

# ARTICLES

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## (In)Effectiveness of Criminal Sanctions as Regards Irregular Immigrants

### *Abstract*

The article discusses whether criminal sanctions are the more effective tool to deal with breaches of national substantive immigration rules regulating the conditions of entry and stay of third-country nationals and to achieve the objectives of the EU migration policy in relation to irregularly entering or staying third-country nationals. To that purpose, the article first defines the concept of effectiveness and scrutinises the compatibility of national laws criminalising the irregular entry and stay of third-country nationals with EU law and then examines whether the use of criminal law to sanction irregular migrants is justified in light of the main theories of punishment and of the general principles of criminal law: deterrence theory, social stigma argument, harm principle, desert theory and proportionality of punishment. These theories and principles governing EU criminal law have been selected because of their significance in the development of present criminal justice policies at the EU level in the field of irregular migration. Drawing on the relevant criminal and criminological research, as well as on the literature on enforcement, and considering that increasing punitive measures has frequently failed to reduce recidivism, the article therefore seeks to answer the question whether criminal sanctions are the more effective tool to achieve the objectives of the EU migration policy in relation to irregularly entering or staying third-country nationals.

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## I. Introduction

Over the past decades, and particularly following the terrorist attacks of 11 September 2001 in the United States and the recent attacks in Europe, migration and security concerns have become intertwined with policy frameworks to combat terrorism and, consequently, a more restrictive legislation and an extensive use of criminal law in punishing irregular immigrants has been adopted in numerous Member States. In this context, specific concerns have arisen over the growing intersection between criminal law and migration management across Europe, which has serious ramifications for the protection of fundamental rights.

In an attempt to control increasing migration flows and avoid breaches of sovereignty, a clear trend has emerged in national immigration laws of numerous EU Member States: criminalisation of irregular entry and stay by third-country nationals.<sup>1</sup>

In turn, although EU law does not explicitly treat irregular entry and stay *per se* as a criminal offence, the EU legislator has adopted numerous instruments dealing with criminalisation of irregular migration. Such criminalisation, particularly aimed at criminalising actions of individuals directly or indirectly connected with irregular migrants, is the result of a broader process of “securitisation of migration”<sup>2</sup> in which irregular immigration is viewed as a security threat.

The ultimate aim pursued by the existing EU legislation concerning irregular migration is the same as that which the Member States’ legislations seek to achieve: force irregular immigrants to leave the territory of the Member State which they entered or where they stay irregularly. Therefore, despite the difference of means employed – criminalisation of irregular entry and stay of migrants themselves, establishment of criminal sanctions for the violation of return instructions at the national level, administrative detention and criminalisation of those who facilitate the entry or stay of irregu-

1 Research funded by the European Union Agency for Fundamental Rights (hereinafter the “FRA”) showed (*FRA*, Criminalisation of migrants in an irregular situation and of persons engaging with them, 2014) that “legislation in all but three EU Member States punishes irregular entry with sanctions in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state. Legislation in 17 Member States punishes irregular entry with imprisonment and/or a fine. Eight Member States punish it with a fine only, although in aggravated circumstances the punishment may still be imprisonment.” Similarly, the “legislation in 25 EU Member States punish irregular stay, with 10 applying a fine and and/or imprisonment and 15 a fine only.” In the remaining Member States, such acts are either considered administrative offences or crime only under certain conditions (this is the case, for instance, in the Netherlands). In this regard, see *Leerkes, Broeders*, A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention, *British Journal of Criminology* 2010, p. 830 et seq. On the criminalisation of irregular migrants in the EU countries, see also *A. Aliverti*, Criminal Immigration law and human rights in Europe, in: *S. Pickering/J. Ham* (eds.), *The Routledge Handbook on Crime and International Migration*, 2015, p. 215 et seq.

2 This expression is used by *V. Mitsilegas*, who particularly distinguishes between “criminalisation as securitisation” and “criminalisation as privatisation”. See *V. Mitsilegas*, *The Criminalisation of Migration in Europe, Challenges for Human Rights and the Rule of Law*, 2015, p. 47 et seq.

lar immigrants at the European level – the objective of both the EU and the national regulation is the same: the most effective removal from the EU territory of third-country nationals entering or staying there irregularly.<sup>3</sup>

However, despite the prevalence of criminal legislation in this area, relatively few of these offences are punished by the courts. Numerous of immigration-related crimes are neither prosecuted nor punished because usually the preferable solution is to administratively remove rather than to criminally prosecute the offenders. In such a situation, the number of cases prosecuted and the selectiveness of prosecutions as well as the correlation between prosecutions, convictions and enforcement of convictions would seem to decrease the institutional legitimacy of the use of criminal sanctions in dealing with immigration-related offences. The main reason is that both at the EU and at the national level, criminal law is used in an instrumental fashion, which conceives of criminalisation as an additional tool to achieve the main objective of removing irregular immigrants from the territory of the State. In this regard, it is contentious whether it is legitimate to use criminal sanctions, which should be used as a last resort, for such a purpose. It is also doubtful whether the use of criminal law is effective in achieving the objective of removing irregularly entering or staying third-country nationals from the EU territory.

The ECJ stated in several recent judgments<sup>4</sup> that detention of immigrants resulting from national criminal prosecution is incompatible with EU law, in particular with the Returns Directive<sup>5</sup>, as far as it is able to jeopardise the achievement of the objectives pursued by the Directive, thus depriving it of its effectiveness. Thus, the ECJ in these judgments interpreted the notion of effectiveness as a limit to criminalisation of irregular entry and stay of third-country nationals under national law and assessed the tenuous link between detention and achievement of the objective of the Returns Directive, namely, the establishment of an effective policy of removal and repatriation of irregularly entering or staying third-country nationals.

It is in this context that the article aims to ascertain whether criminal sanctions are the more effective tool to deal with breaches of national substantive immigration rules regulating the conditions of entry and stay of third-country nationals and to achieve the objectives of the EU migration policy in relation to irregularly entering or staying

3 See Section II.1, and particularly footnote 17, for an overview of the relevant EU legislation from which we deduce that the main objectives of the EU policy in respect of irregular immigrants are, before their entry, to prevent them from entering the EU territory, and, when they are staying irregularly on the EU territory, to remove them.

4 See *European Court of Justice (ECJ) 28.4.2011, case C-61/11 PPU (Hassen El Dridi, alias Karim Soufi)*, [2011] para. 33; *European Court of Justice (ECJ)*, 6.12.2011, case C-329/11 (*Alexandre Achughbaban v. Préfet du Val-de-Marne*), [2011]; *European Court of Justice (ECJ)*, 19.9.2013, case C-297/12 (*Gjoko Filev, Adnan Osmani*), [2013]; *European Court of Justice (ECJ)*, 6.12.2012, case C-430/11 (*Md Sagor*), [2012]; *European Court of Justice (ECJ)*, 30.9.2009, case C-357/09 PPU (*Said Shamilovich Kadzoev (Huchbarov)*), [2009]. For an in-depth analysis, see *V. Mitsilegas* (fn. 2).

5 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 (hereinafter “Returns Directive”), OJ L 348, 24.12.2008.

third-country nationals. Provided that the objectives of the EU policy in respect of irregularly entering or staying third-country nationals are, before their entry, to prevent them from entering the EU territory, and, when they are staying irregularly on the EU territory, to remove them, the article aims to assess whether criminal sanctions are the more effective tool in contributing to achieving the objective of removing third-country nationals irregularly entering or staying on the EU territory.

To that end, the article is divided into two sections. In the first section the concept of effectiveness for the purposes of the analysis is defined and a brief account of the EU legal framework established by the Returns Directive on immigration detention, as well as of the jurisprudence of the ECJ on the relationship between detention of irregular migrants, respect of fundamental rights and effective implementation of the EU legislation is given. In this context, the notion of irregular immigrants relevant for the purposes of the analysis is discussed as well.

The second section assesses whether criminal sanctions are the more appropriate tool to enforce immigration rules and to achieve an efficient system of immigration control. To that end, the main arguments which support the adoption of criminal penalties in respect of irregular immigrants at the national level are examined and it is scrutinised whether the use of criminal law is justified in the light of the main theories of punishment.

Finally, the findings of the analysis are summarised in the conclusion.

## *II. First section. Effectiveness of criminal sanctions in ensuring the enforcement of EU migration law.*

### II.1 Definition of effectiveness.

In order to ascertain whether criminal sanctions are the more effective tool to deal with violations of migration law it is, in the first place, necessary to determine what is meant by effectiveness for the purposes of this analysis. A delimitation of the notion of effectiveness is particularly important considering the multifaceted nature of this concept.

For our purposes,<sup>6</sup> the concept of effectiveness of EU criminal law is given the same meaning as that given to it by AG Kokott in the *Berlusconi* judgment<sup>7</sup> and by the ECJ in the *Environmental Crime*<sup>8</sup> and *Ship-Pollution* cases.<sup>9</sup>

AG Kokott, determining when criminal sanctions have to be considered “effective”, argued that “rules laying down penalties are effective where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for (and, therefore, to attain the objectives pursued by Community law).”<sup>10</sup> Besides, in the opinion of AG Kokott, the concept of effectiveness is strictly connected and to a certain extent overlapping with the criterion of dissuasiveness.<sup>11</sup> The AG furthermore affirms that a penalty is effective and dissuasive when it is proportional, that is to say when it is “appropriate for attaining the legitimate objectives pursued by it, and also necessary.”<sup>12</sup> This definition of effectiveness, according to which to be effective a sanction should be suitable to achieve the desired Union policy objectives, is consistent with the approach of the Commission<sup>13</sup> and with the interpretation which has been given by the ECJ to the concept of “effective implementation”

- 6 Neither the general concept of “effectiveness” nor of “effective enforcement” will be scrutinised in this article. The analysis is focused on the concept of effectiveness of criminal law applicable to the enforcement of EU migration law. For an in-depth analysis of the concept of effectiveness of EU criminal law, see *E. Herlin-Karnell, The Constitutional Dimension of European Criminal Law, 2012* and the articles in *New Journal of European Criminal Law (NJECL), Vol. 5, Issue 3, 2014*.
- 7 Opinion of AG Kokott, 14.10.2004, in joined cases C-387/02, C-391/02 and C-403/02 (*Berlusconi and others*), [2004] paras. 88 et seq.
- 8 *European Court of Justice (ECJ) 13.9.2005, case C-176/03 (Commission/Council)*, [2005] ECR I-7879.
- 9 *European Court of Justice (ECJ) 23.10.2007, case C-440/05 (Commission/Council)*, [2007] ECR I-09097. That jurisprudence was ultimately codified in article 83(2) TFEU.
- 10 Opinion of AG Kokott, *Berlusconi and others* (fn. 7) para. 88 et seq. In her Opinion, the AG underlines in a footnote that in the view of AG Van Gerven (Opinion of AG Van Gerven in case C-326/88 (*Hansen*), [1990] ECR I-2911, para. 8), “effective” means, “amongst other things, that the Member States must endeavour to attain and implement the objectives of the relevant provisions of Community law”.
- 11 In the opinion of AG Kokott, a penalty is dissuasive “where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him.” See Opinion of AG Kokott, *Berlusconi and others* (fn. 7), para. 89.
- 12 As explained in the Opinion, in practise, that means that “where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous.” See Opinion of AG Kokott, *Berlusconi and others* (fn. 7), para. 90.
- 13 The Commission affirmed that “effectiveness requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules”. See the “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Towards an EU Criminal Policy, Ensuring the effective implementation of EU policies through criminal law””, COM (2011) 573 final p. 9; “Commission Staff Working Paper, Impact Assessment, Accompanying Document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Reinforcing sanctioning regimes in the financial services sector””, SEC(2010) 1496 final, p. 11.

in the *Environmental Crime* and *Ship-Source Pollution* cases. In these judgements, the Court affirmed that the EU legislator can adopt criminal sanctions if they are necessary to ensure effective implementation of EU rules and if they are needed to attain the objectives of the given EU policy.<sup>14</sup>

On the basis of the foregoing considerations, it is therefore argued that criminal law is considered effective in the implementation of Union policies if it “can contribute to achieve the Union objectives in the policy area concerned and contribute to the enforcement of the underlying Union rules.”<sup>15</sup> If this definition of effectiveness of criminal law is accepted, criminal sanctions must not be employed to sanction irregularly entering or staying third-country nationals unless the following condition is fulfilled: it must be demonstrated that criminal law is effective in contributing to achieving the objectives of the EU migration policy in relation to irregularly entering or staying third-country nationals.

