/files/srj430508q

de Albuquerque, P. P. (2018). The Rights of Migrants and Refugees under the European Convention on Human Rights: Where are we now? In *The Irish Yearbook of International Law* (pp. 5–22).

De Haas, H. (2008). *Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends* (32; IOM Migration Research Series). IOM. https://publications.iom.int/system/files/pdf/mrs-32_en.pdf

De Haas, H. (2023). *How Migration Really Works—A Factful Guide to the Most Divisive Issue in Politics*. Penguin Random House UK.

de Lange, T., & Groenendijk, K. (2021). *The EU's legal migration acquis: Patching up the patchwork* [ISSUE PAPER]. https://www.epc.eu/content/PDF/2021/Immigration_Issue_Paper.pdf

Del Monte, M., & Luyten, K. (2023). *European Parliament scrutiny of Frontex* [EPRS Briefing]. https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698816/EPRS_BRI(2021)698816_EN.pdf

Dembour, M. B. (2015). *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford University Press.

Desmond, A. (2016). The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative? *Human Rights Law Review*, *16*(2), 247–272. https://doi.org/10.1093/hrlr/ngw012

Desmond, A. (2022). From D v UK to Paposhvili v Belgium: The Evolving Meaning of 'very exceptional' in the Strasbourg Court's Article 3 Medical Expulsion Jurisprudence and its Reception in Council of Europe Member States. *Journal of Immigration, Asylum & Nationality Law*, *36*(1), 5–15.

Directive 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004/38/EC (2004). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038

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, Directive 2008/115/EC (2008). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115

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), Directive 2011/95/EU (2011). https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF

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, 2012/29/EU (2012). https://eur-

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF#:~:text=Victims%20of%20crime%20should%20be%20protected%20from%20secondary%20and%20repeat,with%20sufficient%20access%20to%20justice.

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), Directive 2013/33/EU (2013). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033

ECtHR, A.W. Khan v UK, Application no. 35394/97 (May 12, 2000). https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58841%22]}

ECtHR, D v UK, Application no. 30240/96 (European Court of Human Rights May 2, 1997). https://hudoc.echr.coe.int/fre?i=001-58035

ECtHR, Hirsi, Application no. 27765/09 (ECtHR (Grand Chamber) February 23, 2012). https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-109231%22]}

ECtHR, Ilias and Ahmed, Application no. 47287/15 (European Court of Human Rights March 14, 2017). https://hudoc.echr.coe.int/fre?i=001-172091

ECtHR, Jeunesse v Netherlands, Application no. 12738/10 (October 3, 2014). https://hudoc.echr.coe.int/eng?i=001-147117

ECtHR, Khlaifia et al vs Italy, Application no. 16483/12 (European Court of Human Rights December 15, 2016). https://hudoc.echr.coe.int/fre?i=001-170054

ECtHR, M.N et al vs Belgium, Application no. 3599/18 (European Court of Human Rights March 5, 2020). https://hudoc.echr.coe.int/fre?i=001-202468

ECtHR, N v UK, Application no. 26565/05 (European Court of Human Rights May 27, 2008). https://hudoc.echr.coe.int/eng?i=001-86490

ECtHR, Nunez vs Norway, Application no. 55597/09 (European Court of Human Rights June 28, 2011). https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105415%22]}

ECtHR, Paposhvili, Application no. 41738/10 (ECtHR (Grand Chamber) December 13, 2016). https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-169662%22]}

ECtHR, Rodriguez, Application no. 50435/99 (January 31, 2006). https://hudoc.echr.coe.int/eng/?i=001-72205

EMN. (n.d.). Irregular entry. In *EMN Asylum and Migration Glossary*. European Migration Network. Retrieved July 25, 2023, from https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/irregular-entry_en

Euractive. (2012, September 18). *The European Pact on Immigration and Asylum*. https://www.euractiv.com/section/social-europe-jobs/linksdossier/the-european-pact-on-immigration-and-asylum/

