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The Rise and Fall of International Law in the Post-Lisbon AFSJ Legislation  
Cycles

Elaine Fahey  
November 2021

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The City Law School

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## THE RISE AND FALL OF INTERNATIONAL LAW IN THE POST-LISBON AFSJ LEGISLATION CYCLES

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**Elaine Fahey\***

### **Abstract**

The article focuses on the output and incidence of international law in adopted AFSJ law-making for the period between 2009–14 and 2014–19, with particular emphasis upon asylum and immigration law. The article thus overall shows an initially rising but subsequently falling ‘international’ influence upon EU AFSJ directives and regulations. International law usage is significant even in times of populism or times of crisis-related law-making, particularly as to asylum and immigration law. However, the waning presence of international law also arguably indicates the development of the AFSJ as a booming legal field, where there is an operationalization of a vast field of new actors, institutions, and systems through EU law. This account demonstrates how the EU shows a tangible intent to permit the influence of international law upon the AFSJ which supports well its general efforts to participate and engage as a global legal actor.

**Keywords:** AFSJ, International law, EU law, Asylum & Immigration law, EU international relations

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## I. Introduction

The Area of Freedom, Security and Justice (AFSJ), which Article 3(2) TEU sets out as an ‘area’, has been gradually ‘regularized’ over time as a legal and institutional space and has a booming legislative agenda since the entry into force of the Treaty of Lisbon estimated to be approximately 30% of the EU’s legislative output.<sup>1</sup> It has seen extraordinary advances and developments in a short period of time. Directives in the AFSJ are new legal tools that represent its regularization in the post-Lisbon period, replacing pre-Lisbon Framework Decisions with direct effect. Regulations generally lack implementation requirements and obviate Member State discretion and thus constitute a significant shift in new AFSJ law-making post-Lisbon. The precise pattern by which AFSJ law-making in this new era takes effect is evolving significantly already. For example, some express surprise that regulations have recently been adopted more frequently than directives in the AFSJ, thus warranting further exploration.<sup>2</sup> The metrics for assessing legislative output tend to involve subjective assessments as to their qualities and outcomes. Yet other means of evaluation of output might also seem desirable, employing the use of data and the lens of international law upon the AFSJ, given its rise, salience and significance to EU law-making, which this account develops.

Studies of authoritarian regimes and international law indicate that ‘good’ democratic regimes liberally use international law.<sup>3</sup> There are many legal and non-legal reasons for the EU’s engagement with international law and international organisations, ranging from the EU’s autonomous legal standing to the need to engage with international law if it is to be an effective actor.<sup>4</sup> EU openness to international law is particularly evident when it seeks to incorporate international law developments that are *not* binding upon it or required of it as metrics of good practice. Some distinguish between instruments binding on all or some EU Member States, and instruments that are non-binding in nature but have been agreed upon in multilateral fora where the EU or its Member States (or both) are represented.<sup>5</sup> What is less clear is the extent to which the legislature incorporates these norms out of a sense of *obligation* and respect for international law stemming from Articles 3(5) and 21 TEU in ordinary internal law-making. It is uncontroversial to state that the EU increasingly often helps shape, either directly or indirectly,

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<sup>1</sup> Emilio De Capitani, ‘Progress and Failure in the Area of Freedom, Security and Justice’ in Francesca Bignami (ed), *EU Law in Populist Times* (CUP 2020) 387; Renaud Dehousse and Olivier Rosenburg, ‘There Has Been a Substantial Drop in EU Legislative Output Since 2010’ (*LSE EUROPP*, 3 February 2015) <<https://blogs.lse.ac.uk/europpblog/2015/02/03/there-has-been-a-substantial-drop-in-eu-legislative-output-since-2010/>> accessed 31 January 2021. See also Ariadna Ripoll Servent and Florian Trauner (eds), *Routledge Handbook on Justice and Home Affairs* (Routledge Publishing 2017).

<sup>2</sup> De Capitani (n 1) 378.

<sup>3</sup> Tom Ginsburg, ‘Authoritarian International Law?’ (2020) 114 *AJIL* 221.

<sup>4</sup> Jed Odermatt and Ramses Wessel (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar 2019) 16.

<sup>5</sup> See generally Jan Wouters, Jed Odermatt and Thomas Ramopoulos, ‘Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law’ in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law - Constitutional Challenges* (Hart Publishing 2014). Cf. Mario Mendez, ‘The Application of International Law by the Court of Justice of the European Union’ in Curtis Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019).

developments at the international level and therefore has an interest in accepting international norms it had a hand in developing. In this regard, it is shown in this account how references to international law in preambles to legislation are arguably revealing of the EU's international ambitions and objectives in an area and informative of the EU's broader ambitions. Where they are not particularly revealing of objectives, they are arguably indicative of the EU's general commitment to international law. Studying the use of international law in legislative cycles is thus revealing of broader trends. Where no international is used is also shown to be of interest in understanding law-making cycles and the EU's commitments to and engagements with international law.

Most references to international law are used in the preamble recitals of directives and regulations, emphasizing their placement as legitimating, standard-setting, or justificatory. Although they cannot take precedence over those substantive provisions, recitals can help to establish the purpose of a provision<sup>6</sup> or its scope.<sup>7</sup> The Court of Justice has stated that: 'Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.'<sup>8</sup> The Court of Justice has also stated that: 'the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording...'<sup>9</sup> Similar to many legal orders, recitals are used as interpretative tools in the EU legal order (as in legal orders in general for that matter) that the CJEU refers to in a restrictive manner. Recitals can help to explain the purpose and intent behind a normative instrument. They can additionally be taken into account to resolve ambiguities in the legislative provisions to which they relate.<sup>10</sup>

This article analyses the use of international law in recitals in all *adopted* AFSJ legislation and focuses in particular on the area of asylum and immigration law over two full legislative cycles in current times to better understand output. The article thus compares directives and regulations in this period as the two main legal instruments used in these cycles. The focus here is on law-making from a legal perspective, examining the outcome of AFSJ law-making and international agreement sources used in the recitals of preamble of adopted instruments focussing upon 1) broader AFSJ trends and then 2) trends in the sectoral field of asylum and immigration law.

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<sup>6</sup> Case C-173/99 *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] EU:C:2001:356, paras 37-39.

<sup>7</sup> Case C-435/06 *C* [2007] EU:C:2007:714, paras 51-52.

<sup>8</sup> Case 215/88 *Casa Fleischhandels-GmbH v Bundesanstalt für landwirtschaftliche Marktordnung* [1989] EU:C:1989:331, para 31.

<sup>9</sup> Case C-136/04 *Deutsches Milch-Kontor GmbH v Hauptzollamt Hamburg-Jonas* [2005] EU:C:2005:716, para 32.

<sup>10</sup> I.e. A recital cannot displace the operative provisions of a legal instrument.

This paper explores the incidence how the EU uses international law across a large-scale.<sup>11</sup> It does this through the preamble of regulations and directives because they act as a key focal point for use. The paper also considers the EU's participation or relations to the international law instrument used. The informalization of EU external migration law is one of the most significant developments of recent times, where soft law measures are controversially used, from the EU-Turkey Statement to the Joint Way Forward on Afghanistan,<sup>12</sup> with the result of putting measures beyond judicial review and beyond institutional checks, with significant questions for the rule of law, compliance with international law and human rights.<sup>13</sup> As a result, the use of international law in *internal* EU asylum and immigration law becomes of much more salience, as much as AFSJ law, particularly where it not per se required, in charting engagement with, for example, good law-making practice.

