

THE ROLE OF EU CRIMINAL LAW IN DEFENDING EUROPEAN VALUES

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Abstract

The present contribution addresses the role of EU criminal law in defending European values. The focus is on EU substantive criminal law; namely, the production, at EU level, of definitions of criminal offences and systems related to the imposition of criminal sanctions. It is the thesis of this paper that EU substantive criminal law has a key role in defending European values through the introduction of new criminal offences at EU level. The analysis focuses on the extent to which values-driven EU criminal law can be adopted, from an EU competence perspective, under the criminalization legal basis of Article 83 TFEU and proposes constitutional avenues for values-driven criminalization. The contribution calls for a paradigm shift in the adoption of EU substantive criminal law: from the current paradigm of securitized and functional criminalization to an additional paradigm of values-driven criminalization.

1. Introduction

The present contribution will address the role of EU criminal law in defending European values. The focus will be on EU substantive criminal law, namely the production, at EU level, of definitions of criminal offences and of systems of imposition of criminal sanctions. It is the thesis of this paper that EU substantive criminal law has a key role in defending European values, through the introduction of new criminal offences at EU level. It is acknowledged that the adoption of EU substantive criminal law poses a twofold challenge. Firstly, from the perspective of criminalization theory, the expansion of criminal law may be seen as a challenge to the well-established criminal law principle of *ultima ratio* (criminal law as a last resort) and may raise concerns regarding overcriminalization and the expansion of the sphere of EU and State power at the expense of the protection of

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fundamental rights. Secondly, the production of EU substantive criminal law to defend European values challenges the current constitutional construction of EU competence to define criminal offences and impose criminal sanctions as laid out in the post-Lisbon landscape in the TFEU. It is on this second challenge of the extent of the EU's competence to criminalize that this contribution focuses primarily, with questions concerning the extent of substantive criminalization being addressed throughout the text.

The key argument is that it is essential to promote a paradigm shift from a paradigm of securitized and functional criminalization to a paradigm of values-driven criminalization in EU substantive criminal law. The drafters of the Lisbon Treaty have attempted to introduce clarity in the delimitation of the European Union's competence in the field of substantive criminal law in Article 83 TFEU. I have developed a dual framing of the delimitation of the EU's competence in Article 83 TFEU as securitized criminalization emanating from Article 83(1) TFEU and as functional criminalization emanating from Article 83(2) TFEU.¹ Under the securitized criminalization paradigm, the EU has the competence to adopt substantive criminal law in order to tackle major security threats arising from serious crime.² Under the functional criminalization paradigm, which largely reflects the pre-Lisbon case law of the ECJ,³ the Union has the competence to adopt substantive criminal law in order to enhance the effectiveness of EU law.⁴ Yet neither of these two legal bases expressly addresses the necessity for the adoption of EU substantive criminal law to defend European values. The following sections analyse how

1. Valsamis Mitsilegas, 'EU Criminal Law Competence After Lisbon: From Securitised to Functional Criminalisation' in Diego Acosta and Cian Murphy (eds), *EU Security and Justice Law* (Hart 2014) 110.

2. Art 83(1)(1) and (2) TFEU read as follows: 'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.'

3. See in particular the ruling on environmental crime, Case C-176/03, *Commission of the European Communities v Council of the European Union*, EU:C:2005:542. For an analysis, see Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart 2022) chapter 2.

4. Art 83(2) TFEU reads as follows: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.'

EU competence in substantive criminal law can accommodate a paradigm shift to a values-driven EU criminal law. The first part of this contribution focuses on current attempts to extend EU competence on substantive criminal law in the Treaty, through the use of legal avenues expressly provided for by the TFEU. The second part of the contribution puts forward proposals to accommodate values-driven EU criminal law within the existing Treaty framework on EU competence in substantive criminal law.

