

ARTICLE

Cross-Border Police Cooperation and 'Secondary Movements'. On Reconfigurations in Enforcing Differential Mobility Rights within the Spatial-Legal Schengen Space

Monika Weissensteiner*

In the context of the so-called 'migration crisis', besides the politically more contentious introduction of border controls, on intra-European borders member states responded to onward mobilities – so-called 'secondary movements' – through border-area controls, bilateral (fast-track) readmissions and increasingly through joint patrolling of main cross-border routes. This article sets out to reflect upon the 'Schengen crisis' not by discussing the introduction of border controls, but by focusing on ordinary means of enforcement through border-area policing (Article 23 Schengen Borders Code) and through instruments of police cooperation, such as through joint patrolling or bilateral readmissions. By scrutinising the legal regimes of these instruments, plural in both scale and temporality, this article contributes to reflecting upon the productive reconfigurations in times of 'crisis' of the EU order and its enforcement.

Keywords: Schengen; cross-border police cooperation; secondary movements; Dublin system; article 23 Schengen Borders Code (SBC)

1. Introduction: Schengen anniversaries – more than a thing about the past

The European Commission celebrated the 35th anniversary of the Schengen Agreement¹ in 2020 with the announcement that most controls at internal Schengen borders, introduced to contain the spread of Covid-19, were now being lifted.² A year later, the same Commissioner for Home Affairs, pronounced that there is no 'going back' on Schengen, only a 'going forward'.³ She seemingly reworded the Commission's 'Back to Schengen Roadmap'⁴ which, in the context of the so-called 'migration crisis', had set the objective to return to a border-control-free Schengen area by the end of 2016. In the words of Commissioner Johansson: 'Together, we have learnt the lessons of past crises.'⁵ In her speech on Schengen, she named three 'past crises' posing challenges to Schengen – migration, terrorism and the pandemic – and which had one common denominator: member states' introduction of border controls. The re-introduction, maintenance and justification of such types of border measures *within* the Schengen area – a measure of *ultima ratio*

* Contract-lecturer, WS 2021–2022, Hamburg University, DE; weissensteiner.m@gmx.net

¹ Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985 ('Schengen Agreement').

² Ylva Johansson, 'Commemorating 35 years of Schengen', (COM news, Speech 12 June 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commemorating-35-years-schengen_en> [all links last accessed on 2 October 2021].

³ 'Commissioner Johansson's Plenary speech on Schengen', (COM news, Speech 6 July 2021) https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-plenary-speech-schengen_en.

⁴ European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen – A Roadmap' COM(2016) 120 final, Brussels 4.3.2016 ('Back to Schengen Roadmap').

⁵ 'Commissioner Johansson's Plenary speech on Schengen' (n3).

according to EU law – ultimately triggered debate as to whether Schengen was under attack, in crisis or crisis proof.⁶

Despite increased scholarly work reproblematising a so-called 'refugee-, migration- or Schengen-crisis' in Europe, internal Schengen borders and, in particular, police cooperation instruments used in the enforcement of differential mobility rights, have remained rather peripheral to central concerns and arguments raised in critical scholarship. This contribution aims to contribute towards filling this gap. Rather than focusing on the introduction and maintenance of internal border controls,⁷ or on new ad hoc administrative agreements for swifter Dublin readmissions,⁸ I seek to draw attention to several 'ordinary' measures of government that have increasingly been mobilised in the control of unauthorised mobilities. On intra-European borders, besides the politically more contentious introduction of border controls, member states responded to onward mobilities by means of border-area controls and bilateral administrative (fast-track) readmissions and, increasingly, through joint border-area patrolling of main cross-border routes. National border-area control under Article 23 of the Schengen Borders Code (SBC),⁹ has received some attention in legal and criminological scholarship.¹⁰ This provision of the SBC provides rules on the exercise of police powers during checks within the territory and in border areas to ensure that such policing measures do not amount to border control. However, the question of how migration governance takes place at internal Schengen borders also requires the taking into consideration of cross-border police cooperation as a means of enforcement, as well as its regulation across plural scales of government. This allows me to engage analytically with temporality: from a temporal condition of 'post-crisis', as outlined in the introduction to this *Special Issue*, to the question of temporality in relation to law and crisis. *How* does 'the past' dominate the present while, at the same time, the conditions for new things to become real are emerging? In my contribution I argue that an analysis of temporality and law provide an important feature in generating understanding of how different enforcement instruments and their regulatory regimes have been mobilised and reconfigured in response to so-called 'secondary movements'. The focus of this contribution ties in, in a timely way, with ongoing legislative developments regarding proposals initially outlined in the New Pact on Migration and Asylum¹¹ and in the EU Security Strategy 2020.¹²

In this article I interrogate the Schengen space as a spatial-legal EU order of differential mobility rights. The establishment of a Schengen area with 'freedom of movement' as core symbol – meaning the absence of border controls carried out at 'internal' borders – is deemed to be a major achievement of the European integration process.¹³ The anniversary of the Schengen Agreement and of the subsequent Schengen

⁶ E.g. Elspeth Guild and others, *Internal Border Controls in the Schengen Area: Is Schengen Crisis-Proof?* (European Parliament LIBE Committee 2016) <[www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2016\)571356](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)571356)>.

⁷ See *inter alia*: Guild and others (n6); Evelyn Brouwer and others, 'What Is Happening to the Schengen Borders?' (2015) 86 CEPS Papers <<https://www.ceps.eu/ceps-publications/what-happening-schengen-borders/>>; Sergio Carrera and others, *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016* (European Parliament LIBE Committee 2018) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604943](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604943)>.

⁸ On Germany's administrative arrangements with Portugal, Greece and Spain, see Constantin Hruschka, 'The Border Spell: Dublin Arrangements or Bilateral Agreements? Reflections on the Cooperation between Germany and Greece / Spain in the Context of Control at the German-Austrian Border' (eumigrationlawblog 26 January, 2019) <<https://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/>>; Luisa Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) 22 European Journal of Migration and Law 60 <doi.org/10.1163/15718166-12340069>.

⁹ The normative EU basis for regulating measures at internal (and external) borders is Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1 ('SBC').

¹⁰ Guild and others (n6) 16ff; Kees Groenendijk, 'New Borders behind Old Ones: Post-Schengen Controls behind the Internal Borders and inside the Netherlands and Germany' in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003); Martjie Van der Woude, 'A Patchwork of Intra-Schengen Policing: Border Games over National Identity and National Sovereignty' (2020) 24 Theoretical Criminology 110 <doi.org/10.1177%2F1362480619871615>; Martjie Van der Woude and Jelmer Brouwer, 'Illegal Junk in the Trunk: Underlying Intentions of (Cr)Immigration Controls in Schengen's Internal Border Areas' (2017) 20 New Criminal Law Review 157 <[doi: 10.1525/nclr.2017.20.1.157](https://doi.org/10.1525/nclr.2017.20.1.157)>.

¹¹ European Commission, 'Communication from the Commission on a New Pact on Migration and Asylum' COM(2020) 609 final, Brussels 23.9.2020 ('New Pact on Migration and Asylum').

¹² European Commission, 'Communication from the Commission on the EU Security Union Strategy' COM(2020) 605 final, Brussels 24.7.2020 ('EU Security Strategy 2020').

¹³ The Schengen area started as an intergovernmental agreement between five countries in 1985 and the *Schengen acquis* was incorporated into the EU legal framework through the Treaty of Amsterdam. Today it is part of the Area of Freedom, Security and Justice (AFSJ), regulated since the Treaty of Lisbon by Title V of the Treaty on the Functioning of the European Union (TFEU).

