Judge-made Law and Detention of Irregular Migrants in Europe

A Comparative Study of the Jurisprudences of the Italian Constitutional Court, the Court of Justice of the European Union and the European Court of Human Rights

Edwina L. Jaeger

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 5 November 2019

European University Institute
Department of Law

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Department of Law – LL.M. and Ph.D. Programmes

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Thesis Summary

The aim of this thesis is to examine the impact of the judge on the content of the laws and criminal policies regarding irregular immigration. More specifically, this work is based on the jurisprudence regarding the administrative and criminal sanctions applicable to the irregular migrant for the sole motive of his/her irregular administrative status. By studying a set of selected cases from the Italian Constitutional Court (and to a lesser extent of the Justice of the Peace), the Court of Justice of the European Union and the European Court of Human Rights on these issues, the objective is twofold. Primarily, it seeks to measure whether the judges, at all levels, impinge on the shaping of the law and affect the legal treatment of the irregular migrant. And secondly, the study assesses the effect of their interventions on the protection of the fundamental rights of irregular migrants. The findings of this research surprisingly show two things. First, the judges have indeed found themselves at the crossroads of diverging interests. This position was used by the national Constitutional judges of Italy as a leverage to strongly lean on the legislator and curb the tendency towards an ever-increasing criminalization of irregular immigrants. Whereas the supra-national judges have shown more restraint. Concerning the Court of Justice, the protection afforded to irregular migrants has often been the collateral and paradoxical result of a legal regime essentially geared towards their expulsion. While the European Court of Human Rights' jurisprudence forms a complex regime of protective elements and surprising exceptions justified by the States' sovereignty regarding the control of their territory. Second, the judges' interventions have generally lead to more protection of the irregular migrants' fundamental rights than what national or supranational norms originally granted them.

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This thesis is dedicated to the memory of our beloved daughter Amilia.

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CHAPTER 1: GENERAL INTRODUCTION

Policy and law in the field of migration: an intricate pattern

1. Between the start of this thesis project in the Fall 2012 and its end in the Fall 2018, the phenomenon of migration turned from a predominantly Greek/Italian/Spanish issue with irregular migrants to what is being called a European Union migration crisis. The change in the wording reveals two simultaneous developments. The first measures the amplitude of the phenomenon (from "issue" to 'crisis') as well as its increasingly negative perception. The second ('Greek'/'Italian'/'Spanish' to 'European Union') reflects the progressive transformation of a national policy matter into one that affects the entire European Union.

2. Inevitably, those changes have had a noticeable impact on this project in terms both of orientation and of perspective. Regarding the orientation taken, it became growingly interesting, as migration progressively turned into a focal political point at national and European Union level, to take into consideration the intersections of the political and the legal fields and the respective role they were playing in the debate. While the perspective chosen in this work will be focusing on the interactions between the national courts of Italy, the European Union Court and that of the Council of Europe, it is interesting to briefly note the increasingly tangible impact that judicial interactions have had on the political field. Indeed, some political science analysts have emphasized the legal dimension of immigration policies by arguing that "[t]he potential power of judicial decisions enunciating rights for immigrants […] extends well beyond their ability to constrain politicians […]. [E]ven in the absence of a definitive court victory enunciating new constitutional rights, legal mobilizations that successfully activate public moral sensibilities hold the potential to shape the type of immigration politics that are possible. Guided by this framework emphasizing the co-constitutive relationship between law and immigration politics, we see that the extent to which judicial decisions replicate and transform political dynamics will be historically and contextually contingent"[1]. Pointing to the importance of the role of the judge in policy making in the field of immigration – beyond the mere outcome of a given individual case – the case has been made that "the threat of judicial sanction has ushered in a new policymaking

[1] Leila KAWAR, "*Juridical Framings of Immigrants in the United States and France: Courts, Social movements, and Symbolic Politics*", International Migration Review, Volume 46, Number 2 (Summer 2012), p. 420.

dynamic whereby politicians, who had previously been able to formulate immigration policy without judicial interference, now test the limits of judicial willingness to uphold immigrant rights"[2].

3. The enforcement by European States of policies aiming to limit, control and in some cases penalize more severely irregular immigration while attempting to simultaneously create at a European level a common migration policy[3] has given way to numerous interactions between the European Courts on their interpretation of the impact of these new rules on some of the rights enshrined in national constitutions[4]. These tensions are most likely the consequence of the difficulty to reconcile from a legal point of view individual freedoms and rights with a certain grasp of public order and national security which, heavily encouraged by shifting public opinions, tends to include an ever-sharper control of migration flows as a central issue.

4. European Union legislation, due to the origin of the EU as an economic partnership, has been mainly centred on the protection of rights related to the free movement of goods, services and workers as these were forming the core of the free trade area that the EU was standing for. In this perspective, a restrictive migration policy has been conceived as the necessary consequence of the establishment of a territory where internal frontiers have been virtually abolished: the area of freedom, security and justice[5]. However, it should be emphasized here that this conception is solely the result of a political choice[6] and not the

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[2] Leila KAWAR, "*Juridical Framings of Immigrants in the United States and France: Courts, Social movements, and Symbolic Politics*", International Migration Review, Volume 46, Number 2 (Summer 2012), p. 418-419.

[3] Among many others, the following pieces of EU legislation concerned with questions in relation with irregular migration can be cited as examples of this movement : 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, 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), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air or Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

[4] On the movement of constitutionalisation of immigration law in Europe, see E. MARZAL, *Constitutionalising immigration law,* Bradford England, Emerald Group Publishing, 2006 (in particular p. 7 to 19).

[5] Indeed, Article 3§2 of the Treaty on European Union states that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

[6] See Judgment of the Court of Justice of the European Community, *Florus Ariël Wijsenbeek,* 21 September 1999, Case C-378/97, EU:C:1999:439, ECR1999 I-06207(§ 28): "According to the Commission, abolition of those controls concerns all persons, since the maintenance of controls for nationals of non-member countries at

inevitable effect of the enshrinement of the right to freedom of movement inside the EU in the treaties. This might partly explain why European Union legislation on irregular migration tends to follow the already existing national trend to castigate it[7], while on the contrary EU regulations on regular migrants coming from third countries, and on the foreign members of the families of EU citizens (whether workers, self-employed or employment seekers) who have exercised their right to free movement, have generally been more protective[8]. As a matter of fact, while irregular migration remains a nebulous field divided between European and national regulations, the EU is slowly heading towards a comprehensive common Code on legal immigration[9].

5. A thorough review of the very wide range of political options on how to tackle irregular immigration at European level is not within the subject matter of this research. Nevertheless, it is worth defining briefly and roughly the opposing trends that have been at the center of the debate around the EU for long now.

6. At one end of the spectrum is what has been called the "open borders argument" which still rallies some partisans amongst economists, lawyers, geographers and philosophers – in ever-shrinking quantities though. Whether the notion of border is understood as a social construction which is contested, or as the most basic expression of national sovereignty which should be relinquished, or as the geographical transcription of a History that needs to be overcome, the argument is that borders should be regarded as obsolete and border controls should be limited if not completely removed. According to this

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internal frontiers would mean that they would have to be distinguished from nationals of the Member States and that the latter would therefore also have to undergo controls. Consequently, special Community measures at the external borders would be necessary in order that no Member State has to deal with undesirable foreigners from non-member countries entering via another Member State » and paragraph 36 « This new right conferred on citizens of the Union should be interpreted broadly and its exceptions and limitations should be interpreted strictly. However, as long as specific Community rules concerning controls at the Community's external borders have not been adopted and put into effect, the requirement to produce a valid passport or identity card at internal frontiers, […], does not constitute an abusive obstacle to the right to move freely within the Community and is not disproportionate ».

[7] In addition to the national provisions criminalizing the illegal entry or stay of third-country nationals, the European Union has adopted legislation to reinforce and harmonize this movement. See Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit or residence and Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

[8] See as an example the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and even more strikingly Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[9] This objective is stated in the annex to the Commission's Action plan on the implementation of the Stockholm programme (COM (2010) 171, 20 April 2010).

doctrine, borders constitute undue obstacles to movements of populations which are legitimate in themselves, irrespective of whether these are voluntary or involuntary (caused by climate changes, political or religious violence, economic reasons…). Often over-simplified as a position according to which the EU should cease to be a 'fortress', it defends the need to generally alleviate the pressure at the external frontiers of the EU by largely – if not unrestrictedly – admitting all migrants and consequently revoke all existing measures sanctioning the irregular entry, stay and residence. In its more substantial form and substantiated by economic data and analysis, this political option also provides a regulation mode ensured by the employment market. According to Jeroen Doomernik, "measures to control migration at the (external) borders have failed to prevent unwanted migration while having a number of negative consequences, such as forcing migrants to invest high amounts on overcoming barriers to migration, thereby increasing profits of migration facilitators and discouraging return and circular migration. […] In this proposal ['open borders, close monitoring'], the regulation of migration is left to the labour market, while demands on the welfare state are strictly tied to contributions (taxes, social security payments, pension accounts, etc.). Once registered, there would be no more grounds for exclusion from the territory, unless there are good reasons for it (such as security reasons or a criminal record)"[10].

7. At the opposite end of the spectrum is a movement which is defined by the criminalization of the irregular migrant[11]. It is characterized by the extension of the range of criminal offences which can have an impact on the immigration status of the person who has committed them. It is also defined by the expansion of the qualification of crime for activities somehow relating to irregular immigration (i.e. all forms of assistance to the irregular migrant to enter, transit and stay on the territory of a State, whether for humanitarian or profit purposes, the fabrication, provision and use of false identification documents…). This movement demands the legal transcription of an immigration policy based on the existence of a clear delimitation between legal and illegal immigration. According to this point of view, "[u]nsuccessful asylum claimants who try to avoid return, visa overstayers, and migrants living in a permanent state of irregularity constitute a serious problem. This corrodes confidence in the system. It offers strong arguments for those looking to criticise or stigmatise

[10] Michael JANDL (Ed.), *Ten Innovative Approaches to the Challenges of Migration in the 21st Century*, International Centre for Migration Policy Development (ICMPD), Amsterdam University Press, Amsterdam, 2007, (p.16).

[11] See notably Valsamis MITSILEGAS, *The Criminalisation of Migration in Europe - Challenges for Human Rights and the Rule of Law*, Springer, 2015.

migration. It makes it harder to integrate those migrants staying in the EU as of right".[12] Following this line of reasoning, immigration policy can be construed as a matter of inclusion in or exclusion from society. As such, this movement can be expressed in terms of "membership theory, which limits individual rights and privileges to the members of a social contract between the government and the people, [and which] is at work in the convergence of criminal and immigration law. Membership theory has the potential to include individuals in the social contract or exclude them from it. It marks out the boundaries of who is an accepted member of society"[13]. It has become obvious in the past years that the second approach is clearly the one which now prevails in Europe, as has been once again underlined in the latest report of the Fundamental Rights Agency published in January 2019 which highlights the ever-hardening immigration policies adopted by the Member States and their detrimental effects on migrants' fundamental rights[14].

8. The fact that irregular migration is known to be a sensitive social issue as well as a particularly slippery political subject makes it a characteristically controversial legal area and therefore a very adequate field for the study of the reciprocal influences between the Courts.

Irregular immigration as a field of multiple interactions

9. The angle chosen in this thesis is the study of the various types of interactions which irregular immigration concentrates: the combination of criminal and administrative laws and procedures, the combination of national, European and international legal norms and the corresponding juxtaposition of national, European and International jurisdictions. Combined to each other, these interplays have reciprocally fostered each other and rendered more intricate this entire legal area. As a consequence, the role of the judge – at every level and in both fields of the law involved – has grown to become central in the sphere of irregular immigration.

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[12] Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions – *A European Agenda on Migration*, (COM (2015) 240 final), Brussels, 13 May 2015, (p.7).

[13] Juliet STUMPF, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power », *American University Law Review*, Vol 56, p 377 (2006).

[14] "Migration: key fundamental rights concerns", Quarterly Bulletin (1.11.2018 - 31.12.2018), Fundamental Rights Agency, Luxemburg, Publications Office of the European Union, 2019.

10. At the crossroads of administrative and criminal laws, the field of irregular immigration has seen the balance between those domains constantly shift in the recent years. As has been accurately affirmed by Italian scholars, "it is a real penal-administrative continuum according to which the frontier between penal and administrative law tends to fade to the point of becoming a layout in the norm defining the legal status of the foreigner"[15].

11. Labelled '*crimmigration*'[16] (as the contraction of criminal law and immigration law) in the United States, where it was originally identified, it became a recognizable phenomenon across numerous countries of the European Union – where immigration law rarely stands on its own but is often an element of administrative law. It is defined by "[t]his convergence of immigration and criminal law [which] brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated"[17]. It has been perceived by the doctrine as an exclusively negative movement limiting the rights of the migrant who has been turned into a criminal.

12. However, this movement has also been studied by a minority of scholars across the EU as a movement potentially containing some supplementary elements of protection for the migrant. While this interpretation is spontaneously counterintuitive since criminal law carries the most symbolic expression of the State's power of punishment, its counterpart is an extended protection of the fundamental rights of the person to whom it is applied. As a matter of fact, criminal law is the field in which the procedural guarantees and rights of the defendants are – supposedly at least – the highest. In this perspective, the role of the judge – in all dimensions: constitutional judge, administrative judge, criminal law judge – is pivotal to guarantee that the capacity to affect human rights and freedoms is balanced by the highest procedural guarantees. Otherwise, "the principles and objectives of the criminal order –

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[15] "E un vero e proprio *continuum* penal - amministrativo, in forza del quale il *confine* tra diritto penale e diritto amministrativo tende, nella normativa sulla condizione giuridica dello straniero, a sfumare, fino ad assumere i tratti di un assetto" in Angelo CAPUTO, "Giurisprudenza costituzionale ed immigrazione illegale", in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 50).

[16] See Juliet STUMPF, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power », *American University Law Review*, Vol 56, p 367 and followings (2006).

[17] Juliet STUMPF, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power », *American University Law Review*, Vol 56, p 379 (2006).

criminal law and criminal procedure – [would be] bent and subjugated to the administrative activity intended to remove the irregular migrant [from the territory of the State]"[18].

13. It is precisely to counter this instrumental use of criminal law that the constitutional Courts have often been called into the judicial arena. This movement, called constitutionalisation of immigration law, reflects the opposing current of crimmigration and emphasizes the "trend towards fuller recognition in law of the fact that the exercise of migration control by the state impinges on the rights of individuals"[19]. In this regard, the role of the constitutional Courts has been twofold. It concerns, on the one hand, the sacralization of the migrant's fundamental rights and on the other hand, the delimitation between administrative and criminal laws.

14. The controversies arising from these topics have progressively, and notably with the involvement of the European Courts[20], questioned the construction of a coherent supranational legal order and called for a reflection on the creation of a new model of judicial organization[21]. While a constant case-law of the Court of Justice of the European Union claims, in the name of the principle of primacy, that EU law should prevail over any national - including constitutional - norm[22], the reality of this hierarchy is far from being cut and dried. This dialogical model of judicial organization[23] is constantly questioned by national constitutional Courts[24]. More broadly, the response given to irregular immigration is a

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[18] «I principi e gli scopi dell'ordinamento penale – del diritto e della procedura penale – vengono piegati, asserviti all'attività amministrativa preordinata all'allontanamento dello straniero irregolare» Angelo CAPUTO, "Prime applicazioni delle norme penali della legge Bossi-Fini" in *Quest. Giust.* N. 1/2003.

[19] Galina CORNELISSE "The Constitutionalisation Immigration Detention: Between EU Law and the European Convention on Human Rights", Global Detention Project Working Paper No. 15, October 2016 (p.2).

[20] See *Affaire A.M. c. France*, Requête n° 56324/13, Cinquième Section, 12 juillet 2016 ECLI:CE:ECHR:2016:0712JUD005632413

[21] On different organizational models see the three hypotheses of "coordination through cross-references", "harmonisation by approximation" and "unification by hybridisation" formulated by M. DELMAS-MARTY in *Ordering pluralism – A conceptual framework for understanding the transnational legal world,* translated by Naomi Norberg, Hart Publishing, Oxford, 2009.

[22] "Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure" (*Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel,* 17 December 1970, Case C-11/70, EU:C:1970:114, ECR 1970 – 01125, paragraphs 3 and 4)

[23] On the concept of "dialogical model of judicial organisation" see NIETO MARTIN Adan, "Architectures judiciaires du droit pénal européen" in GIUDICELLI-DELAGE Geneviève, MANACORDA Stefano (dir.), TRICOT Juliette (coord.), *Cour de Justice et Justice Pénale en Europe,* Société de Législation Comparée, 2010, p. 273 and p. 280.

[24] See Case n°287110, *Société Arcelor Atlantique et Lorraine et autres v Premier Ministre, Ministre de l'Ecologie et du Développement durable et Ministre de l'Economie, des Finances et de l'Industrie,* Arrêt d'Assemblée du Conseil d'Etat du 8 février 2007 with the Conclusions of the Commissaire du Gouvernement Guyomar

challenge to European integration and as such engages a reflection on the concept of constitutional pluralism[25] in the European space inasmuch as the oppositions are asserted with so much strength.

15. Undoubtedly, ever since the creation of the European Union, scholars have acknowledged and analysed the existence of an interplay between Courts in various legal fields. With the extension of the competences attributed to the European Union, an ever growing number of legal fields have been regulated by a plurality of norms and submitted to the authority of diverse Courts, hence opening a large arena for judicial debate, controversy and resistance.

16. In particular, such interferences have proven to be extremely vigorous between the national constitutional Courts and the Court of Justice of the European Union as they highlight the critical role of the judge in shaping the law. This stems from the wording of the Treaty on European Union, which states that, while pursuing integration, the Union shall respect the Member States' "national identities, inherent in their fundamental structures, political and constitutional"[26]. This provision, along with the development of doctrines defending a necessary resistance to the positions of the Court of Justice of the European Union opened wide possibilities for the national constitutional Courts to invoke national identity in order to defend their own perspective on key notions of European law and challenge the authority of the aforementioned Court[27]. More recently, there has been yet another striking example of this dialogue between the Italian Constitutional Court and the Court of Justice of the European Union. Once again, the matter regarded criminal law and

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ECLI:FR:CEASS:2007:287110.20070208 and the following case *Société Arcelor Atlantique et Lorraine and Others v Premier Ministre, Ministre de l'Ecologie et du Développement durable et Ministre de l'Economie, des Finances et de l'Industrie,* Case C-127/07, Grand Chamber, 16 December 2008, EU:C:2008:728, ECR *2008 I-09895* and the Conclusions of the Advocate General Poiares Maduro of 21 May 2008, specifically paragraphs 15 and 16.

[25] On the concept of constitutional pluralism see M. POIARES MADURO "Three Claims of Constitutional Pluralism" in AVBELJ M. and KOMAREK J. (editors), *Constitutional Pluralism in Europe and Beyond,* Oxford, 2011 and N. WALKER, "The idea of Constitutional Pluralism", *The Modern Law Review,* n°65, 2002.

[26] See Article 4 § 2 of the Treaty on European Union.

[27] "European unification on the basis of a union of sovereign states under the treaties may, however, not be obtained in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas, which shape the citizen's circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights […]. Essential areas of democratic formative action comprise […] all elements of encroachment that are decisive for the realisation of fundamental rights such as the deprivation of liberty in the administration of criminal law […]". (Paragraph 249cc, *Lisbon Treaty,* BVerfG 2 BvE 2/08, decision of the Second Senate of the Federal Constitutional Court of 30 June 2009 ECLI:DE:BVerfG:2009:es20090630.2bve000208)

more specifically the statute of limitations on a specific offence. Brought by the Italian Constitutional Court through the preliminary ruling procedure, the Court of Justice was asked to rule on the consequences of its *Taricco* jurisprudence[28]. In this new case - *M.A.S*[29] - the Italian Constitutional Court argued that the application of EU law would endanger legal certainty and infringe the principle of separation of powers. It also put forward that Italian law granted a stronger protection in terms of human rights. Finally, the Constitutional Court considered that the determination of the rules about the statute of legislations was part of the principle of legality of criminal offences and penalties and was to be regarded as such as constitutive of the constitutional identity of Italy that the Court of Justice had to respect (according to Article 4-2 TFUE). While Advocate General Bot strongly rebutted those arguments considering that this matter did not regard this member State's national constitutional identity and urged the Court to maintain its jurisprudence on the primacy of EU law, the Court agreed to recognize that the statute of limitations could be part of the principle of legality and refused to oppose the Italian Constitutional Court a stricter definition of the notion of constitutional identity[30]. By avoiding a frontal conflict, this conciliatory position adopted by the Court of Justice can be read as a will to generally engage in more pacified and constructive interactions with the Member States' Constitutional Courts. This outcome can also be taken as an illustration of the recognition, by the Court of Justice, of the power held by the Constitutional Courts and the weight of their interpretation in shaping the law.

17. Interestingly – and as illustrated by this recent jurisprudence - some areas have been more concerned by such interferences than others. The legal fields that are particularly touched seem to be the ones which had long been perceived as exclusively reserved to the authority of the Member States (notably criminal law and procedure) and which affected human rights directly or indirectly[31]. In this regard, the dual nature of the migrant's legal status renders migration law particularly interesting. Indeed, as human beings, the irregular migrants are entitled to see their fundamental rights protected. But as unwanted non-citizens of the State in which they have entered, transited or are residing illegally (to use EU

[28] *Ivo Taricco and Others,* Case C-105/14, Grand Chamber, 8 September 2015, EU:C:2015:555
[29] *M.A.S,and M.B.,* Case C-42/17, Grand Chamber, 5 December 2017, EU:C:2017:936
[30] For a more detailed analysis of the interactions of the courts on this case, see notably Rostane MEHDI, « Taricco, M.A.S. ou l'art délicat de la retraite en bon ordre… », ELSJ, 2018 (http://www.gdr-elsj.eu/2018/02/06/informations-generales/taricco-m-a-s-ou-lartdelicat-de-la-retraite-en-bon-ordre/ (consulted in December 2018).
[31] A striking example of which can be found in the *Solange* case of the German Federal Constitutional Court (*Wünsche Handelsgesellschaft (Solange II)*, BVerfG 73, 339 2 BvR 197/83, decision of the Federal Constitutional Court of 22 October 1986)

terminology, instead of "irregularly"), they are solely considered as persons to be returned to their country of origin[32].

18. From the opposition between these two representations of the irregular migrant stems the tensions underlying the Courts' interplays. Caught in between the two opposing visions, the role of the judge is therefore decisive. He can either attempt to reconcile two apparently irreconcilable conceptions or play the role of an arbiter who decides which conception should take precedence over the other. In doing so, the judge modifies the treatment of irregularly staying third-country nationals and indubitably impacts the legal norms applicable to them.

19. Whether called judicial dialogue or "war" between the judges, the existence of an interaction between the European Courts is no longer questioned by scholars. However, a brief literature review underscores that the analysis of this movement has not yet been assiduously examined in the specific field of irregular migration. Yet, this topic is a particularly relevant field of experimentation to study the interplay between autonomous Courts and it entails the comprehension of interactions with its relevance for legal certainty.

20. Precisely, one of the reasons why irregular migration has been such a wedge issue can be found in the fact that a pluralist legal order weakens – or at least transforms – the concept of legal certainty[33] so central to a field which has been more and more the object of criminal law. Therefore, understanding how these exchanges work is quintessential to account for the creation of a supranational legal order that is flexible enough to allow it to evolve while remaining foreseeable[34].

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[32] On the idea of the dual character of the migrant's status, see E. MARZAL, *Constitutionalising immigration law,* Bradford England, Emerald Group Publishing, 2006 (p. 12).

[33] As Mireille DELMAS-MARTY wrote it "the interactions already occurring between multiple and heterogeneous legal systems do not offer the same image of legal certainty as that which results from the principle of hierarchy in the standard representation of legal systems" (*Ordering pluralism – A conceptual framework for understanding the transnational legal world,* translated by Naomi Norberg, Hart Publishing, Oxford, 2009, p.15).

[34] […] "certainties are part of legal culture, and it is difficult to consider the transformations of various components of law in their ambivalence, at once negative and positive. Difficult to admit that the indeterminacy of integrative processes, which may weaken the legal order by reducing foreseeability and fostering arbitrariness, can also contribute to preserving diversity" Mireille DELMAS-MARTY, *Ordering pluralism – A conceptual framework for understanding the transnational legal world,* translated by Naomi Norberg, Hart Publishing, Oxford, 2009, (p.15).

21. This research endeavours to uncover how the judge, as a central figure of the field of immigration law, and through the various modalities of inevitable interplays at national and European level, resolutely impacts and effectively shapes its legal norms.

A note on the languages of the sources used

22. All judgments and other sources that were not found in English are inserted in their original language in the footnotes of this study which is based on materials in mainly three languages (English, French, Italian, plus a couple of them in Spanish and German). The need to conduct background research in several languages and to fully analyse and apprehend, rephrase where appropriate and translate the materials found, constituted obviously a major challenge and took its toll in terms of time. However, the broad basis thus covered may be considered one asset of this research.

23. This is particularly true as concerns material in Italian. The translations that I made, allow for a sizeable amount of material to be made accessible to non-Italian speakers. An overview of the existing doctrine on Italian irregular immigration law, jurisprudence and doctrine in English shows that it is scarce or referring always to the same few pieces. In fact, articles relating to the way Italy handles irregular immigration often make no reference at all to national decisions and comments on those are difficult to find and only available in their original language. The quality and quantity of debate, decisions and norms on the topic in Italy being quite remarkable, their exclusion constitutes a shortcoming in the European arena of dialogue.