2. Extending EU substantive criminal law competence to defend European values

A key avenue for extending EU substantive criminal law competence to defend European values is through the use of the possibilities afforded by the third indent of Article 83(1) TFEU on securitized criminalization. The parameters of the securitized criminalization competence of the EU under Article 83(1) TFEU are set out by reference to a number of areas of particularly serious crime with a cross-border dimension, including terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.⁵ Yet the Treaty leaves open the extension of the EU securitized criminalization competence through the third subparagraph of Article 83(1) TFEU, which states that on the basis of developments in crime, the Council, acting by unanimity and with the consent of the European Parliament, may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU. Thus far, there have been two attempts to extend the competence of the EU using this provision; one successful and one unsuccessful at the time of writing. Both initiatives constitute examples of extending the EU's competence to introduce substantive criminal law to defend European values. As will be seen in this part, there is considerable diversity both in terms of the values that are being evoked and the outcomes of such criminalization efforts.

2.1. Defending European values by criminalizing the violation of restrictive measures

The extension of the EU's substantive criminal law competence to include the violation of Union restrictive measures in the list of the areas of crime falling within the meaning of the second subparagraph of Article 83(1)

5. Art 83(1)(2) TFEU.

TFEU has been triggered by the war in Ukraine. The urgency and political significance of the matter led to an agreement on the extension of the EU's competence in 2022. The Council Decision extending EU competence along these lines⁶ justifies this extension on the grounds that the violation of Union restrictive measures is a particularly serious area of crime that, in terms of gravity, is of a similar degree of seriousness to the areas of crime listed in Article 83(1) TFEU, since it can perpetuate threats to international peace and security, undermine the consolidation of and support for democracy, the rule of law and human rights and result in significant economic, social, societal and environmental damage.⁷ Differences in domestic criminalization approaches in the Member States are deemed to undermine the Union's objectives of safeguarding international peace and security and upholding Union common values.⁸ The justification of the extension of EU competence on the grounds of defending European values is combined with a functional criminalization approach (although the Decision introduced an extension of competence in Article 83(1) and not 83(2) TFEU), with the preamble stating that the violation of Union restrictive measures should be identified as an area of crime in order to ensure the effective implementation of the Union's policy on restrictive measures.⁹

The combination of a securitized and functional criminalization rationale for criminalization is reflected in the subsequently adopted Directive introducing the criminalization of the violation of restrictive measures under the extended legal basis of Article 83(1) TFEU.¹⁰ The recitals to the preamble to the Directive open with the statement that in order to ensure the effective application of Union restrictive measures and the integrity of the internal market within the Union and in order to achieve a high level of security within the Area of Freedom, Security and Justice (AFSJ), it is necessary to establish minimum rules concerning the definition of criminal offences and penalties for the violation of those Union restrictive measures.¹¹ The preamble further justifies criminalization directly on the grounds of achieving the Common Foreign and Security Policy (CFSP) objectives, which include safeguarding the Union's values. Recital 2 states the following:

6. Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union [2022] OJ L308/18.

7. *ibid*, Preamble, Recital 10.

8. *ibid*, Recital 12.

9. *ibid*, Recital 9.

10. Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 [2024] OJ L2024/1226.

11. *ibid*, Preamble, Recital 1.

‘Union restrictive measures, such as measures concerning the freezing of funds and economic resources, the prohibitions on making funds and economic resources available and the prohibitions on entry into or transit through the territory of a Member State, as well as sectoral economic and financial measures and arms embargoes, are an essential tool for the promotion of the objectives of the Common Foreign and Security Policy (CFSP), as set out in Article 21 of the Treaty on European Union (TEU). Those objectives include safeguarding the Union’s values, security, independence and integrity, consolidating and supporting democracy, the rule of law, human rights and the principles of international law and preserving peace, preventing conflicts and strengthening international security in accordance with the aims and principles of the United Nations Charter.’

In terms of the violation of restrictive measures, it can thus be seen how the need to defend a number of diverse European values has acted as a justification for the extension of EU competence in substantive criminal law and the introduction at EU level of the criminalization of sanctions violations. In this process, the boundaries between the CFSP and the AFSJ are being blurred, with an AFSJ legal basis being used to adopt legally-binding coercive measures that could not have been adopted under the CFSP.¹² The urgency of the war in Ukraine has led to the extension of the Union’s criminalization powers and the introduction of new criminal offences at EU level. While these developments have been justified as necessary to defend European values, they are open to challenges from the perspective of criminalization and the reach of EU criminal law. First of all, it is questionable whether the violation of what essentially constitutes administrative measures is an area of crime of equivalent seriousness to the other areas of crime listed in the second subparagraph of Article 83(1) TFEU, such as terrorism, organized crime and money laundering. Secondly, the actual criminalization outcomes that have occurred since the extension of EU competence can be critiqued from a proportionality perspective¹³ and raise the question of overcriminalization in this context. Justification of the extension of EU competence to defend EU values does not necessarily lead to high-quality criminal law.