The article further gives context to the legislative cycle by examining the place of the EU in international organisations relating to the international law that it cites in its laws. It seeks to make this connection because the EU has increasingly appeared in recent years to constitute a distinctive global actor, as one the last 'internationalists' standing.<sup>14</sup> The EU is committed in Article 21 TEU of its treaties to being 'internationalist' as a matter of law, which is commonly (legally) understood to mean strictly adhering to international law, multilateralism, and promotion of 'good' global governance. However, the EU treaties give notoriously little guidance on how international law should be applied within the EU legal order.<sup>15</sup> As a result, legal scholarship usually considers the balance of how 'open' or 'friendly' the CJEU is to international law relative to the legislature.<sup>16</sup> However, it may also be timely to evaluate metrics of international law within law-making. Sector-specific literature on EU legislative practice with regard to international law appears understudied as to the AFSJ general and specific output e.g. in asylum and immigration law over two cycles post-Lisbon.<sup>17</sup>

This article will show how the use of international law *rose or increased* steadily in first-cycle regulations but *fell* suddenly in the second cycle. The account will show that these trends are largely borne out the area of asylum and immigration law. The article thus overall shows an

<sup>11</sup> Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 IO 887.

<sup>12</sup> EU–Turkey Statement of 18 March 2016 (2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 31 January 2021; 'Joint way forward on migration issues between Afghanistan and the EU', adopted by Commission, 'Decision on the signature on behalf of the European Union' (Decision) C (2016) 6023 final.

<sup>13</sup> E.g. Ramses Wessel, 'Normative Transformations in EU External Relations: the Phenomenon of "Soft" International Agreements' (2020) 44 WEurPol 72; Elaine Fahey, 'Hyper-legalisation and Delegalisation in the AFSJ: on Contradictions in the External Management of EU Migration' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019).

<sup>14</sup> Karen Smith, 'The European Union in an Illiberal World' (2017) 116(788) CHist 83.

<sup>15</sup> Piet Eeckhout, *EU External Relations Law* (OUP 2011).

<sup>16</sup> Wouters, Odermatt and Ramopoulos (n 5).

<sup>17</sup> De Capitani (n 1); Evangelia (Lilian) Tsourdi, 'In the Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System' in Bignami (n 1).

initially *rising but subsequently falling* international law influence upon EU AFSJ directives and regulations. Although it attempts to expose a reduction in the international law influence in AFSJ law-making, it is not a uniform narrative. On the one hand, international law usage appears significant even in times of populism or times of crisis-related law-making, particularly as to asylum and immigration law. The assumption that in such domains there might accordingly be *less* open to international law is not per se accurate, as this account will show. However, the waning presence of international law also arguably indicates the development of the AFSJ as a booming legal field, where there is an operationalization of a vast field of new actors, institutions, and systems through EU law. Here, new ‘autonomous’ EU systems and actors are key, not necessarily mimicking or downloading international systems, instead advancing a highly sophisticated yet far-reaching EU direction.<sup>18</sup> International law assists in tracing the nuances of this unfolding law-making.

Section II tracks ‘On Numbers: Adopted Regulations and Directives 2009–14; 2014–19’ and outlines the rising number of regulations and regulations overtaking directives and their content. Section III examines ‘On Areas of Law and Adopted Legislation and International law’, setting out shifts per cycle and per instrument, Section IV discusses the ‘Themes of Rising and Declining International law and internationalization within Directives’, outlining broad themes arising in directives and international law across the two cycles, and Section V discusses ‘EU participation in international law of the AFSJ: on the “outside-in” and the “inside-out”’, followed by Conclusions. The account thus provides overall trends and focuses upon both broader AFSJ and also more sectoral trends in asylum and immigration law with respect to the EU’s role in the international law cited.

## II. On Numbers: Adopted AFSJ Directives and Regulations 2009–14; 2014–19

### AFSJ legislation total

	Directives			
	Directives	Regulations	Refs to PIL	to Regulations Refs to PIL
<i>Cycle 1</i>	19	35	24	19
<i>Cycle 2</i>	20	62	9	21
<i>Total</i>	39	97	33	40

<sup>18</sup> Valsamis Mitsilegas, ‘Autonomous Concepts Diversity Management and Mutual Trust in Europe’s Area of Criminal Justice’ (2020) 57 CMLRev 45.

## Asylum and immigration law

	Directives			
	Directives	Regulations	Refs to PIL	to Regulations Refs to PIL
<i>Cycle 1</i>	7	9	12	12
<i>Cycle 2</i>	2	26	0	21
<i>Total</i>	9	35	12	33

Quantity of AFSJ legislation 2009-2014; 2014-2019 (Directives and Regulations) & references (abbreviated as 'refs') to public international law (PIL).

Source: Author's own compilation based on official documents, Eur-lex website, literature (data up-to-date as of 30 November 2020)

The Eur-lex Legislation Directory was employed as the primary research tool for the time periods from 1 December 2009 to 1 July 2014 and 1 July 2014 to 1 July 2019. This time period was delimited to capture the first and second full post-Lisbon legislative cycle using legal basis, outlined below in detail.<sup>19</sup> Overall, nineteen AFSJ directives were adopted in the first post-Lisbon cycle, and 35 AFSJ regulations were adopted in the same period. Twenty AFSJ directives and 62 AFSJ regulations were adopted in the second post-Lisbon legislative cycle, from 2014 to 2019, in which regulations overtook directives as the main instrument of the AFSJ legislative cycles. This regularization of the domain through this specific instrument (i.e. a regulation) is notable in a legal field marred by competence issues unequally resting between the EU and Member States. A regulation arguably amounts to a clearer line to negotiate legally, unlike a directive, which can attempt for either minimum *or* maximum harmonization and includes national discretion. During recent decades, EU Member States have increased their efforts in the fight against terrorism, organized crime, and illegal immigration, all of which have gradually developed a cross-border dimension, accentuated by the dismantling of internal border controls. Many recent AFSJ legislative developments appear to bypass the national security exception from EU competence (Article 4(2) TFEU) through legislating for interoperability of new EU databases. The AFSJ has been swiftly integrated into transnational governance in times of crisis.<sup>20</sup> This shift thus represents a very clear direction to the EU's legislative outputs over two cycles and is a significant development in studying law-making

<sup>19</sup> A full list of legislation is on file with the author. Repealed legislation and implementing regulations are excluded.

<sup>20</sup> Francesca Galli, 'Interoperable Databases: New Cooperation Dynamics in the EU AFSJ?' (2020) 26 EPL 109.

trends. One other explanation of output is that several potentially significant directives were not *adopted* because of political deadlock, particularly as to asylum and immigration law, but this is not explored further here.

Overall, there were 67 (33 in directives, 40 in regulations) references to international law in adopted legislation in the 2009–14 and 2014–19 AFSJ legislative cycles. However, much context needs to be placed on such figures. There were 7 directives and 9 regulations in asylum and immigration law adopted in the first legislative cycle 2009-2014 and 2 directives and 26 regulations adopted in the second legislative cycle 2014-2019, thereby clearly mirroring overall trends outlined above as to the rising place of regulations in the AFSJ.

What can be said here firstly as to broader AFSJ cycle trends is that the tendency thus to invoke international law towards the end of the first legislative cycle also increased. Hence, there was a distinct rise in the number of regulations throughout the legislative cycle and a corresponding rise in the number of references to international law. However, there has been a dramatic drop-off in the amount of international law cited in the AFSJ Regulations in the second legislative cycle. One means to explain this trend is to consider that it is noteworthy that regulations overtook directives as the main instrument of use in the second cycle. It will be shown here that regulations are increasingly used to create autonomous EU concepts (e.g. actors, programmes, agencies, etc.) in order to operationalize the AFSJ *without reference* to international law. This accentuates the EU's own autonomous agenda, not showing any dependency or necessity to engage with international law, shifting significantly throughout the cycle more broadly but also more specifically in the area of asylum and immigration law. This development is analysed further in Section IV.