24. Moreover, the variety of languages has been viewed as a reflection of something deeply rooted in European identity. As the philosopher and lawyer François Ost puts it, "Europe thinks in various languages, its language is translation, and it would mutilate itself politically and culturally if it submitted itself to the hegemony of *global English*"[35]. In this perspective and despite its intrinsic difficulty, in particular in the legal field and notwithstanding the approximations or simplifications that this research surely contains, translation has been a way to create new links, to allow unnoticed relationships to come to

[35] « l'Europe pense en plusieurs langues, sa langue est la traduction, et elle se mutilerait politiquement et culturellement si elle se soumettait à l'hégémonie du *global English* » in Libération Livre, 4 June 2009, Robert MAGGIORI "François Ost in translation : Langue. Le philosophe et juriste défend le multilinguisme, de Babel à l'Europe actuelle.» (www.liberation.fr consulté le 25 mai 2015).

light and to draw other parallels. In defence of this idea that the reliance on numerous languages carries more advantages than meets the eye, François Ost has used the term "potentiality of significance"[36]. In such way that, instead of the « babelish paradigm »[37], the plurality of language enables « the emergence of a paradigm of translation which accords with a world defined in terms of networks and communication »[38]. From this angle, Ost examines the act of translation as one able to reveal "the imaginary foundations, the historical detours, the conceptual frontiers, the linguistic presuppositions, the ethical implications and the political conditions of implementation of the language"[39]. His conclusion is an '*hymn to multilingualism*' and to this '*linguistic hospitality*' that constitutes translation – '*writing in itself*' – creative, which operates first within each language before working at its borders and which, from '*untranslatable*', posed as an obstacle, becomes an organ and the condition of its possibility"[40].

Framework and method of analysis

25. At a time when irregular migration daily hits the headlines, confusion on the terms used to designate the phenomenon and the people concerned is widespread. In order to avoid it, some precisions on the terms used and on the subject-matter of this research have to be given. An infinite number of definitions of irregular immigration are available and the choice of the reference immediately gives an indication on the perspective under which the topic will be considered[41]. According to the definition used by the International Organization for Migration (IOM), irregular immigration is the "movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or

[36] «potentialités de signifiance» in François OST, *Traduire. Défense et illustration du multilinguisme*, Fayard, Paris, 2009, 432 pages.
[37] «paradigme babélien» in François OST, *Traduire. Défense et illustration du multilinguisme*, Fayard, Paris, 2009, 432 pages.
[38] «l'émergence d'un paradigme de la traduction, accordé à un monde qui se pense en termes de réseau et de communication» in François OST, *Traduire. Défense et illustration du multilinguisme*, Fayard, Paris, 2009, 432 pages.
[39] «les fondements imaginaires, les détours historiques, les frontières conceptuelles, les présupposés linguistiques, les implications éthiques et les conditions politiques de mise en œuvre du langage » in François OST, *Traduire. Défense et illustration du multilinguisme*, Fayard, Paris, 2009, 432 pages.
[40] « Il en résulte un véritable hymne au multilinguisme et à cette *« hospitalité langagière»* qu'est la traduction - *«écriture à part entière»,* inventive, qui opère d'abord au sein de chaque langue avant de travailler à ses frontières et qui, de l'*intraduisible,* posé comme obstacle, fait son «organe» et sa condition de possibilité » in Libération Livre, 4 June 2009, Robert MAGGIORI "François Ost in translation : Langue. Le philosophe et juriste défend le multilinguisme, de Babel à l'Europe actuelle.» (www.liberation.fr consulté le 25 mai 2015).
[41] Amongst the most recent and complete study on the topic, see Benedita MENEZES QUEIROZ, "Illegally Staying in the EU: An analysis of Illegality in EU Migration Law", Hart Publishing, Oxford, 2018.

universally accepted definition of irregular migration[42]. From the perspective of destination countries, it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfill the administrative requirements for leaving the country"[43]. While the IOM definition allows to consider irregular immigration from both sides of the movement – receiving and sending country – the focus of this work is on the receiving countries. Therefore, in the framework of this research, irregular immigration law will solely designate all the norms concerned with the status, condition, measures and sanctions applicable to the foreigner who does not satisfy the legal requirements to enter, transit or stay on the territory of a (European) State. While the exact source of this irregularity – which can be manifold[44] – will most of the time be irrelevant in the framework of this study, irregular migration law or irregular immigration law[45] will not encompass the norms regarding neither asylum seekers[46] nor refugees[47] to

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[42] On this point, I would like to add that this has been evidenced by an European Migration Network (EMN) Study, "Ad-Hoc Query on national definitions of irregular migrants and available data", 2011, compiling answers from 15 EU countries (Austria, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Slovak Republic, Slovenia, Spain, Sweden and United Kingdom) which can be found at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/298.emn_ad-hoc_query_irregular_migration_updated_wider_dissemination_en.pdf (consulted on 5 April 2016). It shows that many of these countries do not have a clear, legal definition of "irregular migrant" and that when they do, the definitions vary from one country to another. Additionally, the distinction between illegal and irregular can assume very different significance or none at all.

[43] See the website of the International Organisation for Migration (IOM), consulted on 5 April 2016, https://www.iom.int/key-migration-terms

[44] The irregularity of the stay can stem from the fraudulent entry on the territory of a State of which the person is not a citizen bypassing border controls, or can stem from a legal entry on the territory of a State (with a short-term tourist, business or education visa) which later becomes an irregular stay because of the absence of request of a residence permit or by overstaying a residence permit, or by having it revoked, annulled or otherwise rendered invalid without requesting its renewal or having received a negative answer to the request. While some authors claim the existence of a difference in vocabulary between someone irregularly entered on the territory of a State ("clandestine immigrant") and a person regularly entered onto the territory of the State but illegally staying ("irregular immigrant"), no difference will be made throughout this work unless expressly mentioned. On the difference, see L. LANZA, Sistema penale e cultura dell'immigrato: quale ruolo per il giudice? in B. PASTORE - L. LANZA, *Multiculturalismo e giurisdizione penale*, Giappichelli, 2008, (p. 69 – 70).

[45] Despite the slight difference existing – according to the Collins Dictionary - in the semantic definition of the words immigration ("the movement of non-native people into a country in order to settle there ») and migration ("the act or an instance of migrating -i.e. to go from one region, country, or place of abode to settle in another, especially in a foreign country »), the latter being more general and encompassing the former, those will both be used to designate the same group of norms. This decision stems from the fact that the distinction is never made in this field and that both are broadly used in an interchangeable manner throughout this research. The same holds for the word "immigrant" and "migrant".

[46] "A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments. In case of a negative decision, the person must leave the country and may be expelled, as may any non-national in an irregular or unlawful situation, unless permission to stay is provided on humanitarian or other related grounds" on the website of the International Organisation for Migration (IOM), consulted on 7 April 2016, https://www.iom.int/key-migration-terms

whom specific international, European, EU and national regulations apply. However, it is worth noting that in spite of the fact that the difference between an irregular migrant and a refugee or an asylum seeker dictates the application of very different legal regimes, the reality is much less unequivocal. The existence of "mixed flows" has been explicitly recognized. It designates population movements and groups of individuals in which refugees, asylum seekers, economic migrants, victims of trafficking, unaccompanied minors, people subject to smuggling, vulnerable individuals… are travelling together, most of them qualifying for more than one single category. Yet, this analysis shall only take into consideration those persons whose irregular administrative status exposes them to administrative and criminal measures and sanctions under EU or national legislation.

26. Concerning the terminology used in this study, the choice has been made to keep, as much as possible, the denomination of each Court. The Italian legislation as well as the Italian Constitutional Court mostly use the words 'foreigner' or 'alien' (*straniero*) which can designate either the non citizen or the – usually irregularly-staying - migrant. As specified by the Single Act on Immigration, in the Italian law on immigration, the term foreigner is meant to designate the citizens of States which do not belong to the European Union and stateless persons (*gli cittadini di Stati non appartenenti all'Unione europea e agli apolidi)*. The Italian Constitutional Court uses the same vocabulary and rarely refers to the 'irregular' or 'illegal migrant' and almost never makes use of the terms 'third-country national' (*straniero extra-comunitario*). The Court of Justice of the European Union usually employs the name 'third-country national' but can sometimes also employ the expression 'illegal' or 'irregular migrant'. Finally, the European Court of Human Rights mainly utilizes the designation 'irregular migrant' or 'irregular immigrant' but sometimes employs the term 'illegal immigrant'. Outside of the framework of the chapters dedicated to each Court, the choice has been made to mostly use the terms 'irregular migrant' or 'irregularly staying third-

[47] "A person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. (Art. 1(A)(2), Convention relating to the Status of Refugees, Art. 1A(2), 1951 as modified by the 1967 Protocol). In addition to the refugee definition in the 1951 Refugee Convention, Art. 1(2), 1969 Organization of African Unity (OAU) Convention defines a refugee as any person compelled to leave his or her country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality." Similarly, the 1984 Cartagena Declaration states that refugees also include persons who flee their country "because their lives, security or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order." on the website of the International Organisation for Migration (IOM), consulted on 7 April 2016, https://www.iom.int/key-migration-terms

country national'. Also, the expression 'irregular immigration law' may sometimes be found along this work. While the locution seems somewhat contradictory, it designates the norms applicable to irregular migrants who do not fall under any other categories – as opposed to asylum law (applicable to asylum seekers, refugees) or to regular migration law (applicable to EU Blue Card recipients, beneficiaries of family reunifications procedures, holders of visa and work permits under specific headings 'seasonal workers', 'pupil exchange schemes', 'educational projects'…).

27. Regarding the framework of the analysis, the sanctions applicable to the irregularly staying migrant are of particular importance in this research. Before considering why the attention has been drawn to one specific type of sanction, it is worth considering the three types of sanctions incurred by irregular migrants for immigration related offences.

28. Starting with the lower penalty, the first category consists in pecuniary sanctions which consists in fines and can be both of administrative or criminal nature.

29. The second type of sanctions are the coercive measures which impact personal liberty. They can be both of administrative and criminal nature and include orders to leave the territory, expulsion with immediate escort to the border, entry bans, house arrest, consignment of the passport or travel document, obligation to present oneself at a given place at given times and the obligation to remain in a defined place.

30. Finally, the last type of sanctions is the most severe one and consists in the deprivation of liberty. The latter can be of administrative nature in which case, it theoretically takes place within specialized facilities for the sole purpose of awaiting removal and avoid the risk of absconding of the migrant, for an undetermined amount of time up to a maximum of 18 months according to the EU standard established by the Return Directive and without any underlying punitive nature. However, detention can also be pronounced as a sanction of criminal law in which case it takes place within penitentiary facilities, lasts for a determined amount of time determined by a judicial authority and is of punitive nature.

31. As regards the ambit of this work, the choice has been made to focus almost exclusively on the most severe sanction – i.e. deprivation for liberty – applicable to the irregular migrant for immigration related offences. This choice can be explained by various

elements. First, as this sanction is the most severe restriction of the fundamental right to freedom that the State can impose on an individual (at least in the European Union), it should also be the most scrutinized one by the Courts and the doctrine. Second, its application to irregular migrants for immigration related offences is bound to be controversial and therefore of special interest to a work of research. In this regard, the particularity of this detention is that, in most EU Member States, it is one of the sole hypotheses where a deprivation of liberty can be of administrative nature (with the noticeable exception of involuntary confinement in psychiatric facilities). Lastly, as it can be both of administrative and criminal nature in the field of migration law, it is a paradigm of the criminalization of this field which "has resulted in measures grounded in administrative law but which have assumed characteristics more akin to criminal sanction (such as detention or having the object of punishment and deterrence)"[48]. In this context, it is arguable that "an understanding of the *substance* of the consequences of criminalisation measures upon individuals, rather than only their legal *form* (as either criminal or administrative law) is essential"[49].

32. Concerning the framework of the research, the choice of Italy as the country of reference in the European Union was guided by various criteria: its geographic location, the evolutions of its immigration policies in the course of the past 20 to 30 years, the abundance of its case-law and the quality of its jurisprudence. The reunion of these elements together justified its choice as a reference in this research.

33. Indeed, located at the far South of Europe with over 7,000 kilometres of shores and at the Northern end of the central Mediterranean migratory route which has long been relied on and especially heavily so[50] since the Arab Springs in 2011[51], it is inevitably one of

[48] Mark Provera, "The Criminalisation of Irregular Migration in the European Union", CEPS Paper in Liberty and Security in Europe No.80/ February 2015, Center for European Policy Studies, 2015 (p. 36-37).
[49] Mark Provera, "The Criminalisation of Irregular Migration in the European Union", CEPS Paper in Liberty and Security in Europe No.80/ February 2015, Center for European Policy Studies, 2015 (p. 37).
[50] Other migratory routes to the European Union across the Mediterranean Sea exist and have been variably relied on and identified as notably, the Western Mediterranean route roughly between Morocco and Spain and the Easter Mediterranean route across Turkey- Greece and the Balkans. Those have been alternatively used as primary access channels changing alongside the conclusion of political agreements (such as the one concluded between Turkey and the European Union on 18 March 2016 following the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March 2016 EU-Turkey Statement), the closing of borders (notably, but not only, in the Balkans during the fall of 2015 and the Spring of 2016), the establishment of reinforced measures rendering next to impossible the crossing of borders (such as the third "wall", a razor wire barrier built in Melilla on the border between Morocco and Spain in 2005) or the mounting of joint border guards operations (such as Joint Operation Hera led by Frontex which started in 2006 off the coasts of Western Sahara, Mauritania, Senegal and Capo Verde to put to a halt the illegal route to the EU through the Canaries Islands).

the most important points of entry in the European Union. The swift and radical evolutions of its immigration policies in the recent times can generally be considered as a mirror image – sometimes with a slight time discrepancy – of the fluctuations of many EU countries' immigration policies oscillating between protection, integration, penalisation and expulsion. These similarities, however, should not mask one specificity of Italy: its transformation from an emigration country to an immigration country. This feature, which it shares with Spain, distinguishes Italy from older traditional immigration countries such as, amongst others, France or the United Kingdom. This evolution resulted in some particularities of its immigration law which renders it all the more compelling to study.

34. Finally, and maybe most importantly, the quantity and quality of its case-law guided the choice of Italy as a country of reference. As a matter of fact, in order to analyse the existence of a possible interference between the jurisdictions, it was imperative that the legal, ethical and political reasoning followed by the Courts appeared clearly in each decision. The Italian legal tradition precisely allows for such an inquiry at least in the highest jurisdictions (Constitutional and Cassation Court as well as in the Council of State).

35. It is worth noting here that the case-law emanating from the Justice of the Peace, which is in practice handling most of the day-to-day litigation regarding irregular migrants entering Italy, has been very rarely studied in the following work. The reasons of this noticeable absence are threefold. The first one is a practical reason: in Italy most of the decisions of these judges are hand written and there is not a centralised system enabling their access. The second reason is that these judgments are very short, written hastily and they do not contain any legal reasoning but the sole mention of the applicable legislation to the given situation. The last reason is more substantial and has to do with the choice to focus on the jurisprudence which, because it originates from a higher Court, is more likely to impact the making of the law.

36. An aspect which partly accounts for the profusion of jurisprudence in this field can be inferred from the fact that, historically in Italy, the figure of the judge is tightly associated with a certain activism in the protection of fundamental rights at national and

[51] See the website of Frontex, consulted on 17 March 2016 : http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/

European level. This is exemplified by the fact that a significant part of the jurisprudence of the Court of Justice of the European Union in the field of irregular immigration is the result of preliminary rulings emanating from Italian Courts.

37. The choice of the other two Courts, often denominated "European supreme Courts" in the course of this work, is relatively self-explanatory regarding the Court of Justice of the European Union in the context of a research concentrated on the judicial interactions in the field of irregular immigration on its territory.

38. Insofar as immigration law touches upon "fundamental rights" (EU terminology) that are enshrined as "human rights" (Council of Europe terminology) in the European Convention of Human Rights the inclusion of the case-law of the European Court of Human Rights in this study is a must. Also, it should not be forgotten that the jurisdiction of the European Court of Human Rights covers all the EU countries which are hence subject to a triple jurisdiction: their national one, that of the European Union and that of the Council of Europe. The interplay between these distinct legal systems whose jurisdiction can – and in practice does – overlap in matters of irregular immigration is at the heart of this study.

39. Finally, some inevitable – brief and simplified – elements of the history and sociology of Italy have sometimes been introduced so as to put the legal elements into their societal context.

Outline of the thesis

40. Irregular immigration-related litigation has been the object of much attention by scholars[52] over the past decades. However, not much has been said about what the interplays between Italian Courts, the European Court of Human Rights and the Court of Justice of the European Union case-law reveal about the place of the judge in the making of immigration policy, at national as well as European level.

41. The argument is made in this thesis that irregular immigration jurisprudence is a case in point to observe the impact of litigation on law. The goal of this work is to determine

[52] Among many others : Valsamis MITSILEGAS, Elspeth GUILD, Violeta MORENO-LAX, Juliet STUMPF, Marie-Bénédicte DEMBOUR, Galina CORNELISSE.

to what extent legal texts regulating irregular immigration are the result of the interpretations given by the judges at all levels as well as by the interactions that these Courts have between themselves. It is therefore primarily a thesis about what has been often called judge-made law.

42. The chosen angle of this analysis is the application to irregular migrants of sanctions affecting their rights and freedoms for offences that are administrative in nature. The qualification of the offences belonging to the field of immigration law as administrative or criminal is a much debated aspect today as the societal stigma, political weight and legal implications of such a qualifications are extensive. Therefore, qualifying these offences as 'administrative in nature' is the choice made in this thesis. As observed "[m]igration law is conventionally based on administrative law and has regulatory or administrative penalties at its disposal to ensure enforcement"[53]. It is not contradicted by the fact that criminal law is concurrently applicable to irregular immigration in the legislation of the State considered here (i.e. Italy). As a matter of fact, this choice aims to emphasize two aspects. First, that the application of criminal law in conjunction with administrative law to the foreigner who is the author of an immigration related offence does not modify the intrinsic administrative nature of the offence. The act at the basis of the offence consists in the non-fulfilment of an administrative obligation (in the case of the irregular entry: to be in possession of a specific document when crossing the border of a State). This offence and those related conducts do not cause any harm to any individual, they only infringe the state's border and immigration control regulations which is why they have long been exclusively dealt with by administrative law. Second, that the growing precedence taken by criminal law over administrative law to these offences – especially with regards to the sanctions applicable - is the result of a political choice. Nevertheless, it should be acknowledged that the qualification of immigration related offences as administrative or criminal is difficult to make in absolute terms as the law itself does not provide for intangible criteria to determine whether a conduct should be regarded as belonging to the field of administrative or criminal law. It should therefore be put into perspective as the limits between these two areas of the law are blurrier than it seems. Indeed, the two arguments sustaining the position defended in this thesis can be overturned. First, other crimes which do not cause harm to any individual (except the author himself) have been recognized as belonging to the field of criminal law (offences related to drug consumption for example). Second, other violations of administrative obligations have been recognized as

[53] Mark Provera, "The Criminalisation of Irregular Migration in the European Union", CEPS Paper in Liberty and Security in Europe No.80/ February 2015, Center for European Policy Studies, 2015 (p. 36).

being constitutive of a criminal offence (such as driving without an insurance). However, the combination of both factors – administrative nature of the offence and abence of tangible harm done to any individual vitim – having criminal consequences is unique. While no specific chapter of this research is solely dedicated to this question, it shall be more amply discussed and argued at various stages along this thesis as it has been the object of much attention by the judges of the Courts considered.

43. Along these lines, the thesis focuses only on the jurisprudence regarding sanctions for offences of irregular entry, stay or transit which consist in the entry, stay or transit on the territory of a State without being in possession of the required documentation, non-presentation of a document establishing the proof of legality of the stay, the violation of an order to leave the territory or of an entry-ban. It is necessary to note here that, in the framework of this study, the word 'offence' is used in its generic meaning (e.g. an act which breaks the law) and not in the sense of a specific category of violation of a criminal law provision.

44. The goal is to show the arguments and general reasoning that the Courts have displayed when confronted with the discrepancy between the relative innocuous nature of the offence for society and the seriousness of the impact of the sanction on the offender's life. A comparison of the reactions by the Courts, pointing out their similarity or their variance, is at the heart of this work and aims at demonstrating that those were pivotal in shaping immigration laws and policies.

45. In order to render the reasoning as easy to follow as possible, the choice has been made to consider each of the jurisprudences separately. Adopting an approach that goes from the most geographically specific to the widest in ambit, it will start with the national Courts – mostly Italy- before going to the Court of Justice of the European Union which covers 28 European States and finally the European Court of Human Rights with its jurisdiction over 47 "European" States.

46. The last chapter of this work will draw the conclusions from the different analyses of the case-law of each jurisdiction, reassembling the similarities and outlining the distinctions. The aim of the conclusion is twofold: to provide an overview of how deep the

impact of the judges is on the laws and policies, and consider how their interactions affect their interpretations of the laws.

47. In Chapter 2 on the Italian jurisprudence. more than one set of case-law will come under scrutiny. The reason for this is that various Courts have been involved in the field of immigration, each of them within the framework of their particular role: the Constitutional Court, the Justice of the Peace and to a lesser extent, the Court of Cassation. This chapter provides an overview of the Italian jurisprudence to demonstrate how the judges' wide array of methods has been put into place mainly to uphold irregular migrants' basic human rights. With some inroads into other national jurisdictions, the chapter affirms the pivotal role of the judge. At every level of the system, the position of the judge has served the double purpose of limiting the leanings of the legislator towards the criminalisation of the irregular migrant and reformulating the interpretations and exigencies of the Court of Justice of the European Union and of the European Court of Human Rights. This chapter demonstrates how litigation has been used by the constitutional and criminal judge as a way to shape national and European immigration legislation creatively by resorting to legal, moral, sociological, political and historical arguments. As the two subsequent chapters, it will start by a presentation of the legal framework within which the Courts are operating. Following a brief introduction, the chapter will be divided into 4 sections. The first section will present the most salient features of the Italian national law on immigration and emphasize to what extent its provisions are the result of a political, social and historical context. The following two sections focus on two ways in which the constitutional judge essentially has tried to operate as a counter balance against the political choices of the legislator towards a harsher treatment of irregular migrants. In this perspective, Section 2 focuses on the strict limitations which the constitutional judge has assigned to the national legislator's interventions in the field of immigration law. Section 3 considers to what extent and to what purpose the scope of application of some offences relating to irregular migration has been reduced by the constitutional judge. Lastly, this Chapter's fourth section highlights the key role played by the Justice of the Peace and how the questions that both his status and the procedures applicable before him are the reflection of the contradictions of the Italian legal system that is applicable to irregular migrants.

48. Chapter 3 concerns the Court of Justice of the European Union. The introductory section regards the European Union bundle of texts on immigration and recalls the heterogeneous nature of this blend of detailed texts and general provisions which form the

legal base of the review operated by the Court. The next sections are concerned with the case-law of the Court itself. Section 2 is focused on the generally protective case law of the Court on deprivation of liberty of European Union citizens for administrative offences. Once presented the depth of the control operated by the Court, the last two sections of this chapter unveil how this control drastically changes when the administrative offence is committed by a third-country national. Section 3 reflects the surprisingly scarce application of the proportionality criteria to the detention of third-country nationals and the progressive evolution of the Court's case law towards a more protective approach. Section 4 underlines the instrumental use of the principle of effectiveness by the Court.

49. Chapter 4 is dedicated to an analysis of the case-law of the European Court of Human Rights Convention of Human Rights on deprivation of liberty for administrative offences. As in the previous chapters, the first section is centred on the European Convention on Human Rights as an all-embracing, unspecialized legal instrument. The second section emphasizes the generally careful scrutiny of the control exercised by the Court on the grounds and conditions of a sanction that deprives an individual of his/her liberty. The following sections underscores the difference of treatment when offences are committed in the field of irregular immigration. There, Section 2 draws the attention to the refusal of the Court to apply the principles of proportionality and necessity to deprivations of liberty of irregular migrants. Section 4 dwells on the recourse, by the Court, to the principle of sovereignty of the States.

50. Chapter 5 concludes by recalling the salient features of the previous chapters and drawing them together in order to discuss the consequences and perspectives that these findings open. The demonstration will be made that this particular situation pushes the judge in a situation where he finds himself *de facto* the arbitrator between the conflicting interests of the various stakeholders involved. Which explains why irregular immigration law is a field of judge-made law *par excellence.*

CHAPTER 2: ITALY – POLITICAL PRESSURE AND THE COURTS' RESISTANCE

Introduction of Chapter 2

51. This Chapter will consider in what measure the role of the national judges has been instrumental in leading the European judges into this direction of a more defensive approach of irregular migrant's fundamental rights. This is particularly true when it comes to the Italian judges whose role has been "increasingly relevant to developing a "regime of minimum standards" in the interpretation of EU migration law and to ensure the coherence and effectiveness of the European Migration regime *vis-à-vis* domestic legal frameworks"[54].

52. Fulfilling the traditional role assigned to the judiciary in a democratic State respecting the rule of law, the Italian judiciary has consistently appeared as a decisive element in the system of checks and balances. Whilst inevitably reaffirming (in accordance with international law in this field) the – very - wide discretionary power of the legislator, it has progressively built a protective case-law aiming at safeguarding a core of rights recognized as inalienable. Basing its reasoning on the difference between the rights of the citizen (which the irregular migrant cannot, by essence, claim) and the rights of the human being (which ought to be fully upheld) the judges have rather consistently curtailed the effects of restrictive laws using a wide array of interpretative methods. As put forward by the Constitutional Court in one of its most famous decisions on immigration law, there is "a community of rights and duties, broader ad more inclusive than the one founded on the criteria of citizenship in the strict sense which welcomes and associates all those who, almost like a second citizenship, receive rights and in return accept duties"[55]. It is in the framework of this generous reading of the legal status of the foreigner that the Court has allowed to recognize and uphold a set of fundamental rights to the non-citizen.

53. In the course of this Chapter, Section 1 is dedicated to a presentation of the Italian legislation on irregular immigration while the following sections will focus on an

[54] FORNALE Elisa "The European Returns Policy and the re-shaping of the national: reflections on the role of domestic courts", *Refugee Survey Quarterly*, 2012, Volume 31, No. 4, (p. 144).