12. See also Lorenzo Bernardini and Francesca Finelli, ‘Violation of EU Sanctions and Criminal Penalties: Proportionality at Peril?’ in Stefano Montaldo, Valsamis Mitsilegas and Lorenzo Grossio (eds), *Proportionality of Criminal Penalties in EU Law* (Hart 2025), 120. They argue that safeguarding international peace and security and upholding the EU’s values in its relations with the wider world have traditionally been objectives to be pursued under the framework of the CFSP, rather than the AFSJ.

13. *ibid.*

2.2. Hate speech and hate crime

The criminalization of hate speech and hate crime at EU level is justified on the grounds of defending a number of European values. Yet, unlike previous EU Treaties that included a specific legal basis for the criminalization of racism and xenophobia in EU law,¹⁴ the TFEU no longer includes an express legal basis for the adoption of EU substantive criminal law on hate speech and hate crime, with racism and xenophobia no longer included in the list of securitized criminalization areas of crime under Article 83(1) TFEU. To address this gap, in 2021 the European Commission proposed the extension of EU competence under Article 83(1) TFEU to add hate speech and hate crime to the list of these areas of crime.¹⁵ The Commission's Communication followed the 2020 State of the European Union address by Commission President Ursula Von der Leyen who announced that the Commission would propose to extend the list of EU crimes to all forms of hate crime and hate speech, whether because of race, religion, gender or sexuality.¹⁶ The Commission expressly linked the criminalization of hate speech and hate crime to the promotion of EU values. It was stated that:

‘Combating hate speech and hate crime is part of the Commission’s action to promote the EU’s core values and to ensure that the EU Charter of Fundamental Rights (“the Charter”) is upheld. All forms and manifestations of hatred and intolerance are incompatible with the values of respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of persons belonging to minorities, upon which the EU is founded. These values, enshrined in Article 2 of the Treaty on European Union (“TEU”), are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. [...] Hate speech and hate crime affect not only the individual victims and their communities, causing them suffering and limiting their fundamental rights and freedoms, but also society at large. Hate undermines the very foundations of our society. It weakens mutual understanding and respect for diversity on which pluralistic and democratic societies are built.’¹⁷

14. See the ensuing adoption of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55. For an analysis, see Mitsilegas, *EU Criminal Law* (n 3) chapter 2.

15. European Commission, ‘A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime’ COM (2021) 777 final.

16. *ibid.*, 1.

17. *ibid.*, 1.

The emphasis on common values is also prevalent in the Annex to the Commission Communication proposing legislation on the addition of hate speech and hate crime to the list of areas of crime under Article 83(1) TFEU.¹⁸ It is stated that hate speech and hate crime undermine the fundamental rights and values on which the Union is founded, and in particular human dignity and equality; they cause harm not only to the individual victims, but also to wider communities and society at large, including by having a chilling effect on freedom of expression; and they impede pluralism and tolerance by leading to polarization and negatively affecting public debate and democratic life.¹⁹ The preamble adds that hate speech and hate crime undermine the very foundations of a democratic and pluralistic society and the common values enshrined in Article 2 TEU.²⁰ The criminalization of hate speech and hate crime are thus being justified on the grounds of defending a wide range of European values, in view of the multidimensional harm of hate crime and hate speech to individuals and societies alike.

Yet, notwithstanding this powerful justification, the EU's competence to criminalize hate speech and hate crime under Article 83(1) TFEU has not been extended at the time of writing. This is due to the resistance of a minority of Member States, who are blocking the unanimous decision required under the Treaty to extend the securitized criminalization competence of the EU under Article 83(1) TFEU.²¹ The tabling of legislation on hate speech and hate crime does appear in the Commission's Work Programme for 2026, which frames such legislation firmly in the context of defending European values.²² Yet it is difficult to see how the unanimity hurdle required for the extension of the EU's competence will be surpassed in the near future. An alternative option for the Commission could be to accommodate legislation on hate speech and hate crime under the existing legal basis of Article 83(1) TFEU, rather than to attempt to extend the scope of this legal basis in the first instance.