Convention (CISA)¹⁴ are also the anniversaries of so-called 'compensatory measures', which were presented as a means for compensating any 'security deficit' deemed to result from the lifting of border controls within the Schengen space.¹⁵ Amongst these measures are institutionalised cross-border police cooperation (hereinafter CBPC) – such as hot pursuit and cross-border surveillance – and the setting up of the Schengen Information System (SIS),¹⁶ as well as common rules regulating immigration and asylum. Amongst the last-mentioned¹⁷ we find the roots of the subsequent Dublin Convention and Dublin Regulation.¹⁸ As the main principle, asylum applicants are required to make a single application for international protection and criteria were established to determine which member state, out of all contracting state parties, is responsible for its assessment. The criterion of 'first entry' has been the most invoked in determining responsibility (obligation), even though it is situated at the bottom of a hierarchy of criteria. It is backed up through hard evidence of a 'hit' in the Eurodac database.¹⁹ While the geographical scope and legal foundation of the Dublin regime has changed over time, its essence remained despite demonstrated ineffectiveness and inefficiency.²⁰ The need for reform was also expressed in the 2016 Dublin IV recast proposal,²¹ in which the Commission nevertheless reaffirmed the Dublin Regulation as a 'cornerstone' of the legislative acts regulating the Common European Asylum System (CEAS). CEAS was initiated in 1999 with the aim of harmonising reception conditions and setting procedural standards as well as common criteria to grant international protection status across all member states. Its legislative components have been reviewed in several reforms.

The Dublin Regulation therewith does not grant freedom of movement to persons seeking international protection in the EU. Onward mobilities from the country of 'first entry' to other member states have been problematised as unauthorised 'secondary movements'. Additionally, in the absence of a mutual recognition of protection statuses, freedom of movement and establishment is likewise not a right automatically attributed to persons to whom a protection status is granted. Whilst it has been pointed out that asylum seekers have for years not necessarily made their application in the first country of arrival and have frequently successfully 'self-relocated',²² the response to these intra-European mobilities has notably shifted from being to some degree tolerated²³ to becoming a political priority: a type of mobility aimed to be countered through

¹⁴ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, implementing the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985 Convention, signed in Schengen on 19 June 1990, in force 1995 (CISA).

¹⁵ Malcom Anderson and others, *Policing the European Union* (Clarendon Press 1995) 131; Peter Andreas and Ethan Nadelmann, *Policing the Globe. Criminalization and Crime Control in International Relations* (Oxford University Press 2006) 179ff.

¹⁶ CISA (n14) Title III – Police and Security, Chapter 1 Police Cooperation; Title IV – The Schengen Information System.

¹⁷ CISA (n14) Title II – Abolition of checks at internal borders and movement of persons, Chapter 7 Responsibility for processing applications for asylum, replaced by the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C 154/1 ('Dublin I'). After asylum matters shifted to first pillar community competency through the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/1 (Amsterdam Treaty), in 1999 the Common European Asylum System (CEAS) was initiated through several legislative acts which were reviewed over time.

¹⁸ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 (recast) [2013] OJ L 180/31 (Dublin (III) Regulation). Dublin III replaced the 2003 Dublin (II) Regulation, which had replaced the Dublin (I) Convention of 1990 (n17).

¹⁹ The European Asylum Dactyloscopy Database contains (not only, but as an initial and primary purpose) the fingerprints of asylum applicants. The Dublin system is composed of the Dublin Regulation and the Eurodac Regulation (Reg (EU) No 603/2013).

²⁰ According to a study by Maiani, these were identified for example in the persistence of national differences in recognition and in reception conditions, a 'no choice policy' limiting collaboration, the infliction of hardship for protection seekers, as well quantitatively low transfer rates and insufficient cooperation of member states. Francesco Maiani, *The Reform of the Dublin III Regulation* (European Parliament LIBE Committee 2016). <[www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf)>; European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report* (DG Migration and Home Affairs 2015) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf>.

²¹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 (recast)' COM(2016) 270 final 2016/0133 (COD), Brussels 4.5.2016 ('Dublin IV recast proposal') 4.

²² Elspeth Guild and Sergio Carrera, 'Rethinking Asylum Distribution in the EU. Shall We Start with the Facts?' (2016) Policy Brief – Centre for European Policy Studies <<https://www.ceps.eu/publications/rethinking-asylum-distribution-eu-shall-we-start-facts>>.

²³ Campesi summarises the matter succinctly: 'The fact that the [EU border] regime was largely built on a (more or less explicit) precarious balance between central and northern EU countries on the one side, and frontline EU countries on the other side

a multiplicity of means and increasingly through punitive measures.²⁴ This is one example of how the Schengen space of 'freedom of movement' constitutes a spatial-legal EU order of differential and unequal mobility rights and obligations.

Asylum policy is deemed to mirror weaknesses of the European integration process.²⁵ The Dublin IV recast proposal was never adopted under the co-legislative procedure, due to polarised positions in the Council of the European Union especially between countries mostly situated at the EU's outward borders, which applied pressure to overcome the 'first entry rule' (calling for a greater 'burden sharing'), and other countries opposing an interpretation of 'solidarity' and 'fair responsibility sharing' (Article 80 TFEU) which underpinned proposals such as that of an emergency relocation and re-distribution scheme for asylum applicants. Such unequal mobility rights and obligations also raise questions on the enforcement of this regulation together with the enforcement of core rights for citizens and migrants. It does so even more in the context of a political 'stalemate' in the reform of the Dublin Regulation. In this context, will discuss in this article the significance of the 2017 Commission's recommendation to enhance proportionate police checks in border areas and to strengthen police cooperation, proposed as a means to also counter 'secondary movements'.²⁶

This article²⁷ proceeds as follows. I first outline the placement of bilateral police cooperation and national prerogatives on internal security within the legal framework of the 'Area of Freedom Security and Justice' (AFSJ). I then provide a brief introduction to the problematisation in scholarship and in policy of a legal 'patchwork' for cross-border police cooperation (Section 2). The main part (Section 3) describes and examines 'crisis' responses: from unilateral to bilateral enforcement instruments, and to their EU endorsement. Attention will be focused upon the regulation for administrative fast-track readmissions (3.1) and upon those of border-area patrols with a focus on joint border-area policing (3.2). Subsequently I engage with criticalities in the enforcement of the rights of EU citizens and of third country nationals in the context of enforcing unequal mobility rights through these instruments (3.3). I conclude by reflecting upon how these tools of enforcement could be allocated within different enforcement models of EU law and what this tells us about such enforcement (3.4). Section 4 elaborates in analytical terms upon the developments presented, by interrogating the role of temporality in the study of the law in the context of 'crisis'. Applied to a 'Schengen crisis' or its aftermath, how can we understand enforcements of 'the EU legal order' and challenges to integration, as well as scrutinise whether, and if so *how*, 'the past' dominates the present while at the same time the conditions for new things to become real are emerging? Following this logic, the article concludes (Section 5) with a reference to proposals on the EU legislative table.

As an analytical path, I propose to draw on anthropological scholarship in legal pluralism and to engage analytically with temporality. The article describes how in migration policing at internal borders and in cross-border police-cooperation multiple legal frameworks interact: they are plural in scale and policy fields, but also bear a particular rapport with temporality. The analysis enables the tracing of the ongoing reconfiguration of forms of power within what are understood as productive and generative effects of 'crisis': creatively combining pre-Schengen, Schengen and post-Schengen instruments. So-called 'old' and 'new' legal orders not only co-exist but also interact and are constitutive to 'the EU legal order' and its ongoing

has also resulted in serious political weakness. The latter received financial compensations and technical support for acting as EU gatekeepers, while the former tolerated a certain degree of secondary movements of migrants not properly identified and fingerprinted according to the EU rules.' Giuseppe Campesi, 'Crisis, Migration and the Consolidation of the EU Border Control Regime' (2018) 4 International Journal of Migration and Border Studies 202 <DOI:10.1504/IJMS.2018.093891>.

²⁴ Sergia Carrera and others, 'When Mobility Is Not a Choice. Problematising Asylum Seekers' Secondary Movements and Their Criminalisation in the EU' (2019) 11 CEPS Paper in Liberty and Security in Europe <<https://www.ceps.eu/wp-content/uploads/2019/12/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf>>.

²⁵ Luisa Marin and others, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 European Journal of Migration and Law 1 <<https://doi.org/10.1163/15718166-12340066>>.

²⁶ European Commission, 'Recommendation of 12.5.2017 on proportionate police checks and police cooperation in the Schengen area' C(2017) 3349 final ('Recommendation on proportionate police checks and police cooperation').