[55] Esiste una "comunità di diritti e di doveri, più ampia e comprensiva di quella fondata sul criterio della cittadinanza in senso stretto [che] accoglie e accomuna tutti coloro che quasi come in una seconda cittadinanza, ricevono diritti e restituiscono doveri". Corte Costituzionale Italiana, sentenza n. 172/1999.

analysis of the case-law of the Italian Courts on the sanctions applicable to the irregularly staying third-country nationals. Section 2 analyses the way in which the Constitutional Court has drawn the contours and set the conditions of the exercise by the State of its power to legislate in the field of irregular immigration. Section 3 examines the role of the judge in reducing the scope of application of certain offences related to irregular immigration. Finally, Section 4 focuses on the pivotal role played by the Justice of the Peace in delivering day to day justice to irregular migrants, highlighting the contradictions that are embodied in that actor's status and in the procedures applicable before him/her.

Section 1: The impulse of the legislator towards a harsher line[56]

54. Though it is common belief that the toughening of the legal treatment of illegal migrants originates in EU legislation, a closer overlook of domestic legislation reveals a common trend in the course of the 2000s. This movement consisted in considering immigration as a criminal law matter contrary to the long-lasting tradition of it being an area dominated by administrative considerations. The following overview of the recent sociological and historical relationship to immigration, the succession of legal norms in the field and the actual state of the law in the present days of Italy illustrates that it is the national legislator who gave the impulse to define a harsher line towards illegal immigration. However, this is not to say that the influences have not been reciprocal between Italian and European Union legislations. As has been eloquently formulated

> "the conceptualization of European migration policy has been described as a vertical double-sense process (National-European/European-National). On the one hand, the European migration regime is identified as an "external venue" to escape from the national context and as a strategy to raise issues that Member States cannot regulate at the national level. On the other hand, the national regulatory framework can be used to influence the adoption of EU norms by importing national legal standards"[57].

[56] As a research within Italian domestic law required to work on sources mainly written in Italian, the vast majority of the following quotes has been the object of a translation which I made. The original quotes in Italian, French or Spanish can be found integrally reproduced in the footnotes. It shall also be noted that the translation of 'libertà personale' is 'personal freedom' or 'individual freedom' as this right benefits from a different and stronger protection in the Italian legal order than the freedom of circulation.

[57] FORNALE Elisa "The European Returns Policy and the re-shaping of the national: reflections on the role of domestic courts", *Refugee Survey Quarterly*, 2012, Volume 31, No. 4, p. 141

55. It can therefore be affirmed that "the complexity of interactions among these two levels shapes and constrains the implementation and incorporation of migration regulations into national legal systems"[58]. The following pages will explore the historical background in which the legislation on aliens is rooted (Paragraph 1), the principles contained in Italy's Constitution regarding aliens (Paragraph 2) and finally, the state of the law as of today as concerns the respective domains of criminal and administrative law in Italy (Paragraph 3).

Paragraph 1: A brief history of Italian legislation on aliens

56. The Italian scenario is one of a southern European country whose historical and sociological situation as a country of immigration is recent but particularly exposed. Because its geographical location as the first European ground on the northern shores of the Mediterranean Sea puts it in direct contact with flows of immigrants who used to come from Albania (in the 1990's) and who today originate from the poorest regions of Africa (mostly Eritrea and Somalia) and the blood-drenched States of the Middle West (essentially Libya and Syria). As a result, "[t]he Italian case appears all the more worthy of note since it may be considered emblematic of an approach to irregular migration that is gaining ground globally, and raises several theoretical issues that are a prerequisite to legal analysis".[59]

57. Despite the fact that this research is principally orientated towards the legal aspects of immigration, a very succinct narrative of the historical and sociological approach to immigration seems inevitable (1). A short presentation of the succession of norms which slowly started to touch upon the question of immigration (2) allows to show why the 1998 legislation marks a turning point (3) before irregular immigration becomes considered as a national security issue (4) radically affecting the way the law deals with the irregular migrant.

[58] FORNALE Elisa "The European Returns Policy and the re-shaping of the national: reflections on the role of domestic courts", *Refugee Survey Quarterly*, 2012, Volume 31, No. 4, p. 141

[59] Alessia DI PASQUALE, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations" in Ruth RUBIO MARIN (ed.) *Human Rights and Immigration,* Oxford University Press, 2014, First Edition, p. 279 – 280.

1. A historical and sociological account of Italy's link to immigration

58. For economic and political reasons, especially in the 1920s and the 1930s, Italy (along with Greece, Spain and Portugal) has long been a land of emigration rather than a land of immigration. As such, Italy has been one of these countries which, only about 25 years after the end of World War II "after having known big waves of emigration, have become countries of immigration at the exact moment when countries with older immigration have considerably limited the entry of aliens on their territory"[60]. As has been underlined by numerous studies dedicated to the subject, in Italy « [m]igration flows became perceptible in the mid-1970s but have increased significantly since the first decade of the 2000s, when Italy became a country of both destination and transit for international migration"[61]. That is why,

> "[f]aced with the first manifestations of the phenomenon of immigration, in the late 1960s and early 1970s, there was no awareness of the transformation of Italy into a country of immigration, nor a unified plan to address the phenomenon; instead, there has been a tendency to consider immigration as a temporary problem and related to occasional situations and emergencies"[62].

59. It is only "in the course of the 80's that immigration has become a structural characteristic of the Italian society"[63].

60. In order to better grasp the origins of the recent development of migration law and the prominent role of the *Questore*[64]*,* it is critical to highlight the central role of the police in the mechanism aiming at managing, controlling and then reducing the flows of migrants.

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[60] « des pays qui, après avoir connu des grandes vagues d'émigration, deviennent des pays d'immigration au moment même où les pays à immigration plus ancienne limitent considérablement l'entrée des étrangers sur leur territoire ». Marco OBERTI, "Politique d'immigration en Italie et au Portugal", *Mouvements,* n°12, Novembre - Décembre 2000, (p.120).

[61] Alessia DI PASQUALE, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations" in Ruth RUBIO MARIN (ed) *Human Rights and Immigration,* Oxford University Press, 2014, First Edition, p. 279.

[62] Alessia DI PASQUALE, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations" in Ruth RUBIO MARIN (ed) *Human Rights and Immigration,* Oxford University Press, 2014, First Edition, p. 289- 290.

[63] "C'est au cours des années quatre-vingt que l'immigration est devenue une caractéristique structurelle de la société italienne." Fabio QUASSOLI "La citoyenneté niée : les politiques d'immigration récentes en Italie", *Mouvements,* n°12, Novembre - Décembre 2000, (p.122).

[64] Since no translation of the term was available as an exact equivalent, it has been chosen to keep it denominated by its Italian name. It designates the provincial chief of the national State police force. The closest translation would have been (police commissioner). In any case, his role is distinct from the one of the *Prefetto* which has here been translated as Prefect.

"From the start, the role of the public security forces in the management of the migratory flows has been decisive. The absence of norms and policies of overall management only confirmed and extended the discretionary character of the interventions of the police in the management of immigration. The centrality of the police forces in the management of the migratory flows and the modalities of insertion of aliens in the Italian society is confirmed by the attribution to the police stations of control of administrative nature (issuance, modification, renewal of residence permits) which in all other European countries are the competences of the local administrative authorities"[65].

61. The timeframe and roots of these immigration flows have been explained by a combination of factors, be they economic, demographic, legal or dependent on the structural organization of the Italian State. They can be roughly summed up as follows:

"A country such as Italy has become all the more attractive as the dynamism of its economy, and more particularly of the sector of its small and medium enterprises of the northern and central parts, have needed a labour force which had diminished as the southern young population did not accept as easily as their parents and grandparents to leave the South of Italy and as the drop in fecundity rate strongly contributed to the ageing of its population. In addition, the traditional sectors, such as construction and chemicals, have been largely ignored by the young [Italians]. Moreover, Italy has an economy in which the informal part is fundamental and whose illegal dimension favours the recruitment in very precarious conditions of aliens in illegal situations"[66].

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[65] "Dès le départ, le rôle des forces de sécurité publique dans la gestion des flux migratoires fut déterminant. L'absence de normes et de politiques de gestion d'ensemble n'a fait que confirmer et étendre le caractère discrétionnaire des interventions de police dans la gestion de l'immigration. La centralité des forces de police dans la gestion des flux migratoires et des modalités d'insertion des étrangers dans la société italienne est confirmée par l'attribution aux commissariats de police des contrôles à caractère administratif (délivrance, modification, renouvellement des permis de séjour) qui, dans tous les autres pays européens, sont de la compétence de l'administration locale." Fabio QUASSOLI "La citoyenneté niée : les politiques d'immigration récentes en Italie", *Mouvements,* n°12, Novembre - Décembre 2000, (p.122).

[66] « Un pays comme l'Italie devient d'autant plus attractif que le dynamisme de l'économie, et plus particulièrement du secteur des PME du nord et du centre, nécessite une main d'œuvre qui se fait d'autant plus rare que les jeunes méridionaux n'acceptent plus aussi facilement que leurs parents et grands-parents de quitter le Mezzogiorno et que la baisse de la fécondité contribue fortement au vieillissement de la population. D'autre part, des secteurs traditionnels, comme le bâtiment ou l'industrie chimique, sont très largement fuis par les jeunes. L'Italie […] a par ailleurs, une économie au sein de laquelle la partie informelle est fondamentale et dont la dimension illégale favorise le recrutement dans des conditions très précaires des étrangers en situation irrégulière. » Marco OBERTI, "Politique d'immigration en Italie et au Portugal", *Mouvements,* n°12, Novembre - Décembre 2000, (p.120).

62. In order to measure the scale of the phenomenon in Italy, the foreign population has grown from approximately 200,000 aliens (0.3 per cent of the population) in 1975 to 6.1 million people (a little over 10 per cent of the population) in 2018. It is also worth noticing that 8,7% of them are irregularly-staying and that 71% of the foreigners residing in Italy are third country nationals[67].

63. The relatively recent appearance and the labour-oriented content of the initial laws regarding immigration can be considered as the result of this belated manifestation of the immigration movements. An apparent and initial social unawareness and lack of interest for the phenomenon explained the moderate interest of politicians in regulating the phenomenon.

2. *Between the end of WWII and the end of the 1990s: a succession of laws progressively approaching the question of immigration*

64. Between the end of the Second World War and 1986, very few were the laws concerned with the management of migrants as Italy had not yet become a country of immigration. The only regulations that can be found in that period regard the condition of the migrant-worker[68] prompted especially by the ratification in 1981 of the Migrant Workers Convention[69] of the International Labour Organisation. As was previously hinted at, "the phenomenon of immigration, which ha[d] been increasing since the 1980s, was initially addressed by the Italian authorities as an issue related exclusively to the labour market"[70].

65. In this regard the first step comes with Law n. 943 of 30 December 1986[71] which legislates for the first time on the phenomenon of immigration including irregular migration. However, it only refers to it in order to regularize the situation of migrant workers who were already in Italy, as title IV (and in particular articles 16 to 18) announces: "Regularisation of the present situations" (*Regolarizzazione delle situazioni pregresse*). With

[67] The statistics mentioned in this paragraph come from the following annual report: the Ventiquattresimo Rapporto sulle Migrazioni 2018, Fondazione ISMU (Iniziative e studi sulla multi etnicità).
[68] See for example Circolare del Ministro del Lavoro n. 51 del 4 dicembre 1964 "Norme per l'impiego in Italia di lavoratori subordinati stranieri".
[69] Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* adopted in Geneva, on the 60th ILC session of 24 June 1975 and ratified by Italy with Legge n. 158 del 10 aprile 1981.
[70] Alberto DI MARTINO, Francesca BIONDI DAL MONTE, Ilaria BOIANO, Rosa RAFFAELLI (eds), "The criminalization of irregular immigration: law and practice in Italy", Pisa University Press, 2013, (p. 7).
[71] Legge del 30 dicembre 1986 n. 943, Collocamento di Lavoratori - Norme in materia di collocamento e di trattamento dei lavoratori extracomunitari immigrati e contro le immigrazioni clandestine, published in the Gazzetta Ufficiale (GU) n. 8 of 12 January 1987.

this law, Italy opens the path to a series of legislative acts of regularizations through which illegally working migrants will be granted the right of residence. This approach will last over a decade without ever building a real migration policy. By precluding any form of criminal liability for illegal entry on the territory in cases where the migrants were already working, the political choice of Italy in those years yields a vision of immigration in which the illegal status can be overcome by the accession to an illegal working position which in turn paradoxically becomes the only entrance door to the granting of a legal status.

66. The second development arrives with Law n. 39 of 28 February 1990 (so-called Martelli Law)[72] which recognizes the status of refugee in the sense of the 1951 Convention (article 1). It sets out (in article 4) the possibility to be granted a residence permit for non EU citizens on multiple grounds – studies, family motives, autonomous labour (in addition to subordinated labour that was the only valid ground with respect to labour before), assigns to the administrative judge the competence for all legal challenges regarding migrants rights (article 5) and consecrates expulsion (which is decided by the Prefect or by the Interior Minister if based on national security motives) as the only means of removal of illegal and/or undesirable foreigners present on the territory of the State[73] (article 7).

67. The next text concerned with immigration is the Decree-Law 489 of 18 November 1995 (the so-called Dini Law)[74] which never converted into a law. It essentially introduces seasonal flows for foreign workers (articles 1, 2 and 3), further develops the conditions of entry and stay and the granting and renewal of the residence permit (articles 4, 5 and 6), creates various hypotheses in which expulsion can be ordered for security reasons (article 7 and 7-quater) or as a preventive measure (article 7-bis), creates the possibility for the expulsion to be required by the foreigner or his attorney themselves or by the Public Prosecutor (article 7- ter) and disposes that administrative expulsion shall take place when the

[72] Legge del 28 febbraio 1990 n. 39, Conversione in legge, con modificazioni, del decreto-legge 30 dicembre 1989, n. 416, recante norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato. Disposizioni in materia di asilo published in the Gazzetta Ufficiale (GU) n. 49 of 28 February 1990.

[73] Which concerns a series of circumstances in which the illegally staying alien has either been condemned in a criminal proceeding of a very serious offence or is held responsible – but not yet condemned – of the commission of a certain type of offences (regarding cultural property, customs regulations, sexual exploitation...), or is in violation of the rules of entry and stay, or constitute a threat to public order and /or the security of the State…

[74] Decreto-Legge del 18 novembre 1995, n. 489, Disposizioni urgenti in materia di politica dell'immigrazione e per la regolamentazione dell'ingresso e soggiorno nel territorio nazionale dei cittadini dei Paesi non appartenenti all'Unione europea. Published in the Gazzetta Ufficiale (GU) n. 270 of 18 November 1995.

foreigner is illegally staying (article 7-quinquies) and is carried out by an order to leave the territory which is motivated and made by the Prefect (article 7-quinquies 4) whose appeal has the effect of suspending the enforcement of the measure (article 7-quinquies 5). The order to leave the territory is generally associated with a 7-year entry ban (article 7-sexies 1). A short list of exceptions completes the legal framework on expulsion: minors of 16 years, pregnant women, foreigners having legally resided in Italy for at least 5 years and foreigners living with Italian relatives within the fourth degree of kin (article 7-sexies 9). The Decree Law also introduces the criminal offence of non-presentation of any identification document (article 7-septies) which is punished by detention up to 3 years if committed after having been ordered to leave the territory. The re-entry on the territory before the end of the entry ban is punished by a detention period comprised between 6 months and 3 years.

68. The real turning point of Italian immigration law however only came with the adoption of a new law in 1998.

3. *The Turco-Napolitano Law of 1998: a turning point with the first law on the status of the migrant in Italy*

69. Indeed, the enactment of Law n. 40 of 6 March 1998 (so-called Turco-Napolitano Law)[75] really marks a decisive moment in the regulation of migration in Italy as it seized the necessity to create a more complete and unitary normative framework. The Law

> "follows three objectives: prevent irregular immigration and the criminal exploitation of migratory flows, put in place a precise policy of limited, programmed and controlled legal entry, start integration courses for newly arrived legal immigrants and for aliens already legally staying in Italy. On the one hand, the entry on Italian territory is object of restriction and on the other hand, more possibilities of integration and recognition of the fundamental rights are provided to the legally staying aliens"[76].

[75] Legge del 6 marzo 1998, n. 40, Disciplina dell'immigrazione e norme sulla condizione dello straniero, published in the Gazzetta Ufficiale (GU) n. 59 of 12 March 1998.

[76] "si prefiggeva tre obiettivi: il contrasto dell'immigrazione clandestine e dello sfruttamento criminale dei flussi migratori, la realizzazione di una puntuale politica di ingressi legali limitati, programmati e regolati, l'avvio di percorsi di integrazione per i nuovi immigrati legali e per gli stranieri già regolarmente soggiornanti in Italia. Da una parte quindi si opera una restrizione per quanto riguarda l'entrata nel territorio italiano, dall'altra, per gli stranieri regolari, si prospettarono molte possibilità di integrazione e di riconoscimento dei diritti fondamentali". Emanuela ZANROSSO, *Diritto dell'Immigrazione – Manuale pratico in materia di ingresso e condizione degli stranieri in Italia, Aggiornato al D. L 23 maggio 2008, n. 92 Misure urgenti in materia di sicurezza pubblica,* II Edizione, Gruppo Editoriale Esselibri – Simone, Napoli, 2008.

70. The Law is divided in 7 titles and contains 46 articles. The first title sets out general principles and creates the basic instruments to establish a migration policy (planning and previsions of the flows, active role of the local and regional entities to develop and coordinate insertion plans…). The second title of the law concerns the entry, stay, push-back and removal of the foreigner. It also enumerates the conditions under which a residence permit is granted and introduces the residence card as a permanent title. Regarding expulsions, the system provides for a general rule in which the foreigner is notified an order to leave the territory within a certain period of time while opening in limited cases the possibility of immediate expulsion through an accompaniment to the border. Detention is foreseen for an initial period of 20 days with a possible extension of another 10 days. Once this time frame has expired, the detention of the foreigner must cease. Title III of the Law is dedicated to the conditions under which the migrant can work while Title IV deals with family rights and the protection of minors. Title V relates to civil and social rights (medical assistance, housing rights, right to education…) and prohibits any form of discrimination against migrants while insisting on the possibilities to integrate the Italian society. Finally, Title VI covers the specific regime of EU citizens and Title VII deals with technical details regarding the application of the law.

71. The same year, the Legislative Decree of 25 July 1998 n. 286 (so called 'Testo Unico sull'immigrazione' which shall be referred to as Single Act on Immigration)[77] ambitioned to reunite in a single text all the applicable legal norms relating to immigration, including the status of aliens which has been, from then on, amended multiple times following changes of migration policy.

4. *From 2000 onwards: a succession of movements increasing the pressure over migrants*

72. The 2000s have been characterized in Italian migration law by a harshening of the treatment of irregular migrants due to an increasing pressure by politicians echoing the negative perception of immigration in the country.

> "Despite the aspirations of the 1998 Single Text on Immigration to regulate migration effectively in all its phases for the first time, the strong presence of irregular migrants

[77] Decreto Legislativo del 25 luglio 1998, n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, published in the Gazzetta Ufficiale (GU) n. 191 of 18 August 1998.

on Italian territory has however remained an issue that is both difficult to solve and fraught with controversy"[78].

73. As a matter of fact,

"[b]ecause of a combination of factors (the impact on the public opinion of the arrival of migrants on the Italian coasts, some headlines as well as the tendency of political parties in place to a certain 'criminal populism'), an actual 'criminal arsenal' against the foreigner in irregular situation has been recently put in place in the perspective of reinforcing the existing administrative mechanisms in the field" [79].

74. While the amplification of migration flows was targeting Europe, the trend that progressively lead to a criminalization of the irregular migrant originated in the Member States, and notably, amongst others, in Italy.

"The migration policy of the [Italian] legislator has been materialized by an 'escalation' of the measures (criminal and administrative) sanctioning the condition of irregularity, with the aim of reassuring the public opinion more than of contributing to a rational management of the historical phenomenon that [Italy], like other European countries, is facing"[80].

75. In their frantic urge to satisfy a sometimes manipulated public opinion, the Italian legislator promoted a series of texts in which criminal law played a more and more central role in the original administrative mechanism. As a result of this movement, the very essence of this mechanism which used to be purely administrative changed.

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[78] Alessia DI PASQUALE, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations" in Ruth RUBIO MARIN (ed) *Human Rights and Immigration,* Oxford University Press, 2014, First Edition, (p. 290).

[79] "A causa de la combinación de varios factores (el impacto sobre la opinión pública de la llegada de emigrantes a las costas italianas, algunos hechos diversos, así como la tendencia de los partidos políticos en el poder a un cierto 'populismo penal'), recientemente se ha puesto en marcha un verdadero 'arsenal penal' contra el extranjero en situación irregular para reforzar el respeto a los dispositivos administrativos ya aplicables en este ámbito." Luca D'AMBROSIO, " De la incapacitación a la exclusión ? Peligrosidad y Derecho Penal en Italia" in Luis ARROYO; Mireille DELMAS-MARTY, Jean DANET, Maria ACALE SANCHEZ, *Securismo y Derecho Penal – Por un derecho penal humanista,* Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2013, (p. 205)

[80] "La politica in materia migratoria del […] legislatore [italiano] si è concretizzata in un '*escalation*' di misure (penali ed amministrative) sanzionatorie della condizione di irregolarità, con lo scopo più di rassicurare l'opinione pubblica, che di contribuire ad una gestione razionale del fenomeno storico che sta interessando […] [l'Italia], come gli altri Paesi europei." Luca MASERA, " 'Terra bruciata' attorno al clandestino" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 29).

"The expression 'criminal law of the perpetrator' indicates the tendency to attribute more importance to the subjective conditions of the perpetrator of the offence than to the act concretely harmful to the social value protected. As a matter of fact, 'enemy criminal law' introduces a new form of 'criminal law of the perpetrator' as the institutional recognition of the belonging of a person to the category of the enemy takes place, necessarily, in consideration of the characteristics of the person more than of his/her legally relevant behaviour"[81].

76. Emblematic of a radical turn, the – still – much debated and controversial Law n. 189 of 30 July 2002 (so-called Bossi-Fini Law) [82] introduced some major changes and departed from the 'spirit' of the 1998 text.

"Along with the Bossi-Fini Law also changes the role of criminal law in the overall field of immigration and the condition of the foreigner, a role that acquires a central dimension above all through the introduction of the offence of unjustified non-compliance with the order to leave the territory [...] and the creation of a *criminal-administrative mechanism* centered upon the *passage* from the expulsion to the order to leave the territory, from the incrimination of resisting the arrest, to the expeditious trial to, once again, the expulsion"[83].

77. The expression "criminal-administrative mechanism" requires some clarification. It designates here the recourse to criminal mechanisms when the existing administrative measures are deemed insufficient to deliver the primary objective pursued by

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[81] "L'espressione 'diritto penale d'autore' indica la tendenza ad attribuire peso più alle condizioni soggettive dell'autore del reato che non al fatto concretamente lesivo dei beni tutelati. In effetti, il 'diritto penale del nemico' introduce una forma inedita di 'diritto penale d'autore, in quanto il riconoscimento istituzionale dell'appartenenza di una persona alla categoria dei nemici avviene, necessariamente, in considerazione delle caratteristiche dell'autore più che alla sua condotta penalmente rilevante." Adolfo CERETTI e Roberto CORNELLI "Quando la sicurezza cortocicuita la democrazia" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 17).

[82] Legge del 30 luglio 2002, n. 189, Modifica alla normativa in materia di immigrazione e di asilo, published in the Gazzetta Ufficiale (GU) n. 199 of 26 August 2002.

[83] "E muta, con la legge Bossi-Fini, anche il ruolo del diritto penale nella complessiva disciplina dell'immigrazione e della condizione giuridica dello straniero, un ruolo che acquista una dimensione centrale soprattutto attraverso l'introduzione del reato di ingiustificata inosservanza dell'ordine di allontanamento [...] e la costruzione di un *meccanismo penal-amministrativo* incentrato sul *passaggio* dall'espulsione all'ordine di allontanamento del questore, dall'incriminazione della sua inottemperanza all'arresto, dal giudizio direttissimo, nuovamente, all'espulsione." Angelo CAPUTO, "La penalizzazione dell'irregolarità in Italia", in Rosaria SICURELLA (a cura di) *Il controllo penale dell'immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici*, G. Giapichelli Editore, Torino, 2012, (p. 203).

this field of immigration law: the removal of the irregular migrant from the territory of the State.

78. In a more detailed fashion, the law introduces a "residence contract for work' (*contratto di soggiorno*) which combines protective provisions with stricter conditions of acquisition (article 6), creates a unique administrative service for migrants at the Prefecture *(Sportello Unico per l'immigrazione)* dedicated to handling most questions related to labour and family reunification (article 18), restricts the conditions at which family reunification can be obtained (article 23 and 24), establishes a simplified procedure for the recognition of the right to asylum (article 32) and lengthens the period of time before a permanent title can be granted (article 9). Regarding the harshening of the treatment reserved to irregular migrants, the law institutes the rule according to which expulsions are generally to be carried out via an accompaniment to the border (article 12), initiates the imposition of a sanction for a delayed communication of the personal data of the foreigner who is accommodated in Italy (article 8), sets up longer entry bans after an expulsion – from 5 to 10 years – (article 14) and finally, extends the maximum period of detention in the Centres for Identification and Expulsion which goes from 30 days in the 1998 Law to 60 days (article 13).

79. As in the "security packages" (see below), some of the key offences and measures introduced by this text were later stricken down by sentences of the Constitutional Court (which will be studied in detail later in this Chapter).

80. Although it could hardly be argued that there was a lull in the pressure set over irregular migrants in those years, the necessity to implement EU law led Italy to make some positive changes in its migration law, like for instance with regard to the right to family reunification or to the status and rights of long-term residents.