As will be seen in the following section, a key technique to accommodate a values-driven EU criminal law under the existing legal basis of securitized criminalization under Article 83(1) TFEU is to refer to the existing area of

18. *ibid*, Annex, Preamble, Recital 1.

19. *ibid*, Preamble, Recital 9.

20. *ibid*, Preamble, Recital 13.

21. For a critique of such inaction, see European Parliament resolution of 18 January 2024 on extending the list of EU crimes to hate speech and hate crime [2024] OJ C/2024/5733, point U.

22. European Commission, 'Commission work programme 2026. Europe's Independence Moment' COM (2025) 870 final. See Annex III, point 100 under the heading 'Protecting our democracy, defending our values'.

‘computer crime’ as an area relevant to criminalization, at least as regards the digital or AI components of hate speech and hate crime. This option was rejected by the Commission when it tabled its proposal for the extension of EU competence, on the grounds that the partial overlap between ‘computer crime’ and hate crime and hate speech would not enable the adoption of minimum criminal law rules covering all forms of hate speech, regardless of the means used,²³ noting in particular that the computer crime legal basis would cover elements of hate speech but not necessarily hate crime.²⁴ Yet, in view of the existing politically motivated inertia as regards the extension of the list of areas of crime under Article 83(1) TFEU to expressly include hate speech and hate crime, proceeding on the basis of using computer crime as an element of the legal basis, may be a pragmatic first step towards the adoption of key legislation that defends European values.

3. Accommodating values-driven criminalization within existing legal bases

The previous section analysed efforts to introduce values-driven criminalization in EU law through the expansion of Union competence in the field of substantive criminal law. Another avenue to achieve this result is by accommodating values-driven substantive criminal law within the existing securitized and functional criminalization legal bases enshrined in Article 83(1) and (2) TFEU. The present section explores these options by focusing on both existing and potential values-driven criminalization.

3.1 Defending values through securitized criminalization

A key recent example of the introduction of values-driven criminalization through Article 83(1) TFEU has been the adoption of a Directive on gender-based violence.²⁵ The aim of the Directive to defend European values is stated from the outset, in its preamble. It is stated that:

‘Equality between women and men and non-discrimination are core values of the Union and fundamental rights enshrined, respectively, in Article 2 of the Treaty on European Union (TEU) and in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union (the “Charter”). Violence against women and domestic violence

23. *ibid*, 18.

24. *ibid*, 19.

25. Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence [2024] OJ L2024/1385.

endanger those very values and rights, undermining women and girls' rights to equality in all areas of life and hindering their equal societal and professional participation.²⁶

The Directive has introduced criminal offences to address the sexual exploitation of women and children (an area of crime included in the list of EU securitized criminalization competence under Article 83(1) TFEU). These include female genital mutilation²⁷ and forced marriage.²⁸ The Directive has been criticized for taking a narrow approach towards gender-based violence, by failing to include further criminal offences in its scope, including rape and sexual assault.²⁹ The existence of EU competence to criminalize rape under the Article 83(1) TFEU legal basis has been hotly debated and contested, including by the Council Legal Service.³⁰ Arguments on the exclusion of rape from the scope of the Directive may have centred on competence, but hidden behind the competence debate may lie legal, political and societal diversity among Member States regarding approaches to the issue and a view that EU intervention may unduly impinge on State sovereignty.

In addition to the offences of female genital mutilation and forced marriage, the Directive has introduced a number of innovative criminal offences related to cyberviolence: non-consensual sharing of intimate or manipulated material;³¹ cyber stalking;³² cyber harassment;³³ and cyber incitement to violence or hatred.³⁴ The title of the chapter introducing all criminal offences under the Directive is 'Offences concerning sexual exploitation of women and children and computer crime'. Computer crime – another area of serious crime enumerated in Article 83(1) TFEU, is thus being used as a legal basis for the adoption of gender-based violence offences with a cyber element. The preamble to the Directive states that it is necessary to provide for harmonized definitions of offences and penalties regarding certain forms of cyber violence where violence is intrinsically linked to the use of information and communication technologies, and those

26. *ibid*, Preamble, Recital 1.