In this regard, a first reading of the relevant EU provisions shows that the main objective of the EU migration policy is to protect European external borders.<sup>16</sup> In particular, the objectives of the EU policy in respect of irregular third-country nationals are, before their entry, to prevent irregular migrants from entering into the EU territory, and, when they are staying irregularly on the EU territory, to remove them.<sup>17</sup>

14 *ECJ, Commission/Council* (fn. 8) 7879, paras. 48-50 and *ECJ, Commission/Council* (fn. 9) 9097, paras. 68-69.

15 These words are of *J. Öberg*, Do we really need criminal sanctions for the enforcement of EU law, *NJECL* 2014, p. 370 et seq.

16 See articles 3(2) TEU, and 77(1)(b)(c) and (2)(b)(d) TFEU.

17 See article 79(1)(2) TFEU. About the rights to be granted in the event of removal, expulsion or extradition, see article 19 of the EU Charter of Fundamental Rights (CFR). Article 79(1) TFEU describes irregular migration as a threat which should be eradicated. Irregular migration is labelled “illegal migration”, thus giving it a criminal connotation and tying it with trafficking in human beings as a criminal activity to combat. In this context, linguistic dimension is important as it entails consequences in the public perception of irregular migrants as criminals. See on this point, *E. Guild*, Who is an Irregular Migrant?, in: B. Bogusz, R. Cholewinski, A. Cygan, Ę. Szyszak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, 2004. Among the EU secondary acts and non-binding instruments adopted at the EU level to deal with irregular migration, see the Returns Directive, the Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28.3.2014 COM(2014) 199 final; 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, 13.5.2015, COM(2015) 240 final; Communication from the Commission to the European Parliament and the Council, On a more effective Return Policy in the European Union – A Renewed Action Plan, 2.3.2017 COM(2017) 200 final; the Return Handbook, the first version of which was adopted in October 2015 (C(2015) 6250). The current version, revised in 2017, builds upon the Commission Recommendation of 7.3.2017 (C(2017) 1600 final) and “features additional guidance to national authorities on how the rules of the Return Directive be used to improve the effectiveness of the return systems, while ensuring full observance of fundamental rights” (p. 5). See Annex to the Commission Recommendation establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks, 27.9.2017 C(2017) 6505, ANNEX 1.

It should therefore be assessed whether criminal sanctions are effective in contributing to achieving the objective of removing third-country nationals irregularly entering or staying on the EU territory. In the event that criminal sanctions are shown to be ineffective in achieving the objectives pursued at the EU and national level, there is no need to demonstrate that other alternative measures are as effective as custodial sanctions in the enforcement of migration laws. If criminal penalties are ineffective, there is no term of comparison. In that case, according to the principle of *ultima ratio* of criminal law, other types of less intrusive measures should be adopted instead of the criminal ones. Before proceeding with the abovementioned scrutiny, it is nevertheless necessary to define the terms of the analysis. In the first instance, the definition of the expression “irregular immigrants” should be given.

## II.2 Definition of the scope of the analysis. Definition of the expression “criminalisation of irregular immigrants”.

The definition of the term “irregular immigrant” is necessary to circumscribe the scope of the analysis. For our purposes, only the conduct of those immigrants who irregularly enter or stay on the EU territory is of relevance.<sup>18</sup> Thus, as far as terminology is concerned, in this article the expression “irregular immigrants” is given the same meaning as that similarly adopted in the Returns Directive: “third-country nationals staying illegally on the territory of a Member State”.<sup>19</sup> According to the Returns Directive, a “third-country national” is “any person who is not a citizen of the Union [...] and who is not a person enjoying the Community right of free movement, [...]”.<sup>20</sup> In turn, is considered “illegally staying” such a third-country national presents on the territory of a Member State “who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State”.<sup>21</sup> In addition to the entry conditions set down in articles 5 and 6 of the Schengen Borders Code,<sup>22</sup> third-country nationals who

18 For a description of the multiple “paths into irregularity”, see *F. Düvell*, Paths into Irregularity: The Legal and Political Construction of Irregular Migration, *European Journal of Migration and Law (EJML)* 2011, p. 275 et seq.; *E. Guild* (fn. 17), p. 3 et seq.

19 Articles 1 and 2 of the Returns Directive. Article 2 defines the scope of the Directive and prescribes that it “applies to third-country nationals staying illegally on the territory of a Member State”.

20 Article 3(1) of the Returns Directive.

21 Article 3(2) of the Returns Directive. This definition is compatible with the definition given in the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, 28.11.2002 OJ L 328/17 (“Facilitation Directive”), which prescribes punishment for “any person who intentionally assists a *person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens*”. Article 1 of the Facilitation Directive.

22 Articles 5 and 6 of the 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), 23.3.2016, OJ L 77/1. On the evolution of the leg-

want to cross the border of a given Member State should respect national provisions on immigration, which may vary from one State to another.<sup>23</sup> “Irregular immigrant” thus assumes various meanings according to the different national administrative provisions concerning immigration.<sup>24</sup>

Immigrants may become irregular because of a multitude of situations; they may be irregular from the moment when they enter the country or from a later point in time. They become irregular the moment they enter the EU territory, if they enter without prior authorisation, without valid travel document, without visa or without sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin, while they may become irregular later, if they overstay their visas or if they do not return to their country of origin after their asylum application has been rejected or after a return decision has been issued.

The term “criminalisation” is given a correlative meaning; it is thus understood in a narrow sense as including the use of criminal law to sanction the conduct of irregularly entering or staying third-country nationals. This article will therefore not analyse the use of criminal tools such as surveillance and preventive measures which are used in the immigration enforcement strategy to prevent migrants from reaching the EU territory,<sup>25</sup> nor will it examine the EU legislation aimed at criminalising actions of individuals directly or indirectly connected with irregular migrants. Thus, neither the measures adopted at the EU level to criminalise human trafficking and human smuggling,<sup>26</sup> nor the EU legislation which imposes criminal sanctions on carriers and employers of

isolation on the entry conditions at the EU level, see *H. Oosterom-Staples*, Has Europeanization Silenced Criticism on Intergovernmental External Border Cooperation?; *R. Cholewinski*, The EU *Acquis* on Irregular Migration Ten Years On: Still Reinforcing Security at the Expenses of Rights?; *D. Acosta Arcarazo*, The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The adoption of Directive 2008/115: the Returns Directive), all in: E. Guild/P. Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, 2012, respectively p. 95 et seq.; p. 127 et seq.; p. 179 et seq.

23 Article 3(2) of the Returns Directive and article 1 of the Facilitation Directive.

24 The Clandestino research project highlighted that, as a result, there are divergent definitions in different Member States. The report refers particularly to the different definitions given in the UK, France, Italy, Germany, The Netherlands, Austria, Spain, Greece, Czech Republic, Slovakia and Poland. See CLANDESTINO Project, “Undocumented migration: Counting the Uncountable? Data and Trends across Europe”, 2009, <[http://irregular-migration.net/ty-po3\\_upload/groups/31/4.Background\\_Information/4.2.Policy\\_Briefs\\_EN/ComparativePolicyBrief\\_SizeOfIrregularMigration\\_Clandestino\\_Nov09\\_2.pdf](http://irregular-migration.net/ty-po3_upload/groups/31/4.Background_Information/4.2.Policy_Briefs_EN/ComparativePolicyBrief_SizeOfIrregularMigration_Clandestino_Nov09_2.pdf)>, accessed November 2017, p. 119 et seq.

25 See, for a detailed analysis of these instruments, *V. Mitsilegas* (fn. 2), pp. 5-44.

26 The relevant legal framework comprises, as far as criminalisation of human trafficking is concerned, the Directive on Trafficking in Human Beings (Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 5.4.2011 OJ L101/1) and the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, 6.4.2004 OJ L 261. With regards to the criminalisation of human smuggling, have been adopted at the EU level the Facilitation Directive

irregular migrants are analysed.<sup>27</sup> Instead, the EU legal framework resulting from the Returns Directive and the case law of the ECJ in this field are briefly analysed in order to assess whether national provisions criminalising the irregular entry and stay of third-country nationals are consistent with EU law. In this regard, the Returns Directive as interpreted by the ECJ is central in placing Member States' detention power under precise limits and in requiring the existence of a link between detention and prospect of removal; in this context, it is particularly the concept of effectiveness which plays an important role in limiting the national power to criminalise the irregular entry or stay of third-country nationals.

### II.3 Compatibility with EU law of national criminal provisions criminalising the irregular entry and stay of third-country nationals.

The EU legislation and the jurisprudence of the ECJ are not analysed in depth, since that is not necessary for the purposes of the present analysis and there is already detailed and remarkable literature on this topic.<sup>28</sup> A brief overview of the EU legal framework and the jurisprudence of the ECJ in respect of the Returns Directive is nevertheless necessary to correctly understand the limits that the Returns Directive, and in general EU law, places on domestic criminal law provisions criminalising the irregular entry and stay of third-country nationals.

The Returns Directive harmonises national provisions on immigration enforcement, establishing “common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.”<sup>29</sup> In this regard, although the setting out of common standards and procedures aimed at removing irregular immigrants

2002/90/EC of 28 November 2002 and Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, 5.12.2002 OJ L 328, which requires the transgressors of the Facilitation Directive to be punished by means of criminal penalties.

- 27 As regards the carriers liability, see Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, 10.7.2001 OJ L187/45 and the Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [2004] 6.8.2004 OJ L 261/24. About the criminalisation of employers of irregular migrants, the instrument of relevance is Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (“the Employer Sanctions Directive”), 30.6.2009 OJ L 168.
- 28 See, *V. Mitsilegas* (fn. 2); *V. Mitsilegas*, *Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive*, in: M.J. Guia, *V. Mitsilegas*, R. Koulis (eds.), *Immigration Detention, Risk and Human Rights*, 2016, p. 25 et seq.; *V. Mitsilegas*, *The Changing Landscape of the Criminalisation of Migration in Europe. The Protective Function of European Union Law*, in: M. Guia, M. Van der Woude and J. Van der Leun (eds.), *Social Control and Justice. Crimmigration in an Age of Fear*, 2012, p. 87 et seq.;
- 29 Article 1 of the Returns Directive.

from the EU territory and, under certain conditions, also directed at detaining them, has contributed to the criminalisation of immigration-related offences at the EU level, the Returns Directive has also acted as a limit, at the national level, to criminalisation of irregular entry and stay as such.<sup>30</sup>

The ineffectiveness of detention in achieving the objective of removing irregularly entering or staying third-country nationals and the consequent incompatibility of such a national criminal law with EU law has been in fact stated by the ECJ in several occasions.<sup>31</sup> In particular, according to the restrictive interpretation given by the ECJ to the coercive measures provided for by the Returns Directive,<sup>32</sup> Member States may not apply stricter standards than those established by the Directive, being only allowed to adopt or maintain provisions which are more favourable to the immigrant, but nevertheless compatible with the Directive.<sup>33</sup> Furthermore, the successive stages of the procedure for returning irregularly entering or staying third-country nationals set out in the Returns Directive should be respected and cannot be derogated from by Member States. According to this procedure, Member States have, firstly, an obligation to issue a return decision in respect of any third-country national entering or staying irregularly on their territory, and secondly, are obliged to give priority, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision.<sup>34</sup> It is only in particular circumstances that, “in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.”<sup>35</sup> The ECJ has furthermore remarked that Member States must carry out the removal “using the least coercive measures possible” and that it is only where, “in the light of an assessment of each specific situation”, the enforcement of the return decision “risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.”<sup>36</sup> In any case, the deprivation of liberty itself must respect the conditions set out in the Returns Directive and should respect the principle of proportionality, being for as short a period as possible and being

30 See in this sense, *V. Mitsilegas* (2016)(fn. 28), pp. 26-29.

31 See *ECJ, Alexandre Achughbabian v. Préfet du Val-de-Marne* (fn. 4). See also *ECJ, Gjoko Filev, Adnan Osmani* (fn. 4); *ECJ, Md Sagor* (fn. 4); *ECJ, Said Shamilovich Kadzoev (Huchbarov)* (fn. 4). For an in-depth analysis, see *V. Mitsilegas* (fn. 2), p. 57 et seq.; *V. Mitsilegas* (2016) (fn. 28), p. 25 et seq. From a slightly different perspective, see *ECJ, 1.10.2015, case C-290/14 (Skerdjan Celaj)*, [2015].