81. In 2008 and 2009 however, "there was what has been called a 'securitization' of immigration policy, introducing "security package" measures to fight crime at both macro- and micro-level, in which major changes to immigration laws were included"[84]. "The two security packages of 2008 and 2009 confirmed the tendency to criminalize conducts centered

[84] Alessia DI PASQUALE, "Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations" in Ruth RUBIO MARIN (ed) *Human Rights and Immigration,* Oxford University Press, 2014, First Edition, *(*p. 279).

on the *status* of irregularity with the introduction of the aggravating circumstance of illegal presence on the territory of the State (Art. N. 11- bis of the Criminal Code, which was later declared unconstitutional by Constitutional Court Decision n. 249/2010) and the offence of illegal entry and stay on the territory"[85].

82. These two sets of laws will be considered later on as the key modifications they introduced have led to some of the most interesting decisions of the Constitutional Court in the field of migration law. But they did profoundly and durably modify the perception of migration in Italy as well as the image of Italy on the international scene. The reaction of a large part of the Italian scholars as well as the mobilization of a part of the civil society were the result of the fact that, with these "security packages",

> "it was intended to protect the safety of the *citizen* against the *irregular foreigner*, by now considered not only as a *natural candidate* to a criminal career (and hence as a source of danger on which to intervene by a custodial sentence and the consequent expulsion at the first manifestations of such a 'career') but even as a *criminal per se* because of his or her mere *presence* on the national territory, independently from any subjective manifestation of dangerousness for the legal interests objects of the protection of criminal law"[86].

83. More recently, the Single Act on Immigration was amended by the Legislative Decree of 17 February 2017 n.13[87] (also referred to as "Decreto Minniti"). The main modifications brought by this legislation were of diverse importance and include: the modification of the name of the Centres of Identification and Expulsion (CIE) into Centres for

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[85] "I due pacchetti sicurezza del 2008 e del 2009 hanno poi segnato l'accentuarsi della tendenza alla criminalizzazione di condotte incentrate sullo *status* di irregolarità, con l'introduzione della circostanza aggravante della presenza illegale nel territorio dello Stato *ex* art. 61, n. 11-*bis* c.p. (poi dichiarata incostituzionale dalla sentenza n. 249/2010 della Corte Costituzionale) e del reato di ingresso e soggiorno illegale." Angelo CAPUTO, "La penalizzazione dell'irregolarità in Italia", in Rosaria Sicurella (a cura di) *Il controllo penale dell'immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici*, G. Giapichelli Editore, Torino, 2012, (p. 204).

[86] "si è dunque inteso tutelare la sicurezza del *cittadino* contro lo *straniero irregolare*, ormai considerato non più soltanto come *candidato naturale* alla carriera criminale (e pertanto come fonte di pericolo su cui intervenire con la pena detentiva e la conseguente espulsione sin dalle prime manifestazioni di tale 'carriera'), ma addirittura come *criminale in sé* in ragione della sua stessa *presenza* sul territorio nazione, indipendentemente da qualsiasi manifestazione soggettiva di pericolosità per i beni giuridici tradizionalmente oggetto di tutela penale." Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pachetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. VIII).

[87] Decreto Legge del 17 febbraio 2017, n. 13. "Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale nonché per il constrasto dell'immmigrazione illegale", published in the Gazzetta Ufficiale (GU) n.90 of 18 April 2017.

the Temporary Reception for Returnees (CPR), the acceleration of the identification procedures, some important changes in the asylum procedures and the creation of sections specialized in immigration, international protection and free movement in the EU within a certain number of tribunals.

84. The very latest substantial modifications to the Single Act on Immigration were brought by the Legislative Decree of 4 October 2018 n.113[88] (so-called "Decreto Salvini"). The most important changes consist in the suppression of the residence permits for humanitarian motives and their replacement by "special" residence permits, the introduction of the detention of asylum seekers in two new different circumstances and finally, the possibility to detain an irregular migrant in places other than CPR for logistics reasons. Those provisions have been heavily criticized in Italy and abroad and some are already deemed to be unconstitutional and in violation of EU law and international treaties.

Paragraph 2: The fundamental principles enshrined in the Italian Constitution

85. Like many post-World War II Constitutions, the Italian Constitution, which was enacted by the Constituent Assembly on 22 December 1947, is characterized by a first core enunciation of "Fundamental Principles" (*Principi Fondamentali)* of universal application and followed by two Parts, the first one of which is dedicated to the "Rights and Duties of Citizens" (*Diritti e Doveri dei Cittadini*), the second to the "Organization of [the] Republic" (*Ordinamento della Repubblica*). As has been extensively remarked and analyzed, "with the second post war period opens up a new important constitutional phase: some European States adopt new constitutional charters, whose catalogue of rights is absolutely significant"[89].

[88] Decreto Legge del 4 ottobre 2018, n. 113. "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata", published in the Gazzetta Ufficiale (GU) n. 131 of 4 October 2018.

[89] "Con il secondo dopoguerra si apre una nuova fase costituente importante: alcuni Stati europei si danno delle nuove Carte costituzionali, il cui catalogo di diritti è assolutamente significativo." Cecilia CORSI "Lo statuto costituzionale del non cittadino" in Rosaria Sicurella (a cura di) *Il controllo penale dell'immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici*, G. Giapichelli Editore, Torino, 2012, (p. 141).

86. This distinguishing feature is obviously particularly relevant when considering the status of foreigners in Italian Constitutional law. However, because Italy was at the time a country of emigration, "the works of the assembly and then the constitutional text itself reflect a nearly inexistent awareness of the problem and therefore an absence of in-depth analysis"[90] which has led to much doctrinal and jurisprudential debate on the applicability of numerous rights whose enjoyment is textually limited to the citizens. Starting with an examination of the rights of the migrant as a human being (1), this sub-paragraph will then turn to the definition of a particular status of foreigner (2) before presenting the jurisprudential extension to the foreigners of rights textually attached to the citizens (3).

1. The rights of the migrant as a human being

87. As upheld by Article 2 – one of the most important articles of the Italian Constitution – the beneficiary of the constitutional guarantees is first and foremost the human being:

> "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled."[91]

88. While many more articles of the Constitution have been discussed with regard to their applicability to foreigners, it is mostly Articles 2 and 3 in combination with Article 10 which have been the object of speculation. As Article 3 affirms:

> "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.

89. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full

[90] "i lavori dell'assemblea e poi lo stesso testo costituzionale rispecchiano una pressoché inesistente consapevolezza del problema e quindi un'assenza di approfondimento." Cecilia CORSI "Lo statuto costituzionale del non cittadino" in Rosaria Sicurella (a cura di) *Il controllo penale dell'immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici*, G. Giapichelli Editore, Torino, 2012, (p. 123).

[91] English version of the Constitution of the Italian Republic, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, consulted on 12 January 2015.

development of the human person and the effective participation of all workers in the political, economic and social organization of the country"[92]

90. Therefore, only Article 2 benefits unambiguously to all human beings while Article 3 is more problematic as it is explicitly directed at 'citizens'. It has been explained that

> "[t]he scarcity of norms explicitly referring to aliens in the Italian Constitution is compensated by the presence of constitutional principles generically intended to the person and which, as a consequence, are addressed to all, citizens and non citizens. […] The […] principle contained in article 2 of the Constitution actually represents the essential norm of reference of the Italian Constitution in the area of rights and presupposes the protection of the inviolable rights of every person"[93].

91. This is why, a fair number of authors have affirmed, along the lines of Filippo Scuto, that:

> "The legal status of all aliens staying in Italy must be regulated bearing in mind the central role assumed by the person in the Italian Constitution and, as a result, of the fundamental importance that it grants to the inviolable human rights. The norms of reference of the Constitution allow to outline the *status* of the foreigner first and foremost from the point of view of its being a *person* and, only secondarily, from the point of view of its being a subject to consider in the framework of the regulation of the phenomenon of immigration"[94].

92. Nevertheless, the existence of a specific Article (10) in the Constitution

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[92] English version of the Constitution of the Italian Republic, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, consulted on 12 January 2015.

[93] "La limitatezza delle norme esplicitamente riferite agli stranieri nella Costituzione italiana viene pero compensata dalla presenza di principi costituzionali che sono genericamente destinati alla persona e che, di conseguenza, sono rivolti a tutti, cittadini e non. […] Il principio […] contenuto nell'art. 2. Cost. rappresenta infatti la norma essenziale di riferimento della Costituzione Italia in materia di diritti e presuppone la tutela dei diritti inviolabili di ogni persona." F. SCUTO, *I diritti fondamentali della persona quale limite al contrasto dell'immigrazione irregolare,* Università degli studi di Milano, Dipartimento Giuridico - Politico – Sezione di Diritto Pubblico Europeo, Coordinata da Paola Bilancia, Giuffrè Editore, 2012 (p. 15).

[94] "La condizione giuridica di tutti gli stranieri presenti in Italia deve dunque essere disciplinata tenendo conto della centralità che assume la persona nella nostra Costituzione, e, di conseguenza, dell'importanza primaria che essa assegna ai diritti inviolabili dell'uomo. Le norme di riferimento della Costituzione consentono di delineare lo *status* dello straniero innanzitutto dal punto di vista del suo essere *persona* e, solo secondariamente, da quello del soggetto da considerare nell'ambito della regolazione del fenomeno dell'immigrazione." F. SCUTO, *I diritti fondamentali della persona quale limite al contrasto dell'immigrazione irregolare,* Università degli studi di Milano, Dipartimento Giuridico - politico – Sezione di Diritto Pubblico Europeo, Coordinata da Paola Bilancia, Giuffrè Editore, 2012 (p. 42).

regulating the legal condition of the foreigner allowed for some speculation on this question until the definitive answers given by the Constitutional Court were given.

2. *The definition of a particular status as foreigner*

93. The only article expressly dedicated to the foreigner in the Italian Constitution is Article 10, which has, as an inevitable result, been the object of infinite debate regarding the role and importance it should be given in the Italian legal order:

> "the legal status of foreigners is regulated by law in conformity with international provisions and treaties.
>
> 94. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. [right of asylum]
>
> 95. A foreigner may not be extradited for a political offence. [prohibition of extradition of the foreigner for political motives]"[95].

96. As a preliminary – and incidental - remark, it is worth noticing here that contrary to what the Constitution provides, the condition of the foreigner has not been dealt with exclusively through law. First, given the administrative organization of Italy, some legislative acts regarding aliens are taken by the regions and not only by the State. While the rules governing asylum and immigration as well as the legal status of a third-country national depend on the sole competence of the State, the Regions have a – concurring or residual - legislative competence for healthcare, education, vocational training, cultural activities, mediation, social assistance, housing[96] The details of the regional rules will not be further explored in this research. Second, "[a]lthough Article 10 of the Italian Constitution establishes that the legal status of foreigners must be regulated by law (so-called '*riserva di legge'*), until the 1990s a foreigner's status was defined exclusively by administrative practice"[97]. This

[95] English version of the Constitution of the Italian Republic https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, consulted on 12 January 2015.
[96] See Gianpaolo FONTANA "La condizione giuridica dello straniero tra ordinamento costituzionale, internazionale e comunitario nella prospettiva delle fonti del diritto" in Alberto MACRILLO (a cura di), *Il diritto degli stranieri,* Il diritto applicato – I grandi temi, Collana diretta da Giuseppe Cassano, CEDAM, 2014, (p. 49).
[97] Alberto DI MARTINO, Francesca BIONDI DAL MONTE, Ilaria BOIANO, Rosa RAFFAELLI (eds), "The criminalization of irregular immigration: law and practice in Italy", Pisa University Press, 2013, (p. 7).

element is revealing of the little interest that the field of immigration law raised in Italy until the 1990's. This lack of concern can be explained by two factors which are correlated and have been more extensively commented previously (see Paragraph 1): the fact that Italy was not yet a country of immigration and the fact that the main angle through which the foreigners present on the territory were considered by the legal system was labour law.

97. Regarding now the most relevant provision of this Article for the purposed of this thesis, one potential doctrinal understanding of this Article was that

> "Article 10 […] lays down the minimum standards of protection complying with international standards as well as with what is imposed by the respect of the aforementioned combination of Articles 2 and 3 of the Constitution which does not allow infringements of the inviolable rights of the person which are to be recognized and guaranteed to individuals as such independently of their citizenship status"[98].

98. However, this straightforward interpretation of the implications of Article 10 in combination with Articles 2 and 3 was debated and over the years the Constitutional Court has had to clarify its position with regard to this knotty question.

3. *The jurisprudential extension to the foreigners of the rights textually attached to the citizens*

99. Abstractly, two theories existed as to the interpretation that ought to be given to the Articles which interpretation was debated (namely, Article 2, 3 and 10):

> "on the one side [was] the point of view of who understands Article 10 of the Constitution, specifically dedicated to the foreigner and included amongst the fundamental principles of our legal order, [as being] the key rule to reconstruct the legal condition of the foreigner; on the other side [was] the position of those authors who, leaning on Article 2 of the Constitution, fundamental norm above any other,

[98] "L'art. 10, […] impone trattamenti minimi di tutela rispettosi degli *standard* internazionali nonché di quanto imposto dall'osservanza del già menzionato combinato disposto degli artt. 2 e 3 Cost. il quale non consente violazioni dei diritti inviolabili della persona che vanno riconosciuti e garantiti agli individui in quanto tali a prescindere dal loro *status* di cittadinanza." Gianpaolo FONTANA "La condizione giuridica dello straniero tra ordinamento costituzionale, internazionale e comunitario nella prospettiva delle fonti del diritto" in Alberto MACRILLO (a cura di), *Il diritto degli stranieri*, Il diritto applicato – I grandi temi, Collana diretta da Giuseppe Cassano, CEDAM, 2014 (p. 26).

repeat the inherence of the inviolable character of the human rights to the person as such, independently from his/her possession of the national citizenship"[99].

100. Lastly, the question was raised about the potential extension to the foreigner of Article 3 dealing with the principle of equality which expressly mentions the citizen.

101. The reasoning of the Court was simple: differentiate between the rights of the citizen which the irregular migrant is not entitled and the rights of the human being which are fully applicable to him or her. Restlessly called upon to give a definitive answer as to the meaning of the combination of Articles 2, 3 and 10, the Constitutional Court has chosen to follow a sensible and firm line ever since its first decision in 1967.

102. Concerning the entitlement of the foreigner to the protection of his/her fundamental rights, the Court held that "Article 2 of the Constitution, recognizing and guaranteeing inalienable fundamental human rights, is a protective legal norm applicable not only to the citizen but also to the foreigner"[100].

103. With regard to Article 3, it held unambiguously that "while it is true that Article 3 refers expressly to the citizens it is also certain that the principle of equality applies also to the foreigners when it comes to the respect of fundamental rights "[101]. The Court also indicated in a subsequent decision the origin of the distinction: "the basic difference existing between the citizen and the foreigner consists in the circumstance that while the relationship of the former with the State is usually primal and in any case permanent, the relationship of the latter is acquired and is generally temporary"[102]. This precision of the Court can be

[99] "da un lato [si comprendeva] il punto di vista di chi coglie nell'art. 10 Cost., specificamente dedicato allo straniero e contenuto tra i principi fondamentali del nostro ordinamento, la norma chiave per ricostruire la condizione giuridica dello straniero; dall'altro parimenti configurabile [era] la posizione di quegli autori che appoggiandosi all'art. 2 Cost., norma fondamentale più di ogni altra, ribadiscono l'inerenza dei diritti inviolabili alla persona in quanto tale, indipendentemente dal possesso della cittadinanza". Cecilia CORSI "Lo statuto costituzionale del non cittadino" in Rosaria SICURELLA (a cura di) *Il controllo penale dell'immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici*, G. Giapichelli Editore, Torino, 2012, (p. 131).

[100] « l'art. 2 Cost., riconoscendo e garantendo diritti inviolabili dell'uomo, è norma di tutela non solo del cittadino ma anche dello straniero ». Corte Costituzionale Italiana, Sentenza n.199/1986 ECLI:IT:COST:1986:199 (Considerato in diritto 1)

[101] « se è vero che l'art. 3 si riferisce espressamente ai solo cittadini, è anche certo che il principio di eguaglianza vale pure per lo straniero quando trattasi di rispettare quei diritti fondamentali » Corte Costituzionale Italiana, Sentenza n. 120/1967 ECLI:IT:COST:1967:120 (Considerato in diritto 2).

[102] "la basilare differenza esistente tra il cittadino e lo straniero, consistente nella circostanza che, mentre il primo ha con lo Stato un rapporto di solito originario e comunque permanente, il secondo ne ha uno acquisito e

understood as a way to minimize and circumscribe this difference to one single and objective criterion. In a nutshell it meant that "the principle of equality is applicable to all human beings with a possibility to differentiate the treatment only when they relate to elements essentially linked to citizenship"[103].

104. And as for Article 10, the Court considered that

> "the main norm regarding the legal condition of the foreigner […] is Article 10, Paragraph 2 of the Constitution, which established that "it is regulated by the law in conformity with the international laws and treaties". It derives from such a provision that, on one side, for what concerns the entry and circulation on the national territory (Article 16 Cost.), the situation of the foreigner is not equal to the one of the citizen, on the other side, that the legislator, in its choices, is constrained by the limits originating from the norms generally recognized in international law and the international treaties potentially applicable to every single cases"[104].

Paragraph 3: The state of the law: the use of criminal procedure to execute administrative sanctions

105. While the interferences of criminal law in the field of migration law have already been commented, this Paragraph shall consider how "criminal law [is used] in a selective manner to pursue immigration outcomes (chiefly, removal) when administrative law measures are seen not to provide a desirable outcome from a state's perspective"[105]. What shall be studied in the coming paragraphs is how the recourse to criminal law is purely

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generalmente temporaneo" Corte Costituzionale Italiana, Sentenza n. 104/1969 ECLI:IT:COST:1969:104 (Considerato in diritto 4).

[103] "il principio di eguaglianza si [applica] a tutti gli esseri umani con possibilità di differenze di trattamento connesse esclusivamente ai profili essenziali del legame di cittadinanza." Cecilia CORSI "Lo statuto costituzionale del non cittadino" in Rosaria SICURELLA (a cura di) *Il controllo penale dell'immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici*, G. Giapichelli Editore, Torino, 2012, (p. 151).

[104] "la principale norma concernente la condizione giuridica dello straniero […] è quella dell'art.10, comma secondo, Cost. la quale stabilisce che essa "è regolata dalla legge in conformità delle norme e dei trattati internazionali". Da tale disposizione si può desumere, da un lato, che, per quanto concerne l'ingresso e la circolazione nel territorio nazionale (art. 16 Cost), la situazione dello straniero non è uguale a quella dei cittadini, dall'altro, che il legislatore, elle sue scelte, incontra anzitutto i limiti derivanti dalle norme di diritto internazionale generalmente riconosciute ed eventualmente dei tratti internazionali applicabili ai singoli casi". Corte Costituzionale Italiana, Sentenza n. 148/2008 ECLI:IT:COST:2008:148 (Considerato in diritto 3).

[105] Mark Provera, "The Criminalisation of Irregular Migration in the European Union", CEPS Paper in Liberty and Security in Europe No.80/ February 2015, Center for European Policy Studies, 2015 (i).

teleological and how the creation of dual procedures in immigration law as applicable to irregular migrants serves as a primary objective the effective removal of the migrant.

106. The Italian legislation which will be considered here emanates from the Single Act on Immigration, already mentioned previously. Regarding its relationship to relevant EU law Directive 2008/115 has been partially implemented and with delay by the Legislative Decree of 23 June 2011 n. 89 later converted into Law n. 129 of 2 August 2011 which amended the Single Immigration Act. The Italian provisions which were most modified by the Directive were Articles 13 and 14 leaving the essential traits of the Italian expulsion system unaltered, thus raising doubts on its compatibility with EU law (hence the numerous preliminary rulings considered at Chapter 3).

107. First however, it is proposed to look into the basic rights of the foreigner whatever his/her status (1), before proceeding to a typology of the various offences that are attached to the very status of the irregular migrant (2). This will be followed by a consideration of the criminal and administrative procedures to which those offences lead following the return decision (3) and an analysis of the protective and exceptional measures that derogate from those rules (4).

1. *The definition and basic rights of the 'foreigner' (regardless of the administrative status) according to the law*

108. To start with, the scope of the law was clearly defined to exclude all EU citizens and apply only to citizens of countries which are not Member States of the European Union and who are to be designated as 'foreigners' by the law[106].

109. Following the principles set forth in the Constitution, the Single Act on Immigration recalls the universal application of fundamental human rights according to which

> "[t]o the foreigner showing up at the border or staying on the territory of the State are recognized the fundamental rights of the human being set forth in the domestic legal

[106] Articolo 1 Comma 1 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero –Decreto legislativo del 25 luglio 1998, n°286, G.U.18.08.1998 : "The present Consolidated Law, in accordance with Article 10, second sub-paragraph of the Constitution, is to apply – except if diversely provided for – to the citizens of the States which are not part of the European Union and to the stateless citizens, from that point on designated as foreigners" ("Il presente testo unico, in attuazione dell'articolo 10, secondo comma, della Costituzione, si applica, salvo che sia diversamente disposto, ai cittadini di Stati non appartenenti all'Unione europea e agli apolidi, di seguito indicati come stranieri.").

system, in the international conventions currently in force and in the principles of international law generally acknowledged"[107].

110. Taking into consideration the position of the Constitutional Court on the application of Article 3, it also affirms the principle of non-discrimination and equality before the law:

"The equality of treatment of the citizen relating to the juridical protection of his/her legitimate rights and interests in the framework of his/her relationships with the public administration and the access to public services, is recognized to the foreigner within the limits and according to the modes specified by the law"[108].

111. As a logical consequence of the rights recognized to the foreigner, the Law also sets out that "[t]he foreigner present on the Italian territory is, in any case, bound by the obligations provided by the applicable norms".[109]

112. Moving on to the rights attached to the right to a fair trial, the law provides that,

"[f]or the purposes of communication to the foreigner of the measures concerning the entry, the stay and the expulsion, the acts are to be translated, even synthetically, in a language that can be understood by the foreigner, or, when this is not possible, in French, English or Spanish, with a preference for the language indicated by the person concerned"[110].

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[107] Articolo 2 Comma 1- Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Allo straniero comunque presente alla frontiera o nel territorio dello Stato sono riconosciuti i diritti fondamentali della persona umana previsti alle norme di diritto interno, dalle convenzioni internazionali in vigore e dai principi di diritto internazionale generalmente riconosciuti."

[108] Articolo 2 Comma 5- Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Allo straniero è riconosciuta parità di trattamento con il cittadino relativamente alla tutela giurisprudenziale dei diritti e degli interessi legittimi, nei rapporti con la pubblica amministrazione e nell'accesso ai pubblici servizi, nei limiti e nei modi previsti dalla legge."

[109] Articolo 2 Comma 9 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Lo straniero presente nel territorio italiano è comunque tenuto all'osservanza degli obblighi previsti dalla normativa vigente."

[110] Articolo 2 Comma 6 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Ai fini della comunicazione allo straniero dei provvedimenti concernenti l'ingresso, il soggiorno e l'espulsione, gli atti sono tradotti, anche sinteticamente, in una lingua comprensibile al destinatario, ovvero, quando ciò non sia possibile, nelle lingue francese, inglese o spagnola, con preferenza per quella indicata dall'interessato."

113. The right of defence is also guaranteed regardless of the administrative status of the foreigner as "[t]he foreigner who is the claimant or is subject to a criminal proceeding is authorized to re-enter Italy for the time strictly necessary for the exercise of his/her right of defence, for the sole purpose of participating in the procedure or the completion of acts for which his/her presence is necessary"[111].

114. The right to family life is translated in a clear recognition of family reunification, according to which the residence permit for family reasons is issued to

> "the foreign parent […] of an Italian minor who is resident in Italy. In such case, the residence permit for family reasons is released regardless of the possession or non-possession of a valid residence title, provided that the requesting parent has not been deprived of his or her parental rights"[112].

115. Access to justice and the effectiveness of the fight against labour exploitation are ensured by the following provision which aims at encouraging denunciations by the victims of their condition: "[i]n the event of particular labour exploitation […], a residence permit is released […] to the foreigner who has lodged a complaint and cooperates in the criminal proceedings initiated against the employer"[113].

116. Regarding social rights, Italian immigration law lays down basic rights to health services within limitative but non-exceptional conditions:

> "Within public and accredited structures, long-lasting emergency or essential outpatient and inpatient treatments required by illness or accident, as well as preventive health programmes, whether individual or collective, are guaranteed to the foreigner who is irregularly present on national territory. Are in particular guaranteed:
> a) the social protection of pregnancy and maternity on equal terms as the Italian

[111] Articolo 17 Comma 1 –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Lo straniero parte offesa ovvero sottoposto a procedimento penale è autorizzato a rientrare in Italia per il tempo strettamente necessario per l'esercizio del diritto di difesa, al solo fine di partecipare al giudizio o al compimento di atti per i quali è necessaria la sua presenza".

[112] Articolo 30 Comma 1–Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "al genitore straniero […] di un minore italiano residente in Italia. In tal caso il permesso di soggiorno per motivi familiari è rilasciato anche a prescindere dal possesso di un valido titolo di soggiorno, a condizione che il genitore richiedente non sia stato privato della potestà genitoriale."

[113] Articolo 22 Comma 12 quater - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Nelle ipotesi di particolare sfruttamento del lavoro […], è rilasciato […], allo straniero che abbia presentato denuncia e cooperi nel procedimento penale instaurato nei confronti del datore di lavoro, un permesso di soggiorno."

citizens […]; b) the protection of the minor […]; c) the vaccinations […] e) the care, diagnosis and treatment of infectious diseases"[114].

117. Two essential prerequisites without which this right would be void of effectiveness are also granted.

118. The first one is the gratuity of those services according to which "[t]he services […] are dispensed without any charge for the patient who is deprived of sufficient economic resources, to the exception of the amount due as participation to health expenditures on equal terms as Italian citizens" [115].

119. The second one being the strict confidentiality of the services provided which entails the non-communication to the administration of the irregular status of the patient:

"Access to medical facilities by the foreigner who does not comply with the regulations on entry and stay, cannot in any case entail any kind of signalization to the authorities, except in cases where the content of the medical report imposes to do so, in the same conditions as for an Italian citizen"[116].