27. Art 3 of Directive on combating violence against women and domestic violence (n 25).

28. *ibid*, Art 4.

29. Nina Peršak, 'Protecting the Victims of Gender-based Violence at EU Level: Sexual Integrity, Consent and the Directive on Combatting Violence against Women and Domestic Violence' (2025) *Eur J Crime Cr L Cr J*, doi: 10.1163/15718174-20250001.

30. *ibid*.

31. Art 5 of Directive on combating violence against women and domestic violence (n 25).

32. *ibid*, Art 6.

33. *ibid*, Art 7.

34. *ibid*, Art 8.

technologies are used to significantly amplify the severity of the harmful impact of the offence, thereby changing the characteristics of the offence.³⁵ It adds that the use of IT bears the risk of easy, fast and wide-spread amplification of certain forms of cyber violence with the clear risk of creating or enhancing profound and long-lasting harm to the victim.³⁶ The inclusion of these offences in the Directive has been met with a variety of reactions from commentators: it has, in principle, been welcomed by some, who also highlight the limits in the criminalization introduced by the directive,³⁷ while others have highlighted the complexity of navigating the legal landscape from the perspective of criminal law principles.³⁸ Whatever the view about the extent and scope of criminalization, the adoption of these offences at EU level is an example of legal innovation in criminal law aimed at defending European values at EU level through recourse to the computer crime component of the legal basis of Article 83(1) TFEU.

Computer crime can serve as the legal basis for the adoption of EU substantive criminal law related to AI-enabled crimes, including crimes committed through the use of deepfakes. A key instance of AI-enabled behaviour threatening European values is interference in democracy through misinformation and the spreading of fake news through deepfakes.³⁹ While the discussion on the parameters and extent of the use of criminal law to tackle AI-generated electoral interference remains open,⁴⁰ it is submitted that EU institutions should consider the adoption of legislation criminalizing interference with democratic processes, including elections, through the use of AI. Article 83(1) TFEU is an appropriate legal basis for such criminalization, designed to defend democratic values, as all the elements required

35. *ibid*, Preamble, Recital 17.

36. *ibid*, Preamble, Recital 18.

37. For background and critique of Art 5 of the Directive, see Carlotta Rigotti, Clare McGlynn and Franziska Benning, 'Image-Based Sexual Abuse and EU Law: A Critical Analysis' (2024) 25 GLJ 1472, doi: 10.1017/glj.2024.49.

38. Clementina Salvi, 'Emerging trends in criminalising (non-consensual) sexual deepfakes: challenges and perspectives from England and Wales, the US and the EU' in Gert Vermeulen, Nina Peršak and Stéphanie De Coensel (eds), *Researching the Boundaries of sexual integrity, gender violence and image-based abuse* (RIDP, Maklu 2024) 391.

39. See also Frank Zimmerman and Sophia Jorczyk, 'The Criminal Law Protection of Democracy in the Digital Age- Threats that Deepfake Technology Poses for Democracy and Possible Reactions by Means of Criminal Law' (2023) 13 EuCRL 118, 121, doi: 10.5771/2193-5505-2023-2-118. Here, they note that deepfakes have the potential to shatter the very fundament of democracy.

40. *ibid*, 129 and 131. The authors note the 'valid concerns that criminalising deepfakes could be misused to suppress dissent and criticism of those in power', adding that if individuals fear to be punished for spreading false information, they may become hesitant to share their views or engage in political discussions, even if they believe their statement to be true.

for criminalization are being met in this case. Moreover, the criminalization of interference in European elections can also be introduced under the functional criminalization legal basis of Article 83(2) TFEU. EU substantive criminal law is necessary to ensure the effective protection of a European interest *par excellence*; namely, the democratic life of the Union. The use of Article 83(2) TFEU to adopt criminal law on fraud affecting the Union's financial interests constitutes a precedent for such developments⁴¹ – in that case, EU substantive criminal law was justified as necessary to protect another European interest: the budget of the European Union.