### **III. On Areas of Law and Adopted Legislation and International law**

#### **A. Areas of Adopted AFSJ Directives in the 2009–14 cycle**

The AFSJ directives of the 2009–2014 legislative cycle can be loosely and informally grouped into distinct themes – namely, accused and victims' rights, fighting serious crime/terrorism, third-country nationals/asylum, and immigration and data-related areas, relating to the broader official fields of human mobility and protection of borders, Common Asylum Policy, EU Migration Policy and Criminal Justice policy. Matters related to third-country nationals are the

most common,<sup>21</sup> whilst the accused and victims' rights agenda forms a close second thereto.<sup>22</sup> Their concentration indicates the breadth of the legislative agenda in newer areas of legal basis as well as its political salience. The selection of directives over regulations in these fields indicates a concern with Member State autonomy as to matters traditionally at the heart of Member State sovereignty, for example, procedural and substantive criminal law. Overall, as indicated above, the number of AFSJ directives increased throughout the cycle, similar to regulations, but not to the same degree. A significant increase in the number of asylum and immigration law directives and regulations appears at the very end of the legislative cycle, also steadily increasing in number by year, consistent with temporal data on the EU's refugee 'crisis'.<sup>23</sup> It also has a simpler example - a lot of legislation at the end of the cycle is explained by the fact that it takes several years for legislation to get adopted and political momentum to adopt it before the end thereof.

The Geneva Convention, United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol) and the UN Convention on the Protection of the Rights of the Child are cited in Directive 2011/36 on trafficking,<sup>24</sup> the EU's first criminal law directive. The Geneva Convention, UNHCR and UN Convention on the Rights of the Child are cited in Directive 2013/32 on common procedures for granting and withdrawing international protection.<sup>25</sup> The UN Convention on the Rights of the Child and Protocols and the Palermo Protocol are the key international law instruments cited in the far reaching Directive 2011/92 on combating sexual abuse and sexual exploitation of children and child pornography.<sup>26</sup> The Geneva Convention and UN Convention on the Rights of the Child are cited in Directive 2013/33 laying down standards for the reception of applications for international protection<sup>27</sup> and the Geneva Convention, UN Convention on the Rights of the Child and UN Charter are all

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<sup>21</sup> Directive 2014/36 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375; Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1; Directive 2011/95 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 [2011] OJ L337/9; Directive 2013/32 on common procedures for granting and withdrawing international protection [2013] OJ L180/60; Directive 2013/33 laying down standards for the reception of applicants for international protection [2013] OJ L180/60.

<sup>22</sup> Directive 2010/64 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; Directive 2012/29 establishing minimum standards for victims of crime [2012] OJ L315/57; Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2011/99 on the European Protection Order [2011] OJ L338/2.

<sup>23</sup> I.e., Directive 2014/36; Directive 2014/41 regarding the European Investigation Order in criminal matters [2014] OJ L130/1; Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L127/39; Directive 2014/57 on criminal sanctions for market abuse (Market Abuse Directive) [2014] OJ L173/179; Directive 2014/62 on the protection of the Euro and other currencies against counterfeiting by criminal law [2014] OJ L151/1; Directive 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1.

<sup>24</sup> Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L101/1, recitals 8, 9, 10.

<sup>25</sup> Directive 2013/32, recitals 3, 25, 33.

<sup>26</sup> Directive 2011/93 on combating the sexual abuse and sexual exploitation of children and child pornography [2011] OJ L335/1, recitals 1, 5, 6, 23.

<sup>27</sup> Directive 2013/33, recitals 3, 9, 15.

cited particularly extensively and in unusually specific detail in Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.<sup>28</sup>

In the area of asylum and immigration law in the 2009-2014 legislative cycle, there were 7 Directives (using a broad diversity of legal basis of 78(2), 78(2)(d), 78(2)(f), 79(2), 82(2), 83(1) TFEU) as to trafficking, qualifications for asylum, third country national legal workers, international protection procedure, reception (asylum), third country nationals (corporate transfers and season workers), i.e. regular migration, thus using a broad spectrum of legal tools. In the 7 Directives, there were 12 references to international law: referencing many broadly accepted international instruments, i.e. with broad membership amongst the Member States and internationally, i.e. the Geneva Convention, UN Convention on the Rights of the Child and International Labour Organisation (ILO) Convention No. 29 Forced/ Compulsory Labour. There were thus few asylum and immigration directives, mainly as to irregular migration and few references in international law.

## **B. Areas of Adopted AFSJ Directives in the 2014–19 cycle**

The directives of the 2014–19 legislative cycle can similarly be grouped loosely or informally into distinct themes, namely, accused and victims' rights; fighting serial crime/ terrorism; third-country nationals/asylum and immigration. Matters relating to crime and terrorism are the most numerous, followed by accused and victims' rights, and this shift away from the dominance of third-country nationals/asylum/immigration is particularly noticeable. However, there is a noticeable upswing also in 'law and order' legislation as the EU battled perceptions of increasing crime, and justice- and terrorism-related 'crises', and turned more towards preventive security.<sup>29</sup> It can thus also be argued that certain issues such as asylum and immigration increasingly are understood to attract additional criminalization in this time period and that the characterization of law-making shifts here.<sup>30</sup>

The UN Convention on the Elimination of all Forms of Discrimination Against Women is used in Directive 2012/29 to establish minimum standards on the rights, support, and protection of victims of crime.<sup>31</sup> Here, we witness an effort to broadly embed the salience of international law across EU AFSJ directives in the EU's first Criminal Law Directive (Directive

<sup>28</sup> Directive 2011/95, recitals 3, 18, 22, 23, 24, 29, 31, 33.

<sup>29</sup> See Valsamis Mitsilegas, 'The Preventive Turn in European Security Policy: Towards a Rule of Law Crisis?' in Bignami (n 1).

<sup>30</sup> Violeta Moreno-Lax, *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (CUP 2017).

<sup>31</sup> Directive 2012/29; Directive 2012/13; Directive 2011/99.

2011/36 on trafficking) and also the EU's pioneering victims' rights agenda.<sup>32</sup> To a similar effect, one of the directives citing the *most* international law is the Directive on the Presumption of Innocence (Directive 2016/343), citing the International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, and UN Convention against Torture. It arguably provides evidence of the EU 'downloading' significant international law that its Member States are all party to in innovative law-making on the victims of crime, explored further in Section IV.

There is also a continuation of the operationalization of the AFSJ in the second cycle with the development of many new EU actors, systems, and institutions. A small number of recent directives indicate a much more minor role for systematization of a policy field through directives rather than regulations. For example, Directive 2019/884 notably contains no international law despite the development of a European Criminal Records Information System (ECRIS-TCN) for third-country nationals. To achieve a similar effect, Directive 2019/997 establishes an EU Emergency Travel Document System, without any reference to international law. The highly procedural nature of such directives, perhaps similar to other directives adopted later, signifies the evolution of the "form" of directives in the AFSJ. This arguably constitutes evidence of the EU developing autonomous actors and concepts, whilst granting member states leeway in the development of the AFSJ. Ultimately, however, the two recent AFSJ cycles testify to a broader usage of regulations across the board and directives as more exceptional instruments.

In 2014-2019, there were very few directives, with a considerable drop from the already limited number in the first cycle, with 2 Directives in the area of asylum, immigration and border control (using the legal basis of: Articles 79, 82(1) TFEU) as to third country national (entry/residence for research, education), exchange information third country national criminal records (ECRIS). In the 2 Directives, there were zero references to international law as outlined above. This decline will be considered further in Section IV.

### **C. Areas of Adopted AFSJ Regulations in the 2009–14 cycles**

Regulations in this cycle are dominated by what can be informally labelled systems, borders, visas, civil procedures, criminal justice, and third-country nationals. There was a significant emphasis on asylum and immigration law-related matters in the first-cycle regulations. In several asylum and immigration law regulations of 2010 relating to long-stay visas, a European

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<sup>32</sup> See Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing 2016) 160-70.