120. Finally, the right to education is enforced by the remainder that minors – regardless of their administrative status – are subject to an obligation to attend school: "The foreign minors staying on the territory are subject to compulsory schooling; all the rules concerning the right to education, access to educational services and the participation in school life are applicable to them"[117].

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[114] Articolo 35 Comma 3 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Ai cittadini stranieri presenti sul territorio nazionale, non in regola con le norme relative all'ingresso ed al soggiorno, sono assicurate, nei presidi pubblici ed accreditati, le cure ambulatori ed ospedaliere urgenti o comunque essenziali, ancorché continuative, per malattia ed infortunio e sono esteso i programmi di medicina preventiva della salute individuale e collettiva. Sono, in particolare garantiti: a) la tutela sociale della gravidanza e della maternità, a parità di trattamento con le cittadine italiane […]; b) la tutela della salute del minore […]; c) le vaccinazioni […] e) la profilassi, la diagnosi e la cura delle malattie infettive […]."

[115] Articolo 35 Comma 4 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Le prestazioni […] sono erogate senza oneri a carico dei richiedenti qualora privi di risorse economiche sufficienti, fatte salve le quote di partecipazione alla spesa a parità con i cittadini italiani."

[116] Articolo 35 Comma 5 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "L'accesso alle strutture sanitarie da parte dello straniero non in regola con le norme sul soggiorno non può comportare alcun tipo di segnalazione all'autorità, salvo i casi in sui sia obbligatorio il referto, a parità di condizioni con il cittadino italiano."

[117] Articolo 38 Comma 1- Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "I minori stranieri presenti sul territorio sono soggetti all'obbligo scolastico; ad essi si

2. *Typology of offences attached to the sole status of irregular migrant*

121. The list of offences which come with the irregular migrant's status is rather extensive and tedious to read because of the long sentences used in Italian law. The same language and complex grammatical structures are used in the judgments that will be considered in the following sections of this chapter and make for a somewhat fastidious reading. Nevertheless, the aim of this catalogue is to present only those offences strictly related to the sole fact of entering or staying irregularly to the exclusion of the collateral offences which suggest the commission of an act or any other kind of illegal conduct of the foreigner. The difference is however often hazy and the choice to consider certain offences as relating to the mere "status" of the person is debatable. While some of them undoubtedly fall under this category, other offences could arguably relate to a more active conduct of the foreigner.

2.1. The illegal entry and stay: the so-called "illegality" offence (reato di clandestinità)

122. When the 2009 Security Package was adopted it stood out as a change of criminal policy which was

> "certainly relevant on the *symbolic and expressive level* […]. [It] is however a novelty whose *practical impact is insignificant* on the situation of the illegally staying foreigner, since the only sanction provided for is of exclusive pecuniary nature (that the migrant is unlikely to be able to pay), and that the expulsion applicable as substitutive measure will in any case be carried out on the basis of the same prerequisite (the lack of a valid residence title) which is now elevated to an autonomous offence. The *real afflictive sanction* towards the irregular migrant is devolved upon *interventions of administrative nature* with which, amongst other, a longer deprivation of personal liberty is allowed in the Centres of Identification and Expulsion (CIE) [since 2017, they are called CPR]"[118] .

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applicano tutte le disposizioni vigenti in materia di diritto all'istruzione, di accesso ai servizi educativi, di partecipazione alla vita della comunità scolastica."

[118] "Una modifica certamente *significativa sul piano simbolico - espressivo*, […]; è tuttavia una novità che ha un *impatto pratico insignificante* sulla situazione dello straniero irregolare, considerato che per il reato è prevista una pena di natura esclusivamente pecuniaria (che ben difficilmente il migrante sarà in grado di pagare), e che l'espulsione applicabile in qualità di misura sostitutiva sarebbe comunque da eseguire, con le stesse modalità, in via amministrativa sulla base del medesimo presupposto (la mancanza di un valido titolo di soggiorno) oggi elevato ad autonoma figura di reato. La *vera stretta sanzionatoria* nei confronti dello straniero clandestine è

123. Indeed, Article 10 bis of the Law provides that

"the foreigner who enters or remains on the territory of the State in violation of the present provisions […] is liable to a fine of 5,000 to 10,000 euros. The provisions of Article 162 of the Criminal Code are not applicable. [These] provisions […] are not applicable to the foreigner who is subject to a removal order […] or to the foreigner identified in the course of the controls made by the border police as he was exiting the territory of the State".[119]

124. Article 162 of the Criminal Code[120] relates to the possibility for the offender, where the law only states a fine as a criminal sanction, to pay a third of the maximal amount of the fine before the opening of the proceedings, as a result of which the person is discharged of the offence. With this regard, it is worth mentioning that

"[t]his is the only case […] in which a contravention sanctioned by the sole pecuniary penalty which is excluded from the sphere of applicability of the causes of extinction of the offence […]. It can be imagined that the impossibility to extinguish the offence aims at *giving a larger scope of application to the alternative sanction of the expulsion*, which would not otherwise be applicable as soon as the offender would have used this mechanism (however improbable this eventuality would have been given that to benefit from the mechanism, the foreigner would have had, in any case, to pay a sum of money – more than 3,000 euros – normally way over the capacities of subjects in socio-economic conditions such as an irregular migrant). The result is to

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affidata ad *interventi di natura amministrativa* con cui fra l'altro si consente una più lunga privazione delle libertà personale nei Centri di Identificazione ed Espulsione". [118] Luca MASERA, " 'Terra bruciata' attorno al clandestino" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 30)

[119] Articolo 10 bis Commi 1 e 2 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "1. […] lo straniero che fa ingresso ovvero si trattiene nel territorio dello Stato, in violazione delle disposizioni del presente testo unico […] è punito con l'ammenda da 5.000 a 10.000 euro. Al reato di cui al presente comma non si applica l'articolo 162 del codice penale. 2. Le disposizioni di cui al comma 1 non si applicano allo straniero destinatario del provvedimento di respingimento […] ovvero allo straniero identificato durante i controlli della polizia di frontiera, in uscita dal territorio nazionale."

[120] Articolo 162 del Codice Penale: Oblazione nelle contravvenzioni: "Nelle contravvenzioni, per le quali la legge stabilisce la sola pena dell'ammenda, il contravventore è ammesso a pagare, prima dell'apertura del dibattimento, ovvero prima del decreto di condanna, una soma corrispondente alla terza parte del Massimo della pena stabilita dalla legge per la contravvenzione commessa, oltre le spese del procedimento. Il pagamento estingue il reato".

dictate a more rigorous discipline than the one provided for offences of equal or lesser gravity"[121].

125. This analysis begs a short remark on the offence of illegal entry or stay. Not only was this article the object of much criticism by scholars but the judges themselves have repeatedly attempted to oppose its application. Both the introduction of the offence itself and the conditions of its application were challenged, before the Italian Constitutional Court as well as before the Court of Justice of the European Union. The grounds to challenge this article were multiple and included alleged inexistence of a social value protected by this offence and a violation of the principles of equality before the law, proportionality and necessity. As a result of these domestic and EU case-law, the article was modified - notably to supress the criminal law sanction of detention. These jurisprudences shall be later considered in this thesis and will therefore not be analysed in greater depth at this stage.

2.2. The non-compliance with the order to display an identification document and a relevant residence title

126. This offence which obviously stands outside the scope of application of the Return Directive is mentioned here as it is a paradigm of the criminalization of immigration related offences. The penalties to which an irregular migrant is liable are considerable – in particular as they include a sanction of deprivation of liberty – and arguably disproportionate. This is especially true when considering that any irregular migrant subject to such order would inevitably commit the following offence. This element, as well as others have been raised to challenge the constitutionality of this article. They shall be considered at a later stage in this Chapter.

"The foreigner who, […] does not comply, without justification, to the order to display a passport or another identification document and the residence title or another

[121] "Si tratta del unico caso in cui una contravvenzione punita con la sola pena pecuniaria venga sottratta alla sfera di operatività di questa causi di estinzione del reato, […] si può immaginare che l'impossibilità di estinguere il reato sia finalizzato *a concedere maggiore spazio alla sanzione sostitutiva dell'espulsione,* che non sarebbe stata applicabile qualora l'imputato avesse fatto ricorso all'oblazione (eventualità peraltro nient'affatto probabile, posto che per godere del beneficio lo straniero avrebbe comunque dovuto versare una somma di denaro – più di 3.000 euro – normalmente superiore alle disponibilità di soggetti nelle condizioni socio-economiche del migrante irregolare). Il risultato è quello di dettare una disciplina più rigorosa rispetto a quanto previsto per reati della medesima o anche di maggiore gravità,". Luca MASERA, " 'Terra bruciata' attorno al clandestino" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 45-46).

document certifying the regularity of his or her presence on the territory of the State is liable to detention of up to a year and to a fine of up to 2,000 euros"[122].

2.3. The re-entry ban and its violation after a removal

127. The entry ban is mentioned at Article 11 of the Return Directive, however the violation of such entry ban and especially its consequences in national criminal law are outside the scope of application of the Directive according to Article 2(2)b.

"The foreigner subject to an expulsion order cannot re-enter the territory of the State […]. In case of violation, the foreigner is sanctioned by a detention of 1 to 4 years and is expulsed again with an immediate escort to the border. […] [T]he detention of the author is compulsory even outside of the cases in which he was arrested in flagrancy. […]. The ban operates for a period of not less than 3 years and not more than 5 years and its duration is determined taking into account all the relevant circumstances of the individual case"[123].

3. <u>The return decision</u>

128. The equivalent of Article 6 of the Return Directive can be found in the following provisions of Italian legislation which seem to be in line with the definition of a return decision given by Article 3(4) of the same Directive.

"The Minister of Interior can proceed to the expulsion of a foreigner on public order or national security grounds. […]. The expulsion is decided by the Prefect, on a case to case basis, whenever the foreigner: a) has entered the territory of the State avoiding border controls and […] has remained on the territory of the State without asking a residence permit in the prescribed time, except when the delay is due to *force majeure*

[122] Articolo 6 Comma 3 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Lo straniero che, […], non ottempera, senza giustificato, all'ordine di esibizione del passaporto o di altro documento di identificazione e del permesso di soggiorno o di altro documento attestante la regolare presenza nel territorio dello Stato è punito con l'arresto fino ad un anno e con l'ammenda fino ad euro 2.000."

[123] Articolo 13 Commi 13, 13- bis, 13- ter e 14 -Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "13. Lo straniero destinatario di un provvedimento di espulsione non può rientrare nel territorio dello Stato […]. In caso di trasgressione lo straniero è punito con la reclusione da uno a quattro anni ed è nuovamente espulso con accompagnamento immediato alla frontiera. […]. 13-ter. […] è obbligatorio l'arresto dell'autore del fato anche fuori dei casi di flagranza […] 14. Il divieto […] opera per un periodo non inferiore a tre anni e non superiore a cinque anni, la cui durata è determinata tenendo conto di tutte le circostanze pertinenti il singolo caso."

[…]. The expulsion is decided in all cases by a motivated decree that is immediately enforceable even if challenged or submitted to an appeal by the person concerned "[124].

3.1. The measures pending the return

3.1.1 The detention of the alien in a Centre of Temporary Reception for Returnees (CPR)

129. The following provision of Italian law stands in clear contradiction with the logic set forward in the Return Directive (Article 15(1)) which considers detention as a last resort measure. This conception has been confirmed on numerous occasions by the Court of Justice which held that this "provision makes clear that recourse may be had to such detention only when other sufficient but less coercive measures cannot be applied effectively in a specific case"[125].

> "When it is not possible to carry out immediately the expulsion […]. the *questore* disposes that the foreigner be detained for the time strictly necessary in the closest Centre of Temporary Residence for the Returnees […]. Among the situations which legitimate the detention are, apart […] [from the risk of absconding], also the necessity to assist or rescue the foreigner or carry to out additional verifications regarding his/her nationality or identity or to acquire travel documentation or the non-availability of an appropriate transportation"[126].

[124] Articolo 13 Commi 1, 2, 2-bis, 2-ter e 3 –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero : "1. Per motivi di ordine pubblico o di sicurezza dello Stato, il Ministro dell'interno può disporre l'espulsione dello straniero […]. 2. L'espulsione è disposta dal prefetto, caso per caso, quando lo straniero: a) è entrato nel territorio dello Stato sottraendosi ai controlli di frontiera […] b) si è trattenuto nel territorio dello Stato […] senza avere richiesto il permesso di soggiorno nel termine prescritto, salvo che il ritardo sia dipeso da forza maggiore, […].3. L'espulsione è disposta in ogni caso con decreto motivato immediatamente esecutivo, anche se sottoposto a gravame o impugnativa da parte dell'interessato".

[125] *Bashir Mohamed Ali Mahdi,* Case C-146/14 PPU, Third Chamber, 5 June 2014, EU:C:2014: 1320 (§ 67)

[126] Articolo 14 Comma 1 –l Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero –Decreto legislativo 25 luglio 1998, n°286, G.U.18.08.1998: "Quando non è possibile eseguire con immediatezza […]. il questore dispone che lo straniero sia trattenuto per il tempo strettamente necessario presso il centro di permanenza per i rimpatri più vicino […]. Tra le situazioni che legittimano il trattenimento rientrano, oltre […] [il rischio di fuga] anche quelle riconducibili alla necessità di prestare soccorso allo straniero o di effettuare accertamenti supplementari in ordine alla sua identità o nazionalità ovvero di acquisire i documenti per il viaggio o la disponibilità di un mezzo di trasporto idoneo"

3.1.2 The definition of a 'risk of absconding'

130. The domestic definition of 'risk of absconding' can be found in the provisions regarding the removal of the foreigner. However, the notion which is also used in other articles of the Directive, has a particular meaning with regard the detention of the foreigner.

> "The risk of absconding […] is characterized when at least one of the following circumstances, ascertained by the Prefect on a case by case basis, reveals the risk that the foreigner might evade the voluntary execution of the expulsion order : a) lack of possession of a passport or of any other valid identification document; b) lack of appropriate documentation showing the existence of an accommodation where he/she could easily be found; c) previous false declaration or statement on personal data ; d) non-compliance with an order ; e) previous violation of one of the conditions [of parole]"[127].

131. This definition of the risk of absconding – notion which has been the object of much attention, speculation and case-law even in EU law – is problematic with regard to its compatibility with Directive 2008/115. Indeed, Article 3(7) provides that risk of absconding "means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond". What seems to be in contradiction with Italian law is that EU law provides for the existence of 'reasons' when Italian law is satisfied with the existence of 'at least one' circumstance. The necessity to have a set of concurring elements and not just one element is also underlined by the Commission Handbook on Return.

> "The list of criteria should be taken into account at any stage during the return procedure as an element in the overall assessment of each individual situation, but it cannot be the sole basis for assuming automatically a risk of absconding, as frequently it will be a combination of several of the above-listed criteria that will provide a basis for concluding the existence of such a risk. Any automatic conclusion, such as that

[127] Articolo 13 Comma 4-bis –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "4. bis. Si configura il rischio di fuga […] qualora ricorra almeno una delle seguenti circostanze da cui il prefetto accerti, caso per caso, il pericolo che lo straniero possa sottrarsi alla volontaria esecuzione del provvedimento di espulsione : a) mancato possesso del passaporto o di altro documento equipollente, in corso di validità ; b) mancanza di idonea documentazione atta a dimostrare la disponibilità di un alloggio ove possa essere agevolmente rintracciato ; c) avere in precedenza dichiarato o attestato falsamente le proprie generalità ; d) non avere ottemperato ad uno dei provvedimenti emessi […]; e) avere violato una delle misure [condizionando la possibilità di rimanere in libertà]".

illegal entry or lack of documents mean the existence of a risk of absconding, must be avoided."[128]

3.1.3 The conditions at which the alien can remain in liberty

132. While detention is almost systematically pronounced against the irregularly staying foreigner, the law grants an alternative measure allowing the foreigner to remain in liberty under specific constraints.

> "In the cases in which the foreigner is in possession of a passport or of an equivalent valid document, [and fulfils other conditions] […], the *Questore*, instead of ordering detention […], can order one or more [of the same measures as the one provided for when the foreigner has been given a term for voluntary departure]".[129]

133. Here, the mention of the existence of a passport or equivalent document in possession of the foreigner as an essential condition to remain in liberty allows to believe that the absence of such document is on the contrary decisive to order a detention. Such interpretation is however in clear opposition with the case-law of the Court also which specifically established that "the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention"[130].

3.1.4 The conditions of detention

134. Previously called Centre for the Identification and Expulsion (CIE), these centres have often been renamed by the successive legislations without changing their nature (with the last modification dating back to the Legislative Decree n. 13/2017[131]). They are administrative detention centres which receive irregular migrants whose return procedure is

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[128] Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks (COM (2017 6505 final), Brussels, 27 September 2017. (p. 11).

[129] Articolo 14 Comma 1-bis –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Nei casi in cui lo straniero è in possesso di passaporto o altro documento equipollente in corso di validità [e a certe altre condizioni] […] il questore, in luogo del trattenimento […], può disporre una o più delle [stesse misure che quelle previste nel caso nel quale è stato deciso di lasciare allo straniero un termine per la partenza volontaria]."

[130] *Bashir Mohamed Ali Mahdi*, Case C-146/14 PPU, Third Chamber, 5 June 2014, EU:C:2014: 1320 (§ 73)

[131] Decreto Legge del 17 febbraio 2017, n.13. "Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale nonché per il contrasto dell'immigrazione illegale", published in the Gazzetta Ufficiale (GU) n.90 of 18 April 2017.

generally under way. The condition of detention in those centres has been the object of much criticism both at the domestic and international level. However, as they stand legally, there is no obvious incompatibility with the provisions of Directive 2008/115 (Article 16).

> "The foreigner is detained in a centre with modalities such as to insure the necessary assistance and full respect of his/her dignity. […]. The *questore* […] sends a copy of the acts to the […] Justice of Peace, for confirmation, without delay and in any case at the latest 48 hours after the adoption of the decree."[132]

3.1.5 The duration of the detention

135. The provisions of the Italian legislation concerning the detention prior to removal seems to be in line with Article 15 of Directive 2008/115 which provides for a maximum of 18 months' detention, a 'speedy judicial review' of the detention which should be 'reviewed at reasonable intervals of time'. All these requirements seem to be generally fulfilled by this provision even if the reality and depth of the judicial review by the Justice of the Peace will be critically considered further in this Chapter.

> "The confirmation entails a 30 days' detention in the centre. In cases where the establishment of the identity and nationality or the acquisition of the travel documents present serious difficulties, the judge, […] can prolong the detention for another 30 days. Even before the end of such term, the *questore* can carry out the expulsion or the push back, with notification to the judge. After this deadline, […], the *questore* can ask the Justice of the Peace one or more prolongations when concrete elements have emerged that allow to consider as probable the identification of the foreigner or if it is necessary to organize the return operations. In any case, the maximum period of detention in the CPR can not exceed 180 days. Such duration can be prolonged by 15 days with prior authorization of the justice of the peace in the case of particular complexity of the identification procedure and organization of the return procedure. […] when it becomes impossible to maintain him in a CPR or more precisely when the

[132] Articolo 14 Commi 2, 3 e 4 –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "2. Lo straniero è trattenuto nel centro con modalità tali di assicurare la necessaria assistenza ed il pieno rispetto della sua dignità. […] 3. Il questore […] trasmette copia degli atti al giudice di pace […] per la convalida, senza ritardo e comunque entro le quarantotto ore dall'adozione del provvedimento."

detention in such a centre has failed to allow the expulsion the *questore* orders the foreigner to leave the territory of the state within 7 days".[133]

3.2. The delay for voluntary departure

136. These provisions of the Italian legislation seem to be in line with Article 7 of the Return Directive allowing for voluntary departure.

"The foreigner […] can ask the Prefect [..] to grant him time for voluntary departure […]. The Prefect can, […] order the foreigner to leave voluntarily the territory of the state, within a term comprised between 7 and 30 days. Such a term can be extended, […]. Whenever a term for voluntary departure is conceded, the *Questore* requires the foreigner to prove the availability of sufficient economic resources […]. The *Questore* orders, moreover, one or more of the following measures to be put in place: consignment of the passport or another valid equivalent document which will be returned at the moment of departure; obligation to remain in a place previously identified where the foreigner can easily be tracked; obligation to present himself/herself at established days and times at a territorially competent police station […]. The violation of one of the aforementioned measures is punished by a fine of 3,000 to 18,000 euros. In such hypotheses, […] the *Questore* carries out the expulsion."[134]

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[133] Articolo 14, Commi 5 e 5-bis - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "5. La convalida comporta la permanenza nel centro per un periodo di complessivi trenta giorni. Qualora l'accertamento dell'identità e della nazionalità ovvero l'acquisizione di documenti per il viaggio presenti gravi difficoltà, il giudice, su richiesta del questore, può prorogare il termine di ulteriori trenta giorni. Anche prima di tale termine, il questore esegue l'espulsione o il respingimento, dandone comunicazione senza ritardo al giudice. Trascorso tale termine, […] il questore può chiedere al giudice di pace una o più proroghe qualora siano emersi elementi concreti che consentano di ritenere probabile l'identificazione ovvero sia necessario al fine di organizzare le operazioni di rimpatrio. In ogni caso, il periodo massimo di trattenimento dello straniero all'interno del centro di permanenza per i rimpatri no può essere superiore a centottanta giorni. Tale termine è prorogabile di ulteriori 15 giorni, previa convalida da parte del giudice di pace, nei casi di particolare complessità delle procedure di identificazione et di organizzazione del rimpatrio. […] 5- […] il questore ordina allo straniero di lasciare il territorio dello Stato entro il termine di sette giorni, qualora non sia stato possibile trattenerlo in un CPR, ovvero la permanenza presso tale struttura non ne abbia consentito l'allontanamento dal territorio nazionale."

[134] Articolo 13 Commi 5 e 5.2 –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "5. Lo straniero, […] può chiedere al prefetto, ai fini dell'espulsione, la concessione di un periodo per la partenza volontaria, […]. Il prefetto […] intima lo straniero a lasciare volontariamente il territorio nazionale, entro un termine compreso tra 7 e 30 giorni. […]. 5. 2. Laddove sia concesso un termine per la partenza volontaria, il questore chiede allo straniero di dimostrare la disponibilità di risorse economiche sufficienti […]. Il questore dispone, altresì, una o più delle seguenti misure; a) consegna del passaporto o altro documento equipollente in corso di validità, da restituire al momento della partenza; b) obbligo di dimora in un luogo preventivamente individuato, dove possa essere agevolmente rintracciato; c) obbligo di presentazione, in giorni ed orari stabiliti, presso un ufficio della forza pubblica territorialmente

4. <u>The protective measures that allow derogation from the aforementioned rules</u>

137. While the procedures described in the previous section clearly tend to foster an extensive use of removal as the ultimate goal – and real sanction - to which the foreigner is subjected, in an exhaustively enumerated lists of situations, derogatory rules apply to prevent the execution of the removal procedure. These measures are in line with Directive 2008/115 which allows the Member State "to adopt or maintain provisions which are more favourable to persons to whom its applies provided that such provisions are compatible with this Directive"[135].

4.1. The prohibition of expulsion and push back for vulnerable categories of persons

138. Regarding this provision, it seems that it is in line with Directive 2008/115 which only provided as a remainder that Member States shall "respect the principle of non-refoulement".

> "In no case can there be an expulsion or a push back to a State in which the foreigner can be subject to persecution for reasons of race, sex, language, citizenship, religion, political opinion, personal or social condition or in which the foreigner could be sent to another State in which he/she would not be protected from persecution. The push back or expulsion or extradition of a person towards a State were there are reasons to believe that he/she is at risk of being tortured. […]"

> "Under no circumstances can the push back of an unaccompanied minor take place. The expulsion is not allowed, […], for: foreign minors under 18 years, except when they are to follow an expulsed parent or foster parent; […] foreigners living with an Italian spouse or parent up to the second degree; pregnant women or women who have given birth less than 6 months ago to a child that they raise. The push back or execution of the expulsion of a disabled person or elderly, or minor or components of a mono-parental family with minor children, or victims of serious psychological,

competente. […] Il contravventore anche solo ad una delle predette misure è punito con la multa da 3.000 a 18.000 euro. In tale ipotesi, […] il questore esegue l'espulsione. […]".

[135] Article 4 (3) 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

physical or sexual violence are carried out under modalities that are compatible with each individual situation"[136].

139. Regarding this set of provisions, Directive 2008/115 only generally mentioned that Member States "shall take due account of the best interest of the child; family life; the state of health of the third country national concerned"[137] which constitutes a feeble requirement especially when considering that one of the elements listed is a fundamental right upheld among other international treaties by the European Convention on Human Rights[138]. With regards to the particular situation of unaccompanied minors, Directive 2008/115 mentions two obligations: "due consideration […] to the best interests of the child"[139] and the need for "authorities of that Member States to be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities"[140]. With regard to this set of EU law provisions, Italian law undoubtedly provides for a much greater protection as the general rule is a prohibition to expel any foreign minors with the exception of the situation when the minor has to follow his parents who have been expelled.

140. More generally, it does seem that Italian law provides for a greater protection of 'vulnerable persons'. While the understanding of that notion encompasses more of less the same variety of people and situations as those mentioned at Article 3(9) of the Directive, the protection granted – the prohibition of expulsion - is not contemplated by the Directive.