European Commission. (2001). *COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON A COMMON POLICY ON ILLEGAL IMMIGRATION*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0672

European Commission. (2011). *Communication from THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - Communication on migration* (COM(2011) 248 final).

https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0248:FIN:EN:PDF

European Commission. (2017). *How West African migrants engage with migration information en-route to Europe*. European Commission, Directorate-General for Migration and Home Affairs. https://data.europa.eu/doi/10.2837/97937

European Commission. (2020a). *Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] (SWD/2020/207 final)*. European Commission. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291023467&uri=SWD%3A2020%3A207%3AFIN

European Commission. (2020b). *Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund],*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0207&from=EN

European Commission. (2021). *Communication from the Commission to the European Parliament and the Council—Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy. COM(2021) 56 final*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0056

European Commission. (2022a). *Proposal for a COUNCIL IMPLEMENTING DECISION establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection* (COM(2022) 91 final). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0091

European Commission. (2022b). *COMMISSION Communication providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders* (2022/C 104 I/01). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0304(10)

European Commission. (2022c). *Commission Staff Working Document Evaluation of 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* (SWD(2022) 179 final). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0179

European Commission. (2023a). *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the monitoring of the EU's visa free regimes*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023DC0297

European Commission. (2023b). *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia*. European Commission - Press release. https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_3887/IP_23_3887_EN.pdf

European Commission. (2023c). *10-Point Plan for Lampedusa*. European Commission - Press release. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4503

European Commission. (2023d). *Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum*. https://home-affairs.ec.europa.eu/news/historic-agreement-reached-today-european-parliament-and-council-pact-migration-and-asylum-2023-12-20_en

European Commission. (2024a). *Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic of Egypt and the European Union*. https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en

European Commission. (2024b). *Irregular migration and return*. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return_en

European Council. (1999). *Tampere European Council 15-16.10.1999: Conclusions of the Presidency*. European Parliament. http://www.europarl.europa.eu/summits/tam_en.htm

European Council. (2010). *The Stockholm Programme – An open and secure Europe serving and protecting its citizens.* European Council. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF

European Council. (2016). *EU-Turkey statement* [Press Release]. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

European Council. (2023). *The Council and the European Parliament reach breakthrough in reform of EU asylum and migration system* [Press Release]. https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/

European Council - A New Strategic Agenda 2019 - 2024 (2019). https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf

European Ombudsman. (2024). *Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck* (01/3/2023/MHZ). https://www.ombudsman.europa.eu/en/decision/en/182665

European Pact on Immigration and Asylum, 13440/08 (2008). https://data.consilium.europa.eu/doc/document/ST-13440-2008-INIT/en/pdf

European Parliament. (2016). *Europeans in 2016: Perceptions and expectations, fight against terrorism and radicalisation—Special Eurobarometer of the European Parliament*. https://europa.eu/eurobarometer/surveys/detail/2354

European Parliamentary Research Service. (2019). *Data on returns of irregular migrants* [Briefing Infographic].

https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637907/EPRS_BRI(2019)637907_EN.pdf

Europol. (n.d.). *Crime Areas: Facilitation of Illegal Immigration* [Webpage]. Retrieved January 23, 2024, from https://www.europol.europa.eu/crime-areas/facilitation-of-illegal-immigration#:~:text=Through%20its%20European%20Migrant%20Smuggling,EU%20on%20a%20massive%20scale.

Europol. (2023). *EU Policy Cycle—EMPACT*. Europol. https://www.europol.europa.eu/crime-areas-and-statistics/empact

Feith Tan, N. (2021). Conceptualising externalisation: Still fit for purpose? *Forced Migration Review*, *68*. https://www.fmreview.org/sites/default/files/FMRdownloads/en/externalisation/tan.pdf

Forin, R. (2023, September 27). *How to break the business model of smugglers* [Mixed Migration Centre]. https://mixedmigration.org/articles/how-to-break-the-business-model-of-smugglers/

Fox-Ruhs, C., & Ruhs, M. (2022). *The fundamental rights of irregular migrant workers in the EU: understanding and reducing protection gaps*. European Parliament.