Asylum Support Office (EASO) and third country national visa exemptions at a key point in the EU migration crisis, there is only 1 reference to leading international law agreements, i.e. the Geneva Convention in the EASO Regulation.<sup>33</sup> This omission is surprising given that the instruments span a vast array of policy fields with no significant international law underpinnings therein: residence permits, visas, visa exemptions by country, or border checks.

To similar effect, no references to international law are found in the 2011 Regulations, for example, on a European Network of Immigration Liaison Officers, an External Borders Agency (Regulation 1168/2011), or Immigration Liaison Officers Network (Regulation 493/2011), with their main focus upon operationalizing the AFSJ. In 2013, there were three regulations relating to asylum and immigration law, with two referencing international law: establishing criteria in Regulation 604/2013 for international protection, referencing the Geneva Convention and the UN Convention on the Rights of the Child and establishing a European External Borders Surveillance System,<sup>34</sup> 'Eurosur' in Regulation 1052/2013, the latter referencing the UN Convention on the Law of the Sea, International Convention for the Safety of Life at Sea and the Geneva Convention.<sup>35</sup> In 2014, five out of 10 regulations related to the overarching field of asylum and immigration law without *any* reference to international law.<sup>36</sup> Of the 2014 regulations, all references to international law were concentrated in one sole regulation – Regulation 656/2014 on surveillance of external sea borders.<sup>37</sup> There was a continuation of regulations being used for AFSJ operationalization, for example, Regulation 514/2014 on an Asylum, Migration and Integration Fund. Notably, the regulation using the second-largest number of international law instruments was the one establishing the European Border

<sup>33</sup> Regulation 265/2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa [2010] OJ L85/1; Regulation 439/2010 establishing a European Asylum Support Office [2010] OJ L132/11; Regulation 1091/2010 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (repealed) [2010] OJ L81/1. See recital 4 of Regulation 439/2010.

<sup>34</sup> Regulation 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 [2012] OJ L180/31, recital 3.

<sup>35</sup> Regulation 1052/2013, establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11, recital 25. See Regulation 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints [2013] OJ L180/1.

<sup>36</sup> Although all but one are implementing or delegation regulations: Regulation 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93; Cf. Commission Implementing Regulation 1049/2014 [2014] OJ L291/9, Commission Delegated Regulation 1048/2014 [2014] OJ L291/6, Commission Implementing Regulation 799/2014 [2014] OJ L219/4, Commission Implementing Regulation 801/2014 [2014] OJ L219/19.

<sup>37</sup> See italics for asylum and immigration law related Regulations: *Regulation 656/2014*; Regulation 655/2014 of the establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59; Regulation 542/2014 amending Regulation 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice [2012] OJ L163/1; Regulation 540/2014 on the sound level of motor vehicles and of replacement silencing systems, and amending Directive 2007/46/EC and repealing Directive 70/157/EEC [2014] OJ L158/131; *Regulation 516/2014 on the asylum, migration and integration fund* [2014] OJ L150/168; *Regulation 515/2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC* [2014] OJ L150/143; *Regulation 514/2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management* [2014] OJ L150/143; Regulation 513/2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA [2014] OJ L150/93.

Surveillance System (Eurosur), Regulation 1052/2013, followed by Regulation 656/2014, establishing rules for the surveillance of the external sea borders.<sup>38</sup> Given the challenges of seeking unity in EU external migration law generally, a more regularized use of a 'uniform' EU legal instrument here such as a regulation is of note.<sup>39</sup> This cycle arguably shows efforts to seek external legitimization of law-making in a contentious subject area developing a diverse portfolio of actors.

As to asylum and immigration law, in 2009-2014 there were 9 Regulations, thus slightly more Regulations than Directives in this cycle, on a broad diversity of asylum and immigration law topics (using the legal basis of: Articles 74, 77(2)(b) and (c), 78(1) and (2), 78(2), 79(2)(a), 81(1)(d), 82(1), 84, 85(1), 87(2)(a), 88(2)(a)): i.e. as to Schengen (long stay visas), the EASO, IT systems in the AFSJ, External Borders Agency, Immigration Liaison Officers Network, Schengen Information System II, international protection criteria, Eurodac (finger printers), Asylum, Immigration Integration fund and Internal Security fund. In these 9 Regulations there were 12 references to international law, similar to Directives in this regard, including again broadly accepted international law agreements: the UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the UN Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the UN Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Convention on the Rights of the Child.<sup>40</sup>

#### **D. Areas of Adopted AFSJ Regulations in the 2014–19 cycle**

In the 2014-2019 cycle, 'systems' continue to dominate along with civil procedures, civil justice, third-country nationals, and data as they are rolled out. However, the 'areas' of law and policy became difficult to decipher in this second cycle. For instance, two regulations were adopted in 2019, creating interoperability across six AFSJ databases, and thus the broadening and widening of the AFSJ substantive and procedural areas evolves through such cross-cutting

<sup>38</sup> Regulation 656/2014, recital 8: "During border surveillance operations at sea, Member States should respect their respective obligations under international law, in particular the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the United Nations Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention on the Rights of the Child and other relevant international instruments."

<sup>39</sup> Paula Garcia Andrade, 'The Legal Feasibility of the EU's External Action on Legal Migration: The Internal and the External Intertwined' (2013) 15 EJML 263.

<sup>40</sup> The analysis excludes repealed Regulations.

instruments.<sup>41</sup> Two ‘cross-cutting’ regulations were adopted on the interoperability of AFSJ information systems in 2019, Regulation 2019/817 EU-LISA and Regulation 2019/818, to check data on individuals whose names were stored on six EU databases (VIS, SIS II, Eurodac, EES, ETIAS, ECRIS ITN).<sup>42</sup>

The number of adopted regulations being used to operationalize the AFSJ through the development of new actors, systems, agencies, and programmes relating to asylum, immigration law, for example, a European Coast and Border Guard, EU-LISA, and ETIAS-TCN, increased steadily in the second cycle of 2014–19.<sup>43</sup> This trend continues to occur through regulations – unlike directives, which give discretion to Member States. It arguably serves to emphasize the operationalization of the broader legislative agenda taking place at the EU level. Regulations from this cycle mostly do not make reference to international law despite many questions of fundamental rights raised by these systems with their surveillance agenda.

A small minority of regulations cited international law exceptionally and in abundance, in regulations relating to agencies: Regulation 2016/1624 (European Border and Coast Guard), and Regulation 2016/1625 (European Maritime Safety Agency).<sup>44</sup> There is arguably evidence of attempted ‘legitimation’ actions here on the part of the EU by using international law in these instances, for example, Regulation 2016/1625 referencing all nine key international law instruments relating to the law of the sea and asylum and immigration law. This is considered further below in Section IV.<sup>45</sup>

In 2017 alone, eight out of ten regulations related to asylum and immigration law and thus

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<sup>41</sup> Evelien Brouwer, ‘Large-Scale Databases and Interoperability in Migration and Border Policies: The Non-Discriminatory Approach of Data Protection’ (2020) 26 EPL 71.

<sup>42</sup> Niovi Vavoula, ‘Databases for Non-EU Nationals and the Right to Private Life: Towards a System of Generalised Surveillance of Movement?’ in Bignami (n 1); Regulation 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [2008] OJ L218/60; Regulation 2018/1861 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks [2018] OJ L312/14; Regulation 603/2013; Regulation 2018/1860 on the use of the Schengen Information System for the return of illegally staying third-country nationals [2018] OJ L312/1; Regulation 2018/1240, establishing a European Travel Information and Authorisation System (ETIAS) [2018] OJ L61/1; Regulation 2019/816, establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System [2019] OJ L135/1.

<sup>43</sup> Regulation 2018/1726 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) [2018] OJ L295/99.