²⁷ This article draws in part on research for a concluded PhD in Cultural and Global Criminology. In this article I discuss further developments in legislation and policy and I concentrate on data from documentary sources. The original study, including data and findings from qualitative research through interviews with border-region police officers in several EU member states (2017-2019), was submitted in 2020. Monika Weissensteiner, *Policing-mobilities in the border-strip: cross-border police cooperation and viapolitics at the internal Schengen-borders of the EU Area of Freedom, Security and Justice* (2021) <doi.org/10.33540/678>. The multi-sited qualitative study on cross-border police cooperation and my participation in the joint Doctoral programme were accomplished with financial support from the EU's Education Audiovisual and Culture Executive Agency's Erasmus Mundus Scheme.

reconfiguration. In my conclusion I suggest that it could well be the call for increased EU regulated 'policing-mobilities' – such as the mobility of officers and of information – to emerge strengthened by the 'past crises' referred to in the opening of this article.

2. (Cross-border) police cooperation within the legal order of the AFSJ

2.1. The AFSJ and state prerogatives

The Lisbon Treaty established, as an objective of the EU, the maintenance and development of the EU as an Area of Freedom, Security and Justice (AFSJ) – an area in which both the free movement of persons and the prevention and combating of crime are assured. Set out in Article 3(2) of the Treaty of the European Union (TEU), this objective now precedes the traditional goal of the internal market (Article 3(3)).²⁸ The AFSJ is regulated by Title V of the Treaty on the Functioning of the European Union (TFEU),²⁹ which covers (a) policies on border checks, asylum and immigration, (b) judicial cooperation in civil matters, (c) judicial cooperation in criminal matters and (d) police cooperation. Title V, however, does not affect member state responsibility for maintenance of law and order and internal security.³⁰ This primary competency also arises in the Schengen Borders Code (SBC). Whilst establishing that 'internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out',³¹ it also specifies that: (a) member states can temporarily introduce systematic border controls as a last resort in exceptional circumstances; (b) the absence of border controls does not affect member states' exercise of police powers to conduct spot checks and identity controls in border areas (regulated by Article 23 SBC). In addition, the Court of Justice of the European Union has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a member state.³²

2.2. Cross-border police cooperation

Both the TFEU³³ and CISA³⁴ encourage bilateral police cooperation between member states, the latter in particular containing measures for countries sharing a common border through cross-border police cooperation (CBPC). Whilst informal cooperation across European border regions has been the rule rather than the exception, there has been an increased institutionalisation of CBPC, initially through bi- and multilateral agreements that often filled the initial legal void or grey area within which previous (experimental) practices had developed. In particular, the two main references for operational police cooperation in EU law today – CISA and the Prüm Decisions³⁵ – started out as intergovernmental agreements between a smaller number of contracting states and were only subsequently incorporated into EU law. Both set out that on sensitive matters (such as the attribution of executive powers beyond jurisdiction or temporal-spatial limitations in hot pursuit etc.) it is left to member states and their bilateral agreements to define the powers of cooperation in further detail. This constitutes a politically sensitive field, as formal police powers have traditionally been constrained within the borders of national territorial jurisdiction. Also within the legal order of the EU, new EU legislation on operational cooperation (and cooperation in criminal matters) follows the special legislative procedure (Article 89 TFEU).

The regulatory framework for police cooperation in Europe has frequently been described by scholars as a 'fragmented legal terrain' or 'patchwork quilt'.³⁶ Scholars who study police cooperation have analysed how

²⁸ Consolidated version of the Treaty on European Union [2012] OJ C326 (TEU): art 3(2) AFSJ, art 3(3) internal market.

²⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326: Title V arts. 67–89.

³⁰ *ibid*, art. 72.

³¹ SBC (n 9) Title III – Chapter I, art. 22.

³² TFEU, exemption clause art. 276.

³³ *ibid*, art. 73: 'Member States can organise between themselves and under their responsibility forms of co-operation and coordination'.

³⁴ CISA (n14) Title III – Police and Security, Chapter 1 Police Cooperation: mutual assistance/information exchange (art. 39; art. 46), cross-border surveillance (art. 40), hot pursuit (art. 41), seconding liaison officers (art. 47); with the specification that police cooperation in border regions can be further refined in bilateral agreements.

³⁵ Section 3.2.1. below.

³⁶ See James Sheptycki, 'Patrolling the New European (In)Security Field; Organisational Dilemmas and Operational Solutions for Policing the Internal Borders of Europe' (2001) 9 *European Journal of Crime, Criminal Law and Criminal Justice* 144 153 <<https://doi.org/10.1163/15718170120519372>>. See also in e.g. Saskia Hufnagel, 'Harmonising Police Cooperation Laws in Australia and the European Union: The Tension between Local/National and National/Supranational Interests' (2012) 44 *Australian Journal of Forensic Sciences* 45 <<https://doi.org/10.1080/00450618.2011.581249>>; Ben Bowling and Charline Kopf, 'Transnational Policing

EU legislation in the field of the AFSJ has proliferated since Lisbon, without prior laws becoming obsolete,³⁷ arguing *inter alia* that ongoing law-generation processes not only provided recognition to regional cooperation initiatives but also produced legal uncertainty and conflicts between national and EU levels.³⁸ Most executive operational aspects are carried out by member states and specifically through horizontal bi- or multi-lateral CBPC.³⁹

At the policy level, particularly within the context of the recent 'crises' problematised by the Commissioner and introduced at the beginning of this article, CBPC regulation has become a topic of debate in several settings. In 2020 the European Commission argued that, contrary to other areas of the Schengen acquis, the legal framework for law enforcement cooperation has not been consolidated. It problematised scattered and inconsistent provisions in EU legislation (CISA, the Prüm Decisions, the Swedish Framework Decision etc.) as well as plural arrangements between member states constituting a complex web on a bi- or multilateral level. This situation is deemed to hamper effective law enforcement cooperation.⁴⁰ In its inception impact assessment concerning an EU Police Cooperation Code the Commission highlighted how some bi- or multi-lateral cooperation agreements provide for more extensive powers than EU legislation.

2.3. Plural legal orders and temporality

Bridging (socio-) legal police cooperation scholarship and legal anthropology, the *analytical* understanding of what is frequently described as a 'legal patchwork quilt',⁴¹ can be enhanced by drawing on anthropological studies of legal pluralism. Legal pluralism has been proposed as an analytical framework or sensitising concept to approach the possibility that, within a geographic space or social order, different legal orders and bodies of law exist.⁴² These orders are often of different scale and interact with each other (vertically, horizontally). Legal pluralism, rather than being a merely descriptive notion and classified as 'absence' of a legal framework,⁴³ captures a multiplicity of elements that *de facto* and *de jure* constitute police cooperation. Beyond the regulation of policing, it allows the investigation of interlegality⁴⁴ across policy fields, which matters when policing inner-European border areas: such as the interaction between laws regulating (a) national policing and police cooperation, (b) international protection and (c) those regulating the 'absence' of border controls at internal borders. An analysis of legal pluralism in anthropology or legal geography frequently puts, at the centre of empirical studies, 'law-as-practice' and dynamics of negotiations of plural legal orders by various situated or 'local agents'.⁴⁵ In this article, however, I would like to delve into details of law-as-text, highlighting specifically in Section 4 how legal pluralism and interlegality are useful analytical tools to engage with law and temporality in a 'post-crisis' situation from a social science perspective.

in Europe and Its Local Effects' (2017) 3 European Police Science and Research Bulletin 47; Saskia Hufnagel, '(In)Security Crossing Borders: A Comparison of Police Cooperation within Australia and the European Union' in Saskia Hufnagel, Simon Bronitt and Clive Harfield (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives*, (Routledge [online] 2012).

³⁷ Monica den Boer, 'Towards a Governance Model of Police Cooperation in Europe: The Twist between Networks and Bureaucracies' in Frédéric Lemieux (ed), *International Police Cooperation. Emerging issues, theory and practice* (Routledge 2010) 43.

³⁸ Hufnagel (n36).

³⁹ den Boer (n37).

⁴⁰ European Commission, 'Inception Impact Assessment. EU Police Cooperation Code (PCC)' Ares(2020)5077685 – 28.09.2020, available at European Commission, 'EU police cooperation code – tackling cross-border serious & organised crime' (COM, 28.09.2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12614-EU-police-cooperation-code-tackling-cross-border-serious-&-organised-crime_en>.

⁴¹ Sheptycki and other authors (n36).