FRA. (2011). *Fundamental rights of migrants in an irregular situation in the European Union—Comparative report*. European Union Agency for Fundamental Rights. https://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf

FRA. (2023). *Search and rescue operations in the Mediterranean and fundamental rights*. https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities?page=3#read-online

Frontex. (2023). *Frontex Risk Analysis for 2023/2024*. https://www.frontex.europa.eu/assets/Publications/General/ARA_2023.pdf

Gambino, L. (2015, December 6). No human being is illegal': Linguists argue against mislabeling of immigrants. *The Guardian*. https://www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say

Garlic, M. (2021). Externalisation of international protection: UNHCR's perspective. *Forced Migration Review*, *68*. https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/externalisation/garlick.pdf

Gibney, M. J. (2008). Asylum and the Expansion of Deportation in the United Kingdom. *Government and Opposition*, *43*(2), 146–167. https://doi.org/10.1111/j.1477-7053.2007.00249.x

Guild, E. (2006). The Europeanisation of Europe's Asylum Policy. *International Journal of Refugee Law*, *18*(3–4), 630–651.

Guild, E. (2019, May 10). Amending the Visa Code: Collective Punishment of Visa Nationals? *EU Immigration and Asylum Law and Policy*. https://eumigrationlawblog.eu/amending-the-visa-code-collective-punishment-of-visa-nationals/

Hansen, F., & Pettersson, J. (2022). Contradictory migration management? Differentiated security approaches to visa overstay and irregular border crossings in the European Union. *European Security*, *31*(1), 117–134. https://doi.org/10.1080/09662839.2021.1945038

Hathaway, J. C. (2008). *The Human Rights Quagmire of "Human Trafficking." 1/2008*, 1–59.

Hendow, M., & Qaisrani, A. (2024). *Comparing national laws and policies addressing irregular migrants* (MIrreM Working Paper NoXX/2024). 10.5281/zenodo.10054959

Heschl, L., & Stankovic, A. (2018). The Decline of Fundamental Rights in CJEU Jurisprudence after the 2015 "Refugee Crisis"'. In *European Yearbook on Human Rights* (W. Benedek, P. Czech, L. Heschl, K. Lukas and M. Nowak (eds.), pp. 103–135). Intersentia, Cambridge.

Human Rights of Irregular Migrants, Resolution 1509 (2006) (2006). https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17456

Hurwitz, A. (1999). The 1990 Dublin Convention: A Comprehensive Assessment. *International Journal of Refugee Law*, *11*(4), 646–677.

International Commission of Jurists. (2022). *Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU* [Briefing paper]. https://www.icj.org/wp-content/uploads/2022/04/Criminalization-paper-22-04-2022.pdf

IOM. (no date). *KEY MIGRATION TERMS "irregular migration."* KEY MIGRATION TERMS. https://www.iom.int/key-migration-terms

Johnston, I. (2019). Words Matter: No Human Being is Illegal. *Immigration and Human Rights Law Review - Blog*. https://lawblogs.uc.edu/ihrlr/2019/05/20/words-matter-no-human-being-is-illegal/

Koser, K. (2000). Asylum Policies, Trafficking and Vulnerability. *International Migration*, *Special Issue 2000/1*, 91–111.

Kosinska, A. M. (2016). *The problem of criminalisation of the illegal entry of a third-country national in the case of breaching an entry ban: Commentary on the judgment of the Court of Justice of 1 October 2015 in Case C 290/14, Skerdjan Celaj*. *18(2)*, 243–257.