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[136] Articolo 19 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "1. In nessun caso può disporsi l'espulsione o il respingimento verso uno Stato in cui lo straniero possa essere oggetto di persecuzione per motivi di razza, di sesso, di lingua, di cittadinanza, di religione, di opinioni politiche, di condizioni personali o sociali, ovvero possa rischiare di essere rinviato verso un altro Stato nel quale non sia protetto dalla persecuzione.1.1 Non sono ammessi il respingimento o l'espulsione o l'estradizione di una persona verso uno Stato qualora esistano fondati motivi di ritenere che essa rischi di essere sottoposta a tortura […] 1.bis In nessun caso può disporsi il respingimento alla frontiera di minori stranieri non accompagnati 2. Non è consentita l'espulsione, salvo che nei casi previsti dall'articolo 13 comma 1, nei confronti: a) degli stranieri minori di anni diciotto, salvo il diritto a seguire il genitore o l'affidatario espulsi; […] c) degli stranieri conviventi con parenti entro il secondo grado o con il coniuge, di nazionalità italiana; d) delle donne in stato di gravidanza o nei sei mesi successivi alla nascita del figlio cui provvedono. 2-bis Il respingimento o l'esecuzione dell'espulsione di persone affette da disabilità, degli anziani, dei minori, dei componenti di famiglie monoparentali con figli minori nonché dei minori, ovvero delle vittime di gravi violenze psicologiche, fisiche o sessuali sono effettuate con modalità compatibili con le singole situazioni personali".

[137] Article 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

[138] Article 8 European Convention on Human Rights: "Everyone has the right to respect for his private and family life".

[139] Article 10 (1) 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

[140] Article 10 (2) 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

4.2. The residence permits for victims of domestic violence or ex-members of criminal organisations

141. "When in the course of a police operation, an investigation or a trial for […] [certain] offences, […] situations of violence or abuse of a foreigner and concrete and actual danger for his/her personal integrity emerge as a consequence of the choice to escape this violence or by effect of the declarations given in the course of the preliminary investigations or the trial, the *Questore*, […] grants a special residence permit to allow the victim to escape violence. For the purpose of this Article, domestic violence covers one or more acts, serious and not only occasional, of physical, sexual, psychological or economic violence, which take place inside a family or a household or between people related, actually or in the past, by a marriage or an emotional relationship independently from the fact that the author of such acts shares or had shared the same residence as the victim".[141]

142. "When, in the course of a police operation, an investigation or a trial […], situations of violence or serious exploitation of a foreigner, and concrete danger for his safety emerge […], the *Questore*, […] grants a special residence permit to allow the foreigner to evade the violence and brainwashing of the criminal organisation"[142].

143. These two last provisions are very interesting as they do not refer to any provisions contained in Directive 2008/115 and are meant to provide protection for people in particular situation of vulnerability (victims of domestic violence) or requiring the protection of the State (ex-members of criminal organisations) whose situation has not been contemplated by this Directive. However, regarding victims of domestic violence, a few elements shall be mentioned to mitigate this protection. First, the legal definition of domestic

[141] Articolo 18-bis Comma 1 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Quando, nel corso di operazioni di polizia, di indagini o di un procedimento per […][certi] delitti […]siano accertate situazioni di violenza o abuso nei confronti di uno straniero ed emerga un concreto ed attuale pericolo per la sua incolumità, come conseguenza della scelta di sottrarsi alla medesima violenza o per effetto delle dichiarazioni rese nel corso delle indagini preliminari o del giudizio, il questore, […], rilascia un permesso di soggiorno […] per consentire alla vittima di sottrarsi alla violenza. Ai fini del presente articolo, si intendono per violenza domestica uno o più atti, gravi ovvero non episodici, di violenza fisica, sessuale, psicologica o economica che si verificano all'interno della famiglia o del nucleo familiare o tra persone legate, attualmente o in passato, da un vincolo di matrimonio o da una relazione affettiva indipendentemente dal fatto che l'autore di tali atti condivida o abbia condiviso la stessa residenza con la vittima".

[142] Articolo 18 Comma 1 –Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero: "Quando, nel corso di operazioni di polizia, di indagini o di un processo […] siano accertate situazioni di violenza o di grave sfruttamento nei confronti di uno straniero, ed emergano concreti pericoli per la sua incolumità […], il questore […] rilascia uno speciale permesso di soggiorno per consentire allo straniero di sottrarsi alla violenza ed ai condizionamenti dell'organizzazione criminale."

violence as acts which are "serious and not only occasional" is contrary to the definition provided for by the Convention on Domestic Violence[143] which has been ratified by Italy. Second, the conditions are difficult to meet as: the victim must prove to be "in actual and concrete danger", which has to be "a consequence of the choice to escape this violence". Third, the residence permit is released according to the discretional evaluation made by the *questore* of the situation and is based on his or her appreciation of criteria which are rather subjective. Lastly and for all the reasons which have been mentioned, it seems that in practice this type of residence permit is very rarely – if at all – granted by the Italian authorities.

Conclusion of Section 1

144. Much more could have been said on each of these offences and on the legislation that governs them. But the first aim of this presentation was to present to the reader as simply as possible – but in detail – the normative structure of immigration law in Italy.

> "On the whole, what appears with clarity is the framework of a criminal discipline *subordinated* to the execution of the (typically administrative) measure of removal of the foreigner. Institutions and procedures of criminal law and proceedings depend on objectives that are extraneous to the jurisdiction, creating a *lex specialis* which poses a series of questions in terms of compatibility with the constitutional principal of equality-rationality".[144]

145. Such elements of potential and real incompatibility will be considered in the rest of the Chapters with a study of some of the landmark cases of the Italian Constitutional Court.

146. Indeed, the second objective of this presentation was to demonstrate the problematic and/or contradictory aspects of the law, in particular with regard to Constitutional, European and International standards.

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[143] Article 3 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011

[144] "Complessivamente, si delinea con nettezza il quadro di una disciplina penale *subordinata* all'esecuzione della misura (tipicamente amministrativa) dell'allontanamento dello straniero: istituti e procedure del diritto e del processo penale sono piegati a scopi estranei alla giurisdizione, dando vita ad una *lex specialis* che pone ancora una volta *seri problemi di compatibilità* con il principio costituzionale di uguaglianza-ragionevolezza." Luca MASERA, " 'Terra bruciata' attorno al clandestino" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 47).

Section 2: Conditions of the legitimacy of the power to legislate in the field of immigration law

147. Starting with the basics, the first element on which the judges have sought to counter-balance the choices of the legislator has been on the conditions under which the legislator was recognized the power to legislate in the field of immigration law. This section will look into them. More precisely, the question has been phrased in terms of the existence of a legitimacy of the legislator to enact legislation in the field of immigration law. Following this line of reasoning, the extent of the power recognized to the legislator in this area shall first be defined (Paragraph 1). Later, the conditions and limits of such legitimacy shall be studied (Paragraph 2).

Paragraph 1: Definition of the power to legislate in the field of immigration law

148. Two sets of questions were raised. Does a legitimate power to legislate in the field of immigration law exist at all? What is the justification of the existence of this power to legislate? In other words, is there a social value recognised by the Constitution as worthy of protection in the area of immigration law? (1) And if such a value exists, what is the extent of the discretionary power recognized to the legislator? (2)

1. The existence of a social value worthy of protection

149. This paragraph shall first present the notion of principle of harm in Italian law (1.1), before wondering about the definition of the corollary notion of social value in the field of immigration (1.2) and its particular relevance in the field of the criminal law of immigration (1.3). Finally, consideration will be given to the recognition by the Constitutional Court of a social value in the field of the criminal law of immigration (1.4).

1.1. A short presentation of the principle of harm

150. In this very brief presentation of two related key notions of Italian Law, the choice has been made to translate the notion of "principio di offensività" by the principle of harm and the notion of "bene giuridico" by the notion of legally protected social value or

simply social value. However, the latter is sometimes more accurately translated by the notion of right, especially when the proposition relates to a person or a group of person (ie 'il bene giuridico del cittadino'). This ambivalence in the translation reflects the complexity of the notion and the difficulty to express it fully, let alone transpose it in another legal system.

151. As has been skilfully emphasized by the Italian doctrine, these translations are not perfectly accurate as their meanings in Italian hold more significations than their translations.

> "The problem of the 'social harmfulness' of the offence is translated in the main European languages through the *harm principle*, the *Sozialschädlichkeit*, the *lesividad* […] and only partly through the idea of 'strict necessity' in criminal law already historically provided for by Article 8 of the Declaration of Rights of the Man and the Citizen of 1789 and today requested by Article 83 TFUE. Besides, none of these notions coincides exactly with the principle of harm or with the idea of the legal protection of the values of 'significant constitutional relevance' which characterized the most famous translation of this principle in the 1970's. The principle of harm presupposes the social value"[145].

152. In other words, for the principle of harm to exist, there is a requirement that the offence committed either harms or damages or endangers or otherwise affects a social value that needs to be protected by law.

153. It has been duly noted by the Constitutional Court that the principle of harm operates as "a limit of constitutional rank to the discretion of the ordinary legislator when criminally prosecuting a conduct"[146]. It is precisely this meaning which is of particular interest for this study. This limit is a subjacent consequence of the application of the principle of harm and is one of the tools used by the Court to moderate the power of the legislator in the

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[145] "Il problema della 'dannosità sociale' del reato è declinato nelle principali lingue europee attraverso le categorie dell'*harm principle*, della *Sozialschädlichkeit*, della *lesividad* […] e solo in parte attraverso l'idea della '*stretta necessità*' della tutela penale già storicamente prevista dall'art. 8 della Dichiarazione dei diritti dell'uomo e del cittadino del 1789 e oggi riecheggiata nell'art. 83 del TFUE. Nessuna di queste nozioni, peraltro, coincide esattamente con il principio di offensività, né tanto meno con l'idea della tutela penale di bei di 'significativa rilevanza costituzionale', che ha caratterizzato la declinazione più famosa di quel principio negli anni Settanta del secolo scorso. L'offensività pre-suppone il bene giuridico". Massimo DONINI, "Il principio di offensività. Dalla penalistica italiana ai programmi europei", Rivista trimestrale, *Diritto Penale Contemporaneo*, n°4, 2013, (p. 5 – 6).

[146] 'come limite di rango costituzionale alla discrezionalità del legislatore ordinario nel perseguire penalmente [una] condott[a]". Corte Costituzionale italiana, sentenza n. 360/ 1995 (Considerato in diritto 7).

field of immigration. Considering that in order for a conduct to become criminally prosecutable, it needs to be proven that the said conduct can effectively 'harm' a legally protected social value, the Court has seized the opportunity to reflect on the existence of a social value worthy of protection in the field of immigration.

1.2. A definition of the notion of social value

154. As it has been defined

> "[a] legally protected social value is the object/value/right that is safeguarded through the law, not the entire bundle of regulations themselves. Such an interpretation of the legally protected social value would otherwise cancel any function of criticism of the legislation, turning the mere disobedience to the law into a harm of the legally protected social value"[147] .

155. The distinction emphasised by this definition is crucial: the social value which grants a legitimacy to the legislator in a determined field cannot be the respect of the law itself but the social value (which can be a right, a good, a notion) which is protected by the legal norm.

1.3. The relevance of social value for the field of criminal law of immigration

156. The differentiation noted above is crucial when it comes to criminal law and even more so ever since criminal law has invaded the – previously administrative – field of immigration. Given the seriousness of the impact of criminal law on the fundamental rights of an individual, the standard of the Constitutional Court in wondering whether this intervention was justified was supposedly high. It required the existence of a social value which would be at the very least endangered (if not actually 'harmed') by the conduct described as illegal in the legal norm under scrutiny and protected by the application of that norm. The Italian Constitutional Court asked the question whether such a value existed to justify the intrusion of criminal law in the field of immigration. As has been vehemently argued,

[147] "[un] [b]ene giuridico è l'oggetto che si vuol tutelare attraverso le regole, non l'insieme delle regole stesse. Un tale modo di vedere il bene giuridico ne cancella ogni funzione di critica della legislazione, elevando a lesione del bene la mera disobbedienza alle regole". Antonio CAVALIERE, "Diritto penale e politica dell'immigrazione" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 232 – 233).

"[c]riminal law does not intervene on phenomena but subjects an individual to the most serious sanction that the State can inflict whereas a single individual cannot for sure endanger, with his/her own conduct, a legally protected social value as gigantic as the resources of a community […]. Criminal law indeed, uses the single individual for (symbolic) means of reassurance of the community, punishing him/her for a fact which is in itself absolutely not dangerous for a value characterized by its magnitude, in contradiction with the constitutional principles of human dignity, equality, proportion, personality of the criminal responsibility, harm principle and rehabilitation finality of the sanction. Even when such sanction is only pecuniary, the principles of criminal law keep their own binding nature with regard to the fact that this sanction can be converted and to the stigma attached to the punitive intervention."[148]

157. The answer of the Court with regard the value that the legislator was purported to protect through the intervention of criminal law in the field of immigration was to determine the entire direction of the discipline. As was observed "[a] criminal law of immigration that is inspired by the Constitution could potentially contribute to protect the rights of the immigrants for it is those rights which are really affected. The physical integrity, the dignity, the freedom, the property […] of the immigrant are at stake here"[149]. This has however not been the direction followed by the Constitutional Court.

1.4. The recognition of a social value in the field of the criminal law of immigration

158. The fact that the Constitutional Court was more or less bound to recognize the existence of a value worthy of protection was rather obvious. Therefore, the interest of its

[148] "[i]l diritto penale non interviene su fenomeni, ma assoggetta alla più grave sanzione statuale singoli individui, ed il singolo immigrato irregolare non può certo porre in pericolo, con la propria condotta, un gigantesco bene giuridico come le risorse di vita della collettività. […] Esso, infatti, strumentalizza il singolo per fini (simbolici) di rassicurazione della collettività, punendolo per un fatto in sé assolutamente non pericoloso per un bene giuridico affetto da gigantismo, in contrasto con i principi costituzionali di dignità umana, eguaglianza sub specie proporzione, personalità della responsabilità penale, offensività e finalismo rieducativo. Anche qualora la sanzione sia costituita dalla sola pena pecuniaria, i principi del diritto penale conservano la propria vincolatività, in considerazione della convertibilità di tale pena e dello stigma comunque connesso all'intervento punitivo".Antonio CAVALIERE, "Diritto penale e politica dell'immigrazione" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 232 – 233).

[149] "[u]n diritto penale dell'immigrazione costituzionalmente orientato potrebbe forse concorre a tutelare i bene giuridici degli immigrati: sono essi ad essere realmente lesi messi in pericolo da condotte legate al fenomeno dell'immigrazione. Sono in gioco la vita, l'incolumità fisica, la dignità, le libertà, il patrimonio […] degli immigrati", Antonio CAVALIERE, "Diritto penale e politica dell'immigrazione" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 novembre 2011, Jovene Editore, Napoli, 2013, (p. 239).

decisions lies in the choice of the value that was recognized by the Court as worthy of protection because it was going to determine the perspective that the Court would take when controlling the adequacy and reasonableness of the measures preferred by the legislator.

159. In one of its most commented decisions in the field of immigration (and in conformity with a previous decision[150]), the Italian Constitutional Court held that,

> "[t]he social value protected […] is to be seen in the interest of the State to control and manage migration flows according to a determined normative system: the assumption of the protection of that interest by criminal law cannot be considered as irrational and arbitrary – as it is a social value 'of category' which is associated to almost all the incriminating norms of the 1998 Single Act in Immigration - and which is affected by the conducts of illegal entry and stay of the foreigner. The orderly management of the migrations flows presents itself as an instrumental social value through the protection of which the legislator effectively guarantees the entirety of the actual social values that are constitutionally guaranteed and which are susceptible of being compromised by uncontrolled migratory phenomena. That is to say, according to a strategy of intervention analogous to the one which characterizes wide sectors of complementary criminal law where the criminal sanction – which often consists in contraventions – relates to the violation of an administrative norm that captures functions of regulation and control over determined activities, and aims to preventively safeguard things or values which are common and endangered by the chaotic development of these activities (one could think, for example, of the criminal laws relating to urban planning, environment, financial markets, and safety at work)"[151].

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[150] Italian Constitutional Court, Sentence n. 353 of 1997. "il bene giuridico protetto […], è in realtà agevolmente identificabile nell'interesse dello Stato al controllo e alla gestione dei flussi migratori" - "The social value protected […] is, in reality easily identifiable in the interest of the State to control and manage migration flows".

[151] " il bene giuridico protetto […] è identificabile nell'interesse dello Stato al controllo e alla gestione dei flussi migratori, secondo un determinato assetto normativo : interesse la cui assunzione ad oggetto di tutela penale non può considerarsi irrazionale ed arbitraria – trattandosi, del resto, del bene giuridico "di categoria", che accomuna buona parte delle norme incriminatrici presenti nel testo unico del 1998 – e che risulta, altresì, offendibile dalle condotte di ingresso e trattenimento illegale dello straniero. L'ordinata gestione dei flussi migratori si presenta come un bene giuridico 'strumentale', attraverso la cui salvaguardia il legislatore attua una protezione in forma avanzata del complesso di beni pubblici 'finali', di sicuro rilievo costituzionale, suscettivi di essere compromessi da fenomeni di immigrazione incontrollata. Ciò, secondo una strategia di intervento analoga a quella che contrassegna vasti settori del diritto penale complementare, nei quali la sanzione penale – specie contravvenzionale – accede alla violazione di discipline amministrative afferenti a funzioni di regolazione e controllo su determinate attività, finalizzate a salvaguardare in via preventiva i beni, specie sovra individuali, esposti a pericolo dallo svolgimento indiscriminato delle attività stesse (basti pensare, ad esempio, al diritto penale urbanistico, dell'ambiente, dei mercati finanziari, della sicurezza del lavoro)". Corte Costituzionale Italiana, Sentenza n.250/2010 (Considerato in diritto 6.3).

160. This peculiar understanding of the exigency contained in the 'harm principle' undeniably entails an extension of the fields where the legislator is justified to intervene. Indeed, if the impact on the protected social value can be indirect, the constitutional rule aiming at limiting – or at least controlling - the intervention of the legislator is bound to be much less efficient.

161. This is the part which was more heavily criticized in the decision of the Constitutional Court.

> "The regulation or, in other words 'the control and management of [migration] flows' do neither constitute a legally protected social value nor a specious one: rather, the migration flows are regulated in order to protect the legally protected social values of the citizens, individually and collectively. The migration flows are phenomena considered as dangerous, and their control, their 'management', is the *rationale* of the entire legislation, but not the object of the protection, whether administrative or criminal"[152].

162. What was denounced here is the confusion operated by the Court between the objective of an entire discipline and the existence of a protected social value. The risk of such interpretation of the 'harm principle' by the Constitutional Court was twofold. Firstly, it could give a *carte blanche* to the legislator in the field of irregular immigration, and secondly it could modify fundamentally the features of the criminal law of immigration. I consider that the first risk did not materialize as the Court's jurisprudence shows a relatively sharp control aiming at the protection of the fundamental rights of the migrant. But it is arguable that the second did, as there was clearly a "change from criminal law focused on the safeguard of protected social values to one that sanctioned mere transgression."[153].

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[152] "La regolazione o, il che è lo stesso, 'il controllo e la gestione dei flussi' non costituiscono un bene giuridico, neppure strumentale: piuttosto, i flussi vengono regolati in vista della tutela di beni giuridici dei cittadini, quali singoli e come collettività. I flussi sono il fenomeno considerato pericoloso, e controllarli, 'gestirli', è la *ratio* dell'intera disciplina, ma non l'oggetto della tutela, né amministrativa e neppure penale". Antonio CAVALIERE, "Diritto penale e politica dell'immigrazione" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 224).

[153] "La deviazione dal diritto penale della tutela di beni giuridici a quello della mera trasgressione". Antonio CAVALIERE, "Diritto penale e politica dell'immigrazione" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 230).

163. Indeed,

"as regards harm, instead of safeguarding legally protected individual and collective social values of the citizens and/or of the immigrants – values which are precisely determined and which can verifiably harmed […] and the importance of which is proportionate to the values affected by the criminal sanction – the criminal law of immigration aims to support the administrative field which, above all, does not efficiently protect the rights of the citizens but contributes to harm those of the immigrants. As a consequence, the criminal field is centred on the offences of mere disobedience, that is to say on the transgression of a rule dedicated to the reduction of the migration flows"[154].

164. This transformation of the law of immigration lead progressively to

"an actual criminal-administrative continuum in which the boundary between criminal law and administrative law tends, in the regulation of the legal status of the foreigner, to vanish to the point of acquiring the features of a system in which 'the principles and objectives of the criminal law and criminal procedure are bent, subdued to the administrative activity'[155] oriented towards the expulsion of the irregularly-staying foreigner". [156]

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[154] "per quel che concerne l'offensività, anziché tutelare beni giuridici individuali e collettivi dei cittadini e/o degli immigrati – beni che siano precisamente determinati e verificabilmente offendibili […] e di valore proporzionato ai beni lesi dalla sanzione penale – il diritto penale dell'immigrazione mira a presidiare la disciplina amministrativa; la quale, oltretutto, […], non tutela efficacemente neppure i beni dei cittadini e contribuisce a ledere quelli degli immigrati. Di conseguenza, la disciplina penale si incentra su reati di mera disobbedienza, ossia sulla trasgressione della disciplina volta alla riduzione dei flussi". Antonio CAVALIERE, "Diritto penale e politica dell'immigrazione" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 230).

[155] Angelo CAPUTO, "*Prime applicazioni delle norme penali della legge Bossi-Fini*", Questione Giustizia n. 1/2003.

[156] "E un vero e proprio continuum penal-amministrativo, in forza del qual il confine tra diritto penale e diritto amministrativo tende, nella normativa sulla condizione giuridica dello straniero, a sfumare, fina ad assumere i tratti di un assetto in cui "i principi e gli scopi dell'ordinamento penale – del diritto e della procedura penale – vengono piegati, asserviti all'attività amministrativa"[156] preordinata all'allontanamento dello straniero irregolare Angelo CAPUTO, "Giurisprudenza costituzionale ed immigrazione illegale", Angelo CAPUTO, "Giurisprudenza costituzionale ed immigrazione illegale", in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p. 50).

2. *The extent of the discretionary power of the legislator*

165. While the legitimacy for the legislator to intervene in the field of irregular immigration has been recognised, the contours of such a power have been mapped out by the Constitutional Court. The existence of a wide margin of discretion of the legislator has been affirmed (2.1) and explained by a particular relationship of the foreigner with the Italian State (2.2).

2.1. The wide margin of discretion of the legislator

166. The discretion of the legislator and the correlated limits of the control operated by the Constitutional Court on the content of the legal norms have been recognized with regard to different aspects. The various facets of this form of auto-censure operated by the constitutional judges on the extent of their control are particularly interesting as the exercise that consisted in striking a balance between the different powers and counter-powers of the State was hardly an easy one. The Court, which was given several occasions to rule on this question, progressively drew the line between the role of the judge and the untouchable prerogatives of the State. The evolution of the vocabulary used by the Court as well as the way in which it envisaged the question of the conditions in which the discretion was to be exercised is compelling.

167. In one remarkable passage, the Court found that

> "the rationale of human solidarity cannot be affirmed outside an appropriate balance of the values at stake of which the legislator is in charge. The State, cannot indeed relinquish the inextricable duty to control its borders: the rules established according to an orderly management of the migration flows and the adequate hospitality must therefore be respected and not eluded or even circumvented from time to time with arguments which are substantially discretional"[157].

[157] "Le ragioni della solidarietà umana non possono essere affermate al di fuori di un coretto bilanciamento dei valori in gioco, di cui si è fatto carico il legislatore. Lo Stato, non può infatti abdicare al compito, ineludibile, di presidiare le proprie frontiere: le regole stabilite in funzione d'un ordinato flusso migratorio e di un'adeguata accoglienza vanno dunque rispettate, e non eluse, o anche soltanto derogate di volta in volta con valutazioni di carattere sostanzialmente discrezionale". Corte Costituzionale Italiana Sentenza n. 353/1997 ECLI:IT:COST:1997:353 (Considerato in diritto § 2).

168. At the time, the Court's phrase apparently put on an equal footing hospitality and solidarity on the one hand and the need to protect borders on the other.

169. Such an assessment is not likely to be repeated in today's context. If the values expressed are certainly still taken into consideration by the judges, they are surely not granted the same importance as the defence of the borders. Reflecting this change, the Court held that

> "[t]he discretion of the legislator to set up a procedural scheme characterized by its swiftness and articulated around the sequence order of the police-confirmation by the judge is surely not under discussion. Especially as security and public order are at risk to be compromised by uncontrolled immigrations flows »[158].

170. The change is striking: while in 1997 the Court said that the values of hospitality and solidarity had to be weighed against the need to protect the border, in 2004 it mentions exclusively the requirements of public security and public order. Within its new self-defined framework,

> « the Court is not entitled to express appraisals on the efficiency of the criminal measures taken with respect to illegal behaviour which are taking place within the striking phenomenon of today's migration flows that poses serious social, humanitarian and security questions"[159].

171. The Court also recognizes the possibility for the legislator to adapt the legislative answer to the evolving situation regarding immigration.

> "The determination of the most adequate sanction […] and in particular the establishment of whether those should assume a criminal connotation instead of a merely administrative one […] is part of the discretional choices of the legislator, who

[158] "Non è certo in discussione la discrezionalità del legislatore nel configurare uno schema procedimentale caratterizzato da celerità e articolato sulla sequenza provvedimento di polizia-convalida del giudice. Vengono qui, d'altronde, in considerazione la sicurezza e l'ordine pubblico suscettibili di esser compromessi da flussi migratori incontrollati". Corte Costituzionale Italiana Sentenza n.222/2004 ECLI:IT:COST:2004:222 (Considerato in diritto § 6).

[159] "non spetta a questa Corte esprimere valutazioni sull'efficacia della risposta repressiva penale rispetto a comportamenti antigiuridici che si manifestano nell'ambito del fenomeno imponente dei flussi migratori dell'epoca presente, che pone gravi problemi di natura sociale, umanitaria e di sicurezza". Corte Costituzionale Italiana, Sentenza n. 236/2008 ECLI:IT:COST:2008:236.

can modulate in time […] the nature and level of the repressive intervention in the field"[160].

172. The only exception to this principle being

"the exception of unconstitutionality (which) can be asserted when the sanctions chosen by the legislator reveal an obvious violation of the standard of rationality when substantially identical types of offences are submitted to diverse sanctions"[161] (on the obligation to respect the principle of equality of treatment, see Paragraph 2 below).