32 *V. Mitsilegas* was the first to refer to “a restrictive interpretation” of the coercive provisions of the Returns Directive. See *V. Mitsilegas* (fn. 2), p. 61.

33 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 33.

34 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), paras. 35-36.

35 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 38.

36 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 39.

maintained as long as removal arrangements are in progress and executed with due diligence.<sup>37</sup>

It is in the light of those considerations that the ECJ assessed in different occasions whether the rules introduced by the Returns Directive preclude national legislation criminalising the irregular entry and stay as such of third-country nationals.<sup>38</sup> In this regard, in *El Dridi* the ECJ affirmed a principle, which has been reiterated in later judgments,<sup>39</sup> according to which, although “Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States’ territory”,<sup>40</sup> national criminal legislation should comply with EU law.<sup>41</sup> Thus, in order to respect the principles of effectiveness and loyal cooperation, Member States cannot apply rules, even criminal ones, which are able to jeopardise the achievement of the objectives pursued by the directive, thus depriving it of its effectiveness.<sup>42</sup> In application of these principles to the specific case before it, the ECJ considered that Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal, provide for a custodial sentence “on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after the order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.”<sup>43</sup> The reason is that such a custodial sentence risks jeopardising the achievement of the objective pursued by the Returns Directive delaying the enforcement of the return decision by *de facto* preventing irregular immigrants from returning to their country of origin.<sup>44</sup> In this regard, the objectives of the directive are frustrated since irregular immigrants, instead of being removed from the receiving country will spend more time on its territory, albeit in prison. In the light of *El Dridi* judgment, the Returns Directive plays therefore a “protective role for the affected migrants”,<sup>45</sup> as it “has the potential of bringing the full effect of European Union law on a wide range of Member States’ choices to criminalise migration, with domestic criminal law being

37 Article 15 of the Returns Directive. *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), paras. 40-41.

38 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 44.

39 *ECJ, Alexandre Achughbajian v. Préfet du Val-de-Marne* (fn. 4). See also *ECJ, Gjoko Filev, Adnan Osmani* (fn. 4); *ECJ, Md Sagor* (fn. 4); *ECJ, Said Shamilovich Kadzoev (Huchbarov)* (fn. 4). For an in-depth analysis, see *V. Mitsilegas* (fn. 2), p. 57 et seq.; *V. Mitsilegas* (2016) (fn. 28), p. 25 et seq. From a slightly different perspective, see *ECJ, Skerdjan Celaj* (fn. 31).

40 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), paras. 52-53. The ECJ highlighted that Member States are free to adopt national criminal provisions in the area of illegal immigration and illegal stays only in case that the procedure set out in the Returns Directive has not led to the expected result, namely, the removal of the third-country national against whom the return decision was issued (para. 52).

41 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 54.

42 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), paras. 55-56.

43 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 58. Emphasis added.

44 *ECJ, Hassen El Dridi, alias Karim Soufi* (fn. 4), para. 59.

45 *V. Mitsilegas* (fn. 2), p. 65.

subject to an assessment in the light of EU law when all aspects of the return of third-country nationals come into play”.<sup>46</sup>

The *El Dridi* reasoning has been reiterated by the ECJ in later judgments in respect of different forms of criminalisation of irregular entry or stay of third-country nationals. The Court particularly reiterated the *El Dridi* ruling in case of criminalisation of irregular stay of third-country nationals *per se*,<sup>47</sup> in case of alternative forms of criminalisation, such as “the imposition of fines which may be replaced by an expulsion order or home detention”,<sup>48</sup> and in case of irregular entry by a third-country national following the imposition of an entry ban of unlimited duration.<sup>49</sup>

An in-depth analysis of the cases mentioned is beyond the scope of this article and therefore it is not addressed. However, some remarks are useful to understand the scope of application of the jurisprudence of the Court. In the *Achughbabian* case the Court extended the *El Dridi* ruling that Member States’ criminal legislation cannot jeopardise the achievement of the objectives of the Returns Directive, thus depriving it of its effectiveness, to any national provisions whose ultimate aim is the removal of an irregular third-country national.<sup>50</sup> According to this reasoning, the Court thus applied the *El Dridi* reasoning to the case at issue which concerned the criminalisation of the irregular stay of a third-country national on the EU territory as such. Following such a reasoning of the Court it is therefore “very unlikely that criminalisation at national level (in particular the criminalisation of irregular entry or stay) can be viewed independently from the returns Directive”<sup>51</sup>. In fact, as “is clear from *Achughbabian*, the criminalisation of irregular entry or stay cannot be an aim in itself but is ultimately linked to the objective of the return of the third-country national affected – thus bringing into play the application of EU law”.<sup>52</sup> Furthermore, in the *Filev* and *Osmani* case, the Court assessed the compatibility with EU law, and particularly with the Returns Directive, of national provisions criminalising the breach of an entry ban imposed on a third-country national. In this case, the Court, applying the reasoning in *El Dridi* to a case of irregular entry into the EU territory, ruled that the Returns Directive must be intended as precluding “breach of an entry and residence ban in the territory of a Member State [...] from giving rise to a criminal sanction, unless that national constitutes a serious threat to public order, public security or national security”.<sup>53</sup> Thus, in this judgment the ruling of the Court in *El Dridi* has been reiterated in respect of national provisions aimed at criminalise the irregular entry of third-country nationals.

The application by the ECJ of the reasoning in *El Dridi* in different cases concerning different conduct of irregular stay and entry of third-country nationals on the EU ter-

46 *V. Mitsilegas* (fn. 2), p. 65.

47 *ECJ, Alexandre Achughbabian v. Préfet du Val-de-Marne* (fn. 4).

48 *ECJ, Md Sagor* (fn. 4).

49 *ECJ, Gjoko Filev, Adnan Osmani* (fn. 4).

50 *ECJ, Alexandre Achughbabian v. Préfet du Val-de-Marne* (fn. 4), para 35 et seq.

51 *V. Mitsilegas* (fn. 2), p. 70.

52 *V. Mitsilegas* (fn. 2), p. 70.

53 *ECJ, Gjoko Filev, Adnan Osmani* (fn. 4), para. 45.

ritory proves that, according to the jurisprudence of the ECJ, the use of criminal sanctions by the national legislator in respect of irregularly entering or staying third-country nationals is not justified by compliance with EU law and, on the contrary, it has been deemed to jeopardise the achievement of the objectives and, therefore, the effectiveness of EU law.

Provided that the criminalisation of the irregular entry and stay of third-country nationals is, at least in the cases examined by the ECJ, incompatible with ensuring the effective implementation of the objectives of the EU migration policy in relation to irregularly entering or staying third-country nationals, it is necessary to assess whether criminal provisions are, at least at the national level, an effective tool to ensure the achievement of the objective of removing irregular immigrants. In this regard, if they are proved to be ineffective in the light of the main theories of punishment and if there is no rationale behind them, the use of them should be considered illegitimate and not justified.

### *III. Second Section. Rationale for the use of criminal sanctions to remove irregularly staying third-country nationals.*

The aim of this section is to ascertain whether the adoption of criminal law to enforce national provisions prescribing the conditions of entry and stay of third-country nationals is justified. This is particularly important if we consider that “criminal liability is the strongest formal condemnation that society can inflict”,<sup>54</sup> and it may also result in the most intrusive means of enforcement at the state's disposal, *i.e.*, imprisonment, which deprives the offender of one of the most important human rights, individual liberty.<sup>55</sup> That is one of the reasons why criminal law may be used only as a means of last resort, when other measures have proved insufficient to protect the fundamental interest protected by law.<sup>56</sup> The use of criminal sanctions should be justified even because the State, when imposing criminal sanctions, does censure the conduct of individuals, which is not the case when the State equally limits individual liberty in other circumstances, such as when it levies taxes and thus deprives taxpayers of a part of their in-

54 A. Ashworth, *Principles of Criminal Law*, 2003, p. 2.

55 The right to individual liberty and security is enshrined in article 5 of the European Convention of Human Rights (hereinafter the “ECHR”) and in article 6 of the European Charter of Fundamental Rights (hereinafter the “CFR”). There is a huge amount of literature, which is mainly focused on the justification of punishment. See, *ex multis*, HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 1968, in which Hart elaborates the general justifying aim of the criminal justice system as well as the justification of punishment.

56 About the principle of *ultima ratio* at the EU level, see S. Melander, *Ultima ratio in European Criminal Law*, *European Criminal Law Review (EuCLR)* 2013, p. 45 et seq. and the “Manifesto on European Criminal Policy”, *European Criminal Policy Initiative, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)* 2009 <[www.zis-online.com](http://www.zis-online.com)> and <<http://www.crimpol.eu>>.

come. Through the imposition of criminal sanctions, the State imposes an official censure and that censure “requires a clear justification”.<sup>57</sup>

The justification for punishment has been scrutinised by the main theories of punishment, which aim to determine the function of criminal law and the rationale justifying the adoption of criminal sanctions. In the absence of a justification, if criminal punishment aims only to fulfil a symbolic function,<sup>58</sup> it loses its empirical legitimacy, namely the perception of those governed that the authority asserted is legitimate and that the laws are just.<sup>59</sup> This results in a high risk that the criminalised conduct will no longer be perceived as a crime by the society.

In the author’s opinion, this risk is actually materialising in respect of criminalisation of entry or stay of third-country nationals. The reason is that the use of criminal law and, in particular, of imprisonment to sanction irregular immigrants is deemed to be unjustified in the context of the main theories of punishment.

### III.1 Deterrence theory

The deterring nature of criminal sanctions is the strongest argument in favour of the criminalisation of the conduct of irregularly entering and staying third-country nationals. It is submitted that criminal sanctions have the capacity to deter more than any other sanctions because of their harsher nature. Thus, if deterrence is considered as “the avoidance of criminal acts through fear of punishment”,<sup>60</sup> then, at least theoretic-

57 *Ashworth* (fn. 53), p. 2.

58 About the symbolic function of criminal law, see *T. Elholm, R. Colson*, The Symbolic Purpose of EU Criminal Law, in: R. Colson/S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity, Legal Cultures in the Area of Freedom, Security and Justice*, 2016, p. 48 et seq.

59 About the difference between empirical and normative legitimacy, see *M. Hough, M. Sato*, Report on compliance with the law: how normative and instrumental compliance interact, Research project in the framework of FIDUCIA Deliverable 5.1, in: S. Maffei, L. Markopoulou (eds.), *New European crimes and trust-based policy*, Vol. 2, 2014, p. 8. About the concept of legitimacy of criminal law, see also *N. Peršak* (ed.), *Legitimacy and Trust in Criminal Law, Policy and Justice Norms, Procedures, Outcomes*, 2014.

60 See *Von Hirsch, A., A.E. Bottoms, E. Burney, P.O. Wikström*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, 1999. The theory of deterrence referred to in the text is general deterrence, theorised by Jeremy Bentham, which is different from specific deterrence. General deterrence theory pursues the objective of preventing the public at large from committing the crime. The punishment of the offender is considered as an example to other potential offenders, who will not commit the crime in order not to suffer the same fate as the convicted offender. Specific deterrence is designed to deter the individual subjected to the punishment from committing it again in the future. The severity of the punishment inflicted on the offender will make him or her unwilling to re-offend in the future.

cally,<sup>61</sup> the deterring effect increases according to the level of punishment: the greater the severity of punishment, the greater the deterring effect.<sup>62</sup>

This assumption relies on the belief that people choose to obey or infringe the law after calculating the benefits and the costs of their actions. The classical economic theory of the rational actor model on which the deterrence theory is based assumes that the offenders make a rational choice whether to offend on the basis of their knowledge of the threat of the criminal sanction.<sup>63</sup> It is therefore implicitly assumed that the potential offender has knowledge of the punishment and that any offender is a rational actor who engages in a rational cost-benefit analysis when deciding whether or not to comply with the law.