Kraler, A., & Ahrens, J. (2023). *Conceptualising migrant irregularity for measurement purposes.* (MIrreM Working Paper 2). University for Continuing Education (Danube University Krems). https://doi.org/10.5281/zenodo.7868237

Kraler, A., & Rogoz, M. (2011). *Irregular Migration in the European Union since the turn of the millennium – development, economic background and discourses*. Database on Irregular Migration, Working paper 11/2011. https://irregular-migration.net/wp-content/uploads/2021/06/WP10_2011_Kraler_Rogoz_Europe_IrregularMigration_Dec11_fin.pdf

Kreilinger, V. (2017). *A Watchdog Over Europe's Policemen: The New Joint Parliamentary Scrutiny Group for EUROPOL*. Jacques Delors Institute. https://institutdelors.eu/wp-content/uploads/2020/08/awatchdogovereurope-spolicemen-kreilinger-jdib-june2017-4.pdf

Léonard, S., & Kaunert, C. (2016). Beyond Stockholm: In search of a strategy for the European Union's Area of Freedom, Security, and Justice. *European Politics and Society*, *17*(2), 143–149. https://doi.org/10.1080/23745118.2016.1160636

Lingaas, C. (2019). Judicial Responses to the Migration Crisis: The Role of Courts in the Creation of a European Identity'. In *Migration Issues before International Courts and Tribunals* (F.M. Palombino and A. Di Stefano, pp. 1–24).

Lopatin, E. (2013). The Changing Position of the European Parliament on Irregular Migration and Asylum under Co-decision. *Journal of Common Market Studies*. https://doi.org/10.1111/jcms.12015

Lutz, F. (2018). Non-removable Returnees under Union Law: Status Quo and Possible Developments. *European Journal of Migration and Law*, *20*(1), 28–52. https://doi.org/10.1163/15718166-12340019

Majcher, I. (2020). *The European Union Returns Directive and its Compatibility with International Human Rights Law Analysis of Return Decision, Entry Ban, Detention, and Removal* (Vol. 45). Brill Nijhoff.

Marchesi, A. (2019). *Italy's Current Externalisation Policy and the Role of Libya*. https://arts.unimelb.edu.au/__data/assets/pdf_file/0006/4264143/CONREP-Blog-Compendium-Final.pdf

Marchetti, S., & Palumbo, L. (2022). *10 Years After the Directive 2011/36/EU* (Brief 33). https://population-europe.eu/files/documents/pb33_vulner_human-trafficking_final.pdf

Mitsilegas, V. (2015). *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*. Springer.

Moraru, M. (2019, July 4). The Return Directive and irregularity: The Gnandi case and the recast Return Directive. *Picum - Legal Seminar*. https://picum.org/blog/redrawing-the-boundaries-of-the-return-directive-and-irregularity-the-gnandi-case-c-181-16-and-the-proposed-recast-return-directive/

Moraru, M., & Renaudiere, G. (2016). *European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive—Procedural safeguards* (3; REDIAL Research Report). European University Institute (EUI). https://cadmus.eui.eu/bitstream/handle/1814/42184/Redial2016_03.pdf?sequence=1&isAllowed=y

Mouzourakis, M. (2014). 'We Need to Talk about Dublin'—Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union. *Working Paper*, *105*. https://www.rsc.ox.ac.uk/files/files-1/wp105-we-need-to-talk-about-dublin.pdf

Neidhardt, A.-H. (2024). *Navigating the New Pact on Migration and Asylum in the Shadow of Non-Europe* [Discussion Paper]. https://www.epc.eu/content/PDF/2024/Non-Europe_migration_policy_DP_v2.pdf

Neidhardt, A.-H., Milazzo, E., Kapeti, L., van Meeteren, M., & de Lange, T. (2024). *Dignity for (irregular) migrants employed in Farm to Fork Sectors: A Regulatory Infrastructure Approach to EU Legal and Policy Frameworks*. https://www.dignityfirm.eu/wp-

content/uploads/2024/02/Working-Paper.-Dignity-for-irregular-migrants-employed-in-Farm-to-Fork-Sectors.pdf

Noll, G. (2000). *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*. Kluwer Law International.

OHCHR. (2008). *UN experts express concern about proposed EU Return Directive*. OHCHR.