⁴² Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory, and the State' (2018) 50 Journal of Legal Pluralism and Unofficial Law <doi.org/10.1080/07329113.2018.1532674>; Sally Engle Merry, 'Global legal pluralism and the temporality of soft law' (2014) 46 Journal of Legal Pluralism and Unofficial Law.

⁴³ E.g. Monica den Boer, 'Introduction to Comparative Policing from a Legal Perspective' in (ed), *Comparative Policing from a Legal Perspective* (Edward Elgar Publishing 2018) 3.

⁴⁴ Santos Boaventura-de-Sousa referred to the interaction between legal orders of different scales which seemingly regulate the same object as 'interlegality'. Santos Boaventura-de-Sousa, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279 <doi.org/10.2307/1410186>.

⁴⁵ Nicolas Blomley, *Law, Space, and the Geographies of Power* (Guilford 1994); Anne Griffiths, 'Anthropological Perspectives on Legal Pluralism and Governance in a Transnational World' in Michael Freeman and David Napier (eds) *Law and Anthropology: Current Legal Issues* (Oxford Press 2010).

3. 'Crisis' responses: from unilateral to bilateral enforcement instruments, to their EU endorsement

The 'hotspot approach' at the EU's external borders, set out in the European Agenda on Migration in 2015,⁴⁶ was the most publicised policy response to reinforce the Dublin system within Europe. Amongst multiple aims, it aimed to increase the fingerprinting rate of persons arriving irregularly in Greece and Italy, feeding into the Eurodac database. On intra-European borders, besides the politically more contentious unilateral introduction of border control,⁴⁷ member states responded to onward mobilities through border-area controls and especially initially through bilateral fast-track readmissions. In particular, from 2014 onwards, along certain routes and border sections, border-area patrols were intensified, readmission requests peaked and CBPC was strengthened. In September 2014 the heads of several national central border police directorates met in Germany to discuss possible bi- and multi-lateral responses to the 'migration emergency'.⁴⁸ Amongst the provisional agreements also figured 'the activation of bi- or trilateral joint control mechanisms along the main traffic arteries of interest to so-called secondary movements of migrants, who from South of Europe, especially from Italy, aim to reach countries of final destination'.⁴⁹ This was more than a simple 'activation'; as, for example, stated by a police union representative in a parliamentary hearing with regard to Italian-Austrian-German patrols, the joint controls (first set up in 2000/01) in this context had undergone a change in frequency and in intensity and were carried out within a modified trajectory, namely limited to the Italian territory.⁵⁰ Joint control measures, such as trilateral joint patrols on border-crossing trains set up by Germany, Austria and Italy, as well as by Germany, Austria and Hungary on a German initiative,⁵¹ were also mentioned by the European Commission as best-practice examples in the Commission's Recommendation on proportionate police checks and police cooperation in the Schengen area.⁵²

This recommendation, issued in the context of ongoing border controls, is significant. It called for 'alternative measures' to border controls and recommended member states to shift towards and enhance proportionate police checks in border areas (regulated by Article 23 of the SBC) instead of border controls. Intensified policing of border areas was considered by the Commission to be a necessary and justified measure to counter what has been named together as three threats to 'public policy or internal security': (1) terrorism, (2) serious cross-border crime and (3) literally, 'risks of secondary movements of persons who have irregularly crossed the external borders'.⁵³ 'Secondary movements', and even the mere risk thereof, were problematised as a security threat. In addition, there was a recommendation to enhance cross-border police cooperation through joint patrolling (hence the 'best practice' examples), as well as the application of bilateral readmission agreements. In particular, what had initially been national and then intergovernmental responses to unauthorised onward mobilities, became embraced on an EU-level: deemed suitable also for enforcing EU law, namely asylum policy and in particular the rationale of the Dublin Regulation, outlined in the introduction to this article.

Following this recommendation, scholars have examined the normative implications of enhanced border-area measures with regard to Article 23 of the SBC. No scholarly attention has been given to what it means and

⁴⁶ Further under n93ff.

⁴⁷ Border control in 2015 was first carried out under art. 28 of the SBC (a situation requiring immediate action, emergency procedure, unilateral action through prior member state notification – maximum 2 months), followed by an application of art. 27 (foreseeable events, general procedure – maximum 6 months). Subsequently member states applied art. 29 (exceptional circumstances putting the overall functioning of the area without internal border control at risk as a result of persistent serious deficiencies relating to external border control as referred – maximum 2 years – dependent upon recommendation). The application of art. 29 was first recommended in May 2016 through Council Implementing Decision (EU) 2016/894, upon proposal of the Commission, which took place after the Commission stated 'serious deficiencies' in external border control on the occasion of its Schengen Evaluation visit to Greece.

⁴⁸ From Austria, Belgium, France, Germany, Italy, the Netherlands and Switzerland; in Ministero dell'Interno, *Relazione sull'attività delle forze di polizia, sullo stato dell'ordine e della sicurezza pubblica e sulla criminalità organizzata – anno 2014 – DOC. XXXVIII, N. 3 Tomo II* (Senato della Repubblica, Camera dei deputati, XVII Legislatura 2016) 24.

⁴⁹ *ibid*, emphasis added (translation).

⁵⁰ Commissione straordinaria per la tutela e la promozione dei diritti umani, *Resoconto Sommario n. 98 del 08/06/2016 – XVII Legislatura* (2016) <https://senato.it/japp/bgt/showdoc/17/SommComm/0/978446/index.html?part=doc_dc>.

⁵¹ Deutscher Bundestag, *Antwort auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Wolfgang Gehrcke, Frank Tempel, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/11218 – Polizei- und Zolleinsätze im Ausland (Stand: Viertes Quartal 2016)* (Drucksache 18/11391 2017) <<http://dipbt.bundestag.de/doc/btd/18/113/1811391.pdf>>.

⁵² Recommendation on proportionate police checks and police cooperation (n26).

⁵³ *ibid* 6.

implies when the *likewise* recommended police cooperation instruments (such as joint patrols) and bilateral readmission regimes are both enhanced and implemented for the scope of mobility control. Contrary to what some scholars suggested in the past,⁵⁴ bilateral readmission practices have not been substituted by the Dublin Regulation as an inner-European multi-lateral readmission agreement, and they have not become obsolete with the establishment of the internal market – neither in practice, nor in law.

3.1. Bilateral fast-track readmissions

In a publication on 'how police officers experience the refugee movement', an officer described fast-track readmissions across internal Schengen borders as follows: '[i]f in this job it is even possible to talk of an "experience of success", then it's those situations in which it is possible to intercept illegal immigrants quickly and to readmit them swiftly'.⁵⁵ According to statistics of the Police Directorate Tyrol – one of 9 Austrian federal *Länder* and workplace of this officer – the years 2014–2015 saw a peak in such swift returns, reaching 220–330 persons readmitted to Italy each year, before returns from Southern Germany into Tyrol following a denial of entry became more predominant.

Bilateral readmission agreements between member states that share a common border frequently contain a 'fast-track' or simplified procedure. Under specific conditions, a third country national who does not satisfy the criteria for entry or stay, can be returned within spatial-temporal limits to the neighbouring country, i.e. border region, if it is proved that the person entered from the neighbouring country and provided that several other criteria are fulfilled. A fast-track request that is denied can subsequently be resubmitted through the ordinary central channel. The simplified procedure falls under the jurisdiction of border-area police departments.

Whilst such readmissions are usually not listed amongst the instruments of cross-border police cooperation, historical as well as qualitative data of my research has shown how 'cooperation' features as a crucial and at times conflicting element between neighbouring police forces engaged in these practices.⁵⁶ Restricting my argument here to bilateral readmissions/agreements currently in force, I will outline how this instrument enabling a 'swift' return over an internal Schengen border (notably through a legally different regime from that of a denial of entry through border control) has its roots in a pre-Schengen political order and has been upheld in post-Schengen EU legislation, albeit lacking certain legal guarantees otherwise required for return procedures. Excluded from such 'swift' returns are persons registered in the Eurodac database, who fall instead under the scope of Dublin transfers. As the mobilities of asylum seekers increasingly shifted from being to some degree tolerated into becoming a political priority, fast-track readmissions gained renewed significance as a governmental measure to counteract so-called unauthorised 'secondary movements' of persons not registered in Eurodac.