3.2. *Defending values through functional criminalization – rethinking functional criminalization*

The criminalization of AI-generated interference is not the only instance where the functional criminalization legal basis of Article 83(2) TFEU can be used to adopt substantive criminal law aimed at defending European values. The present contribution calls for a rethinking of functional criminalization, from the current focus on individual policies such as the internal market and the environment to focusing more directly on the effective implementation of EU policies, also from the perspective of upholding European values such as the protection of fundamental rights and the rule of law. The policy area of immigration is a key example of the need for refocusing. Currently, EU immigration law is marked by a concerning rule of law deficit, with migrants being increasingly placed outside of the law with limited consideration for their fundamental rights.⁴² A key component of this rule of law deficit is the overcriminalization of migration at EU level, and in particular as regards the current EU offences involving the facilitation of unauthorized entry, transit and stay, which generate a hostile environment against migrants and those who help them.⁴³ Calls for the decriminalization of migration at EU level in order to respect the principle of effectiveness in EU law⁴⁴ were partially heeded by the Court of Justice in

41. Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29, 29–41.

42. Elspeth Guild, Valsamis Mitsilegas and Niovi Vavoula, *Lawless Borders. The Rule of Law Deficit in European Immigration Control* (Bristol University Press 2025).

43. Valsamis Mitsilegas, 'Contested Sovereignty in Preventive Border Control: Civil Society, the 'Hostile Environment' and the Rule of Law' in Mary Bosworth and Lucia Zedner (eds), *Privatising Border Control: Law at the Limits of the Sovereign State* (OUP 2022) 36.

44. Valsamis Mitsilegas, 'From Overcriminalisation to Decriminalisation. The Many Faces of Effectiveness in European Criminal Law' (2014) 5 NJECL 415, doi: 10.1177/203228441400500309.

its recent ruling in *Kinsa*, which provides an avenue for narrowing the scope of the criminalization of facilitation in EU law.⁴⁵

The present contribution argues that, in addition to decriminalization, there is a place for the EU to actually produce criminal law ensuring the effectiveness of EU law under Article 83(2) TFEU to protect the rights of migrants, and in this manner, defend the European values of fundamental rights, the rule of law and human dignity. There have been voices advocating the use of EU criminal law to enact such forms of legislation at the domestic level by establishing EU offences relating to failure to provide assistance under Article 83(2) TFEU. The EU is called to adopt legislation criminalizing failure to comply with international law of the sea, and in particular with SAR obligations.⁴⁶ Without such criminalization, and in view of the hostile environment polices generated on the high seas by EU Member States and agencies such as Frontex,⁴⁷ the effective implementation of EU policies is at risk. The adoption of EU criminal law would provide effective sanctions against actions that contravene both international law and EU law. The EU should therefore adopt a directive requiring Member States to criminalize all actions contrary to Article 98 UNCLOS.⁴⁸

The use of Article 83(2) TFEU in this context can be justified as a ‘functional criminalization’ legal basis, with criminalization being necessary to achieve the effective implementation of the Union’s transport policy. The Union’s transport policy has been central to CJEU litigation, setting rule of law limits on Member States’ imposition of heavy administrative sanctions on NGO boats conducting search and rescue operations.⁴⁹ The CJEU set limits on State arbitrariness in imposing sanctions on NGOs providing assistance at sea by interpreting EU law in conformity with international law of the sea, including the UNCLOS⁵⁰ and its provision on the duty to

45. See the ruling of the Court of Justice in Case C-460/23, *Kinsa*, EU:C:2025:392. For an analysis, see Valsamis Mitsilegas, ‘Decriminalising the Facilitation of Unauthorised Entry in EU Law. *Kinsa* as a First Step?’ (2025) 27 EJML 329, doi: 10.1163/15718166-12340204.

46. Elspeth Guild and Valsamis Mitsilegas, ‘The Duty of the EU to criminalise failure to rescue at sea’ (*EU Migration and Asylum Law Blog*, 23 December 2022) <eumigrationlaw.blog.eu/the-legal-duty-of-the-eu-to-criminalise-failure-to-rescue-at-sea/> (all websites last accessed 22 November 2025). Here, it is recommended that the EU adopts a directive requiring Member States to criminalize all action contrary to Art 98 UNCLOS.

47. Guild, Mitsilegas and Vavoula (n 42).

48. Elspeth Guild and Valsamis Mitsilegas, ‘Taking the normative foundations of EU criminal law seriously: The legal duty of the EU to criminalise failure to rescue at sea’ (2021) 27 ELJ 502, doi: 10.1111/eulj.12455.