Opinion AG Mengozzi, X and X vs Belgium, Case C-638/16 PPU (CJEU February 7, 2017). https://curia.europa.eu/juris/document/document.jsf?docid=187561&doclang=EN

Peers, S. (2014, January 20). Do potential asylum—Seekers have the right to a Schengen visa? *EU Law Analysis*. https://eulawanalysis.blogspot.com/2014/01/do-potential-asylum-seekers-have-right.html?utm_source=Weekly+Legal+Update&utm_campaign=458ab40b3b-WLU_31_01_2014&utm_medium=email&utm_term=0_7176f0fc3d-458ab40b3b-

Peers, S. (2016). Chapter 7 Irregular Migration. In *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law (4th edn)*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198776833.001.0001

Petroni, N. (2020). *Chapter Twelve EU Integration and Policy (In)coherence towards Irregular Migration: Vol. The Future of the European Union-Demisting the Debate. Institute for European Studies: Malta*. The Institute for European Studies, University of Malta. https://www.um.edu.mt/library/oar/bitstream/123456789/52313/1/The_future_of_the_European_Union_demisting_the_debate_2020.pdf#page=230

PICUM. (n.d.). *"Words Matter!" EU campaign for accurate terminology | Digital Undoc*. Retrieved September 21, 2021, from https://digitalundoc.wordpress.com/2014/06/20/words-matter-eu-campaign-for-accurate-terminology/

PICUM. (2013). *No One is Illegal: Ending Criminalisation of Undocumented Migrants is Crucial to Ensure their Rights*.

PICUM. (2021, June 24). *Employers' sanctions: Will the EU finally take steps to protect migrant workers?* https://picum.org/blog/employers-sanctions-will-the-eu-finally-take-steps-to-protect-migrant-workers/

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Laying down Minimum Rules to Prevent and Counter the Facilitation of Unauthorised Entry, Transit and Stay in the Union, and Replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023) 755 final (2023). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0755

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast), COM(2018) 634 final (2018). https://eur-lex.europa.eu/resource.html?uri=cellar:829fbece-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL Establishing a European Travel Information and Authorisation System (ETIAS) and Amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624, COM(2016) 731 final (2016). https://eur-

lex.europa.eu/resource.html?uri=cellar:5b95461f-ac1c-11e6-aab7-01aa75ed71a1.0001.02/DOC_1&format=PDF

Proposal for a Regulation of the EUROPEAN PARLIAMENT AND OF THE COUNCIL Establishing an Entry/Exit System (EES) to Register Entry and Exit Data and Refusal of Entry Data of Third Country Nationals Crossing the External Borders of the Member States of the European Union and Determining the Conditions for Access to the EES for Law Enforcement Purposes and Amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011, COM(2016) 194 final (2016). https://eur-lex.europa.eu/resource.html?uri=cellar:19cfa4b9-fca5-11e5-b713-01aa75ed71a1.0020.02/DOC_1&format=PDF

Quadt, T. (2024, February 29). No Benefit—Germany's section 96 in light of the Kinshasa Referral. *Verfassungsblog on Matters Constitutional*. https://verfassungsblog.de/no-benefit/

Raffaelli, R. (2011). *Criminalising irregular immigration and the Returns Directive: An analysis of the El Dridi case*. *13(4)*, 467–489.

Raffaelli, R. (2012). Case note: The Achughbabian case: Impact of the Return Directive on national criminal legislation. *Diritto Penale Contemporaneo*, 176–183.