3.1.1. Regulatory framework

The primary basis of this mobility control instrument is provided through bilateral agreements regulating 'the readmission of persons on [sic] the border',⁵⁷ as well as through related national law, setting for example the criteria and temporal conditions for administrative (pre-readmission) detention. Agreements between member states in force today mostly date back to the late 1990s, early 2000s, and a few to the 1960s.⁵⁸ Today, their 'anchoring' in EU law is found in Article 6(3) of the Return Directive.⁵⁹

Many of the agreements in force have notably been stipulated or renewed in the context of an envisaged *abolition* of border control throughout the Schengen area or during the enlargement processes. In 1997 the Schengen Executive Committee issued guiding principles 'for means of proof and indicative evidence within

⁵⁴ E.g. Daphné Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) 5 *European Journal of Migration and Law* 359 <doi.org/10.1163/157181603322599288>.

⁵⁵ Helmut Gufler, 'Eine Gesellschaft, die ihre Augen nicht zum Sehen verwendet, wird sie eines Tages zum Weinen verwenden', in Dobretsberger C. (ed) *An der Grenze. Wie Polizistinnen und Polizisten die Flüchtlingsbewegung erleben* (OEGB GmbH 2018) 110.

⁵⁶ It is beyond the scope of this article to engage with the genealogy of this instrument, or with qualitative fieldwork findings, see in Weissensteiner (n27).

⁵⁷ Formulation (translation) of several agreements (n64–68).

⁵⁸ Operational protocols can serve as updates, but the terms of the agreement itself remain in force. For an overview of several bilateral agreements in force and their specificities, see Weissensteiner (n 27) 335.

⁵⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 ('Return Directive').

the framework of readmission agreements between Schengen States'.⁶⁰ Readmissions were mentioned in Article 23(4) of CISA but, according to the Committee, problems persisted between signatory parties in applying readmission agreements in practice.⁶¹ The Committee aimed to ease in particular the temporal and evidentiary criteria contained as conditions for a successful readmission.⁶² Agreements stipulated in the 1990s aimed to ameliorate the conditions for successful readmissions, by setting temporal and evidentiary criteria which were easier to satisfy. They also introduced stricter time limits for fast-track readmissions, compared with those found in agreements of the 1950s and 1960s.⁶³ This practice, in interaction with border-area checks, thus became more closely related to border-crossing interceptions in the border area.

Provision is made for fast-track procedures today, for example, within 24 hours from an alleged border crossing in the Italian-Austrian agreement,⁶⁴ 4 days in the German-Austrian agreement,⁶⁵ 4 hours in the French-Spanish agreement,⁶⁶ and 24 hours or an interception within 10 kilometres in the Italian-Slovenian agreement.⁶⁷ Here we see (a) existing differences in the bilateral regulatory framework for these practices and (b) the strict time frame, indicating a relation to an irregular border crossing rather than to an irregular stay. A proposal to further regulate and 'harmonise' internal European readmission agreements, was part of the (never adopted) broader Finnish Initiative in 1999-2000.⁶⁸

The Return Directive⁶⁹ notably replaced the provisions of Articles 23 and 24 of CISA. It aimed to set 'common standards and procedures in Member States for returning illegally staying third-country nationals'. An explicit reference to bilateral readmission agreements between member states is contained in Article 6 (return decisions), namely as one of the 'exceptions' under which member states may refrain from issuing a return decision: 'if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive' (Article 6(3)).

In the 2018 Commission's proposal for a Return Directive recast,⁷⁰ Article 6(3) was maintained. Within the co-legislative procedure, amendments were only proposed in terms of inserting the exact date: bilateral agreements in force prior to January 2009 are set to remain valid. Additionally, in the Commission's recommendation to enhance border-area policing, member states were advised that a 'proper' and 'efficient' application of the bilateral readmission agreements in accordance with Article 6(3) of the Return Directive

⁶⁰ Decision of the Executive Committee of 15 December 1997 on the guiding principles for means of proof and indicative evidence within the framework of readmission agreements between Schengen States (SCH/Com-ex (97) 39 rev.). The Schengen acquis [2000], OJ L 239/188.

⁶¹ *ibid*, Preamble.

⁶² E.g. time limit within which a request for readmission could be made and had to be responded to; the proofs that could be presented as evidence that the concerned third-country national had entered and been present for some time in the neighbouring country. See also Lehnguth and others *Rückführung und Rückübernahme: Die Rückübernahmeabkommen der Bundesrepublik Deutschland: Textsammlung mit Einführung und Erläuterungen* (Schulz 1998).

⁶³ For example, if we consider bilateral agreements of Germany stipulated in the 1960s and still in force today: the Danish-German agreement contains a clause for fast-track readmissions (within 7 days), as does the German-Benelux agreement (1 month), as opposed to the 6 months' time frame for making an ordinary readmission request. In both agreements, it needed to be proved that the person had entered from the neighbouring country and had spent 2 weeks there before. German bilateral agreements in force, see Bundesministerium des Innern für Bau und Heimat, *Abkommen zur Erleichterung der Rückkehr ausreisepflichtiger Ausländer. Stand Februar 2020* (2020) <www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/rueckkehrfluechtlinge.pdf?__blob=publicationFile&v=3>.

⁶⁴ Abkommen zwischen der Bundesregierung der Republik Österreich und der Regierung der Italienischen Republik über die Übernahme von Personen an der Grenze / Accordo tra il Governo Federale della Repubblica d'Austria e il Governo della Repubblica Italiana sulla riammissione delle persone alla frontiera, zu Wien, am 7. Oktober 1997 (BGBl. III – Nr. 160).

⁶⁵ Abkommen zwischen der Bundesregierung der Republik Österreich und der Regierung der Bundesrepublik Deutschland über die Rückübernahme von Personen an der Grenze (Rückübernahmeabkommen) (BGBl. III Nr. 19/1998).

⁶⁶ Acuerdo entre la República Francesa y el Reino de España sobre la readmisión de personas en situación irregular, hecho 'ad referendum' en Málaga el 26 de noviembre de 2002 (BOE núm.309).

⁶⁷ Accordo bilaterale fra il Governo della Repubblica Italiana e il Governo della Repubblica di Slovenia sulla riammissione delle persone alla frontiera, firmato a Roma il 3 settembre 1996.

⁶⁸ Council Initiative of the Republic of Finland with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals (1999/C 353/05) [1999] OJ C 353/6. Despite several meetings of the Council's Working Party on Migration and Expulsion, which took place between October 1999 and January 2000, in the end the proposal was not adopted. According to the Presidency it would have impacted existing bilateral agreements on readmission between Schengen members.

⁶⁹ Return Directive 2008/115/EC (n59).

⁷⁰ European Commission, 'Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)' COM(2018) 634 final, Brussels 12.9.2018.

would be 'instrumental in addressing secondary movements of illegally staying third-country nationals'.⁷¹ They are in practice also applied to counter irregular entries, not only stays, especially in the case of simplified fast-track readmission procedures following interceptions in the border area. As such, they interact with border-area police checks, regulated by Article 23 SBC which, in particular, cannot have border control as an objective. Mobile police patrols in border areas are a governmental technology which emerged within the neo-functionalist reasoning of 'compensatory measures' that accompanied the process of abolishing border control amongst Schengen members.⁷²

3.2. Joint patrols and border area control Article 23 SBC

In the context of increased Eurodac fingerprinting through the 'hotspot approach', fast-track readmissions have become less applicable to counter 'secondary movements', since persons have increasingly been registered in Eurodac and consequently, if intercepted in another country than that of registration, such person falls under the scope of Dublin transfers. It is in such a context that the deployment of joint patrols along exit routes should also be placed, tasked to impact (momentarily) on attempted onward mobilities before a person crosses the border into another EU member state. For the purpose of this contribution, I will concentrate on one specific form of joint patrols and their relation to Article 23 of the SBC, namely joint patrols set up along exit routes, set up – just as with the trilateral patrols mentioned above – with the explicit purpose of countering onward mobilities. According to a European Migration Network survey,⁷³ police checks carried out in border areas adjacent to internal Schengen borders are measures put in place by countries both for the purpose of crime control⁷⁴ and, in particular, for immigration-related checks.⁷⁵ This survey should be read in connection with the Commission's Recommendation on proportionate police checks and police cooperation in the Schengen area,⁷⁶ which recommended intensifying proportionate police checks in border areas and strengthening CBPC. In the course of 2014-2015 one can identify a tendency of member states to draw further on joint border-area patrolling experiences which were identified amongst the best practices outlined by the Commission in 2017. These included joint patrols along international railways connecting member states of so-called 'first arrival' and central EU member states.