<sup>44</sup> Referencing for example, in Regulation 2016/1624 on the European Border and Coast Guard [2016] OJ L251/1, recital 8: Tokyo Convention on Offences, UNCLOS, International Convention for Life at Sea, International Convention on Maritime Search and Rescue, International Convention for the Prevention of Pollution from Ships, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers; See Regulation 2016/1625, establishing a European Maritime Safety Agency [2016] OJ L251/77, recital 2: “The implementation of this Regulation does not affect the division of competence between the Union and the Member States or the obligations of Member States under international conventions such as the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the International Convention for the Prevention of Pollution from Ships, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, and other relevant international maritime instruments.”

<sup>45</sup> Regulation 2016/1625, recital 2.

showed continuity with the first post-Lisbon legislative cycle thematically, although all eight were *without* reference to international law.<sup>46</sup> One of these, Regulation 2017/458 amended the EU borders code to provide for additional checks on EU and non-EU citizens at borders, citing no international law provisions per se but referencing Interpol's lost and stolen databases.<sup>47</sup> The shift towards regulations continues to be distinctive where regulations enable no Member State implementation or discretion in such an instrument, which is overwhelmingly used for EU 'institution building', 'actor establishment', or 'systems establishment'. More significantly, no international law is used or cited in regulations to establish entities as part of a systematization of an asylum, immigration and borders control field (e.g. Coast Guard, etc). This constitutes evidence of the EU developing autonomous actors and concepts even in sensitive fields. This operationalization includes powers to post immigration liaison officers to non-EU countries and to extend the scope of EU operations there (e.g. through Regulation 2019/1240).<sup>48</sup> However, proliferation of autonomous concepts can also be said to align with certain discourses incrementally seeking a ratcheting up of law and order. There is still far less sensitivity to international law in the second legislative cycle.

In 2014-2019 there were 26 Regulations relating to asylum, immigration and border control using the legal basis of: Articles 77(2), 79(2)(a), 82(1), 87(2), 88(2), 100(2) TFEU, Regulations 514/2014 and Regulation 516/2014 (i.e. delegated regulations) on: surveillance of sea borders, asylum, migration and integration fund, European travel document (return illegal third country nationals), European Border and Coast Guard and a European Maritime Safety Agency. In these 26 Regulations, there were 21 references to international law, which included most key law of the sea and asylum and immigration law, clearly indicating the prevalence of external borders regulation as a regulatory choice: UN Convention on the Law of the Sea, International Convention for the Safety of Life at Sea, International Convention for Maritime Search and Rescue, UN Convention on Transnational Organised Crime, UN Convention Status of Refugees, International Covenant for the Protection of Civil and Political Rights, UN Convention on Torture, UN Convention on the Rights of the Child, UNHCR, Tokyo Convention on Offences, International Convention for Prevention Pollution from Ships and International Convention on Standards of Training Certification and Watchkeeping for Seafarers.

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<sup>46</sup> Regulation 2017/2226 establishing an Entry/Exit System (EES) [2017] OJ L327/20; Regulation 2017/2225 on the use of the Entry/Exit System [2017] OJ L327/1; Regulation 2017/1954 laying down a uniform format for residence permits for third-country nationals [2017] OJ L286/9; Regulation 2017/1939 on the establishment of the European Public Prosecutor's Office [2017] OJ L283/1; Regulation 2017/1370 laying down a uniform format for visas [2017] OJ L198/24; Regulation 2017/850 listing the third countries whose nationals must be in possession of visas and whose nationals are exempt (Ukraine) [2017] OJ L133/1; Regulation 2017/458 on reinforcement of checks against relevant databases at external borders [2017] OJ L74/1; Regulation 2017/371 listing the third countries whose nationals must be in possession of visas when crossing the external borders and whose nationals are exempt [2017] OJ L61/1; Regulation 2017/372 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 (Georgia) [2017] OJ L61/7; Regulation 2017/353 on insolvency proceedings [2017] OJ L57/19.

<sup>47</sup> Regulation 2017/458.

<sup>48</sup> Regulation 2019/1240 on the creation of a European network of immigration liaison officers [2019] OJ L198/88, art 6.

There were thus significantly more regulations than directives here and a considerable rise in the citation of international law aligning well with broader trends in the two cycles of the AFSJ.

#### **IV. Themes of Rising and Declining International law and internationalization within Directives**

Directives are important new legal tools in the AFSJ because of their direct effect and the place of Member State discretion in their implementation in an area with complex links to Member State competences and powers. Their demise in adopted legislation is thus significant in times of crisis and populism, as the first and second legislative cycles have experienced, particularly linked to debates on asylum and immigration law. A select number of themes are considered here as a means to synthesize the law-making period, which are inevitably arbitrary but are chosen nonetheless as representative means of reflection. The examples chosen below mostly reflect upon the AFSJ with application to asylum and immigration law *also* as far as possible.

##### **A. Rising international law in AFSJ lawmaking**

There are three broad themes considered here as evident in initially rising international law trends in AFSJ 2009-2014 directives, where international law is used with greater incidence and evidence, namely: i) legitimation, ii) standard-setting, and iii) innovation in EU law-making.

###### *(i) International law as legitimation of law-making*

First, it might be said that permitting international law in directives results from practical necessity, where a law-maker seeks international law with both normative and practical significance, thus adding a certain legitimation to the law-making. The last year of the EU's 2009–14 cycle demonstrates the increasing salience of asylum and immigration law to the legislative agenda, in which almost half of the AFSJ directives relate to asylum and immigration law, and the other half relate to financial crisis matters.<sup>49</sup> The instruments deployed cross-cutting regulations concerning people, children, trafficking, sea, and treatment of refugees, and demonstrate EU efforts to enable global influence in its laws through international law, even in a difficult policy cycle of crisis.<sup>50</sup> Here, the EU has acted as an emerging global soft power

<sup>49</sup> 2 out of 6 Directives (Directive 2014/36; Directives 2014/66) and 4 out of 8 Regulations in 2014 (Regulation 514/2014; Regulation 515/2014; Regulation 516/2014; Regulation 656/2014).

<sup>50</sup> Itamar Mann, *Humanity at Sea* (CUP 2016); Moreno-Lax (n 30).

grappling with a complex refugee crisis and has sought to ‘download’ international or international law for legitimization purposes. The concentration of international law in key instruments is also notable, where the quantity of references used, for example, citing all major international law instruments relating to the law of the sea in Regulation 2016/1624 (European Border and Coast Guard), and Regulation 2016/1625 (European Maritime Safety Agency). This concentration arguably supports the broader thesis of legitimization through international law usage.

*(ii) EU usage of international law as standard-setting*

Second, permitting global influence can be viewed as the engagement in standard-setting, showing the EU seeking to act as a strong internationalist institution. In an example of broader AFSJ law-making trends, for example, the UN Convention on the Protection of the Rights of the Child forms the main external norm or source for maximum harmonization in Directive 2011/92 on combating sexual abuse and sexual exploitation of children and child pornography, to which the EU is not party. The Convention is the most widely ratified of all human rights treaties and explicitly seeks full and direct incorporation to maximize its full legal effect.<sup>51</sup> As outlined above, the EU has ratified the Convention as a strategic agenda and places emphasis upon an internal and external interlinkage of policy. It adopts a maximum harmonization approach in Directive 2011/92, with far-reaching criminal law penalties, in Article 4(5). This raises questions as to subsidiarity given its character because it differs significantly from minimum harmonization more usually found in AFSJ directives and thus attempts *maximum* norm convergence therein. This also raises the link between asylum, immigration and securitization.<sup>52</sup> Here, the Convention has an important legitimizing effect. Explicit ‘norm-taking’ here legitimizes EU practices yet also demonstrates the EU acting as a ‘standard-setter’ rather than just as a ‘norm-follower’ – that is, it leads legal policy using international law.

*(iii) Downloading of international law in innovative law-making*

The explicit invocation of international law sometimes manifests in ‘downloading’ of norms, particularly in innovative areas of AFSJ law-making, meaning that it is used and circulated in the EU legal order. Apart from the Geneva Convention, the UN Convention on the Protection of the Rights of the Child forms the main external norm in the first EU Criminal Law Directive

<sup>51</sup> Ingi Iusmen and Helen Stalford (eds), *The EU as a Children’s Rights Actor: Law, Policy and Structural Dimensions* (Barbara Budrich Publishers 2015).