2.2. The particular relationship of the foreigner with the Italian State

173. The wide discretionary power recognized to the legislator has been justified by the Court by the fact that the foreigner does not originally have a specific bond with the Italian territory. The Court considered the reasons of this absence.

"The absence of an intrinsic bond between the foreigner and the national community and therefore of a constitutive legal connection with the Italian State leads to deny the foreigner a position of liberty with regards the entry and stay on the Italian territory […]. In reality, the distinctive position of the foreigner, characterized by the subjection by principle to the legislative and administrative regimes […] is explained […] by the fact that the regulation of the entry and stay of the foreigner on the national territory is related to the pondering of various public interest as for example, public security, health and order, international obligations and national immigration policy. The weighing of interests falls first and foremost under the responsibility of the ordinary legislator who enjoys a wide discretion in this field, limited only by the conformity to the Constitution according to which his choices shall not be manifestly unreasonable"[162].

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[160] "Determinare quale sia la risposta sanzionatoria più adeguata […], e segnatamente stabilire se esso debba assumere una connotazione penale, anziché meramente amministrativa […] rientra nell'ambito delle scelte discrezionali del legislatore, il quale ben può modulare diversamente nel tempo […] la qualità e il livello dell'intervento repressivo in materia d'immigrazione". Corte Costituzionale Italiana Sentenza n. 250/2010 ECLI :IT :COST :2010 :250 (Considerato in diritto 6.3).

[161] "il sindacato di costituzionalità, può investire le pene scelte dal legislatore solo se appalesi una evidente violazione del canone della ragionevolezza, in quanto ci si trovi di fronte a fattispecie di reato sostanzialmente identiche, ma sottoposte a diverso trattamento sanzionatorio". Corte Costituzionale Italiana Sentenza n. 22/2007 ECLI:IT:COST:2007:22 (Considerato in diritto 7.3).

[162] "la mancanza nello straniero di un legame ontologico con la comunità nazionale e quindi di un nesso giuridico costitutivo con lo Stato italiano, conduce a negare allo stresso una posizione di libertà in ordine all'ingresso e alla permanenza nel territorio italiano, […]. In realtà, la diversa posizione dello straniero, caratterizzata dall'assoggettamento, in via di principio, a discipline legislative e amministrative, […] ha una ragione nel rilievo, […] secondo il quale la regolamentazione dell'ingresso e del soggiorno dello straniero nel territorio

Paragraph 2: The limits of the power of the legislator in the field of immigration law

174. While recognizing wide discretional power to the legislator in the field of immigration law, the Constitutional Court set forth an abundant case-law in which the protection of some essential values and fundamental rights of the migrant limits the power of the State.

175. Fully playing the role of a counter-power, the Court found astute ways to keep in check the willingness of the legislator to extensively criminalize the field of immigration law while avoiding to engage in a political debate which is clearly outside the realm of its competences. Using it as a shield and as the basis of its decisions, the Court made some daring interpretations of the Italian Constitution which will be studied in this Paragraph. It has been argued that two lines of cases can be identified in the jurisprudence of the Court:

> "the first one concerns decisions in which the recognition in favour of the (irregular) migrant of a fundamental right is not related to the distinction between capacity and enjoyment of the right in question while the second line of cases is made of decisions in which the reasoning of the constitutional judge is anchored in constitutional parameters (for examples criminal law principles […]) that are held up completely outside the variable citizen/foreigner (and outside of the variable regular/irregular migrant)"[163].

176. While this way of looking at the case-law is entirely valid, I prefer a different pattern of interpretation that evolves around the five different obligations which the State ought to respect when enacting legislation in the field of immigration. Such a reading also allows to take into consideration limitations which cannot be affiliated with either one of the

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nazionale è collegata alla ponderazione di svariati interessi pubblici , quali, ad esempio, la sicurezza e la sanità pubblica, l'ordine pubblico, i vincoli di carattere internazionale e la politica nazionale in tema di immigrazione. E tale ponderazione spetta in via primaria al legislatore ordinario, il quale possiede in materia un'ampia discrezionalità, limitata, sotto il profilo della conformità a Costituzione, soltanto dal vincolo che le sue scelte non risultino manifestamente irragionevoli". Corte Costituzionale Italiana sentenza n.62/1994 ECLI:IT:COST:1994:62 (Considerato in diritto 4).

[163] "il primo riguarda decisioni nelle quali il riconoscimento a favore del migrante (irregolare) di un diritto fondamentale è svincolato dalla distinzione tra titolarità e godimento del diritto stesso, mentre al secondo sono riconducibili pronunce in cui la *ratio decidendi* individuata dal giudice delle leggi è ancorata a parametri costituzionali (ad esempio, i principi penalistici, […]) assunti in termini del tutto indipendenti dalla variabile cittadino/straniero (e da quelle straniero regolare/irregolare)" Angelo CAPUTO, "Giurisprudenza costituzionale ed immigrazione illegale", in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 novembre 2011, Jovene Editore, Napoli, 2013, (p. 36).

two above-mentioned trends as they are standing at the margins of the competence of the Constitutional Court.

177. The aim of such interpretation is also to show that while the discretion of the State is wide, the number of limitations set forth by the judges are numerous and circumscribe this power. These limitations can be found in the obligation to consider a wide array of interests beyond the State's need to control its borders (1), the mandatory respect for the right of equal treatment between the citizen and the foreigner (2), the compulsory respect of certain guarantees when measures impact the personal freedom of an individual (3), the imperative to respect the rights of defence (4) and the prohibition to criminalize a personal quality of the author of the offence (5).

1. Consideration of other interests than the need to protect State borders

178. In stark contrast with populist assertions and simplifications the Court affirmed in unambiguous words that

> "[t]he control of the migration flows and the regulation of the entry and stay of foreigners on the national territory is a serious social, humanitarian and economic problem which implies appraisals of legislative policy that can neither be reduced to mere general requirements of public order and security nor […] to the dangerousness of some individuals and to some conducts which have nothing to do with the immigration phenomenon"[164].

179. This courageous affirmation can hardly be reconnected to any specific provisions of the Italian Constitution and can only be linked to the role of the Court through a distant relationship with the harm principle that allows the judge to examine the motivations of the legislator in enacting provisions of criminal law. In any case, such imperious reminder clearly unveils the intent of the Court to act as a counter-power to the legislator.

[164] "Si tratta [nel controllo dei flussi migratori e la disciplina dell'ingresso e della permanenza degli stranieri nel territorio nazionale] di un grave problema sociale, umanitario ed economico che implica valutazioni di politica legislativa non riconducibili a mere esigenze generali di ordine e sicurezza pubblica né […] alla pericolosità di alcuni soggetti e di alcuni comportamenti che nulla hanno a che vedere con il fenomeno dell'immigrazione". Corte Costituzionale Italiana Sentenza n. 22/2007 ECLI:IT:COST:2007:22 (Considerato in diritto 7.2).

2. *The right to equal treatment including the principle of non-discrimination*

180. The right to an equal legal treatment of the foreigner and of the citizen has been recurrently used by the Constitutional Court as a ground for unconstitutionality of numerous provisions of criminal immigration law. According to the jurisprudential definition put forward, "as far as the enjoyment of inviolable human rights is concerned, which is the case here with personal freedom, the constitutional principle of equality in general does not tolerate discriminations between the positions of the citizen and the one of the foreigner" [165]. More precisely, "the legal condition of the foreigner must not be considered – for the protection of [fundamental] rights – as an admissible cause for a different and worse treatment especially in the field of criminal law, which is more directly connected to the fundamental freedom of the person."[166]

181. Although circumscribed to a core set of 'inviolable' rights, the principle allows the judge to perform an in-depth control of a legal provision as the equality of treatment must be both formal and real. In other words, it must correspond to an appearance of equality as much as it must guarantee actual equality.

182. Quite a number of criminal law provisions designed to govern immigration fell victim to the Court's finding of a violation of the right to equal treatment. One famous example was Legislative Decree of 23 May 2008 n.92 wherein the aggravating circumstance of 'clandestinity' was introduced by the legislator in the Italian legal system (art. 61 n. 1-bis of the Penal Code). The provision allowed to increase any criminal sanction by up to a third if the author who committed the offence was irregularly staying on the territory of the State. Called upon to rule on the validity of this provision, the Constitutional Court declared it unconstitutional.

> "[T]he introduction of the offence of illegal entry and stay […] put the conditions for possible duplications or multiplications of the sanctions, all originating […] [from a]

[165] «quando venga riferito al godimento dei diritti inviolabili dell'uomo, quale è nel caso la libertà personale, il principio costituzionale di eguaglianza in generale non tollera discriminazioni fra le posizioni del cittadino e quella dello straniero». Corte Costituzionale Italiana Sentenza n. 62/2004 ECLI:IT:COST:2004:62 (Considerato in diritto 4).

[166] "la condizione giuridica dello straniero non deve essere pertanto considerata – per quanto riguarda la tutela di […] diritti [fondamentali] – come causa ammissibile di trattamenti diversificati e peggiorativi, specie nell'ambito del diritto penale, che più direttamente è connesso alle libertà fondamentali della persona." Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI:IT:COST:2010:249 (Considerato in diritto 4.1).

single violation of the immigration laws, now object of an autonomous criminalization, and yet deprived of any connection with the criminal precepts theoretically violated by the individual. The third-country national is punished a first time for the fact […] [of his/her] illegal entry or stay on the national territory, but is subjected to one or more subsequent punishments related to the persistence of his/her condition of irregular migrant […]. The irrationality of the consequence is fully grasped when is considered the fact that from a contravention punished by a sole fine can stem a series of additional sanctions, including detention […]. Not only is the foreigner in irregular situation more severely punished than the EU citizen or the Italian citizen for the same offences, but the foreigner in irregular situation also remains exposed for the entire duration of his stay on the national territory and for all the offences provided for by Italian laws to a more severe criminal treatment. All this is contrary to the principle of equality. "[167].

183. Censured on more than one ground (it was also considered illegal in as much it criminalized a personal quality of an individual), the provision remains a case in point of the capital importance of the principle of equal treatment as a limitation to the discretion of the legislator. It is also worth noticing that the Court, while seemingly restricting itself to the control of the constitutionality of the norm, made a passing comment on the opportunity or – inopportunity – of the incrimination of the illegal entry and stay.

3. Guarantees surrounding measures that impact the right to freedom

184. As regards the safeguard of the right to freedom, the Court proved to be particularly fierce towards the legislator. It reaffirmed the indisputable requirement for the legislator to respect the guarantees provided for by the Constitution at Article 13 when

[167] "[L]'introduzione del reato di ingresso e soggiorno illegale […] ha posto le premesse per possibili duplicazioni o moltiplicazioni sanzionatorie, tutte originate […] [di una] unica violazione delle leggi sull'immigrazione, ormai oggetto di autonoma penalizzazione, e tuttavia priva di qualsivoglia collegamento con I precetti penali in ipotesi violati dal soggetto interessato. Lo straniero extracomunitario viene punito una prima volta […] [per il] suo ingresso o soggiorno illegale nel territorio nazionale, ma subisce una o più punizioni ulteriori determinate dalla perdurata esistenza della sua qualità di straniero irregolare, in rapporto a violazioni, in numero indefinito […] L'irragionevolezza della conseguenza si coglie pienamente ove si consideri che da una contravvenzione punita con la sola pena pecuniaria può scaturire una serie di pene aggiuntive, anche a carattere detentivo, […] Non solo lo straniero in condizione di soggiorno irregolare, a parità di comportamenti penalmente rilevanti, è punito più gravemente del cittadino italiano o dell'Union Europea, ma lo stesso rimane esposto per tutto il tempo della sua successiva permanenza nel territorio nazionale, e per tutti i reati previsti dalle leggi italiane […] ad un trattamento penale più severo. Tutto ciò si pone in contrasto con il principio di eguaglianza." Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI:IT:COST:2010:249 (Considerato in diritto 6).

enacting a measure susceptible of infringing it. Beyond that, the judges went as far as to requalify as detention a measure that the legislator was attempting to disguise as a provision of assistance.

> "The detention of the foreigner in a centre of assistance and temporary permanence [now called Centre of Temporary Reception for Returnees (CPR)] is a measure infringing personal freedom, which cannot be adopted outside of the guaranties set forward by Article 13 of the Constitution. One could possibly doubt that this measure is/or not to include in the typical restrictive measures that are expressly mentioned at Article 13. Such doubt could be partly reinforced by the consideration that the legislator has been careful to avoid, also in the terminology, the identification with familiar institutions of criminal law, assigning to the detention a finality of assistance and providing for it a regime different from the penitentiary one. However, when looking at the content of such measure, the detention is at least to be qualified as one of the 'other restrictions of liberty' […]. This can be inferred […] [from the fact that] the *Questore*, […] adopts efficient measures of security in order to prevent the foreigner to get out of the centre without authorisation. […]. Therefore, even when such detention is not dissociated from a finality of assistance, it implies a mortification of the dignity of an individual which occurs in all circumstances where there is a physical subjection by a third-party power; this is the ineluctable indicator of the connection of the measure to the sphere of personal freedom. It could also not be said that the guarantees of Article 13 of the Constitution can undergo attenuations with respect to foreigners, in order to protect other constitutionally relevant values. As multiple as the public interests impacting the field of immigration may be and as serious as the problems relating to public security and order in relation to uncontrolled migration flows may be perceived to be, the universal character of personal freedom cannot be minimally scratched, exactly like other rights which the Constitution proclaims to be inviolable; it belongs to each individual not as a member of a determined political community but as a human being"[168].

[168] "Il trattenimento dello straniero presso i centri di permanenza temporanea e assistenza è misura incidente sula libertà personale, che non può essere adottata al di fuori delle garanzie dell'art.13 della Costituzione. Si può forse dubitare se esso sia o meno da includere nelle misure restrittive tipiche espressamente menzionate dall'articolo 13; e tale dubbio può essere in parte alimentato dalla considerazione che il legislatore ha avuto cura di evitare, anche sul piano terminologico, l'identificazione con istituti familiari al diritto penale, assegnando al trattenimento anche finalità di assistenza e prevedendo per esso un regime diverso da quello penitenziario. . Tuttavia, se si ha riguardo al suo contenuto, il trattenimento è quantomeno da ricondurre alle 'altre restrizioni della libertà personale' […].Lo si evince […] [dal fatto che] il questore, […] adotta efficaci misure di vigilanza affinché lo straniero non si allontani indebitamente dal centro […].Si determina dunque nel caso del

185. Several elements of this quotation are worth commenting as they reveal the judges' irritation and concern with the misguided ways of the legislator which lead to violations of constitutionally guaranteed rights. They also show the depth of the control operated by the Court when the protection of the right to individual freedom is at stake.

186. The words 'careful to avoid' lay bear the exasperation of the Court towards the bad faith of the legislator. This is only one of several such expressions of annoyance. Taken together, they are an indicator of the extent of the power and of the influence that the judges enjoy in Italy with respect to the Government. While it would be astonishing to read such kind of assertion in a decision of the French Constitutional Court for example, it is not such a surprise to find it in the country where the vast judicial operation called "Mani Pulite" in the 1990's profoundly and durably transformed the role of the judge.

187. As for the depth of the control operated by the Court, it is rendered evident by the fact that the judges did not accept at face value the label given by the legislator to the measure under scrutiny. As appears from the quote, the Court took into consideration the actual features of the measures in order to assess whether the measure ought to be surrounded by the guarantees provided for by the Constitution for any kind of deprivation of personal freedom.

188. Moreover, the Court highlighted its scepticism on the opportunity of the measures by underlying that the problems were only 'perceived' to be caused by irregular migration.

189. Finally, to express its concern regarding the orientations taken by the legislator, the Court uses the very strong words "mortification of human dignity" to describe the effect

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trattenimento, anche quando questo non sia disgiunto da una finalità di assistenza, quella mortificazione della dignità dell'uomo che si verifica in ogni evenienza di assoggettamento fisico all'altrui potere e che è indice sicuro dell'attinenza della misura alla sfera della libertà personale. Né potrebbe dirsi che le garanzie dell'articolo 13 della Costituzione subiscano attenuazioni rispetto agli stranieri, in vista della tutela di altri beni costituzionalmente rilevanti. Per quanto gli interessi pubblici incidenti sulla materia della immigrazione siano molteplici e per quanto possano essere percepiti come gravi i problemi di sicurezza e di ordine pubblico connessi a flussi migratori incontrollati, non può risultarne minimamente scalfito il carattere universale della libertà personale, che, al pari degli altri diritti che la Costituzione proclama inviolabili, spetta ai singoli non in quanto partecipi di una determinata comunità politica, ma in quanto esseri umani". Corte Costituzionale Italiana, Sentenza n. 105/2001ECLI:IT:COST:2001:105 (Considerato in diritto 4).

of a deprivation of liberty on an individual. It is therefore only logical that the protection against such 'mortification' be proportionate to the stakes. There again, the choice of words is as unambiguous as can be, and the prohibition to alter the protection of these rights is clear 'cannot be minimally scratched'.

4. *The right of defence*

190. Under the general rule affirmed in a constant jurisprudence by the Constitutional Court,

> "[t]he foreigner (even the one staying irregularly) enjoys all the fundamental rights of the human being, among which the right of defence, the effective exercise of which implies that the subject of an order diversely infringing his/her freedom of auto-determination, be put in a position to understand its content and meaning"[169].

191. Under this definition, the right of defence goes beyond the possibility to be assisted by a lawyer and entails the actual understanding of the procedure against the foreigner whenever such procedure impacts his/her liberty. On the right of defence, the Constitutional Court considered that

> "whatever the scheme chosen, those must comply with the principles of jurisdictional protection which therefore means that neither can the effective control over the order […] be eliminated nor can the person object of the order be deprived of his right of defence".[170]

5. *The prohibition to criminalize a personal quality of the individual*

192. Article 25 Paragraph 2 of the Italian Constitution states that "No punishment may be inflicted except by virtue of a law in force at the time the offence was committed"[171].

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[169] "lo straniero (anche irregolarmente soggiornante) gode di tutti i diritti fondamentali della persona umana, fra i quali quello di difesa, il cui esercizio effettivo implica che il destinatario di un provvedimento variamente restrittivo della libertà di autodeterminazione, sia messo in grado di comprenderne il contenuto e il significato". Corte Costituzionale Italiana, Sentenza n. 198/2000 ECLI:IT:COST:2000:198 (Considerato in diritto 3).

[170] "quale che sia lo schema prescelto, in esso devono realizzarsi i principi della tutela giurisdizionale; non può, quindi, essere eliminato l'effettivo controllo sul provvedimento […] né può essere privato l'interessato di ogni garanzia difensiva". Corte Costituzionale Italiana, Sentenza 222/2004 ECLI:IT:COST:2004:222 (Considerato in diritto 6).

[171] Official translation of the Senato della Repubblica : « The Italian Constitution » at : www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

193. The combination of this provision with the principle of harm has been interpreted by the Constitutional Court as entailing the prohibition to criminalize a personal quality of the individual:

> "The strict respect of the inviolable rights implicates the illegitimacy of more severe criminal procedures founded on the personal quality of the subjects which derive from the previous commission of acts […] introducing hence a responsibility of the author in clear violation of the principle of harm" "[172].

194. A violation of this absolute constitutional and criminal law principle has been alleged with regard various offences of immigration law. Three examples will be studied in this paragraph. In one of them the Court refused to recognize the existence of a violation while the argument was successfully put forward before the Constitutional judge in the two following examples.

195. The attempt to argue that the offence of illegal entry and stay sanctions a personal condition and not an act was made but it was rebutted by the Constitutional Court which refused to acknowledge the unconstitutionality of the provision under scrutiny:

> "the offence of illegal entry and stay on the territory of the State […] cannot be considered to criminalize 'the mere personal and social condition' from which a social dangerousness would be arbitrarily deduced. The object of the incrimination is not 'the way that the person is' but the specific transgressive conduct of the applicable norms. […] [I]t is an instantaneous active conduct (the illegal crossing of national borders) and one with a permanent character the illegal core of which is constituted by an omission (the omission to leave the national territory while not in possession of a legal title authorising the legal permanence)"[173].

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[172] "Il rigoroso rispetto dei diritti inviolabili implica l'illegittimità di trattamenti penali più severi fondati sulle qualità personali di soggetti che derivino dal precedente compimento di atti […], introducendo cosi una responsabilità penale d'autore 'in aperta violazione del principio di offensività'". Corte Costituzionale Italiana, Sentenza n. 249/2010 ECLI:IT:COST:2010:249 (Considerato in Diritto 4.1).

[173] "non si può infatti ritenere che […] la contravvenzione di 'ingresso e soggiorno illegale nel territorio dello Stato', penalizzi una mera 'condizione personale o sociale' – della quale verrebbe arbitrariamente presunta la pericolosità sociale. Oggetto dell'incriminazione non è 'un modo di essere' della persona, ma uno specifico comportamento trasgressivo di normi vigenti. […] [è] una condotta attiva istantanea (il varcare illegalmente i confini nazionali) e una a carattere permanente il cui nucleo antidoveroso è omissivo (l'omettere di lasciare il territorio nazionale, pur non essendo in possesso di un titolo che renda legittima la permanenza)". Corte Costituzionale Italiana Sentenza n. 250/2010 ECLI:IT:COST:2010:250 (Considerato in diritto 6.2).

196. Technically speaking, the Court's reasoning was impeccable as was its analysis of the nature of the offence. An act or an omission is indeed required by the provision under scrutiny and it is the commission of either or both of them which triggers the application of a specific field of the law to the author.

197. Regarding the two other occurrences in which the argument was put forward, the Court recognized the existence of a violation of the principle. One was in the framework of an appeal against the fact that the condition of irregularity of the foreigner systematically excluded the possibility to benefit from alternative measures to detention. In this case, the Court held that

> "such preclusion is automatically connected to the situation [of irregularity]– which in itself is not distinctively characteristic neither of a particular social dangerousness, incompatible with a rehabilitation process through any alternative measure, nor with the certainty of an absence of bond with the territory"[174].

198. The reasoning of the Court shows that two distinct elements were problematic. One was the link established by the legislator between the irregularity of the status of an individual, his/her dangerousness and the absence of a bond with the territory. According to the provision, both the dangerousness and the absence of bond derived from the irregularity of the status: no proof of their existence was required and the presumption was irrefutable. According to the Court, this presumption fell short of any substantiating element and thus equated elements which bore no relationship one with another. This element leads to the other problematic aspect of the provision which consisted in the systematic character of this provision. This 'automatic' application of the law lied in clear contradiction with the principle of criminal law according to which the judge has to take under consideration all the personal features of an individual when determining his/her sanction as this provision allowed no margins of appreciation in its application.

199. In one other situation in which the aggravating circumstance of 'clandestinity' was challenged as unconstitutional, the Court went into the details of its reasoning leading to the censure of the provision which was considered to be in contradiction with various

[174] "tale preclusione risulta collegata in modo automatico dello stato [di irregolarità] – che, di per sé, non è univocamente sintomatica né di una particolare pericolosità sociale, incompatibile con […] un percorso rieducativo attraverso qualsiasi misura alternativa, né della sicura assenza di un collegamento col territorio". [174] Corte Costituzionale Italiana Sentenza 78/2007 ECLI:IT:COST:2007:78 (Considerato in diritto 4).

principles. The Court first found that the provision violated the prohibition to criminalize a characteristic of a person.

> "The substantial reason at the foundation of the norm considered as unconstitutional is a general and absolute presumption of greater dangerousness of the irregular migrant which is reflected on the entire procedures applicable for any violation of the criminal law […]. The qualities of the individual person under judgment recedes as the general feature formerly established by the law is highlighted, on the basis of an absolute presumption which identifies a 'type of author' subjected, always and in any case to a more severe treatment."[175]

200. Here again, as in the previous case studied, the Court found that the same two aspects were problematic: the existence of a 'presumption' which is not based on factual elements drawn from the individual case and its indiscriminate application to all individuals and every procedure against one individual by reason of a single previous violation of the provision on entry and stay on the national territory. The Court insisted on the fact that the legislator

> "cannot introduce automatically and preventively an assessment of dangerousness of the responsible subject; this ought to be the result of a particular verification, which must be done on a case by case basis, with regard to the concrete circumstances, to objective and subjective personal characteristics."[176]

201. However, this was not the only ground on which the law was censured. The provision was also held to infringe the principle of equality based on a distinction which is unjustifiable according to the Constitutional jurisdiction.

> "The attribute of 'irregular migrant' […] becomes a 'stigma' which transforms a presupposition into a differentiated criminal treatment of the individual, whose

[175] "la ratio sostanziale posta alla base della norma censurata è una presunzione generale ed assoluta di maggiore pericolosità dell'immigrato irregolare, che si riflette sul trattamento sanzionatorio di qualunque violazione della legge penale […].Le qualità della singola persona da giudicare rifluiscono nella qualità generale preventivamente stabilita dalla legge, in base ad una presunzione assoluta, che identifica un 'tipo di autore' assoggettato, sempre e comunque, ad un più severo trattamento". Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI:IT:COST: 2010:249 (Considerato in diritto 9).

[176] "ma [il legislatore] non può introdurre automaticamente e preventivamente un giudizio di pericolosità del soggetto responsabile, che deve essere frutto di un accertamento particolare, da effettuarsi caso per caso, con riguardo alle concrete circostanze, oggettive ed alle personali caratteristiche soggettive." Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI:IT:COST:249:2010 (Considerato in diritto 9).

conduct appears, in general and without reserve or distinctions, characterized by an exacerbated antagonism against the law."[177]

202. In addition, the Court held that

"the provision considered is in contradiction with the principle of harm as the illegal conduct is not configured as more offensive according to a specific reference to the social value protected but serves to connote a general and presumed negative quality of his/her author. […] This determines a conflict between the field under consideration and [the Constitution] which poses an act as the basis of criminal responsibility and also prescribes, in a strict manner, that the individual is to be sanctioned for his/her actions and not for his/her personal qualities." [178]

203. What is interesting is that, at first glance, the reasoning of the Court in the present case could be read as being in contradiction with the sentence of the Court studied above in which it held that the criminalization of the irregular entry and/or stay was in line with the Constitution as it constituted an offence and was not as such a sanction of a 'personal quality' of its author. In the present decision however, the Court, by censuring the aggravating circumstance of 'clandestinity' – circumstance which results from the sole violation of the regulation on entry and stay on the territory of the State – does so only because the legislator inferred a 'dangerousness' of the author from this violation. This slight distinction which allows to reconcile both decisions carries a troublesome conclusion. If the aggravating circumstance had been solely based on the commission of the previous offence of irregular entry and stay, the Court would logically not have censured it.