In order to make it possible for the individual to make a choice, another implicit requirement is that there are alternative means to achieve the same objectives without infringing the law. A criminal sanction would prevent a potential offender from committing an unlawful act if he or she can achieve the same objective respecting the law.<sup>64</sup>

Applying the deterrence theory to immigration-related offences, irregular immigrants are, at least theoretically, deterred from committing immigration-related offences if the costs deriving from the threatened penalties outweigh the perceived benefits of the offence. According to this reasoning, therefore, the threat of criminal sanctions and, particularly of imprisonment, will achieve better compliance with national migration rules than any other type of sanction due to the greatest severity of the punishment threatened.

However, despite the fact that the correctness of that assumption is very difficult to prove since the deterring effect of criminal sanctions is a mostly empirical issue,<sup>65</sup> even a theoretical consideration of the issue shows that for numerous reasons criminal sanc-

61 There are studies highlighting that it is not necessarily the case in practice. See *Kleck, Sever, Li, Gertz*, The Missing Link in General Deterrence Research, *Criminology* 2005, p. 653; *A.N. Doob, C.M. Webster*, Sentence Severity and Crime: Accepting the Null Hypothesis, *Crime and Justice* 2003, p. 187; *A. Von Hirsch, A.E. Bottoms, E. Burney, P.O. Wikström* (fn. 59), p. 47; *D. Ritchie*, Sentencing Matters Does Imprisonment Deter? A Review of the Evidence, 2011.

62 The assumption that increasing the level of penalties by a certain amount will bring a decline in offending (also called “marginal deterrence”) is close to the approach adopted by economic theorists such as Richard Posner, who view punishment as a sort of pricing system. See *R. Posner*, An Economic Theory of Criminal Law, *Columbia Law Review* 1985.

63 See *D.B. Cornish, R. Clarke*, The Reasoning Criminal: Rational Choice Perspective on Offending, 1986; *R.L. Akers*, Rational Choice, Deterrence, and Social Learning Theory in *Criminology: The Path Not Taken*, *J. Crim. L. & Criminology* 1990, p. 653 et seq; *A. Von Hirsch, A. Ashworth, J. Roberts* (eds.), *Principled Sentencing: Readings on Theory and Policy*, 2009, p. 44 et seq.

64 This criterion was deemed necessary by *J. McGuire*, *What works: reducing reoffending, guidelines from research and practice*, Wiley, 1995.

65 The deterring effect of criminal sanctions is therefore very difficult to measure due to the same nature of deterrence: if successful, deterrence prevents potential offenders from committing the crime. However, only those offenders who have committed the crime and have therefore not been deterred from committing the crime are known. Thus, they are not representative of those individuals for whom deterrence works. Nevertheless, extensive empirical

tions, and imprisonment in particular, have no deterring effect on irregular migrants. First of all, one should consider that there are different categories of migrants who end up entering or staying irregularly on the EU territory, and not all of them behave as a rational actor. The level of education, the level of knowledge of the language of the country which they enter and the awareness of the law of the host country vary significantly from one person to another and from one group of migrants to another. Not all the immigrants have the means or the possibility to know and understand in advance, before their arrival on the EU territory, the legislation of the country which they are entering and the threatened sanctions in case of infringement of the aforementioned legislation. The first precondition for the application of the deterrence theory, *i.e.*, the knowledge of the ensuing punishment, is therefore not met in respect of those irregular immigrants who do not know in advance the rules regulating the entry into and the stay on the territory of the EU Member State concerned.<sup>66</sup> Thus, since many immigrants do not know or understand in advance the threatened penalties, a severe punishment will not deter them from entering the EU territory.

Second, criminal sanctions have no deterring effect in respect of those irregular migrants who are refugees and may have trouble getting the passports in their country of origin without putting their lives in danger. In this case, the threat of criminal sanctions has no deterring effect on them even if they knew in advance the legal framework regulating the entry and stay in the EU territory, because the risks they would run by staying and seeking to obtain valid documents in the country of origin are considerably more serious than the perspective of entering irregularly and being imprisoned in the country of destination. Numerous migrants have come to the EU territory to es-

research into the effectiveness of criminal sanctions as a general or specific deterrent has been conducted. Such research tries to measure the “counterfactual” figure of deterrence by adopting different approaches, such as comparing crime rates in different jurisdictions having different penalties or comparing crime rates in the same jurisdiction before and after the change in penalties. Thus, empirical research is necessary to determine whether criminal sanctions have a deterring effect in respect of irregular migrants. Such research would examine the effect on the rate of immigration-related offences of the threat of criminal sanctions instead of other type of sanctions, such as administrative ones, or of the changes in severity and certainty of punishment. On the difficulty on measuring deterrence see *Nagin, Cullen, Jonson, Imprisonment and Reoffending, Crime and Justice 2009*, p. 115 et seq.; *McAdams, Ulen, Behavioral Criminal Law and Economics in: N. Garoupa (ed.) Criminal Law and Economics: Encyclopedia of Law and Economics, 2009*.

- 66 L. Zedner affirms that “[a]lthough ignorance of the law is no defence and visitors to a country are bound by the laws of land, it could be said that the creation of immigration offences risks breaching the requirement of fair warning, that people should be given adequate notice of any legal requirement, so that they can reasonably adjust their conduct to accord with it. Notices now proliferate in the crowded arrivals halls of major airports which, in lengthy, minute script, enumerate just some of the many immigration offences. Whether this suffices to satisfy the requirements of fair warning merits further consideration, especially given the difficulty, to which any traveller will attest, of ensuring that one accords with the minutiae of local immigration requirements”. See *L. Zedner, Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment*, in: K. Franko Aas/M. Bosworth (eds.), *The Borders of Punishment*, 2013, p. 51.

cape from war, political oppression and poverty, as well as from environmental disasters caused by climate change or natural events; in this case, the threat of criminal sanctions is not an effective deterrent for them. Furthermore, in many cases they do not in any event have any place where to return.

Connected with this is one of the main reasons why criminal sanctions have no a deterring effect in this regard: the second precondition for sanctions to be effectively deterrent, *i.e.*, the existence of alternative means to achieve the same objectives without infringing the law, is not met. Without prejudice to the exceptions listed in paragraphs 2-5 of article 6 of the Returns Directive,<sup>67</sup> irregular immigrants, once they have entered irregularly on the EU territory cannot regularise their status unless they meet the requirements for seeking asylum.<sup>68</sup> Therefore, the threat of criminal sanctions is not a deterrent from entering or staying irregularly on the EU territory because, in the absence of a lawful way of achieving the aim of resettling on the EU territory, the alternative to entering the EU territory irregularly is undertaking a dangerous long journey to their country of origin, which is riskier than violating the law of the country of resettlement. On the contrary, if there had been a lawful way of resettling in addition to the aforementioned exceptions, criminal sanctions may have a more deterring effect because the choice would not have been between resettling in the EU irregularly and not resettling at all, facing therefore a risky journey, but between resettling irregularly while running the risk of going to prison and resettling lawfully, in compliance with the administrative law of the destination country, that is to say prison vs. possibility to lead a normal life in the EU. In this case, the threat of criminal sanctions would have probably deterred irregular migrants from entering and staying irregularly on the EU territory and they would have preferred to try to comply with immigration rules regularising their status. In multiple cases, irregular immigrants have valid justifications for not wanting to return to their country of origin and if they do not have an alternative way to resettle lawfully on the EU territory, criminal sanctions do not represent an effective deterrent.

67 Paragraphs 2-5 of article 6 of the Returns Directive list a series of exceptions which allow the Member State concerned not to issue a return decision, by means of regularising the irregular conditions of migrants. Among them, the Returns Directive provides that a “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory” (para. 4).

68 However, even if they are asylum seekers, they usually should wait for a long period of time in prison before the competent authority issues a decision. See, about regularisation of irregular immigrants, *M.R. Rosenblum*, *Immigrant Legalization in the United States and European Union*:

*Policy Goals and Program Design*, 2010; *S. Chauvin, B. Garcés-Masareñas, A. Kraler*, *Working for Legality: Employment and Migrant Regularization in Europe*, *International Migration* 2013, p. 118 et seq.; *K. Brick*, *Regularizations in the European Union: The Contentious Policy Tool*, 2011; *A. Kraler (coord.), D. Reichel, A. König, M. Baldwin-Edwards, M. Şimşek*, *Feasibility Study on the Labour Market Trajectories of Regularised Immigrants within the European Union (REGANE I)*, Final Report March 2014.

This reasoning holds true not only with regard to refugees and asylum seekers, but also in respect of the so-called “economic migrants”, *i.e.*, those immigrants who come to the EU territory to ameliorate their financial situation. Even in this case undocumented migrants, in fact, usually put their lives in peril when undertaking extremely dangerous journeys crossing the Mediterranean by boat or arriving to the EU territory via land by means of illegal migration channels. In both cases they risk their lives in order to reach the EU territory.<sup>69</sup> Criminal sanctions do not, therefore, have a deterrent effect with regard to this category of irregular immigrants either, for the same reasons given above.<sup>70</sup>

Thirdly, the threat of criminal sanctions does not deter irregular immigrants from entering irregularly the EU territory because of the innate nature of irregular migration. Irregular migration, even if it is considered a crime,<sup>71</sup> it is not a profit-driven crime, *i.e.*, a crime “related to the accrual of financial gain or the avoidance of financial losses”<sup>72</sup> and the motivation for such offences is not a purely financial one. Thus, it is unlikely that irregular migrants engage in a strict financial cost-benefit analysis when deciding whether or not to comply with migration rules, since the aim is not to make a profit but to escape from desperate living condition. In this regard, even though this assumption holds true without doubt in respect of irregular migrants who escape from war, prosecution or disaster areas, it is contentious whether the situation is any different in respect of “economic migrants” who decide to move to the EU territory to improve their financial condition.<sup>73</sup> It is nevertheless argued that also in this case the threat of criminal penalties does not deter this category of migrants from entering the EU territory. In many cases in fact they are not irregular because of a deliberate choice, but because of “the lack of legal migration channels,<sup>74</sup> the overcomplicated, bureaucratic, time-consuming and inefficient procedures in applying for immigration,<sup>75</sup> the constantly changing and difficult regulations,<sup>76</sup> the strict conditions placed on work permits,<sup>77</sup> the different types of legal status requesting a myriad of conditions that are

69 See, about the number of migrants’ deaths on land and by sea, *F. Laczko, A. Singleton, J. Black* (eds.), *Fatal Journeys*, Vol. 3, Part I, Improving data on missing migrants, 2017 International Organisation for Migration (IOM), p. 6 et seq.

70 In the same vein, *A. Aliverti*, *Crimes of Mobility, Criminal law and the regulation of immigration*, 2013, p.147, where the author affirms that undocumented migrants “will often prefer to spend some time in a British prison to immediate return”.

71 About the discursive dimension of criminalisation of migration, see *J. Parkin*, *The Criminalisation of Migration in Europe, A State-of-the-Art of the Academic Literature and Research*, Research in the framework of the FIDUCIA Project, No. 61 / October 2013, p. 2 et seq.

72 *J. Öberg*, *Is it “essential” to imprison insider dealers to enforce insider dealing laws?*, *Journal of Corporate Law Studies* 2014, p. 117.

73 About the number of economic migrants, see the *Clandestino Project Final Report* (fn. 24), for the data about migration and migrant population statistics, the Eurostat statistics, available at <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics#Further\\_Eurostat\\_information](http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Further_Eurostat_information)>.