<sup>52</sup> Valsamis Mitsilegas, ‘The Coherence of the Adopted Measures by the EU with regard to Organised Crime, namely the Fight against Human Trafficking and the UN Convention on Organised Crime – the Palermo Convention 6 and its 3 Protocols’ in Didier Bigo and Anastassia Tsoukala (eds), *Controlling Security* (L’Harmattan 2008).

2011/36 on trafficking,<sup>53</sup> as well as in Directive 2013/32 on common procedures for granting and withdrawing international protection,<sup>54</sup> Directive 2011/92 on combating sexual abuse and sexual exploitation of children and child pornography,<sup>55</sup> Directive 2013/33 laid down standards for the reception of applications for international protection<sup>56</sup> and Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.<sup>57</sup> They give an insight into how elements of the EU agenda converge internally and externally.

Directive 2011/36 is highly significant in its objectives for preventing and combating trafficking in human beings and protecting its victims and a good example of the development of asylum and immigration law here and also AFSJ best practice. It uses the UN Convention on the Rights of the Child, the UN Convention on Transnational Organized Crime and Protocols thereto, and the UN Convention relating to the Status of Refugees, and is an important strategic use of international law by the EU given longer-term EU policy in this area.<sup>58</sup> However, some have argued that the Directive was considerably watered down in the end so as to allow national preferences to be exercised.<sup>59</sup> It has also been argued that the Directive lent itself towards implementing security maintenance rather than victim protection and rehabilitation, a concern that arises as to much EU AFSJ law relating to asylum and immigration.<sup>60</sup> Still, it is considered a landmark point in EU law and is a vivid example of the downloading of international law in AFSJ law-making.

## **B. Declining international law in AFSJ law-making**

The legislative output of the two cycles broadly supports the thesis of their being declining international law usage in AFSJ law-making. There are three broad themes evident in *declining* international law in AFSJ 2014–19 Directives: i) the rise of regulations, ii) multiple actors developed in Regulations and iii) multiple systems developed in Regulations.

### *(i) The Rise of Regulations*

The operationalization of the regulation as an AFSJ instrument is an important continuing trend

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<sup>53</sup> Directive 2011/36, recital 8.

<sup>54</sup> Directive 2013/32, recital 33.

<sup>55</sup> Directive 2011/93, recital 1.

<sup>56</sup> Directive 2013/33, recital 9.

<sup>57</sup> Directive 2011/95, recital 18.

<sup>58</sup> Sarah Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights' (2009) 15 ELJ 775.

<sup>59</sup> See Meng-Hsuan Chou, 'The European Union and the fight against human trafficking: Comprehensive or Contradicting' (2008) 4 Stair 76, 79.

<sup>60</sup> *ibid* 76.

in an area of law-making sensitivity of the Member States. This is particularly so in the areas of asylum and immigration law. The number of regulations used to operationalize the AFSJ through the development of new or revitalized agencies, actors, systems, and programmes increased dramatically, particularly relating to third country nationals. An absence of reference to international law is found in all regulations to establish new autonomous AFSJ concepts, in other words, entities forming part of a systematization of a policy field (e.g. EPPO, Coast Guard). For example, Europol (Regulation 2016/794), Eurojust (Regulation 2018/1727) or a European Border and Coast Guard (Regulation 2016/1624), EU-LISA (Regulation 2018/1726) or ETIAS-TCN (Regulation 2019/816), are significant in crisis-related times. Certain 'new entities', such as the European Border and Coast Guard, as independent EU agencies represent a continuing trend towards agencification of the AFSJ. Their evolution is unlinked to international activities or programmes, and they are thus autonomous developments in AFSJ law-making, affording less discretion to Member States to implement the AFSJ. It thus signifies its growth.

*(ii) Multiple New Actors in Regulations*

Some 'new' actors developed as a result of the AFSJ, such as the European Border and Coast Guard, have in fact evolved from existing agencies (i.e. Frontex) and represent over 30 years of evolution of the Schengen Agreement (Regulation 2016/1624).<sup>61</sup> In 2017, a regulation was similarly used to establish multiple actors without reference to international law, such as the European Public Prosecutor's Office (EPPO) (Regulation 2017/1939)<sup>62</sup> and the aforementioned European Border and Coast Guard, comprising a vast array of measures from 'hot spots' to travel documents. The European Border and Coast Guard will eventually have 10,000 operational staff, representing a significant increase in EU capacities and transforming Frontex into a quasi-federal agency.<sup>63</sup> The EPPO was adopted after a very long and complex negotiation within the Council and a decision by 20 Member States to proceed through enhanced co-operation. As the centrepiece of a new system joining national law enforcement, judicial authorities, and EU actors such as the European Anti-Fraud Office (OLAF), Eurojust and Europol appear to constitute an example of a clearly autonomous EU concept arising to support the emergence of more complex investigations. Of course, all AFSJ agencies are generally thought to circumscribe the Commission's executive powers and to weaken the oversight powers of the European Parliament but conversely improve the influence of the

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<sup>61</sup> Regulation 2016/1624.

<sup>62</sup> Regulation 2017/1939.

<sup>63</sup> De Capitani (n 1).

Member States,<sup>64</sup> and so it is not a given that a rise of AFSJ actors per se aligns with the rise of, for example, crisis or populism in this era. The rapid operationalization of the AFSJ here through new actors and also systems and agencies is a logical consequence of the evolution taking place. Again, these developments are not linked to the occurrence of any international law, and they thus take place mainly without reference to international law, showing a reduction in international influence but also a rise in the development of autonomous concepts in this cycle of law-making.<sup>65</sup>

### *(iii) Multiple Systems developed in Regulations*

New systems adopted in the AFSJ recently (EES,<sup>66</sup> ETIAS, and ECRIS-TCN)<sup>67</sup> represent the so-called 'third wave' of databases and a new generalization of surveillance of movements of non-citizens based upon the concept of interoperability of systems. They move on from the 'first wave' systems of the Schengen Information System (SIS) and Eurodac, concerned with modernizing immigration control and allocating responsibility amongst the states and the 'second-wave' databases associated with the 'War on Terror', the VIS database and SIS II, that were 'upgraded'.<sup>68</sup> Three regulations were adopted to extend the use of SIS II further in 2018.<sup>69</sup> ETIAS is a broad system for all third-country nationals entering the Schengen area,<sup>70</sup> which will be paired with a system for monitoring the presence on the Schengen territory of visa 'overstayers' ('EES' Entry/Exit system (Regulation 2017/2226)). The EES and ETIAS introduce surveillance for almost all travellers grounded through automaticity and blind reliance on technology. This appears overall to indicate continuity between the legislative cycles in terms of evolution. It also represents a significant push to institutionalize the AFSJ through far-reaching and controversial 'autonomous EU concepts' in sensitive fields traditionally close to Member State sovereignty. They are not related to international law activities of the EU. It is notable that this third wave occurs through a regulation not a directive (i.e. without Member State discretion) and mostly *without* reference to international law. This suggests that the EU legislative cycle has found it easier to process regulations as the output of the cycle. This further indicates that the EU is not seeking sources of external legitimacy from international law in regulations because they are not deemed to be needed in an 'autonomous EU concept'.<sup>71</sup>

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<sup>64</sup> *ibid.*

<sup>65</sup> Mitsilegas, 'Autonomous Concepts Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (n 18).

<sup>66</sup> Regulation 2017/2226.

<sup>67</sup> Regulation 2019/816.

<sup>68</sup> Vavoula (n 42).

<sup>69</sup> Brouwer (n 41); The regulations are: Regulation 2018/1860; Regulation 2018/1861; Regulation 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters [2018] OJ L312/56.