3.2.1. Regulatory frameworks

The primary legal basis for joint patrols is found in the bilateral police cooperation agreements between the participating parties. Joint patrolling was not part of the Schengen instruments, but it emerged out of an additional initial multilateral convention outside the EU framework, namely the Prüm Convention (2005),⁷⁷ most of which was incorporated into EU law through the Prüm Decisions (2008).⁷⁸ While the Prüm Decisions are mostly known for regulating enhanced information exchange possibilities, Chapter 5 of Council Decision 2008/615/JHA covers 'other forms of cooperation', amongst which joint patrols feature as one type of joint operation. Legal aspects of relevance for operational police cooperation are the competencies and executive powers given to officers operating on another country's territory, as well as the use of equipment (such as weapons or vehicles) and the liability of officers. Depending on the cooperating partners, there are differences in the powers given bilaterally. The granting of executive powers to another

⁷¹ Recommendation on proportionate police checks and police cooperation (n26) point 19.

⁷² Anderson and others (n15).

⁷³ European Migration Network, *EMN Ad-Hoc Query on Intra-Schengen Border Monitoring and Border Control. Requested by NL EMN NCP on 4th June 2018* (2018) <https://ec.europa.eu/home-affairs/document/download/e2afd19f-fe4e-4599-845e-914d534ae899_en>. Responses from: Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovak Republic, Slovenia, Sweden, United Kingdom, Norway (20 in total).

⁷⁴ Austria, Belgium, Czech Republic, Germany, Estonia, Italy, Lithuania, Poland, Portugal, Slovenia, Slovakia, Sweden; in EMN, 'OPEN Summary of EMN Ad-Hoc Query No. 2018.1303 Intra-Schengen border monitoring and border control' (NL EMN NCP 30.11.2018) 2. See also EMN (n73).

⁷⁵ Austria, Belgium, Germany, Estonia, Finland, Hungary, Italy, Lithuania, Luxembourg, Latvia, Netherlands, Norway, Poland, Portugal, Slovakia, Sweden; in EMN (n74).

⁷⁶ Recommendation on proportionate police checks and police cooperation (n26).

⁷⁷ Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the Stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed by the contracting parties in Prüm (Germany) on 27 May 2005 ['Prüm Convention'].

⁷⁸ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L 210/1; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L 210/12 ['Prüm Decisions'].

country's police force either by (a) conferring executive powers of the hosting state and, in particular, by (b) allowing the carrying out of executive functions as attributed by the sending state represents a very sensitive topic, also expressed through the explicit reference to national legislation.⁷⁹ In addition, when carried out in border areas, joint patrols also interact with Article 23 SBC and the increased juridification of border-area policing, such as through interpretations of judgments of the Court of Justice of the European Union.

Following up on the European Commission's 'Back to Schengen Roadmap'⁸⁰ and the 2017 Recommendation to enhance police controls in border areas and police cooperation, the recommended instruments became the topic of an 'orientation debate' within the Committee on Operational Cooperation (COSI) of the Council and were followed up by three meetings of the Law Enforcement Working Party (LEWP) of the Council. Member states were asked to outline their existing cooperation experiences and their legal base as well as being asked to respond to the question whether these instruments 'may constitute alternatives to temporary reintroductions of controls at internal borders'.⁸¹ It is here that we find roots within the 'Schengen crisis' in which the enhancement of the current legal framework for police cooperation (mostly regulated through bilateral agreements in detail) emerged. In the concluding document, legal fragmentation was highlighted and it was argued that a 'more predictable regime' could be aimed for, 'where agreements on cross-border police cooperation are multilateral rather than bilateral, and possibly based on harmonized EU instruments rather than local agreements'.⁸² Enhanced possibilities were welcomed, albeit not necessarily as alternatives to border control.

3.3 Reinforcement of differential freedom of movement and impacts on rights of EU citizens, persons with immigration status or seeking international protection

Whilst overall the search for 'alternatives' to border control is presented as a means to save the (economic) Schengen area and to guarantee the effective exercise of mobility rights, these measures, when applied to counter unauthorised mobilities, can impact on the enforcement of other rights of EU citizens and of third country nationals. (1) The Return Directive set procedural safeguards (decision in writing, effective remedy to appeal, etc.). The fast-track procedure, provided for in readmission agreements between member states that share a common border, does not provide for such safeguards *within* the terms of the bilateral agreements. In addition, when Article 6(3) is applied, the procedures continue to fall under the scope of the Directive.⁸³ Whilst fast-track readmissions have seldom been subject to academic analysis, in specific cases legal scholars and in particular legal advocacy groups have highlighted a breach of the right to legal assistance and judicial advice, and the related possibility of information, defence and appeal.⁸⁴ (2) According to the Return Directive, a bilateral readmission to another member state is followed up by the receiving country issuing an eventual return decision. However, it has also been argued that the Directive *per se* does not preclude the possibility of so-called 'chain readmissions', i.e. the receiving country in turn readmitting a person to another country from which the person had entered.⁸⁵ Chain readmissions, thus leading to the fast-track removal of a person across multiple countries, have more frequently been addressed by legal advocacy or in court, not least since chain readmission can potentially lead to a comparatively swift removal of a third-country national across the external EU border. (3) For readmissions under the Dublin regime, the jurisprudence of the European Court of Human Rights has set certain limitations by suspending

⁷⁹ Art. 17(2) Prüm Decision 2008/615/JHA: member states may '(...) confer executive powers on the seconding Member States' officers involved in joint operations or, in so far as the host Member State's law permits, allow the seconding Member States' officers to exercise their executive powers in accordance with the seconding Member State's law. Such executive powers may be exercised only under the guidance and, as a rule, in the presence of officers from the host Member State. The seconding Member States' officers shall be subject to the host Member State's national law.'

⁸⁰ Back to Schengen Roadmap (n4).

⁸¹ Council EU, 'Commission Recommendation on proportionate police checks and police cooperation in the Schengen area – follow-up to the orientation debate in COSI on 20 June 2017' (11839/17), Brussels 6.9.2017, 4.

⁸² Council EU 'Commission Recommendation on proportionate police checks and police cooperation in the Schengen area – follow-up to the orientation debate in COSI on 20 June 2017' (11839/2/17 REV 2), Brussels 22.9.2017, 4.

⁸³ Case C-47/15 *Affum* [2015] ECLI:EU:C:2016:408, para 86. See in Pistoia E, 'Il Muro Invisibile Ma Impervio di Ventimiglia' (2018) 3 *federalismi. rivista di diritto pubblico, comparato, europeo* 2 <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=35657&content=&content_author=>.

⁸⁴ Case study on Spain-France: Iker Barbero, 'La Readmisión de Extranjeros en Situación Irregular entre Estados Miembros: Consecuencias Empírico-Jurídicas de la Gestión Policial de las Fronteras Internas (2017) 36 CEFD – Cuadernos Electrónicos de Filosofía del Derecho 1 <doi.org/10.7203/CEFD.36.10640>.