74 Spain, Italy, Czech Republic, Poland. See *Clandestino Project Final Report* (fn. 24), p. 15.

75 Greece, Spain. See *Clandestino Project Final Report* (fn. 24), p. 15.

76 France, UK. See *Clandestino Project Final Report* (fn. 24), p. 15.

77 UK, Czech Republic. See *Clandestino Project Final Report* (fn. 24), p. 15.

prone to be overstepped,<sup>78</sup> and the organisational cultures in the bureaucracies that put more emphasis on protecting the country from ‘illegitimate immigrants’ than serving newcomers as customers”.<sup>79</sup> The condition of irregularity, therefore, is not a choice of the migrants but a risk that they prefer to take rather than stay in the country of origin. It is, therefore, unlikely that they would prefer to return to the place they escaped because of the threat of criminal sanctions. Furthermore, it should be highlighted that, even assuming that economic migrants engage in a strict financial cost-benefit analysis, for them living in prison in the host country will cost less than a return journey to the country of origin.

There is another factor which is not financially quantifiable and has a preponderant influence on the choice of irregular migrants not to return to their country of origin: the so-called “social debt”.<sup>80</sup> In this regard, some research shows that “economic migrants” on numerous occasions feel that they should meet the expectations of those who stayed at home, mainly by means of sending remittances or saving money. If the migrants fail in sending remittances or saving money, they feel ashamed and embarrassed and therefore they do not want to return to their country of origin. In this regard, studies based on empirical evidence demonstrate that if irregular migrants feel ashamed to return to their country of origin because of their failure, they would not come back regardless of the scale of the expected sanctions.<sup>81</sup> This collides with the rational actor model and contradicts cost-benefit analysis, since it is an emotional “debt” that prevails and there is no rational sanction, however serious, which can convince those irregular migrants to face their relatives and other members of their social networks.

Fourthly, numerous studies have confirmed that beliefs about the probability of detection rather than about the severity of punishment are more likely to influence human behaviour and actions.<sup>82</sup> Therefore, the deterring effect is higher if the potential offenders perceive a reasonable probability of being convicted. Criminal sanctions will

78 UK, Germany. See See Clandestino Project Final Report (fn. 24), p. 15.

79 Spain, Greece. See See Clandestino Project Final Report (fn. 24), p. 15. See Working Paper No 10/2011, A. Kraler, M. Rogoz, Irregular Migration in the European Union since the turn of the millennium – development, economic background and discourses. See also COM (2004)412; COM (2006)402.

80 M. Kox, Leaving Detention. A Study on the Influence of Immigration Detention on Migrants’ Decision-Making Processes regarding Return, 2011, p. 23, available at <[http://www.iom-nederland.nl/images/Rapporten/AVRD\\_Report\\_Leaving\\_Detention.pdf](http://www.iom-nederland.nl/images/Rapporten/AVRD_Report_Leaving_Detention.pdf)>, accessed November 2017.

81 See J. van Wijk, Reaching out to the unknown: Native counselling and the decision-making process of irregular migrants and rejected asylum seekers on voluntary return, in: International Organization for Migration, Out of Sight: Research into the living conditions and decision-making process of irregular migrants in the main cities of The Netherlands, Germany and Austria, 2008; European Council on Refugees and Exiles, The way forward: Europe’s role in the global refugee protection system; the Return of Asylum Seekers whose applications have been rejected in Europe, ECRE, 2005.

82 See A. Von Hirsch, A.E. Bottoms, E. Burney, P.O. Wikström (fn. 59), ch. 6; R. Tay, General and Specific Deterrent Effects of Traffic Enforcement: Do We Have to Catch Offenders to Reduce Crimes, Journal of Transport Economics and Policy, 2005, p. 220 et seq.

not deter future potential offenders of immigration-related rules if enforcement is weak and the probability of being prosecuted and sentenced to imprisonment is low. In this regard, empirical data reveal that irregularly entering and staying third-country nationals are rarely prosecuted and convicted.<sup>83</sup> Prosecution and conviction of perpetrators of immigration-related offences is close to random. The deterring effect of criminal sanctions in such a situation is further weakened. Although, as argued, in many cases irregular migrants would probably choose the risk of being sent to a prison in the EU over staying in their country of origin, they are in any case unlikely to be deterred by the threat of criminal sanctions which are unlikely to be applied. The choice is, therefore, between staying in their country of origin and the unlikely, although theoretically possible, conviction in the EU.

Finally, it has to be highlighted that even if criminal sanctions are enforced, recent research shows that the removal rates are not increased by the imprisonment of irregular immigrants.<sup>84</sup> On the contrary, it has emerged that irregular migrants “who were highly unsatisfied with the detention conditions, or who had been detained for a long period, were not more likely to report an increased willingness to leave the country.”<sup>85</sup> On the contrary, the “potential deterrent effects of “tough” detention practices were partially, or even totally, annulled by a corresponding decrease in the perceived legitimacy of forced return.”<sup>86</sup> Similarly, the research highlighted that rejection of asylum requests after very short or very long admission procedures makes them lose legitimacy in the eyes of asylum seekers and their lawyers. Therefore, a quick decision of rejection, instead of preventing illegal migrants from developing ties to the country of asylum, decreases the perceived legitimacy of migration rules and induces them not to comply voluntarily with the order to depart.<sup>87</sup>

In conclusion, the criminalisation of irregular entry and stay *per se* of third-country nationals is not justified on the basis of the deterrence theory, since criminal sanctions have no deterrent effect in respect of irregular migrants and do not prevent them from entering or staying irregularly on the EU territory.

### III.2 Denunciatory function of criminal law. Shaming or social stigma argument.

Furthermore, it has been claimed that the criminalisation of irregular entry and stay of third-country nationals is justified on the basis of the denunciatory function of criminal law, *i.e.*, the shaming or social stigma argument. In this regard, it has been argued

83 According to the EU Agenda on Migration, COM(2015) 240 final (fn. 17), p. 9, “only 39.2% of return decisions issued in 2013 were effectively enforced”. See also *Aliverti* (fn. 1), pp. 254-255; *Parkin* (fn. 70), p. 9.

84 *Kox* (fn. 79), p. 64 et seq.

85 A. Leerkes, Managing migration through legitimacy? Alternatives to the criminalisation of unauthorised migration, in: S. Carrera/E. Guild (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings, Policy Dilemmas in the EU*, 2016, p. 29.

86 *Leerkes* (fn. 84), p. 29.

87 *Leerkes* (fn. 84), p. 29.

that certain behaviour is punished by means of criminal law because the society decides to consider such behaviour as amounting to a serious offence. Criminal sanctions are, therefore, necessary to harshly condemn the offenders committing these offences; being convicted for such behaviour would result in public censure and social stigma.

Criminal sanctions would, therefore, have a deterring effect since individuals would be interested in avoiding the social stigma and public censure resulting from prosecution. As a result, the desire to avoid public condemnation and to preserve one's reputation and social image would contribute to the achievement of general deterrence. The social stigma argument has nevertheless no deterring effect on irregular immigrants who, unlike, for instance, white-collar offenders, have no social status or reputation to preserve. Irregular immigrants are already socially marginalised and have no opportunity to be included in the social life from the moment they are considered irregular, *i.e.*, either from the moment of entry into the EU, if they have no valid documents or infringe some other immigration-related rules, or from the moment they overstay their visa, if they entered the EU lawfully. Thus, imprisonment does not entail any additional form of social condemnation, and social stigma which comes with prosecution is not an effective deterrent in their respect.

In this regard, the impossibility for them to build a social reputation or to be a part of the host country's community is due both to the detrimental implications deriving from the criminalisation of irregular entry and stay as such and from the consequences arising from the existing EU secondary legislation<sup>88</sup> which, criminalising the activities of those who facilitate the entry or stay of irregular immigrants, contributes to their marginalisation. As a result of this legal framework, irregular immigrants are cut out of the social life the moment when they become irregular. The fact of being prosecuted and convicted does not therefore entail any additional negative consequence in terms of social stigma and public condemnation; they are already publicly condemned and stigmatised as criminal the moment they become irregular.<sup>89</sup>

88 See in this regard, the Employers' Sanction Directive and the Carriers' Liability Directive (fn. 27).

89 Furthermore, the use of criminal penalties to sanction the infringement of immigration rules contributes to the presentation of migrants as a risk category, thus having an impact on the perception of them by the society as a whole. It foments the representation of migrants as "criminal offenders, security threats and welfare abusers" and, as has been suggested, "[t]hus, [...] immigrant detention [...] produces both the crime of clandestinity and the criminal figure of the clandestine". See *Parkin* (fn. 70), pp. 16-17. On the discursive dimension of criminalisation, see *B. Anderson*, *Us and Them? The Dangerous Politics of Immigration Control*, 2013; *J. Chacon*, *Managing Migration Through Crime*, *Columbia Law Review* 2009, p. 135 et seq.; *F. Düvell*, *EJML* 2011, p. 275 et seq.; *B.A. Vollmer*, *Policy Discourses on Irregular Migration in the EU – 'Number Games' and 'Political Games'*, *EJML* 2011, p. 317 et seq.; *M. Maneri*, *Media discourse on immigration: Control practices and the language we live in*, in *S. Palidda* (ed.), *Racial criminalisation of migrants in 21st Century*, 2011; *E. Guild* (fn. 17); *A. De Giorgi*, *Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalisation of immigration across Europe*, *Punishment & Society* 2010, p. 147 et seq.; *Clandestino Project Final Report* (fn. 24).

In this regard, marginalisation and social stigma which accompany them from the moment they are considered irregular, instead of deterring them from entering or staying irregularly in the EU, entail numerous negative consequences which lead them to stay in the EU rather than depart from it. There are multiple reasons for this general trend.

In the first place, marginalisation of irregular migrants increases their propensity to commit crime, predominantly in the form of “substance crime” and drug-related offences,<sup>90</sup> and leads to increase both in their vulnerability to exploitation<sup>91</sup> and in the impunity of perpetrators of crime at irregular migrants’ expense.<sup>92</sup> As a result, irregular migrants are more vulnerable and less willing to leave the country. The reason is that they are psychologically dependent and exploited by those for whom they commit crimes, such as drug traffickers, and are often also financially in debt to such persons, so that they cannot freely decide to leave the country. Furthermore, if they are exploited, the fact that the residence permit of the irregular immigrant or the document necessary to regularise his or her situation may be dependent on the perpetrator, who can be a family member or, for domestic workers, the employer, further discourages victims from reporting crimes<sup>93</sup> and further obstructs them from returning to their country of origin. As a result, they are caught in a vicious circle: they are exploited by the perpetrators of crime because they are irregular, while their irregularity frequently depends on those same perpetrators against whom they do not wish to press charges because they are irregular. In conclusion, severe and punitive policies, as well as the social stigma connected to them, instead of preventing irregular migrants from coming, have the effect of limiting regular immigration and the access of foreigners to regular employment.<sup>94</sup>

Social stigma, public condemnation and marginalisation, therefore, fail to make irregularly entering or staying third-country nationals willing to return to their country of origin.

90 Research revealed that criminal involvement has been stimulated by the exclusion of irregular immigrants from the lawful labour market. See *A.S. Leerkes, G. Engbersen, J.P. Van der Leun*, *Crime among irregular immigrants and the influence of internal border control*, *Crime, Law and Social Change*, 2012, p. 15 et seq.; *J. van der Leun, M. van der Woude*, *Legitimacy at Stake? Crimmigration Processes and the Criminal Justice System in the Netherlands*, in: N. Peršak (ed.) (fn. 58), p. 61.

91 See *FRA* (fn. 1), p. 6.

92 See *FRA* (fn. 1), pp. 6-7.

93 See *FRA* (fn. 1), p. 7. See this document also to find possible solutions to this problem and ensure the respect of the fundamental rights of irregular immigrants.

94 This is shown by the “continuous inflow of irregular entrants as well as overstaying of those who are already in the country” which “suggest that such policies to some extent fail in preventing or reducing irregular migration”. See *Clandestino Project Final Report* (fn. 24), p. 15. See also *F. Düvell*, *EJML* 2011, p. 275 et seq.