49. Joined Cases C-14 & C-15/21, *Sea Watch eV v Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Palermo and Capitaneria di Porto di Porto Empedocle*, EU:C:2022:604.

50. *ibid*, para 96.

render assistance at sea and the related obligations of the coastal State in particular.⁵¹

An alternative approach was put forward by Di Martino, who argues in favour of the use of Article 83(1) TFEU on securitized criminalization, under the heading of ‘Corruption’, for the EU to adopt criminal law for the abuse of power in border control. Di Martino’s contribution is important in that it focuses on the criminal liability of EU public officials.⁵² Article 83(2) TFEU can be used to establish EU offences relating to hindering assistance to migrants at sea in order to ensure the effective implementation of EU immigration policy, which must be conducted in compliance with EU values including the protection of fundamental rights. In addition to a transport framing, the use of Article 83(2) TFEU can also be justified on the grounds of ensuring the effective implementation of EU immigration policy in compliance with fundamental rights and the rule of law. This includes obligations under EU asylum law, which at its core requires effective access to asylum.⁵³

4. Conclusion: Towards a values-driven EU criminal law - Parameters for a paradigm change

The question at the heart of this thematic issue is: what does Europe stand for? The present contribution has attempted to address this question by arguing that adopting EU substantive criminal law can be a powerful tool to defend and uphold European values, thus demonstrating clearly what Europe stands for both internally and externally. This contribution has presented the need for a paradigm shift in the delimitation of EU competence to define criminal offences and criminal sanctions: a shift from securitized and functional criminalization to a paradigm of values-driven criminalization.

Within this framework, this article has examined the use of criminal law to defend European values primarily from a competence perspective, critically evaluating the extent, limits and potential of the existing EU criminalization legal bases in Article 83 TFEU for the adoption of values-driven EU criminal law. It has been demonstrated that EU competence can be extended where there is political will, as per the example of the extension of EU competence to criminalize the violation of sanctions as a response to

51. *ibid*, paras 105–109.

52. Alberto di Martino, ‘Does the European Union’s Rule of Law require the Criminalisation of EU Public Officials? A First Appraisal’ (2024) 30 *ELJ* 181, doi: 10.1111/eulj.12507.

53. Mitsilegas (n 45).

the war in Ukraine in order to defend the values of international peace and security. Yet, at the same time, there is greater reticence to extend the Union's competence to adopt criminal law in order to defend values such as equality and human dignity, as demonstrated by the current impasse on the extension of Union competence to criminalize hate crime and hate speech. This contribution has further argued that EU competence for a values-driven substantive criminal law can also be found in the existing securitized and functional criminalization Treaty legal bases of Article 83(1) and (2) TFEU. It has highlighted the need to think creatively about enacting new legislation under both paragraphs to defend values that are under urgent protection, such as democracy, human dignity and the rule of law.

Once the existence of EU competence is established, the precise terms of criminalization need to be carefully considered for each individual dossier and on a case-by-case basis. There are three main issues to consider when putting forward new criminalization proposals. The first issue concerns the impact of values-driven criminalization on the protection of fundamental rights. In a paradigm shift viewing criminal law as a means to protect rather than limit rights, the impact of criminalization on competing values and rights must be carefully considered (for instance, the impact of the criminalization of hate speech and electoral interference on freedom of expression). The second issue concerns the impact of criminalization on national legal and societal diversity. Member States' reluctance to accept the existence of EU competence in certain areas may hide fears that the adoption of EU law will challenge national criminal law reflecting a domestic consensus (the criminalization of rape is a key example in this context). The third issue to be considered relates to concerns raised that values-driven criminalization may be abused by authoritarian regimes, and in particular criminalization in areas (hate speech and electoral interference) that may have a negative impact on freedom of expression and freedom of association. In all three aspects, a key safeguard against overcriminalization at EU level is the need to uphold, when adopting EU criminal law and monitoring its implementation by Member States, the very values that EU criminal law is designed to defend. These include, in particular, the protection of fundamental rights (with an emphasis on the criminal law related principles of legality and proportionality enshrined in Article 49 of the Charter) and the rule of law.