⁸⁵ Kolber I and others, *Recht auf Streife bei der Bundespolizei: die Wichtigsten Eingriffsnormen nach BPolG, AufenthG Und StPO* (2019) 5th ed Richard Boorberg Verlag.

temporarily 'Dublin transfers' of asylum seekers back to Greece⁸⁶ and of vulnerable asylum seekers to Italy.⁸⁷ Such considerations are outside the scope of fast-track readmissions (concerning persons not registered in Eurodac), even if these readmissions have been applied as a means to counter onward mobilities of persons aiming to make an asylum application in another country than that of first arrival. (4) Bilateral readmission agreements uphold the right to asylum and persons who make an asylum application can not be returned through such a readmission. This requires safeguards for the right to make an asylum application, even more so within the criticalities pointed out by legal advocates referred to under point (1). (5) Beyond these criticalities in regulation, both governmental sources and NGO reports have drawn attention to practices carried out outside the terms of bilateral readmission agreements, e.g. in the form of unilateral push-backs, group readmissions or a reluctance to consider individual cases and the situation of minors or vulnerable persons. (6) Readmissions are directly related to border-area controls, which are broader in scope and in effect. While the absence of border controls does not affect member states' exercise of police powers to conduct spot-checks and identity controls in border areas (regulated by Article 23 of the SBC), by definition, spot-checks in border areas cannot have 'border control as an objective' and are to be executed in a 'manner clearly distinct from systematic checks' (ibid). However, controls along exit routes aim to intervene not after the fact but on a future reality. By aiming to prevent or 'cancel out' a potential unauthorised border-crossing, the border control objective is clear. Also, following the interpretation of the Court of Justice of the European Union, 'spot checks' need to be targeted and, when combined with targeting an 'immigration' offence, need to be based on police information and carried out selectively.⁸⁸ This puts citizens and migrants perceived to be immigrants – in what is a 'spot[and]check' – in a position of systematic targeting within the selection criteria, less able to be guaranteed not only freedom of mobility, but what is increasingly associated and confused in meaning: 'speedy' mobility.⁸⁹ 7) Lastly and remarkably, it is the very European Commission, a key actor in the Schengen Evaluation and Monitoring Mechanism (responsible for monitoring compliance with the SBC) which is advising member states to make (intensified) use of their policing powers in border areas for the explicit goal of countering *inter alia* unauthorised 'secondary movements'.

3.4 Regulation and enforcement – asylum and police cooperation

3.4.1. Regimes for enforcing EU law

The editorial of a previous special edition of the *Utrecht Law Review*, engaging in discussions on mixed regulation and enforcement regimes in the EU, pinpointed three main levels of enforcement.⁹⁰ (1) Traditionally, enforcement of EU law has been the responsibility of national authorities and national supervisory authorities, with the clear influence of European law (e.g. national implementation and enforcement of EU law). Additionally, other trends have emerged: (2) the creation of networks of national authorities, aiming to coordinate and harmonise enforcement, by exerting (informal) influence on each other's; (3) an increasing shift not only from national enforcement to networks, but towards European enforcement through European supervisory authorities, with binding (or non-binding) powers.⁹¹ Focusing on enforcement in different policy fields – from the financial to the environmental sector – so-called Europeanisation (see point (3)) has, for example, been analysed in the banking sector, where powers were transferred from the national to the European level through the creation of the European Central Bank. In the politically sensitive field of the AFSJ, EU agencies have gained an increasing role: whilst their operational activities are strongly linked with law enforcement on a national level,⁹² it has been argued that asylum policy has also been increasingly enforced through such a 'verticalisation of enforcement'.⁹³ In scholarly

⁸⁶ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.

⁸⁷ *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014.

⁸⁸ According to preliminary rulings of the Court, border-area checks can include objectives of targeting illegal immigration and unauthorised residency, but border-area checks (territorial scope) aimed at detecting irregular immigration (objective pursued) were deemed evidence in need of a clear and precise legal framework of limitations. See in particular: C-9/16 A [2017] EU:C:2017:483, paras. 40, 59, 62; C-278/12 PPU *Adil* [2012] EU:C:2012:508 para. 75.

⁸⁹ Dider Bigo, 'Freedom and Speed in Enlarged Borderzones' in Vicky Squire (ed) *The Contested Politics of Mobility. Borderzones and Irregularity* (Routledge 2010).

⁹⁰ Madeleine de Cock Buning and others, 'Regulation and Enforcement in the EU: Regimes, Strategies and Styles' (2014) 10 (5) *Utrecht Law Review* 1 <doi.org/10.18352/ulr.297>.

⁹¹ ibid 5-6.

⁹² Michiel Luchtman and John Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10(5) *Utrecht Law Review* 132 <doi.org/10.18352/ulr.305>.

⁹³ Salvatore Nicolosi, 'In search for an Enforcement Strategy for the Common European Asylum System' (2020) *Renforce-blog* <<http://blog.renforce.eu/index.php/en/2020/07/01/in-search-for-an-enforcement-strategy-for-the-common-european-asylum-system-2/>>.

studies of policing, EU agencies such as Europol or Frontex have been categorised as a form of 'vertical integration', opposed to 'horizontal integration' through bilateral cooperation.

3.4.2. Enforcement during the 'migration crisis'

When considered in the context of the so-called 'migration crisis' of 2015, the hotspot approach⁹⁴ was considered to be a measure that 'Europeanised'⁹⁵ the responses of Greece and Italy in dealing with arrivals at the EU's external borders. According to the Commission, it aimed to provide a 'platform for the agencies [seconded personnel of Europol, EASO, Frontex/EBGA, Eurojust] to intervene, rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders'.⁹⁶ The deployment of seconded EU Agency personnel aimed to increase the fingerprinting rate and support subsequent measures, ranging from swift returns (Frontex) to enabling relocation (EASO). Registration and Dublin responsibilities remained those of the first EU country of arrival (except for relocated persons, the overall number of whom was small compared with the initial goals of the relocation programme). These measures, in which the objects of control were not just arriving migrants but also member states which had refrained from fingerprinting,⁹⁷ followed the 'indirect enforcement' through prior infringement procedures issued by the Commission against Italy and Greece (and Croatia).⁹⁸

At internal borders, besides the unilateral introduction of border control, we have seen a combination of national measures (border-area policing) and potential bilateral readmission of persons not registered in Eurodac, and on some borders a shift towards joint rather than mono-national patrolling of routes through bilateral police cooperation, also along exit routes and thus able to target and to impact additionally on the movement of persons already registered in Eurodac. Whilst EU Agencies have acquired competencies in the field of monitoring 'secondary movements', operational enforcement at internal borders has so far been carried out through intergovernmental coordination, in particular through bilateral police cooperation. This modality of enforcement may well be considered under the second modality of the 'networked' enforcement type described by de Cock Buning and others⁹⁹ as a means of exerting (informal) influence between cooperating partners (see point 3.4.1.), e.g. in readmissions or including through auxiliary (and not executive) functions in joint activities. However, talking broadly about inter-governmental or networked cooperation misses the detail, namely that, in practice, enforcement takes place in a decentralised way through the daily interaction between police officers working at the regional and local level. Considered within the political-historical context in which governments have been unable to find an agreement on the reform of the Dublin System, negotiating the enforcement of this controversial EU law is placed on the daily practices of those whom I have called 'street-level diplomats in uniform'.¹⁰⁰

What is thereby enforced is not only national immigration control, but also the EU Dublin regime. Whilst multiple measures have been adopted on the EU level, such as those outlined *inter alia* in the EU Agenda on Migration or in the New Pact on Migration and Asylum, one can identify not only an entanglement of enforcement regimes but also the predominance of bilateral cooperation at internal borders and its subsequent endorsement on the EU level. Whilst not leading yet to increased vertical integration, horizontal cooperation has been reinforced. As we will see in the concluding Section 5, the heterogeneity of CBPC in regulation and practice on a bilateral or multilateral level has been subsequently identified as a field in need of further EU regulation. Prior to outlining ongoing and upcoming reform proposals, it will be necessary to turn analytical attention to temporality, law and crisis.

⁹⁴ Initiated through the Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration' COM(2015) 240 final 2015, Brussels 13.05.2015 ('European Agenda on Migration').

⁹⁵ Elsbeth Guild and others, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece* (European Parliament LIBE Committee' 2017) <[www.ceps.eu/wp-content/uploads/2017/03/pe_583_132_en_All\(1\).pdf](http://www.ceps.eu/wp-content/uploads/2017/03/pe_583_132_en_All(1).pdf)>.

⁹⁶ Council of the European Union, 'Note: Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, Letter to Ministers' Brussels, 15 July 2015 10962/15 Annex II 'Explanatory note on the "hotspot" approach' <<http://data.consilium.europa.eu/doc/document/ST-10962-2015-INIT/en/pdf>>.

⁹⁷ Giuseppe Campesi, 'Crisis, migration and the consolidation of the EU border control regime' (2018) 4(3) *International Journal of Migration and Border Studies* 211 <<https://doi.org/10.1504/IJMS.2018.093891>>.