In the second place, detention has a detrimental impact on the mental and physical health of immigrants detained.<sup>95</sup> Mental and physical health problems may be caused by detention or exacerbated by it, if the mental or physical health conditions of migrants were already damaged because of torture or inhuman and degrading treatment suffered by them in the country of origin.<sup>96</sup> The creation of mental health problems has consequences not only on the health of immigrant detainees, but also on the society as a whole and it is a further reason that leads irregular immigrants to stay in the host country. In this regard, mental and physical problems have a detrimental effect on the intellectual capacities of irregular immigrants, with the result of making them less likely to leave the host country compared with irregular migrants without health problems. The main reason is that “due to health problems, migrants are less capable of collecting information and required travel documents for return.”<sup>97</sup> They are occupied with their mental and physical health problems, and thus they do not consider returning anymore.<sup>98</sup> Therefore, detention and health problems caused by the period of detention, instead of representing an additional motivation for irregular migrants to depart the host country, have the opposite effect of making them need health care and become more unwilling to return to their country of origin.<sup>99</sup>

In conclusion, the criminalisation of irregular entry and stay of third-country nationals is not even justified on the basis of the denunciatory function of criminal law, since the social stigma and public condemnation argument neither prevents irregular migrants from entering or staying irregularly on the EU territory nor induces them to leave the host country.

- 95 See *K. Robjant, R. Hassan, C. Katona*, Mental health implications of detaining asylum seekers: systematic review, *British Journal of Psychiatry* 2009, p. 306 et seq.; *A. S. Keller, B. Rosenfeld, C. Trinh-Shevrin et al.*, Mental health of detained asylum seekers, *The Lancet*, 2003, Vol. 362, p. 1721 et seq.; *C. Pourgourides*, A second exile: the mental health implications of the detention of asylum seekers in the UK, *Psychiatric Bulletin* 1997, pp. 673-674.
- 96 *Kox* (fn. 79), pp. 52-53, 58-59. There are indications of harmful effects of immigration detention on migrants’ well-being. See, for example *S. Mares, J. Jureidini*, Psychiatric assessment of children and families in immigration detention – clinical, administrative, and ethical issues, *Australian and New Zealand Journal of Public Health* 2004, p. 520 et seq.; *A. Sultan, K. O’Sullivan*, Psychological disturbances in asylum seekers held in long-term detention: a participant-observer account, *Medical Journal of Australia* 2001, p. 593 et seq.
- 97 *Kox* (fn. 79), p. 22; *Black, Koser, Munk et al.*, Understanding voluntary return, Sussex Centre for Migration Research, Home Office Online Report 50/04, 2004; *J. Van Wijk* (fn. 80).
- 98 *Kox* (fn. 79), p. 76; *M. Provera*, The Criminalisation of Irregular Migration in the European Union, No. 80/February 2015, CEPS Paper in the framework of the FIDUCIA Project, p. 221 and academic contributions there quoted. Another reason is that their stay in the host country “prevents relatives in the country of origin from having to take physical and financial care of the returning migrant.” See *Kox* (fn. 79), p. 22.
- 99 See *Kox* (fn. 79), pp. 10-11; European Council on Refugees and Exiles, *The way forward: Europe’s role in the global refugee protection system; the Return of Asylum Seekers whose applications have been rejected in Europe*, ECRE, 1 September 2005, available at <<http://www.refworld.org/docid/4356034c4.html>>, accessed November 2017.

### III.3 Harm principle, desert theory and proportionality of punishment.

The analysis of the legitimate purpose and proportionality arguments prove that the use of criminal sanctions, particularly imprisonment, to deal with irregular immigration is not justified on the basis of the theory of harm principle or the desert theory either. Several reasons justify this conclusion.

In the first place, the use of criminal sanctions in respect of irregular immigrants is disproportionate and unjustified in the light of the harm principle. In particular, as far as the criminalisation of irregular entry and stay of third-country nationals is concerned, the harm principle is undermined since there is no a legitimate interest which justifies the adoption of criminal sanctions.<sup>100</sup> According to the harm principle, which can be formulated by reference to the oft-quoted statement of John Stuart Mill, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>101</sup> The state can, therefore, justifiably criminalise only such conduct which causes harm to others or creates an unacceptable risk of harm to others. The concept has been further developed by Joel Feinberg, who defined the notion of “harm” as “those states of setback interest that are the consequence of wrongful acts or omissions of others”<sup>102</sup> and who further formulated the harm principle in the following terms: “It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor and there is probably no other means that is equally effective at no greater cost to other values.”<sup>103</sup> Thus, the function of the harm principle, strictly connected to the principle of proportionality, is to defend individuals from the abuse of state power and to ensure the respect for the human rights of suspects. The state may therefore use criminal law only as a last resort to punish wrongdoings which cause harm to legally protected interests.<sup>104</sup>

The concept of “interest” has been further developed in the German theory of legally protected interests (Rechtsgutslehre), according to which the proper function of criminal law is the protection of “Rechtsgüter”, *i.e.*, those goods which the law recognises or should recognise as meriting protection.<sup>105</sup> A conduct may, therefore, be criminalised only if it causes harm or creates an unacceptable risk that harm may be caused

100 About the inconsistency of the criminalisation of irregular migrants with the principle of harm see *Zedner* (fn. 65), p. 51.

101 *S. Mill*, *On Liberty*, 1859, ch 1. See on this point *S.E. Marshall, R.A. Duff*, *Criminalisation and Sharing Wrongs*, *Canadian J of Law and Jurisprudence* 1998, p. 11. For a more recent critical analysis of the harm principle and Mill's statement, see *R.A. Duff, S.E. Marshall*, *Abstract Endangerment, Two Harm Principles, and Two Routes to Criminalisation*, *Bergen Journal of Criminal Law and Criminal Justice* 2015, p. 131 et seq.

102 *J. Feinberg*, *Harms to Others*, 1984, p. 215.

103 *Feinberg* (fn. 101), p. 26.

104 *N. Jareborg*, “What Kind of Criminal Law do we Want?”, in A. Snare (ed.), *Beware of Punishment. On the Utility and Futility of Criminal Law*, 1995.

105 *Hassemer*, “The Harm Principle and the Protection of “Legal Goods” (Rechtsgüter-schutz)”, in: A.P. Simester, U. Neumann, A. du Bois-Pedain, *Liberal Criminal Theory*, 2014, p. 187.

to a legally protected interest.<sup>106</sup> Thus, according to this principle, immigration-related offences can be legitimately criminalised only if they cause harm or create risk that harm may be caused to a legally protected interest. Otherwise criminal sanctions will be perceived as disproportionate and unjust and the suspects will be obliged to suffer an undue criminal process.<sup>107</sup> However, in this regard, although it is in general difficult to define what is meant by “legal interests protected by law”,<sup>108</sup> it is even more unclear which interest is being protected by criminalising immigration-related offences and it is furthermore difficult to ascertain whether it can be considered an interest worthy of legal protection.<sup>109</sup>

The question which needs to be answered is, therefore, whether the State’s choice to criminalise the irregular entry and stay of third-country nationals is justified on the basis of the harm principle and legal interest theory. In other terms, is there a legally protected interest which is harmed or would be at risk of being harmed by irregular migrants, and if yes, what is it?

Member States’ authorities usually claim that “immigration offences have the effect of undermining the system of immigration and border controls and the integrity of travel documents”. In other words, “punishment is not justified because the prohibited conduct is harmful *per se*, but because of its broader repercussions on the country’s border controls.”<sup>110</sup> Accepting this argument, therefore, the interest protected by criminalisation of immigration-related offences is the country’s border or the state’s sovereignty.<sup>111</sup>

In the author’s view, however, such a justification seems to be merely symbolic and instrumental, since the entry into or the stay of irregular migrants on the state’s territory does not cause or risk causing any real harm to the state’s sovereignty. Sovereign-

106 *M. Böse*, The Principle of Proportionality and the Protection of Legal Interests (Verhältnismäßigkeit und Rechtsgüterschutz), *European Criminal Law Review EuCLR* 2011, p. 37 et seq.; Hassemer/Neumann, in: *Nomos Kommentar zum StGB*, Vol. 1, 3rd ed. 2010, vor § 1 n. 108 et seq., 146 et seq.; *Roxin*, *Strafrecht Allgemeiner Teil – Band I: Grundlagen – Aufbau der Verbrechenslehre*, 2006, § 2 n. 1 et seq.; Rudolphi, in: *Systematischer Kommentar zum StGB*, 13th Supplement 1990, vor § 1 n. 2.

107 See, about the relationship between harm principle and legitimacy, *N. Peršak*, Norms, Harms and Disorder at the Border: The Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory, in: *N. Peršak* (ed.) (fn. 58), p. 14.

108 See *Ashworth* (fn. 53), p. 32 et seq. In the opinion of the authors of the “Manifesto on European Criminal Policy” (fn. 55), the EU legislator has the power to impose criminal sanctions only in order to protect fundamental interests, rather than legally protected interests. See *M. Kaijafa-Gbandi*, The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law, *EuCLR*, 2011, p. 7 et seq., and for a critical view on this point, *M. Böse*, *EuCLR* 2011, p. 35 et seq.

109 In the same vein, see *Zedner* (fn. 65), p. 51. .

110 *Aliverti* (fn. 69) pp. 111-112. This is said in particular by reference to the English system, but the same applies to other national criminal systems.

111 See *A. Spena*, A Just Criminalisation of Irregular Immigration: Is It Possible?, *Crim Law and Philos* 2017, p. 355 et seq..

ty denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign State or to foreign law other than public international law.<sup>112</sup> Any sovereign State has, therefore, the power to make laws to regulate the entry and stay of foreigners in its territory and to claim a breach of international law if armed forces of another State enter into its territory without its consent. It certainly has the right to defend its territory and its border from attacks on the part of another State, but there is no real need to defend its territory or border in case of entry into its territory of irregular immigrants; in fact, they do not want to claim sovereignty over the State's territory. They are merely seeking to enter and stay on the State's territory to find a job or just to escape from the country of origin.

Thus, the State simply does not have the need to protect its territory or border from irregular migrants. The right of the State to exclude aliens from entering the territory, or *jus excludendi alios*, which allegedly is a corollary of state's sovereignty, plays a completely different role in this regard.<sup>113</sup> Even recognising the State's right to exclude aliens, although at least some doubts have been cast upon it,<sup>114</sup> it does not mean that the State has legitimate power to criminalise actions of those who do not comply with the administrative regulations prescribing the requirements for entry into and stay on its territory. Considering that there are other ways to enforce the decision to exclude irregular migrants from the State's territory, such as non-punitive measures, the State's right to exclude aliens does not automatically imply the legitimacy of the criminal sanctions used to enforce such a decision. On the contrary, the necessity to adopt criminal sanctions should be proved: it is apt to repeat here that criminal law should be used as a last resort and only in case when there is a real harm or risk of harm to a legal interest protected by the law.

As far as immigration-related offences are concerned, the harm principle is thus infringed. Besides, apart from the arguments analysed before, as will be demonstrated below, there are other reasons which prove the absence of harm or risk of harm entailed by irregularly entering or staying third-country nationals. In this regard, in fact, the interests that usually are deemed to be harmed by irregular migrants *per se* are in reality not harmed by them; on the contrary, there would be risk of harm if irregular entry into or stay of third-country nationals in the EU territory were criminalised.

112 H. Steinberger, Sovereignty, in: Max Planck Institute for Comparative Public Law and International Law, Encyclopedia for Public International Law, vol 10 (North Holland, 1987) 414. About the concept of State's sovereignty, see J. Bartelson, The Concept of Sovereignty Revisited, The European Journal of International Law 2006, p. 463 et seq.; G. Distefano, Theories on Territorial Sovereignty: A Reappraisal, in Journal of Sharia & Law 2010, p. 25 et seq.

113 The relationship between the *jus excludendi alios*, the State's sovereignty and the right to expel migrants lies beyond the scope of this article. See S. Lægaard, What is the Right to Exclude Immigrants?, Res Publica 2010, p. 245 et seq.; A. Spina, Crim Law and Philos 2017, p. 351 et seq.