Regulation (EC) No 810/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 Establishing a Community Code on Visas, (EC) No 810/2009 (2009). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0810

Regulation (EU) 2016/794 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, (EU) 2016/794 (2016). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0794

Regulation (EU) 2017/2226 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2017 Establishing an Entry/Exit System (EES) to Register Entry and Exit Data and Refusal of Entry Data of Third-Country Nationals Crossing the External Borders of the Member States and Determining the Conditions for Access to the EES for Law Enforcement Purposes, and Amending the Convention Implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, Regulation (EU) 2017/2226 (2017). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2226

Regulation (EU) 2018/1240 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 September 2018 Establishing a European Travel Information and Authorisation System (ETIAS) and Amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, Regulation (EU) 2018/1240 (2018). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1240

Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (Eu-LISA), and Amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and Repealing

Regulation (EU) No 1077/2011, Regulation (EU) 2018/1726 (2018). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1726

Regulation (EU) 2018/1727 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and Replacing and Repealing Council Decision 2002/187/JHA, Regulation (EU) 2018/1727 (2018). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1727

Regulation (EU) 2018/1806 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 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, Regulation (EU) 2018/1806 (2018). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1806

Regulation (EU) 2019/1240 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on the Creation of a European Network of Immigration Liaison Officers (Recast), Regulation (EU) 2019/1240 (2019). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1240

Regulation (EU) 2019/1896 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, (EU) 2019/1896 (2019). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896

Regulation (EU) 2021/2303 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 December 2021 on the European Union Agency for Asylum and Repealing Regulation (EU) No 439/2010, Regulation (EU) 2021/2303 (2021). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R2303&qid=1706090019408

Regulation (EU) No 439/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 2010 Establishing a European Asylum Support Office, Regulation (EU) No 439/2010 (2010). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0439

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 (Recast), Regulation (EU) No 603/2013 (2013). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0603

Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 Establishing a European Agency for the Operational Management of Large-

Scale IT Systems in the Area of Freedom, Security and Justice, Regulation (EU) No 1077/2011 (2011).

Roman, E., Belloni, M., Cingolani, P., Grimaldi, G., Hatziprokopiou, P., Papatzani, E., Pastore, F., Siotou, A., & Vlastou, F. (2021). *Figurations of Displacement in southern Europe: Empirical findings and reflections on protracted displacement and translocal networks of forced migrants in Greece and Italy* (TRAFIG working paper no. 9). https://zenodo.org/records/5841883

Savatic, F., Thiollet, H., Mesnard, A., Senne, J.-N., & Jaulin, T. (2024). Borders Start with Numbers: How Migration Data Create 'Fake Illegals.' *International Migration Review*, 1–32. https://doi.org/10.1177/01979183231222169

Schlentz, D. (2010). *Did 9/11 matter? Securitization of asylum and immigration in the European Union in the period from 1992 to 2008* (WORKING PAPER SERIES 56). Refugee Studies Centre Oxford Department of International Development University of Oxford. https://www.rsc.ox.ac.uk/files/files-1/wp56-did-911-matter-2010.pdf

Schmalz, D. (2024, March 4). The Place of Numbers in Migration Debate. *Verfassungsblog*. https://verfassungsblog.de/the-place-of-numbers-in-migration-debates/

Senato della Repubblica. (2012). *Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani*. www.senato.it/service/PDF/PDFServer/DF/283163.pdf

Strategic Guidelines for Justice and Home Affairs, EUCO 79/14 (2014). https://www.consilium.europa.eu/en/policies/strategic-guidelines-jha/

The Guardian. (2024, March 17). *EU seals €7.4bn deal with Egypt in effort to avert another migration crisis*. https://www.theguardian.com/world/2024/mar/17/egypt-eu-deal-refugees-mediterranean#:~:text=European%20Union-,EU%20seals%20%E2%82%AC7.4bn%20deal%20with%20Egypt,to%20avert%20another%20migration%20crisis&text=EU%20leaders%20have%20sealed%20a,another%20migration%20crisis%20in%20Europe.

The Hague Programme, 2005/C 53/01 (2005). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303(01)

Thym, D. (2023). *European Migration Law*. Oxford University Press.

Trevisan, S., & Moeller, U. (2019). *Punishing the facilitation of irregular migration. A comparative criminal law analysis of Germany and Italy. 7–8*.