⁹⁸ European Commission, 'Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings' (2015) press-release IP/15/6276, Brussels 10.12.2015 <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6276>.

⁹⁹ Madeleine de Cock Buning and others (n90).

¹⁰⁰ Weissensteiner (n27).

4. 'Post-crisis' and temporality in plural legal orders

The editors of this *Special Issue* invited critical reflection upon 'post-crisis' as a specific temporality condition, in which 'what is past is not left behind', but – as argued by Wendy Brown – conditions, even dominates, a present that nevertheless also breaks in some way with this past.¹⁰¹ Prior to concluding, I would like to reflect upon temporality as analytics in the study of the law in the context of 'crisis', in an approach that moves beyond the notion of a state of exception and the power to suspend the law. Applied to a so-called 'Schengen crisis' or its aftermath, how can we understand enforcements of 'the EU legal order' and challenges to integration, as well as scrutinise whether, and if so *how*, 'the past' dominates the present while at the same time conditions for new things to become real are emerging?

Before engaging with these questions, let us briefly revisit Brown's argument in her publication *Walled States, Waning Sovereignty*.¹⁰² In that publication she proposed reading the increase of nation-state walling post-1989 as a symptom of eroding sovereignty and as theatrical performance. She spoke of a *post-Westphalian* order, where *walling states* is not a response to other states' actions, but to transnational non-state movements contributing to eroding sovereignty without, however, walling losing in importance as a *state* response to anxieties about such erosion. When addressing the introduction of internal border controls in 2015, Josipovic¹⁰³ precisely drew on Brown to highlight the performative aspect of these measures, in a context where matters such as the control of internal Schengen borders are being regulated on a supranational level. However, the discursively connected crisis of the Schengen regime was one of a *post-Westphalian* political order in which borders have come to be problematised in scholarship as 'post-national', 'bio-political', 'networked'. It would, however, be wrong to assume, that the 'crisis' of introducing border controls at internal borders constituted a clear return to a pre-Schengen re-nationalised legal ordering of the EU space, epitomised by the geo-political border.

Attentive to space and time in the study of plural legal orders, von Benda-Beckmann and von Benda-Beckmann argued that 'phases in which new spaces are fading in are typically characterised by the co-existence of the old legal order and an emerging new regulatory regime'.¹⁰⁴ In the previous sections we saw how in migration policing at internal borders multiple legal frameworks interact. They are plural in scale and policy field and bear a particular rapport to temporality. 'Old' and 'new' legal orders not only co-exist, but interact and are constitutive to 'the EU legal order' and its ongoing reconfiguration. Fast-track readmission practices operate under the so-called 'normality' frame of 'ordinary' border work, although they have emerged in processes that preceded the creation of Schengen and of the AFSJ. Joint patrols are a post-Schengen instrument (in EU law). Both bilateral instruments have been mobilised not only to counter irregular migration, but also to enforce EU asylum law. However, the practices embody, actualise, and perform different manifestations of borders and understandings of sovereignty. Fast-track readmissions ('old' legal order), joint patrolling and hot pursuit ('new' orders) are practised at the same time, in the same space, and often by the very same officers. 'The past' shapes the present conditions of possibilities (such as bilateral readmissions being kept alive in law), while contemporaneously the conditions for new things to become real are emerging. Here we see instances of the constant experimentation, repair-work and adjustments of government whereby, through crisis, novel constellations of power and governance may emerge.

5. Conclusion

The focus of this contribution ties in with ongoing legislative developments regarding proposals initially outlined in the New Pact on Migration and Asylum¹⁰⁵ and in the EU Security Strategy 2020.¹⁰⁶ Several upcoming legislative proposals are indicative of how the 'Schengen crisis' was seemingly a generative force to enhance further the enforcement tools of EU law, including through bilateral means.

¹⁰¹ Wendy Brown, *Walled States, Waning Sovereignty* (Princeton University Press, 2010); Veronika Nagy and Salvatore F. Nicolosi, 'Mobility in a European Post-Crisis Scenario: Law-Making Dynamics and Law-Enforcement Challenges' (2021) 17 *Utrecht Law Review* (editorial to this *Special Issue*).

¹⁰² Brown (n101).

¹⁰³ Ivan Josipovic, 'Border politics in Austria: beyond imageries of Nation-State sovereignty' (2019) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/05/border-politics>>.

¹⁰⁴ Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 'Places That Come and Go. A Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders' in Irus Braverman and others (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014) 39.

¹⁰⁵ New Pact on Migration and Asylum (n11).

¹⁰⁶ EU Security Union Strategy 2020 (n12).

The New Pact on Migration and Asylum presented by the European Commission in 2020 reiterated that alternatives to internal border controls are to be found in police checks and it was argued that bilateral readmission agreements between member states could be more effectively implemented.¹⁰⁷ Whilst the explicit aim to 'discourage abuse and prevent secondary movements of applicants within the EU'¹⁰⁸ runs through the whole 2016 CEAS reform proposal and beyond, in the New Pact on Migration and Asylum we see an extension of movements to be targeted. 'Secondary movements' has been exchanged with the formulation 'unauthorised movements, both of asylum seekers and of migrants who should be returned'.¹⁰⁹ This broadens the scope of (targeting) mobilities deemed to put the smooth functioning of Schengen at risk.

Initial discussions on the reform of the SBC showed consistency across EU stakeholders, including the Parliament, all advocating for an enhancement of border-area measures and police cooperation. In addition, in the co-legislative procedure of the Return Directive recasts so far, Article 6(3) has been kept alive, which maintains bilateral readmission mechanisms in force prior to 2009 and anchors them – and thus fast-track procedures lacking certain legal guarantees – through inter-textuality in EU law. The New Pact, however, moves towards a stronger focus on removal of persons outside and not within the EU. The Commission's recommendation and the embracing of intensified border-area measures across most EU stakeholders is a *quid pro quo* not irrelevant to the objective of securing the political form of a 'Union': potentially reducing the exercise of member state prerogatives through border controls at internal Schengen borders by, in turn, amplifying prerogatives of national border-area policing powers.

Finally, regulation of CBPC has also emerged as a target for a new proposal, namely the proposal (expected at the end of 2021)¹¹⁰ for a new EU Police Cooperation Code, introduced as an objective in the EU Security Strategy 2020. Its explicit aim is to further streamline and enhance instruments for more efficient cooperation, particularly against serious and organised crime and terrorism. However, as shown in this article, this renewed call for enhanced cooperation has its roots in debates regarding enhanced cooperation in the search for alternatives to temporary border controls and as a mean for mobility control.

In this contribution I drew analytical attention to the temporalities and plurality of legal orders within Schengen and analysed 'ordinary' means of enforcement beyond the contentious measures of border controls at internal Schengen borders. We saw how different enforcement instruments and their regulatory regimes have been mobilised – such as bilateral fast-track readmissions – and reconfigured – as in joint patrolling – in response to unauthorised mobilities. What had initially been national and then intergovernmental responses to unauthorised onward mobilities, became embraced on an EU level. Border-areas and CBPC are deemed a suitable scale also for enforcing EU law, namely asylum policy and the rationale of the Dublin Regulation. Returning to the opening reference: with no intention to go backwards there are mobilities and respective regulation of enforcement mechanisms that might exit strengthened the various 'past crises' identified by Commissioner Johansson in her 2021 Plenary speech on Schengen,¹¹¹ namely 'policing-mobilities'¹¹²; the 'increased mobility of national law enforcement agencies across member states'.¹¹³ Tracing ongoing reconfigurations of forms of power and of legal orders sheds light on the productive and generative effects of 'crisis'.

Competing Interests

The author has no competing interests to declare.

¹⁰⁷ New Pact on Migration and Asylum (n11).

¹⁰⁸ Dublin IV recast proposal (n21) 4.

¹⁰⁹ New Pact on Migration and Asylum (n11) 14.

¹¹⁰ Post-submission note: on 8.12.2021 the Commission presented a legislative package on the EU Police Cooperation Code composed by three proposals.

¹¹¹ COM news (n3).

¹¹² Weissensteiner (n27).

¹¹³ European Commission, 'EU police cooperation code – tackling cross-border serious & organised crime' (2021) <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12614-EU-police-cooperation/public-consultation_en>.

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