114 See B. Schotel, On the Right of Exclusion: Law, Ethics and Immigration Policy, 2012.

The interests allegedly protected by law could alternatively be the State's finances or the citizen's security. Regarding the former, opinions have been expressed to the effect that illegal migrants are a burden for the State since they benefit from public services without paying taxes, while with reference to the latter, it has been claimed that this interest is at risk since the marginalisation and illegal status of irregular migrants lead them to commit crime and consequently the citizen's security is at stake. However, as some authors have already remarked, these legally protected interests are not at risk of being undermined by irregular migrants *per se*, but by the criminalisation of the irregular entry and stay of third-country nationals and by the marginalisation of irregular migrants. If irregular immigrants had the possibility to regularise their situation and to work, they would be obliged to become full members of society paying taxes and they would not need to risk involvement in criminal activities simply to survive or to avoid being sent to prison. "[I]n other words, it is precisely the political decision to illegalize it that may make immigration harmful. None of those harms would occur had legislators not chosen to render some categories of immigrants "irregular"."<sup>115</sup>

Another argument in favour of criminalisation of irregular entry and stay of third-country nationals relates to the State's national identity. It is assumed that the legally protected interest of the State's national identity could be undermined, if not by the arrival of a limited number of migrants, then by the entry into the State's territory of a quantity of irregular migrants beyond the limits that the receiving state is able to accept. It has particularly been suggested that a huge number of irregular migrants arriving into the territory of a state could threaten national identity, obscuring the national culture and identity of the State.<sup>116</sup> This argument is without foundation for several reasons. In the first place, such reasoning could be extended to all the categories of foreigners coming to the country, including lawful migrants and tourists who decide to spend a considerable period of time in the country. People coming from different cultural, social and economic contexts obviously bring with them a part of the culture of their country of origin and the number of lawful migrants, who can be workers or students, has risen considerably over the last decades due to the globalisation, technological development and increasing number of, as well as cheaper and faster, means of transport. In the second place, in a globalised world the mixture of cultures and skills should be seen as an enrichment of and not as a threat to the State's national identity. More importantly, without embarking on a difficult and subjective discussion about the value of globalisation, which should be conducted on the basis of sociological and philosophical arguments, from a purely legal point of view such an interest cannot represent a legal interest protected by the law, because the boundaries and the exact definition of a State's national identity are not clear. It should not be possible to imprison individuals who only committed the crime of having a different culture from that of

115 A. Spina made the same point in a previous contribution. See A. Spina, *Crim Law and Philos* 2017, p. 362.

116 See M. Dummett, *Immigration and Refugees*, 2001, p. 19 et seq.; D. Miller, *On Nationality*, 1995, p. 128 et seq.; M. Walzer, *Spheres of Justice. A Defence of Pluralism and Equality*, 1983.

the country of destination. Such a justification for criminalising certain conduct would be clearly contrary to all the existing instruments on human rights. It would further violate the prohibition of discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>117</sup> It, therefore, cannot be considered a legitimate interest which enables the State to criminalise irregular entry and stay on its territory of third-country nationals.

The State, as it has already been highlighted, has the right to regulate the entry of people into its territory and their stay there, but the infringement of these rules does not automatically entail a criminal sanction, as is proved by the use in certain Member States of administrative sanctions rather than criminal ones to sanction those who infringe immigration-related rules. The use of criminal sanctions to ensure the enforcement of immigration rules is thus not necessary; it is instead detrimental. In this context criminal sanctions are disproportionate. They are, therefore, not seen as legitimate by those to whom they apply and consequently they are not effective in achieving the objective pursued,<sup>118</sup> *i.e.*, the removal of irregular immigrants.

In this regard, the interconnection between proportionality of sanctions and perception of them as legitimate by those to whom they apply is particularly stressed by the proponents of the desert theory, which is one of the main theories of punishment. More precisely, the desert theory is a modern form of the retributive theories. It vigorously emerged in the mid-1970s, accompanied by the idea of proportionate sentencing.<sup>119</sup> Unlike the traditional retributive conceptions of punishment, which were abandoned because they seemed to constitute a reversion to pre-Enlightenment notions and a return to talionic conceptions,<sup>120</sup> desert theories offer an altered conception of deservedness which concentrates on the idea of proportion, rather than on the “harm-for-harm

117 Article 14 ECHR and article 21 CFR. The same conclusion, on the basis of different arguments, is reached by A. Spena, *Crim Law and Philos* 2017, pp. 364-369.

118 About the concept of legitimacy of criminal law, see *Persak* (ed.) (fn. 58). Until now legitimacy has been mostly researched through the model of procedural justice and has mostly concentrated on the police or policing. See, T.R. Tyler, *Why People Obey the Law*, 1990; T.R. Tyler, *Procedural justice, legitimacy, and the effective rule of law*. *Crime and Justice: A Review of Research*, 2003, p. 283 et seq.; T.R. Tyler, *Legitimacy and compliance: The virtue of self-regulation*, in: A. Crawford and A. Huckleby (eds.), *Legitimacy and Compliance in Criminal Justice*, 2013, p. 8 et seq.; T.R. Tyler, C.J. Wakslak, *Profiling and police legitimacy: Procedural justice, attribution of motive, and acceptance of police authority*, *Criminology* 2004, p. 253 et seq.; M. Hough, J. Jackson, B. Bradford, A. Myhill, P. Quinton, *Procedural justice, trust and institutional legitimacy. Policing: A Journal of Policy and Practice*, 2010, p. 203 et seq.

119 The idea of proportionate sentencing was advocated for the first time by Cesare Beccaria and Jeremy Bentham in utilitarian terms. See C. Beccaria, *Dei delitti e delle pene*, P. Calamandrei (ed.), 1950; J. Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Byrne, H.L.A. Hart (eds.), 1982, p. 168.

120 Among the purely retributive theories of punishment existing in the literature three are worthy of mention. The first one refers to what in German is called *Vergeltung* and stipulates that the wrongdoer has a moral obligation to suffer as a consequence of the wrong done; to say it differently, the wrongdoer should be “paid back” for the wrong committed.

equivalence”.<sup>121</sup> The desert rationale is based on the idea that the penal sanction “should fairly reflect the degree of reprehensibility (that is, the harmfulness and culpability) of the actor’s conduct.”<sup>122</sup> The severity of the punishment should be proportionate to the seriousness of the criminal offence.<sup>123</sup> The seriousness of the offence should, in turn, be determined by two factors: the degree of harmfulness of the conduct and the extent of the actor’s culpability.<sup>124</sup> Thus, once the seriousness of an offence is determined and different categories of offences are ranked in order of gravity, the sentence imposed on the offender should correspond to the gravity of the offence committed by him or her.

This principle derives from the censuring nature of punishment.<sup>125</sup> According to the desert theory, in fact, there is a strict link between criminal censure, proportionality of sanctions and morals:<sup>126</sup> since punishment conveys blame, it would be morally unacceptable if a weak sanction was used for a very serious offence when the degree of blameworthiness is extremely high. Likewise, it is not acceptable on moral grounds to inflict on someone a severe punishment which is disproportionate to the trifling offence committed by the person in question.

In this regard, proportionality of punishment, which is one of the general principles of EU law, now enshrined in article 49(3) CFR,<sup>127</sup> gives the system moral credibility,<sup>128</sup> and thus creates empirical legitimacy, *i.e.*, individuals perceive the criminal-law system

See *M. Moore*, *The Moral Worth of Retribution*, in: F. Schoeman (ed.), *Responsibility: Character and the Emotions*, 1987. Secondly, there is the unfair-advantage theory, according to which the function of criminal sanctions is to impose a disadvantage which counteracts the “unjust advantage” gained by the offender over the victim. See *J. Finnis*, *Natural Law and Natural Rights*, 1980, p. 263 et seq. The third conception of retribution is based on the reaffirmation of the legal order; criminal sanctions represent therefore a reaffirmation of the legal order which has been wronged or upset by the commission of the crime. See *W. Frisch*, *Schwächen und berechtigte Aspekte der Theorie der positiven Generalprävention*, in: B. Schunemann, A. von Hirsch, N. Jareborg (eds.), *Positive Generalprävention: Kritische Perspektive in deutsch-englischen Dialog*, 1998, p. 139 et seq.

- 121 *A. Von Hirsch, A. Ashworth*, *Proportionate sentencing, Exploring the Principles*, 2005, p. 5.
- 122 *A. Von Hirsch, A. Ashworth* (fn. 120), p. 4.
- 123 *P. Asp*, *Two Notions of Proportionality* in: K. Nuotio (ed.), *Festschrift in Honour of Raimo Lahti*, 2007, p. 207 et seq.
- 124 *A. V. Von Hirsch*, *Censure and Sanctions*, 1993, p. 33; *A. Von Hirsch, A. Ashworth* (fn. 120), p. 143 et seq.
- 125 At the European level, see Opinion of AG Jacobs, 3.6.1992, in case C-240/90 (*Federal Republic of Germany v. Commission of the European Communities*), [1992] ECR I-05383, para. 11.
- 126 For the link between proportionality, censure and perception of injustice see *A. Von Hirsch, A. Ashworth* (fn. 120), p. 134 et seq.
- 127 For a comment on the principle of proportionality between penalties and criminal sanctions, see *V. Mitsilegas*, Article 49. Principles of Legality and Proportionality, in: S. Peers, T. Harvey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights, A Commentary*, 2014, p. 1351 et seq.
- 128 See *P.H. Robinson, J Darley*, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, *GEO. L.J.* 2003, p. 457 et seq.

as legitimate.<sup>129</sup> Penalties which are extremely disproportionate in relation to the gravity of the offence are perceived as unjust.<sup>130</sup> It is thus extremely important to adjust the sanction imposed to the gravity of the offence, not only to respect the individual's fundamental right to liberty and security, which can be restricted only in limited cases provided for by law and only when strictly necessary,<sup>131</sup> but also to give the system normative and empirical legitimacy. Applying these principles to the specific case of irregular entry and stay of third-country nationals, it should be noted that the use of criminal sanctions in respect of irregular immigrants whose only guilt is to be 'irregular' is disproportionate and, consequently, the institutional legitimacy of these measures is undermined.<sup>132</sup> The principle of proportionality is in fact compromised by the criminalisation of behaviour which could be coped with by less restrictive and punitive measures.

In the light of the foregoing, criminalisation of irregular entry and stay of third-country nationals is inconsistent with another fundamental principle of criminal law, which derives from the principle of proportionality, the principle of *ultima ratio*.<sup>133</sup> The reason is that criminalising the conduct of irregular immigrants, criminal law is not applied as a measure of last resort.<sup>134</sup> The reasons which justify such a statement are nevertheless not analysed further in this article, provided that it has been demonstrated that the conduct of irregular entry and stay of third-country nationals does not harm a legal interest and, therefore, there is no reason for scrutinising whether criminal sanctions are used as a last resort, as the use of criminal sanctions is in no case justified.<sup>135</sup>

The foregoing analysis reveals that criminalisation of irregular entry and stay of third-country nationals is not justified on the basis of the harm principle, the principle of proportionality and the desert theory. On the contrary, by not respecting these

129 *Hough, Sato* (fn. 58), p. 8.

130 For the connection between proportionate punishments and perception of the penalties as just or unjust, see the work of Claus Roxin and particularly *C. Roxin, Zur jüngsten Diskussion über Schuld, Prävention und Verantwortlichkeit im Strafrecht*, in: A. Kaufmann, G. Bemma, D. Krauss, K. Volk (eds.), *Festschrift für Paul Bockelmann*, 1979, p. 304 et seq.

131 Article 5 ECHR and article 6 CFR.

132 See, for a similar position on this point, *M. Provera* (fn. 97), p. 7 et seq.

133 The *ultima ratio* principle is a fundamental principle of criminal law both at the national and at the EU level. See, on the inclusion of the *ultima ratio* principle among the fundamental principles of criminal law at the EU level, "Manifesto on European Criminal Policy" (fn. 55), p. 707.