<sup>70</sup> Regulation 2018/1240, art 1.

<sup>71</sup> Mitsilegas, 'Autonomous Concepts Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (n 18).

For example, ECRIS-TCN is a new centralized system for the exchange of criminal records on convicted third-country nationals and stateless persons and is meant to complement the existing decentralized ECRIS system where information on criminal records of EU nationals is exchanged.<sup>72</sup> It appears to indicate continuity between the legislative cycles and a significant push to institutionalize the AFSJ through autonomous EU concepts. The European Data Protection Supervisor (EDPS) in Opinion 4/2018 warned that an interoperability regime created a new centralized dataset with information on millions of third-country nationals and the potential for a highly serious data breach.<sup>73</sup> It is also worth noting that no international law is referenced despite an emerging default retention period for data of five years notwithstanding Opinion 1/15 EU–Canada PNR of the CJEU.<sup>74</sup> Perhaps it is the case that legislators see this as a continuation of past legislative practice without the need for external legitimization practices. This does not bode well given that no non-EU citizen will be left ‘unsurveyed’ through at least one database and the aggregation of data will not only generate new databases but also transform existing databases created originally for administrative, immigration control purposes into powerful tools.<sup>75</sup> This also indicates a very specific direction of the AFSJ through autonomous concepts *without* reference to international law that could have sought to use international norms as normative benchmarks or standards. This would have added legitimization or set out prescriptive concerns to follow best international rules, systems, or practices.

## **V. EU participation in international law of the AFSJ: on the ‘outside-in’ and the ‘inside-out’**

The next section outlines the briefly EU’s participation in the international law of the AFSJ in the two cycles, focussing upon international law referenced in asylum, immigration and border control instruments only, as a means to understand the ‘inside-out’ ‘outside-in’ dynamic of international law emerging here. As stated above, there are many reasons for the EU’s engagement with international law, ranging from the EU’s autonomous legal standing to the need to engage with international law if it is to be an effective actor.<sup>76</sup>

Prior to the demise of the Third Pillar, Council of Europe instruments were often used as the primary source of international law in AFSJ law-making, along with UN instruments to a

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<sup>72</sup> Regulation 2019/816.

<sup>73</sup> European Data Protection Supervisor, Opinion 4/2018 of 16 April 2018.

<sup>74</sup> Mario Mendez, ‘Opinion 1/15: The Court of Justice Meets PNR Data (Again!)’ (2017) 2 EurPapers 803.

<sup>75</sup> Vavoula (n 42) 265.

<sup>76</sup> See above (n 4) and (n 16).

lesser extent. AFSJ legal instruments adopted in the 2009–14 legislative period appeared to show a preference for broadly ‘accepted’ international law.<sup>77</sup> This appears generally borne out in the two cycles accounted for here, although a fuller study of membership is beyond the scope of the present work.

The international law referenced in the two cycles of AFSJ legislation as to asylum and immigration law outlined above is as follows in full<sup>78</sup>: the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, European Convention on the Legal Status of Migrant Workers of 24 November 1977, Geneva Convention Relating to the Status of Refugees, ILO Convention No 29 concerning Forced or Compulsory Labour, International Convention for the Prevention of Pollution from Ships, International Convention for the Safety of Life at Sea, International Convention on Maritime Search and Rescue, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, International Covenant on Civil and Political Rights, Tokyo Convention on Offences, UNHCR (*qua* agency), UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, UN Convention on the Law of the Sea, UN Convention on the Rights of the Child, UN Convention relating to the Status of Refugees.

The international law used generally consists of broadly accepted international law instruments of which all Member States are a party thereto mostly.<sup>79</sup>

Overall, the international law sources used mostly demonstrate a commitment on the part of the EU to participate in international organisations and agreements actively and to engage with key international law relating to the AFSJ, even in times of crisis related law-making. The account thus next briefly examines the relationship between the EU with the international agreement or organisation references in its AFSJ legislation.

For reasons of space, a selection is considered here next as to the EU’s role therein. This

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<sup>77</sup> On AFSJ Directives, see Elaine Fahey, ‘Joining the Dots: External norms, AFSJ Directives and the EU’s Role in Global Legal Order’ (2016) 41 ELRev 105, 109–11.

<sup>78</sup> Multiple spellings and versions of abbreviations and instruments are used throughout the two legislative cycles in official legislation and the most common are listed here.

<sup>79</sup> E.g. ‘Geneva Convention’ has multiple variations (with/ without years), without/ without UN, fuller description, etc.

account selects four widely used in the legislative output of the two cycles of asylum and immigration law and considers the EU place therein, namely UNCLOS, UNHCR (*qua* agency), UN Convention on the Rights of the Child and the Palermo Protocol.

## A. UNCLOS

The UN Convention on the Law of the Sea (UNCLOS) features regularly in EU legislation in the cycles outlined. The EU is a party to the UNCLOS but is not able to participate in all areas of the UNCLOS institutional system because for the EU to participate it must either amend the constitutive instrument of the organisation to join or participate without full membership. Despite exercising significant competences in the fields dealt with by the bodies, the EU is neither a member of the International Maritime Organisation (IMO), nor the International Civil Aviation Organisation (ICAO). The EU has joined a number of UN Conventions such as the UN Convention on the Rights of Persons with Disabilities, UN Convention against Corruption, the UN Convention against Transnational Organised Crime and the UN Framework Convention on Climate Change. The EU has long struggled with the reluctance of some member states to accept the EU advancing its role in the transport sector in particular and it has long faced deadlock in some important UN bodies e.g. UNHCR.<sup>80</sup>

At EU level, maritime activities involving security and police activities fall within shared competences. The role of the EU in Search Rescue is problematic as the EU is not a member of the IMO and thus is not party to the relevant Conventions. Even if search and rescue activities (SAR) are meant to be included in the EU's maritime policies and coordinated at EU level, the existing institutional framework does not allow for such a development. However, the EU is party to the UNCLOS and yet a unified EU flag does not yet exist and this has watered down the EU duty of assistance which falls on state flags. Yet, the EU has shared competences in the field of transport and has shown interest in navigation, creating difference forums where stakeholders can exchange information and organise cooperation, one being the European Agency for the Management of the operative cooperation at the external borders of the Member States of the EU. Thus the inclusion of references to UNCLOS in AFSJ legislation in autonomous agencies or actors of the AFSJ is of note in line with its broader engagement policy.

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<sup>80</sup> Frank Hoffmeister, 'Outsider or frontrunner? Recent developments under international and European law on the status of the European Union in international organizations and treaty bodies' (2007) 44 CMLRev 41.

## B. UNHCR

The United Nations High Commissioner for Refugees (UNHCR) is also referenced through legislation in the two cycles and is a UN agency of note, cited more than any other body or organisation and is not thus an ordinary international law instrument. The EU's engagement with the UNHCR dates back to the early 1990s when the latter established a liaison function in its Brussels office to monitor envelopments and input to the EU's emerging harmonisation process in the areas of asylum and immigration. In 2005, the UNHCR and the EU signed a Strategic Partnership Agreement to consolidate, develop and better structure the relationships on protection and assistance for refugees. UNHCR's office in Brussels started a process of networking UNHCR branch offices in national capitals through the establishment of EU focal points in these offices. These were charged with monitoring and influencing their government's positions in negotiations on EU asylum instruments.

As the UNHCR is an agency of the UN, the issue of membership does not arise as all EU Member states are members of the UN and the EU can influence its policies through its observer status. Ever since the Commission and Council started to develop the external dimension of EU asylum and migration policy, aimed at improved co-operation in the joint management of migratory flows, UNHCR has monitored this process closely and has provided expertise and policy inputs as regards EU co-operation with third countries (Eastern Europe, Western Balkans, Mediterranean basin) in asylum and migration matters.<sup>81</sup> The support therefor in legislation is thus significant given the broader engagement ongoing.

