Chapter 5
Decriminalising Migration in EU Law: Upholding Human Rights and the Rule of Law After Lisbon

This book has demonstrated the extent to which European Union law has in recent years led to the increase of state power in immigration control based to a great extent on the proliferation of legal avenues for the criminalisation of migration. A key element in this move towards the criminalisation of migration has been the emphasis on prevention. The increase in extraterritorial immigration control has been accompanied by the extension of the arm of the state via the delegation of power to both the private sector (land and air carriers) and to European Union agencies (FRONTEX). Moreover, the legal expression of the nexus between prevention, immigration control and security has led to the development of a far-reaching EU framework of pre-emptive surveillance, consisting of the collection and transfer of every day personal immigration data *en masse* to law enforcement authorities, the establishment of large-scale EU databases (such as the Visa Information System) and surveillance systems (such as EUROSUR), the normalisation of the use of sensitive personal data for immigration control purposes such as biometrics and the relaxation of purpose limitation requirements by allowing law enforcement authorities to have access to personal data collected for immigration control purposes. The main aim of this multi-layered system of prevention has been on the one hand to stop migrants from reaching the external border of the European Union, and on the other hand to shield the European Union and its Member States from legal responsibility towards migrants by conducting immigration control outside of EU territory. The rule of law challenges this approach entails (via the creation of gaps in the law) are coupled with real risks of human rights violations, in particular as regards the right to seek asylum and the rights to non-discrimination, privacy and data protection. Towards this seemingly relentless evolution of the preventive paradigm of the criminalisation of migration, it is courts who have provided answers and limitations. The European Court of Human Rights in Strasbourg in its landmark ruling in *Hirsi* has sent the strongest message possible with regard to the requirement for both fundamental rights and the rule of law to be upheld in instances of extraterritorial immigration control. What is crucial to note in this context is that the Court's ruling has generated concrete instances of law reform

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at EU level as regards standards on FRONTEX and Member States' operations and search and rescue at sea. A similar pattern may emerge as regards the securitisation of migration in the form of pre-emptive surveillance, with both the Strasbourg and the Luxembourg Courts having delivered a number of important judgments which limit the retention of sensitive personal data by the state in cases involving individuals not convicted of a criminal offence (*Marper*) and prohibiting the generalised, *en masse* retention of every day personal data by the private sector (*Digital Rights Ireland*). The Strasbourg and Luxembourg Courts have thus challenged radically the paradigm of the preventive criminalisation of migration and have made the re-thinking of this paradigm and ensuing law reform a matter of urgency.

This transformative power of the European judiciary has also been visible as regards the criminalisation of migration after entry into EU territory. With regard to the use of substantive criminal law to regulate migration, it must be reminded that while EU law has aligned itself with the global securitised criminalisation initiatives as regards human trafficking and smuggling, it has not as such imposed criminal sanctions on migrants themselves. Not only that, but EU law has acted as a limit to the introduction of such criminalisation by Member States via the intervention of the Court of Justice. What is significant in the landmark ruling of the Court of Justice in *El-Dridi* and its aftermath, is that the Court used here primarily general principles of EU law (in particular the principle of effectiveness) in order to limit criminalisation. Effectiveness in this context, together with proportionality, may back up human rights obligations and serve in the future as further limits to the criminalisation of migration at both national and EU levels. At the stage of removal, the Court of Justice (following the landmark Strasbourg *M.S.S.* ruling) introduced in *N.S.* a paradigm change as regards the automaticity of exclusion inherent in the Dublin system. As in the case of *Hirsi,* judicial intervention has led here to concrete law reform to address human rights concerns. The Court of Justice has also been active in cases concerning the interpretation of the detention provisions of the Returns Directive, where it has sent strong messages against indefinite detention on the grounds that an individual constitutes a security risk, confirming the necessity of a link between detention and a real prospect of removal, and affirming the distinction between immigration detention and imprisonment. In all three levels of criminalisation, it has thus been the judiciary which has rebalanced the system to take into account rule of law and human rights concerns. This will remain an ongoing process with Courts facing growing litigation following the development of the various strands of EU legislation in the field. The growing synergy between the Strasbourg and Luxembourg Courts, the requirement of compliance with the ECHR not only by EU Member States but also by EU institutions after the accession of the EU to the ECHR and the increasing importance of the Charter of Fundamental Rights in interpreting EU law and its implementation render the further reconfiguration of the current paradigm of criminalisation of migration in EU law in favour of upholding human rights and the rule of law highly probable. In the meantime, current judicial developments render the need to revisit highly invasive EU surveillance systems including in the field of immigration control a matter of urgency.