134 For a definition and the implications of the principle of last resort or *ultima ratio*, see *S. Melander*, *EuCLR* 2013, p. 45 et seq.

135 See, in this regard the "Manifesto on European Criminal Policy" (fn. 55) and the order of presentation of the fundamental principles of criminal law which should be respected by the EU legislator in criminalising a certain conduct. In the first place, it should be assessed the respect of the requirement of a legitimate purpose and of the principle of proportionality, from which the requirement of a legitimate purpose derives, and only then, if these two interconnected principles are respected, the observance of the principle of *ultima ratio* may be scrutinised.

principles, criminal law risks losing its legitimacy and therefore, instead of preventing irregular migrants from entering or staying irregularly on the EU territory, lead them to perceive as unjust and illegitimate the criminal sanctions inflicted on them by the host country, and consequently lead them not to conform to them.

#### III.4 Use of other instruments, such as administrative measures

The foregoing analysis has shown that criminalisation of the conduct of those immigrants who enter or stay on the EU territory in breach of administrative immigration rules is not justified in the light of the main theories of punishment and is not effective in achieving the aim pursued at the EU and national level as regards irregular migration, *i.e.*, the removal of irregularly entering and staying third-country nationals from the EU territory. Considering that the analysis has shown the ineffectiveness of criminal sanctions in dealing with issues related to irregular migration, it is not necessary to examine in detail whether alternative sanctions are as effective as criminal sanctions in achieving compliance with EU and national immigration rules. It has been proved that criminal sanctions are ineffective and not legitimate in achieving this objective. Thus, the question is not if there are other measures as effective as criminal sanctions in achieving the objective of removing irregular immigrants, but if there are other measures which achieve the EU objective of removing irregular migrants.<sup>136</sup> However, an in-depth analysis of all the possible alternative sanctions would require too extensive an analysis and would exceed the scope of this article, considering that it would not influence the findings of the present analysis about the ineffectiveness of criminal sanctions in dealing with infringements of immigration rules. It is nevertheless important to highlight at this point another aspect that the analysis revealed.

In this article, it has been shown that any punitive response is ineffective in achieving the aim of removing irregular third-country nationals from the EU territory.

It follows that administrative detention does not represent an adequate measure either, if the length of the detention and the conditions of detention are the same as those entailed by a criminal sentence. This is particularly the case in respect of administrative detention of irregular immigrants. In many Member States the boundaries between de-

136 Alternatives measure to detention have been studied by the International Detention Coalition (IDC). See International Detention Coalition (IDC), *There Are Alternatives to Prevent Unnecessary Immigration Detention*, 2011, <<http://idcoalition.org/cap/>> accessed November 2017; Office of the High Commission for Human Rights/United Nations High Commission for Refugees, *Global Roundtable on Alternative to Detention of Asylum-Seekers, Refugees, Migrants and Stateless*, 2011, <<http://www.unhcr.org/4dde23ab9.pdf>>, accessed November 2017. Alternative to immigration detention have been studied also by Amnesty International, *Irregular Migrants and Asylum Seekers*, 2009, *Alternatives to Immigration Detention*, <<https://www.amnesty.org/en/documents/POL33/001/2009/en/>>, accessed November 2017.

tion as a criminal or administrative measure are unclear,<sup>137</sup> although if, theoretically, a measure is labelled as “administrative”, it should neither formally represent a punishment nor follow the conviction of a crime.<sup>138</sup> In respect of the detention of irregularly staying third-country nationals<sup>139</sup> research show that, although this form of detention is formally deemed to be used exclusively to facilitate the removal of irregular migrants, it is in reality an instrument used to detain undocumented migrants for significant periods of time before they are returned to their country of origin or they are released in case that the removal cannot be arranged. In the latter case, usually they are released and then, after a more or less short period of time, they are re-apprehended and re-detained.<sup>140</sup> Thus, although the maximum period of permissible detention set out by the Returns Directive is 18 months,<sup>141</sup> irregular migrants, spend, as a result, long periods of time in the detention centres, which in many cases are not specialised detention facilities but penitentiary institutions, prisons and police custody where ordinary prisoners are detained.<sup>142</sup> As a result, they have only small intervals of freedom.<sup>143</sup>

The repercussions on irregular migrants are similar to those that undocumented immigrants experience when they are imprisoned as a result of a criminal conviction. Their willingness to depart is consequently not increased if the only change is in the label: from “criminal” to “administrative” detention.<sup>144</sup>

137 See, about the different types of centres of detention in Europe, *E. Guild*, A Typology of Different Types of Centres in Europe, Report for the European Parliament, Directorate-General Internal Policies of the Union, 2005, IP/C/LIBE/FWC/2005-22.

138 See, particularly about administrative detention, *A. Leerkes, D. Broeders* (fn. 1), p. 830 et seq.

139 The use of detention in respect of asylum seekers who are detained while their application for asylum is evaluated is not analysed. In this regard see *E. Guild* (fn. 136); *G. Cornelisse*, Immigration Detention and Human Rights, Rethinking Territorial Sovereignty, 2010.

140 See the data extracted from Eurostat Population Database, Enforcement of Immigration Legislation. <<http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>>, accessed November 2017, cited by *C. Gosme*, Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo, in: *M.J. Guia, V. Mitsilegas, R. Koulis* (eds.) (fn. 28), p. 97. See also *G. Cornelisse* (fn. 138). The repeated use of immigration detention is criticised, among others, by *FRA*, Fundamental Rights of Migrants in an Irregular Status in the European Union, 2011, <[http://fra.europa.eu/fraWebsite/attachments/FRA\\_2011\\_Migrants\\_in\\_an\\_irregular\\_situation\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_2011_Migrants_in_an_irregular_situation_EN.pdf)> accessed November 2017, p. 27.

141 Article 15 of the Returns Directive.

142 See *G. Cornelisse* (fn. 138). Article 16 of the Returns Directive prescribes that “[d]etention shall take place as a rule in specialised detention facilities”. See in this regard, the judgment of the ECJ, 17.7.2014, case C-474/13, (*Thi Ly Pham*), [2014]; ECJ, 17.7.2014, joined Cases C-473/13 and C-514/13, (*Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve*), [2014].

143 See, about repeated immigration detention in the EU, *M.A. Vrolijk*, Immigration Detention and Non-removability Before the European Court of Human Rights, in: *M.J. Guia, V. Mitsilegas, R. Koulis* (eds.) (fn. 28), p. 47 et seq.

144 About the bad conditions of detention centres where irregular migrants are administratively detained, see *M.J. Guia, V. Mitsilegas, R. Koulis*, Immigration Detention, Risk and Human Rights (eds.) (fn. 28), and, in particular, the contributions of *M. Flynn*, Sovereign Discomfort: Can Liberal Norms Lead to Increasing Immigration Detention?, p. 13ff.; *E.*

Furthermore, the classification of detention as administrative may entail additional concerns about the respect of the fundamental rights of irregular immigrants.<sup>145</sup> In many cases administrative detention has, in fact, as punitive a character as criminal imprisonment; simply the label of administrative measure excludes the application to detainees of appropriate procedural safeguards which would be available if detention were classified as criminal.<sup>146</sup> In this regard, although the Returns Directive contains fundamental procedural safeguards which have to be respected in the event that undocumented migrants are detained,<sup>147</sup> in practice there has been “observed a lack of adherence to these principles in all of the countries visited”.<sup>148</sup> The lack of respect of fundamental procedural rights of migrants is even more prominent when irregular immigrants are detained in waiting zones or are subjected to extra-territorial detention, the latter of which is promoted at the EU level as an important element of the migration policy. In such situations migrants are detained even before their arrival on the EU territory and are placed in a “legal grey area” without the minimal guarantees applicable to deprivation of liberty.<sup>149</sup>

The overall consequence is that, if full implementation of the Returns Directive is not ensured in all Member States and the conditions of detention are not improved in

*Guild*, Understanding Immigration Detention in the UK and Europe, p. 141ff.; *M. Bosworth, A. Fili, S. Pickering*, Women’s Immigration Detention in Greece: Gender, Control and Capacity, p. 157ff.; *K. Cardoso*, “Immigrants as Detainees”: Some Reflections Based on Abyssal Thinking and Other Critical Approaches, p. 199 et seq.

- 145 It is interesting to note that in regard of the detention of irregular migrants the jurisprudence of the ECJ seems more “protective” compared to the jurisprudence of the ECtHR in respect of article 5(1)(f) ECHR. See *G. Cornelisse*, Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?, in: *M.J. Guia, V. Mitsilegas, R. Koulish* (eds.) (fn. 28), p. 73ff.
- 146 See the Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 24 April 2013, para. 51; *L. Zedner, A. Ashworth*, Preventive Orders: a problem of undercriminalization in: *R.A. Duff, L. Farmer, S. Marshall, M. Renzo, V. Tadros* (eds.), *The Boundaries of the Criminal Law*, 2010, p. 59 et seq.; *S.H. Legomsky*, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, Washington & Lee Law Review 2007, p. 469 et seq.
- 147 See articles 14-18 of the Returns Directive and their interpretation by the ECJ in the following judgements: *ECJ, Thi Ly Pham* (fn. 141); *ECJ, Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve* (fn. 141); *ECJ*, 5.6.2014, case C-146/14 PPU (*Mahdi*), [2014]; 30.5.2013, case C-534/11 (*Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*), [2013]; *ECJ, Said Shamilovich Kadzoev (Huchbarov)* (fn. 4). See for an in-depth analysis of the jurisprudence of the ECJ, *Mitsilegas* (fn. 2), particularly p. 77 et seq.; *V. Mitsilegas*, Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive, in: *M.J. Guia, V. Mitsilegas, R. Koulish* (eds.) (fn. 28), p. 25 et seq.
- 148 Report of the Special Rapporteur on the human rights of migrants, François Crépeau (fn. 145), para. 51. See also *K. Beckett, S. Herbert*, “Penal Boundaries: Banishment and the Expansion of Punishment”, 2010 *Law & Social Inquiry*, Vol. 35, No. 1, pp. 1–38.
- 149 See *Parkin* (fn. 70), p. 16; *G. Cornelisse* (fn. 138); *E. Guild* (fn. 136).

accordance with international human rights standards,<sup>150</sup> administrative detention does not represent an effective instrument to achieve the objective pursued by immigration policy, *i.e.*, the removal of irregular immigrants. Many negative consequences which make irregular migrants unwilling to return in their country of origin because of imprisonment as a result of criminal conviction, therefore, persist unaltered in case of administrative detention. The analysis thus reveals that administrative detention represents a legitimate and effective instrument only if the conditions set out in the Returns Directive are respected and if it is used as an instrument essential to ensure the removal of irregular immigrants detained.

#### IV. Conclusions

This article has shown that criminal sanctions are not an effective tool to achieve the objective of removing from the EU territory irregularly entering or staying third-country nationals. Furthermore, the use of criminal sanctions in respect of irregular immigrants is illegitimate and not justified in the light of the main theories of punishment.

It seems that criminal law has been used only in a symbolic and instrumental fashion, which, however, risks losing its *raison d'être* since, as has been shown, criminal sanctions do not have a deterrent effect in relation to irregularly entering or staying third-country nationals.

A symbolic use of criminal law which does not fulfil any of the typical functions of criminal law is neither justified nor acceptable in a democratic society based on the rule of law. The interests at stake are nothing more and nothing less than the fundamental rights of individuals convicted on the basis of these criminal offences; these interests are not negotiable.

Even if criminalisation is not considered unjustified, the application of the requirements of proportionality and *ultima ratio* lead to enhance the use of non-punitive alternatives to detention. The EU and national legislators should, therefore, engage in studying alternatives to immigration detention, rather than increasing the number of criminal immigration-related offences.

In the light of the foregoing analysis, this seems the only rational solution which enables the achievement of the objective of removing irregularly entering and staying third-country nationals from the EU territory, while ensuring the respect of fundamental rights of irregular migrants and the fundamental principles on which the rule of law is based.

150 This has been suggested by the Special Rapporteur on the human rights of migrants, François Crépeau (fn. 145), paras. 93-94.