## C. UN Convention on the Protection of the Rights of the Child

The UN Convention on the Protection of the Rights of the Child from 1989 is used in much AFSJ legislation relating to asylum and immigration law in the two cycles outlined. The EU has ratified the Convention as a strategic agenda and places emphasis upon an internal and external interlinkage of policy, which is a Convention to which all new EU Member States must accede.<sup>82</sup> The Convention constitutes a landmark in international law by establishing children's status as legally empowered subjects of entitlement. Over the last two decades, the Convention has shaped how states and non- state actors think about children in legal, policy and normative terms at the societal level. It retains its appeal as the *lingua franca* of children's

<sup>81</sup> UNHCR, 'UNHCR and the EU' <<https://www.unhcr.org/uk/41b6cbb64.pdf>> accessed 31 January 2021.

<sup>82</sup> See European Commission, 'EU *acquis* and policy documents on the rights of the child' (April 2020) <[https://ec.europa.eu/info/sites/info/files/eu\\_acquis\\_and\\_policy\\_documents\\_rights\\_of\\_the\\_child\\_april\\_2020\\_2.pdf](https://ec.europa.eu/info/sites/info/files/eu_acquis_and_policy_documents_rights_of_the_child_april_2020_2.pdf)> accessed 31 January 2021.

rights advocacy at the regional, national, European and international levels.<sup>83</sup> The EU is understood to have carved out a distinct and potentially extremely powerful role in developing and enforcing children's rights, not just across the Member States of the EU, but in non-EU states as well. The explicit EU constitutional reference to the protection of children's rights as one of the core objectives of the EU (Article 3(3) TEU) further reinforced by the increasingly explicit allusions to the Convention in the substance of binding EU legislation.<sup>84</sup> The Convention notably forms the main external norm or source for maximum harmonization in Directive 2011/92 on combating sexual abuse and sexual exploitation of children and child pornography, to which the EU is not party, in its earliest AFSJ law-making. The Convention is the most widely ratified of all human rights treaties and explicitly seeks full and direct incorporation to maximize its full legal effect.<sup>85</sup> That the here EU adopts a maximum harmonization approach in Directive 2011/92, with far-reaching criminal law penalties, in Article 4(5) thus shows how it engages with the Convention in a direct and far-reaching way.

#### **D. UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol)**

Trafficking is an important strategic use of international law by the EU given longer-term EU policy in this area.<sup>86</sup> The first international definition of trafficking in human beings was agreed in the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (the Palermo Protocol).<sup>87</sup> All European Union Member States with the exception of Ireland ratified the 2000 UN Protocol against Migrant Smuggling by Land, Sea and Air, which supplements the UN Convention against Transnational Organised Crime (UNTOC), as to the latter which the EU has joined. The EU became party to the Protocol in 2006, annexing a declaration to the Protocol with respect to the EU's and its Member States' competences the subject of the Protocol.

The Palermo Protocol is said to serve as a broad model in a variety of contexts. The EU has previously adopted the values of the UN Palermo Protocol within its treaties.<sup>88</sup> The EU approach to the trafficking in human beings has explicitly sought to differentiate itself as

<sup>83</sup> E.g. Ursula Kilkelly, 'The Convention on the Rights of the Child after Twenty-five Years: Challenges of Content and Implementation' in Martin Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2014).

<sup>84</sup> Helen Stalford and Elenor Drywood, 'Using the CRC to inform EU law and policy-making' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Routledge 2011).

<sup>85</sup> Iusmen and Stalford (n 51).

<sup>86</sup> Krieg (n 58).

<sup>87</sup> It is one of 3 Protocols supplementing the UN Convention against Transnational Organised Crime adopted by UN GA Resolution 55/25 of 15 November 2000 (UN Doc A/Res/55/25 (2000)).

<sup>88</sup> Under former Title XX EC (development cooperation) and Title IV EC (immigration policy); See Mitsilegas, 'The Coherence of the Adopted Measures by the EU with regard to Organised Crime, namely the Fight against Human Trafficking and the UN Convention on Organised Crime – the Palermo Convention 6 and its 3 Protocols' (n 52).

'holistic', 'multifaceted' and even multidisciplinary.<sup>89</sup> However, the EU was previously perceived as favouring the limitation of irregular migration and not ameliorating the situation of the trafficked. Nonetheless, at both international and European level, opposition has long-existed between a rights-based and law enforcement approach. The new Trafficking Directive was the culmination of more than a decade of developing EU strategy to combat illegal migration, discussed below.<sup>90</sup> It is, however, notably perceived as an innovative instrument because of its character as a criminal law.<sup>91</sup> The Directive also contains provisions which are largely similar to the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>92</sup> As Chaudary states, the Directive moves away from the previous EU law approach of subordinating protection measures to investigating and prosecuting human traffickers for acts already committed.<sup>93</sup> The Directive is thus understood to make a very explicit and specific use of the Trafficking Convention (e.g. in recital 9) in providing a 'solid' legal base upon which to successfully advance a trafficking case and is a clear example of adoption of international law in line with the EU's international policy.<sup>94</sup>

## VI. Conclusions

The article has shown how in the legislation adopted under the AFSJ over two full cycles, a broad variety of trends as to international law is evident and revealing because it provides insight into the EU's international law activities and own autonomous development of AFSJ concepts.

It has explored the openness of the AFSJ to international law, looking in detail at the area of asylum and immigration law. It thus focused upon asylum and immigration law in the broader context of the AFSJ which are shown to mirror these trends on the output and incidence of international law in adopted AFSJ law-making for the period between 2009–14 and 2014–19, with particular emphasis upon asylum and immigration law. It is the first and second fully regularized legislative cycle of the post-Lisbon era. Here, the AFSJ became normalized as an area of law institutionally, competence-wise, and enforcement-wise. The article shows how law-making practices initially demonstrate substantial influence of international law on EU law. The common assumption that in times of complex political

<sup>89</sup> Krieg (n 58) 790; See Report of the European Expert Group on Trafficking in Human Beings of 22 December 2004.

<sup>90</sup> See Chou (n 59); Saadiya Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law' (2011) 33 *MichJIL* 77; Krieg (n 58).

<sup>91</sup> E.g. 'Trafficking victims too often treated as immigration cases, say campaigners' *The Guardian* (31 October 2013).

<sup>92</sup> The Council of Europe Convention on Action against Trafficking in Human Beings [CETS No 197] <[http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp)> accessed 31 January 2021

<sup>93</sup> Chaudary (n 90) 98-99.

<sup>94</sup> *ibid* 99.

contexts surrounding asylum and immigration law, there would be less international law is not per se accurate, as this account has shown. Conversely, a decline in the reference to international law appears to indicate the further development of autonomous EU AFSJ concepts or systems. It also appears to indicate a reduction in international influence on EU AFSJ law.

In general, highly disparate legislative practices appear to have evolved throughout the two AFSJ legislative cycles post-Lisbon, with a significant shift away from international law in the second legislative cycle in the context of widening and deepening of legislative packages. The paper argued that the EU actively promotes international law in its AFSJ law-making, even in difficult and sensitive topics in which consensus is challenging. However, this is not the overall picture developed. Rising international law in directives perhaps indicates practices of legitimation and standard-setting (e.g. maximum harmonization and innovation in law-making). On the other hand, there was subsequently a decline in international law influence in the AFSJ cycles studied here. Declining international law appears to relate to the rise of autonomous concepts – also manifested now in directives – where the EU develops sophisticated but far-reaching EU systems, actors, and programmes, mostly wholly unconnected to international law.

This account has demonstrated how the EU shows a tangible intent to permit the influence of international law upon the AFSJ which supports well its general efforts to participate and engage as a global legal actor. This account has shown how many recent developments in international law practice in AFSJ law-making gives greater insights into two legislative cycles taking place in these complex evolving fields.

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