Triandafyllidou, A., Bartolini, L., & Guidi, C. F. (2019). *Exploring the Links Between Enhancing Regular Pathways and Discouraging Irregular Migration—A discussion paper to inform future policy deliberations*. IOM. https://publications.iom.int/system/files/pdf/exploring_the_links_2019.pdf

Tsourdi, L. (2023, September 14). The EU's New Pact on Migration and Asylum: Three key arguments. *EU Law Analysis*. https://eulawanalysis.blogspot.com/2023/09/the-eus-new-pact-on-migration-and.html

Tusk, D. (2018). *Update: Report and concluding remarks by President Donald Tusk to the European Parliament on October European Council meetings*. https://www.consilium.europa.eu/en/press/press-releases/2018/10/24/report-by-president-donald-tusk-to-the-european-parliament-on-october-european-council-meetings/

UNHCR. (1995). *UNHCR Position: Visa Requirements and Carrier Sanctions*. https://www.refworld.org/docid/3ae6b33a10.html

UNHCR. (2021). *UNHCR Note on the "Externalization" of International Protection*. https://www.refworld.org/policy/legalguidance/unhcr/2021/en/121534

Wagner, M. (2023, September 4). *Temporary protection: 18 months in force, 18 to go—And then?* https://www.icmpd.org/blog/2023/temporary-protection-18-months-in-force-18-to-go-and-then

Wagner, M., Seges Frelak, J., & Katsiaficas, C. (2023). *RESPONDING TO DISPLACEMENT FROM UKRAINE: Options to remain when EU temporary protection ends*. ICMPD. https://www.icmpd.org/file/download/59847/file/ICMPD%2520Discussion%2520Paper_Options%2520to%2520remain%2520when%2520EU%2520temporary%2520protection%2520ends.pdf

Wagner, M., Segeš Frelak, J., Katsiaficas, C., Nozarian, N., & Frankenhaeuser, M. (2023). *Responding to Displacement from Ukraine: Past, present, and future policies*. ICMPD. https://www.icmpd.org/file/download/59200/file/Responding%2520to%2520displacement%2520from%2520Ukraine%2520Past%2520present%2520and%2520future%2520policies.pdf

Woollard, C. (2023, June 9). *Editorial: Migration Pact Agreement Point by Point*. https://ecre.org/editorial-migration-pact-agreement-point-by-point/

Woollard, C. (2024, February 16). Editorial: All Pact-ed up and ready to go: EU asylum law reforms. *Editorial*. https://ecre.org/editorial-all-pact-ed-up-and-ready-to-go-eu-asylum-law-reforms/

Zoeteweij, M. H., & Progin-Theuerkauf, S. (2017, March 10). *CJEU Case C-638/16 PPU, X and X – Dashed hopes for a legal pathway to Europe*. https://europeanlawblog.eu/2017/03/10/cjeu-case-c-63816-ppu-x-and-x-dashed-hopes-for-a-legal-pathway-to-europe/

ABOUT THE AUTHORS

Martin Wagner is a Senior Policy Advisor Asylum at the International Centre for Migration Policy Development (ICMPD).

Alan Desmond is an Associate Professor at Leicester Law School, University of Leicester.

Albert Kraler is an Assistant Professor for Migration Studies at the Department for Migration and Globalisation at Danube University Krems, Austria and coordinator of the MIrreM project.

COPYRIGHT CLAUSE

THE MIRREM CONSORTIUM

University for Continuing Education Krems (Coordinator)

European University Institute

University of Osnabrück

University of Maastricht

University of Turku

Complutense University Madrid

Hellenic Foundation for European and Foreign Policy (ELIAMEP)

University of Milan

University of Potsdam

Platform for International Cooperation on Undocumented Migration (PICUM)

International Centre for Migration Policy Development (ICMPD)

Migration Policy Institute Europe (MPI-E)

University of Warsaw

Vrije Universiteit Brussel

Instituto Universitário de Lisboa

Associated Partners:

Toronto Metropolitan University

University of Leicester

University of Oxford