204. Ultimately, it is worth noticing that, in this important decision, the Constitutional judges recalled once again the limits of their review. In doing so, I argue that the Court unveiled its disagreement over the criminalization of the irregular entry and stay of

[177] "[L]a qualità di immigrato 'irregolare'[…] diventa uno 'stigma', che funge da premessa ad un trattamento penalistico differenziato del soggetto, i cui comportamenti appaiano, in generale e senza riserve o distinzioni, caratterizzati da un accentuato antagonismo verso la legalità". Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI:IT:COST:2010:249 (Considerato in diritto 9).

[178] "La previsione considerata ferisce in definitiva, il principio di offensività giacché non vale a configurare la condotta illecita come più gravemente offensiva con specifico riferimento al bene protetto, ma serve a connotare una generale e presunta qualità negativa del suo autore. […] Ciò determina un contrasto tra la disciplina censurata e [la Costituzione] che pone il fatto alla base della responsabilità penale e prescrive pertanto, in modo rigoroso, che un soggetto debba essere sanzionato per le condotte tenute e non per le sue qualità personali." Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI :IT :COST :2010 :249 (Considerato in diritto 9).

an individual. The insertion of the expression 'by effect of the political choice of the legislator' serves no other purpose than to state the position of the Court. "The violation of the norms on the control of the migration flows can be criminally sanctioned, by effect of a political choice of the legislator which cannot be condemned through the constitutional control of legality"[179].

Conclusion of Section 2

205. The analysis of a set of decisions has shown that the Constitutional judge, acting as guardian not only of the Constitution in the strict sense but also of the values which are (instrumentally) considered to be part of the foundation of the Italian society, have succeeded to keep a fragile equilibrium between the limits of their competence and their possibility to effectively check the legislator. While this section dealt with the role of the judge as concerns the actual content of the law, Section 3 will focus on the impact of the judge on the applicability of the law.

Section 3: Redefinition of the scope of certain criminal offences related to the irregularity of the migrant's status

206. This Section considers two ways in which the judge has redefined the scope of application of certain criminal offences related to the irregularity of the status of the foreigner. It aims to demonstrate that whenever the limits of the constitutional review have precluded the judge from outlawing a provision, other interpretative tools remained at his/her disposal. While most of the jurisprudence analysed in this Chapter concerns the Constitutional Court, this section also presents, exceptionnaly, a couple of cases from the Italian Cassation Court whose decisions have shown to be complementary to the ones of the Constitutionnal Court.

207. The first interpretative tool used by the judges was the scope of application of the offence and the other regards one clause of exclusion of punishability: the justification clause. This section considers how the judges used those reviews to modulate the applicability

[179] "La violazione delle norme sul controllo dei flussi migratori può essere penalmente sanzionata, per effetto di una scelta politica del legislatore non censurabile in sede di controllo di legittimità costituzionale". Corte Costituzionale Italiana Sentenza n. 249/2010 ECLI:IT:COST:2010:249 (Considerato in diritto 9).

of certain criminal offences related to the irregularity of the status of the foreigner. The analysis shows the influence of the constitutional judge not only on the content of the law (as was the case in Section 2) but also on its application. The most interesting element however is that this redefinition has been in the case emanating from the Cassation Court to the benefit of the irregularly-staying third-country national as it narrowed the ambit of the offence while the extent of the protective effect of the justification clause by the Constitutional Court was more limited. In the first situation analysed regarding the offence of refusal to comply with an order by a representative of the public authority to exhibit a document for the purpose of identification of the individual, the Cassation Court operated a reduction of the personal scope of application of the offence (Paragraph 1). In the second situation considered, the Constitutional judge gave an interpretation of the clause of exclusion of the punishable character of the offence or the absence thereof (Paragraph 2).

Paragraph 1: The exclusion of the irregular migrant as possible author of some offences

208. This Paragraph uses the example of the offence of non-compliance with an order to display an identification document and a relevant residence title (article 6 § 3 of the Single Act on Immigration) to illustrate how the judge has changed the personal scope of application of an offence. The first paragraph analyses the scope of the interpretations given by the Cassation Court before illegal entry and stay became a criminal offence (1) while the second describes what happened afterwards (2).

1. When the illegal entry and/or stay was only an administrative offence

209. Before the Security Package 2009 (*Pacchetto Sicurezza 2009*), the Cassation Court had two ways for interpreting the norm. In both cases it looked for a way to strike a fair balance between the needs of the public administration and the rights of the irregular migrants.

210. The first solution consisted in recognizing that the norm was applicable to any alien. A regular migrant could present an identification document or a residence permit while the irregularly staying migrant, who could obviously not present a residence permit, could

nevertheless show a passport or any other identification document. This solution was an astute way to acknowledge the need of the public administration to identify all the people present on the territory while upholding the right of the migrants not to be requested to do the impossible or to auto-incriminate themselves.

211. The second solution was to consider that the offence was not applicable to the irregularly staying migrant altogether since he was not in a position to present a valid residence permit. This interpretation resulted in the impossibility for the administration to identify some aliens on its territory, which seemed a somewhat radical solution.

212. This conflict of interpretation was resolved by the United Sections of the Cassation Court in the Mesky case of 2003[180] according to which a residence permit could not be requested from an irregular migrant because it would amount to asking for something impossible.

> "[T]he fact that a foreign citizen may not be in possession of a passport or other identification document as a consequence of the fact that he did not preventively take it along is irrelevant for the constitution of the offence of non exhibition, without justified ground, by the foreign citizen regularly or irregularly staying on the territory of the State, of a passport or other identification document at the request of a public agent or servant […] while the non exhibition of the residence card or any similar document […] by the foreign citizen who irregularly immigrated to Italy, does not constitute neither the offence under scrutiny nor any other offence, for the possession of any such document is incompatible with the very condition of 'irregularly staying foreigner' and consequently, their exhibition cannot be required"[181].

213. However, the irregular migrant was subjected to the obligation to present an identification document, the failure of which would make him liable for the offence. The contrary would have been unfair and would have constituted a violation of Article 3 of the

[180] Corte di Cassazione Sezione Unite, 29 ottobre 2003, n. 45801/2003

[181] "[I]ntegra il reato […] la mancata esibizione, senza giustificato motivo, a richiesta degli ufficiali e agenti di pubblica sicurezza, del passaporto o di altro documento di identificazione, da parte del cittadino straniero che si trovi, regolarmente o no, nel territorio dello Stato, a nulla rilevando che egli non ne sia in possesso per non essersene preventivamente munito : mentre non integra né questa, né altra ipotesi di reato, l'omessa esibizione, da parte dello straniero immigrato clandestinamente in Italia, del permesso o della carta di soggiorno ovvero del documento di identificazione per stranieri […], in quanto in possesso di uno di questi ultimi documenti è inconciliabile con la condizione stessa di 'straniero clandestino' e, conseguentemente, ne è inesigibile l'esibizione". Corte di Cassazione Sezione Unite, 29 ottobre 2003, n. 45801/2003.

Italian Constitution on equality of treatment for nothing would have justified a difference of treatment in the sole identification of a person. The Court took the legislator literally by giving the administration the means to swiftly and efficiently identify a person without giving it the possibility to sanction through this legal provision the possible irregular status of the alien. In this sense, the fact of being irregular is a 'justified ground' ('*giustificato motivo*') not to present a valid residence permit which therefore excludes the possibility to sanction the alien. Any other solution would have entailed the obligation for the irregular migrant to denounce himself in order to explain why he could not produce a residence permit and expose himself to what was then a purely administrative proceeding.

2. *When the illegal entry and/or stay became a criminal offence*

214. Following the change[182] of Article 6 comma 3 of the Single Act on Immigration and the introduction of the new criminal offence of illegal entry and stay (article 10-bis of the Single Act on Immigration) a part of the Italian doctrine concluded that the offence of omission of exhibition of the documents could only be committed by the regularly staying migrant, because, by definition, the irregularly staying migrant could not be in possession of a residence permit or of any other kind of document that would prove the regularity of the stay. The argument was also sustained by the fact that any other understanding of the norm would have meant that there was an obligation, for the irregular migrants to incriminate themselves in case of an identity check which would have been contrary to the constitutional principle *nemo tenetur se detegere.* The analysis was that

> "[t]he introduction of the offence of irregular entry or stay renders non punishable for the foreigner the refusal to accomplish certain actions such as the exhibition of [identification] documents which would have as a necessary consequence to auto-incriminate oneself of the new offence" [183].

[182] The change consisted in a substitution of the word ("ovvero" meaning "or") by the word ("e" meaning "and") between the two categories of document that the person was to present to the public agent on his/her request: the identification document AND the document proving the regularity of the stay in the country.

[183] "L'aver introdotto il reato di clandestinità rende non punibile per lo straniero il rifiuto di eseguire condotte, come l'esibizione dei documenti, che hanno come necessaria conseguenza quella di autoaccusarsi del nuovo reato". Luca MASERA " 'Terra bruciata' attorno al clandestino" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 convertito in legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p.60).

215. However, this was not the initial orientation followed by the Court of Cassation in the first sentences pronounced after the modification introduced by the Security Package. The Court gave precedence to the interest of the State in being able to identify the aliens present on its territory. It was necessary to consider the "objective of public order, in the framework of which the purpose was to punish the behaviour of the person who impedes his identification by the public agents".[184]

216. This interpretation was later on abandoned by the United Sections of the Cassation Court in the *Alacev* case[185] (2011), where it was held that the part of the legal provision which sanctions the irregular migrant who does not present a residence permit is no longer effective. The Court, thus, restricted the personal field of application of the law for the benefit of the irregular migrant. But what is the value of such a precedent in a system of civil law in which precedents are not binding?

> "the subjection of the judge only to the law (ex article 101 § 2 of the Constitution) implicates that the jurisprudential creation of a new right is prohibited and thus as well the elimination of the pre-existing provisions through abrogation […]. The changing of the law is realized only through an act of innovation on part of the legislator […]. The decisions of the judges (except the ones of the constitutional judges) therefore have an effect which is circumscribed to the sole case in point and the jurisprudential precedents are not binding"[186].

217. However, the Cassation Court had considered that art. 637 of the Code of Criminal Procedure was applicable in this specific case because the *abolitio criminis* had not been decided by the United Sections of the Cassation Court who had just interpreted the law

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[184] "finalità di ordine pubblico, nell'ambito della quale si mirava a punire la condotta del soggetto volta ad impedire la sua compiuta identificazione da parte degli agenti di pubblica sicurezza". Marco GAMBARDELLA "Lo straniero irregolare" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p.106).

[185] Corte Suprema di Cassazione, Sezione Unite, 24 febbraio 2011, n. 16453/2011.

[186] "nell'ordinamento italiano la soggezione soltanto alla legge dei giudici (ex. art 101 comma 2 Cost) implica che la creazione giurisprudenziale di nuovo diritto sia vietata, e dunque pure l'eliminazione di preesistenti disposizioni mediante abrogazione […]. Il mutamento del diritto si realizza soltanto con un atto di volontà novativa da parte del legislatore […]. Le decisioni dei giudici (eccetto quelle dei giudici costituzionali) hanno quindi effetti circoscritti al caso deciso e i precedenti giurisprudenziali non sono vincolanti". Marco GAMBARDELLA "Lo straniero irregolare" in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013, (p.108-109).

but had rather been decided by the legislator in the 2009 Law Reform; the *abolitio criminis* stemmed from the legislator and not from the judiciary.

218. The last question with respect to this specific offence relates to the interpretation to be given to the clause of the law according to which it applies only in cases where the offence was committed 'without a justified ground' *('senza un giustificato motivo'*), the "justification clause".

Paragraph 2: Interpretations of the clause of exclusion of the punishable character of the offence

219. The existence of a justification for the illegal behaviour does not technically impact the existence of the responsibility but supresses the punishable character of the conduct. This paragraph will examine the existence of a motive that may justify the illegal conduct which is the object of an offence. First, a jurisprudential definition of the notion of justifying motive will be analysed (1). Then we will be turning to the appraisal of the constitutional judge as regards the absence of a clause that would allow for a justification (justification clause), as is the case for the offence of illegal entry or stay (2). Lastly, we will consider the situation where the constitutional judge has to interpret the extent of the application of such a clause in the case of the offence for violation of an order to leave the territory (3).

1. Definition of the notion of justification by the Constitutional Court

220. First and as noted by the Constitutional Court, the clause itself (or variations of the clause) appears particularly frequently - among others - in the criminal code and in specialized regulations. The frequency of its occurrence does not mean that it is to be considered as a general principle of law whose constitutionality cannot be questioned. On the contrary, the Constitutional Court, repeatedly asked to rule on the validity of offences which included the existence of a similar clause held that the use of such clause was only valid when the principle of determination of the law is duly respected. The clause should never amount to "granting the judicial arbiter the power to determine the boundaries of the regulatory

intervention in the field of criminal law"[187]. According to the definition set out by the same Court,

> "[t]he clause […], cannot be understood as covering only situations entering in the category of the justification clause in the technical sense [and] concerns situations of significant impediment which affect the objective and subjective possibility to obey the order so as to exclude the possibility of compliance or to render it difficult or dangerous"[188].

221. This means that in the criminal law of immigration justification clauses should be understood in a wider sense than in common criminal law, covering more situations. This, in turn, reduces the applicability of the offences for which such clauses exist. However, it shall later be demonstrated at paragraph 3 that, despite the general definition of the Constitutional Court, the clause has been narrowly construed in case of the offence of violation of an order to leave the territory.

222. The mentioning of the words 'without justification' in the law does not technically reduce the scope of application of the offence. It only cancels the punishable character of the offence. This clause is therefore to be considered as an instrument that allows for a fairer application of the law in as much as it requires the judge to take into consideration the individual circumstances that lead to the commission of the offence.

> "Such clauses are intended in principle to serve as 'security valve' in the criminal mechanism, in order to avoid that the criminal sanction be pronounced when – even outside the situations of actual causes of justification – the application of the law appears in the concrete case 'inconceivable' according to the cases"[189].

223. The existence of such a clause can be understood in two ways: as widening the discretionary powers of the judge or as merely acknowledging the duty of the judge to take

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[187] "rimettendo di fatto all'arbitrio giudiziale la fissazione dei confini d'intervento della sanzione penale". Corte Costituzionale Italiana, Sentenza n. 5/2004 ECLI:IT:COST:2004:5 (Considerato in diritto 2.1)

[188] "la clausola […] non può essere ritenuta evocativa delle sole cause di giustificazione in senso tecnico […] [e] ha tuttavia riguardo a situazioni ostative di particolare pregnanza, che incidano sulla stessa possibilità, soggettiva od oggettiva, di adempiere all'intimazione, escludendola ovvero rendendola difficoltosa o pericolosa". Corte Costituzionale Italiana, Sentenza n. 5/2004 ECLI:IT:COST:2004:5 (Considerato in diritto 2.2)

[189] "Dette clausole sono destinate in linea di massima a fungere da 'valvova di sicurezza' del meccanismo repressivo, evitando che la sanzione penale scatti allorché – anche al fuori di vere e proprie cause di giustificazione – l'osservanza del precetto appaia in concreto 'inesigibile' a seconda dei casi". Corte Costituzionale Italiana, Sentenza n. 5/2004 ECLI:COST:IT:2004:5 (Considerato in diritto 2.1).

under consideration all the individual circumstances of the case. While it is debatable which one of these hypotheses is the accurate one, some level of imprecision in the definition of the clause leaves space for appraisal by the judge.

> "The 'elastic' character of the clause is related, […] to the practical impossibility to list analytically all the abstractive situations that can 'justify' the non compliance with the law. Such a list would inevitably – considering the variety of life contingencies and the complexity of the interferences in the normative systems – carry the risk to be incomplete: such incompleteness would not be to the advantage but to the disadvantage of the offender, as the clause more or less assumes the negative role of excluding the punishable character of conducts which, for the rest, correspond to the offence"[190].

224. Regarding the role of the judge, the Court expressly recalled that

"notwithstanding the power and duty of the judge to directly establish, whenever possible, the existence of reasons legitimating the inobservance of the criminal provision – the foreigner has the sole duty to provide evidence of the motives which are not known and cannot be known to the judge" [191].

2. *The validation of the absence of a clause regarding a possible justification in the case of the offence of illegal entry and stay*

225. Called upon to assess the constitutionality of the absence of the justification clause for the offence of illegal entry and stay, the Constitutional Court held that such absence was not unconstitutional.

[190] "Il carattere 'elastico' della clausola si connette, […] alla impossibilità pratica di elencare analiticamente tutte le situazioni astrattamente idonee a 'giustificare' l'inosservanza del precetto. Una simile elencazione sconterebbe immancabilmente – a fronte della varietà delle contingenze di vita e della complessità delle interferenze dei sistemi normativi – il rischio di lacune: lacune che peraltro, tornerebbero non a vantaggio, ma a danno del reo, posto che la clausola in parola assolve al ruolo negativo, di escludere la punibilità di condotte per il resto corrispondenti al tipo legale" Corte Costituzionale Italiana, Sentenza n. 5/2004 ECLI:COST:IT:2004:5 (Considerato in diritto 2.1).

[191] "fermo restando il potere-dovere del giudice di rilevare direttamente quando possibile, l'esistenza di ragioni legittimanti l'inosservanza del precetto penale – lo straniero avrà, dal canto sui, un semplice onere di allegazione dei motivi non conosciuti né conoscibili dal giudicante" Corte Costituzionale Italiana, Sentenza n. 5/2004 ECLI:COST:IT:2004:5 (Considerato in diritto 2.4).

"The insertion in the description of the offense under scrutiny of the [justification clause] is not indispensable for the purpose of ascertaining the conformity with the principle of liability of every offence in the field of immigration law"[192].

226. However, while the Court could have circumscribed its intervention to the question asked, it went beyond this straightforward answer and considered other ways in which the application of this legal provision was to be regulated.

"The applicability to the offence of illegal entry and stay on the territory of the State of the common causes of exclusion of responsibility is indisputable – and in particular the state of need […] – as also the causes of exclusion of culpability including the ignorance of criminal law[193].

227. Was this consideration a simple reminder of the general rules applicable to criminal law and, thus, to the criminal provisions of immigration law? I tend to believe that the review operated by the supreme judges was not neutral. Underpinning this impression are the following considerations.

"With regard to the contravention in question, a different instrument of moderation of the punitive intervention can be recalled […]. It is the institution of impossibility to prosecute because of the particular tenuity of the fact constitutive of the offence […] rendered applicable by the attribution to the Justice of the Peace of the competence for the offence under scrutiny, institution […] which can 'counterbalance' the absence of the justification clause".[194]

228. The notion of "particular tenuity of the fact constitutive of the offence" is interesting as it reminds the numerous other cases in which the Constitutional Court

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[192] "non è lecito […] desumere che l'inserimento nella formula descrittiva dell'illecito in esame della clausola 'senza guistificato motivo' sia indispensabile al fine di assicurare la conformità al principio di colpevolezza di ogni reato in materia di immigrazione." Corte Costituzionale Italiana, Sentenza n.250/2010 ECLI:IT:COST:2010:250 (Considerato in diritto 11.2).

[193] "Fuori discussione, cosi, è l'applicabilità anche al reato di ingresso e soggiorno illegale nel territorio dello Stato delle scriminanti comuni – e, in particolare, di quella dello stato di necessità […] come pure delle cause di esclusione della colpevolezza, ivi compresa l'ignoranza della legge penale". Corte Costituzionale Italiana, Sentenza n.250/2010 ECLI:IT:COST:2010:250 (Considerato in diritto 11.2).

[194] «Rispetto alla contravvenzione in questione è, d'altra parte, rinvenibile un diverso strumento di "moderazione" dell'intervento sanzionatorio. Si tratta, in specie, del […] istituto della improcedibilità per particolare tenuità del fatto […] reso applicabile dall'attribuzione della competenza per il reato in esame al giudice di pace: istituto la cui disciplina […] può […] 'controbilanciare' la mancata attribuzione di rilievo alle fattispecie di «giustificato motivo»». Corte Costituzionale Italiana, Sentenza n. 250/2010 ECLI:IT:COST:2010:250 (Considerato in diritto 11.3).

mentioned the absence of social offensiveness of the conducts and acts of the irregular migrants which have been criminalized by the legislator. It can be read as the Court's fundamental resistance to this movement as this issue was not within the scope of this specific case.

229. This additional remark by the Court is intriguing for two reasons. First, it sounds like an invitation for the Justice of the Peace not to systematically prosecute the offence of illegal entry and stay. This is somewhat surprising when formulated by one of the highest jurisdictions in the country and could be seen as an incitement not to strictly apply the law. Second, the mention of the 'tenuity' of the conduct constitutive of the offence as well as the recourse to a semantic field related to restraint ('counterbalance'; 'instrument of moderation') reveals clearly the opinion of the Court as regards the choices of criminal policy made by the legislator in the field of immigration. Such uncalled-for expressions of the conviction of the judges in a highly sensitive field are worthy to be highlighted as the Court is arguably trespassing the limits of its competences. The use of its influential position to convey such a vehement argument shows the embarrassment of the Court in matters relating to the criminalization of immigration law. The attempt to temper the legislator's assaults on irregular migrants is here clearly visible despite the declaration of conformity of the provisions with the Constitution. As recognized by the Court,

> "[i]t cannot be denied that […] the [justification clause] considerably reduces in fact the ambit of application of the sanctioning norm […][and] is relevant in any case to the opportunity of the choices of criminal policy made in this field; but it does not affect their conformity to the constitution"[195].

3. *The interpretation of the justification clause in the offence of violation of an order to leave the territory*

230. In the case of the offence of violation of an order to leave the territory, the Court interpreted the justification clause contained in it as translating the principle *ad impossibilia nemo tenetur*. As had been held by the Constitutional Court, this principle

[195] "Non può negarsi che […] la formula 'senza giustificato motivo' riduce notevolmente, in fatto, l'ambito applicativo della norma incriminatrice […] [e] incide comunque sul piano dell'opportunità delle scelte politico-criminali sottese a tale disciplina e non su quello della loro legittimità costituzionale" Corte Costituzionale Italiana, Sentenza 5/2004 ECLI:IT:COST:2004:5 (Considerato in diritto 2.2).

"remains also operative as general security valve for the offences consisting in omissions" [196]. However, it does not encompass the "difficulties which reflect the typical condition of the 'economic migrant' even though they express as such fully legitimate requests"[197].

231. It is arguable that any other position would have rendered the offence effectively inapplicable to the vast majority of cases. The court held hence that

> "[s]uch formulation […] covers all the hypotheses of impossibility or serious difficulty (refusal to grant travel or identity documents by the competent authority, absolute destitution which renders impossible the acquisition of travel tickets and other similar situations) which, though not qualifying for motive of justification in the technical sense, impede the foreigner to comply with the order to leave the territory in the prescribed terms"[198].

232. These precisions about the meaning of the justification clause in the particular case of non-compliance with an order to leave the territory can be envisaged as guidance for the Justice of the Peace whenever he/she is confronted to this offence. They also arguably extend the possibility of application of the clause as the list of situations of impossibility or serious difficulty to abide by the order is not exhaustive and the variety of situations enumerated covers a wide range of cases.

Conclusion of Section 3

233. As was demonstrated, the role of the judges – those of the Constitutional Court and to a lesser extent those of the Court of Cassation - has been particularly decisive to shape the law by a redefinition of the scope of application of the offences under scrutiny. While it cannot be considered that the judges' intervention has always been to the benefit of the irregular migrant, it is argued that there has been a tendency to limit the legislator's

[196] "rimane, altresì, operante […] per la generalità delle fattispecie omissive proprie". Corte Costituzionale Italiana, Sentenza n.250/2010 ECLI:IT:COST:2010:250 (Considerato in diritto 11.2).

[197] "esigenze che riflettano la condizione tipica del 'migrante economico', sebbene espressive di istanze in sé e per sé pienamente legittime" Corte Costituzionale Italiana, Sentenza n. 5/2004 ECLI:IT:COST:2004:5 (considerato in diritto 2.2).

[198] "Tale formula, […] copre tutte le ipotesi di impossibilità o di grave difficoltà (mancato rilascio di documenti da parte dell'autorità competente, assoluta indigenza che rende impossibile l'acquisto di biglietti di viaggio e altre simili situazioni), che, pur on integrano cause di giustificazione in senso tecnico, impediscono allo straniero di prestare osservanza all'ordine di allontanamento nei termini prescritti" Corte Costituzionale Italiana, Sentenza n. 22/2007 ECLI:IT:COST:2007:22 (Considerato in diritto 7.4).

inclination towards hardening the legal regime applicable to the irregularly staying third-country national.

234. While the findings of the Constitutional judge are relevant for the shaping of the law, the judge whose office most impacts the lives of irregularly staying migrants is the Justice of the Peace. Its impact has been indirectly considered in the previous two sections as it is very often thanks to the procedure introduced by the Justice of the Peace that the Constitutional Court was seized. It shall now be considered directly through the review of the daily procedures under his/her jurisdiction.

Section 4: The Justice of the Peace: A key player at the crossroads of the contradictions of the Italian legal system applicable to irregular migrants

235. While this case study has focused so far on the jurisprudence of the courts at the top of the Italian judicial system, the institution at the very centre of a wide majority of the decisions regarding irregular migrants is the Justice of the Peace (*Giudice di Pace)*. The position of these single judges bears some atypical features. Their peculiar – and problematic - status within the judicial system (Paragraph 1) as well as an overview of the accelerated procedures which characterize their office (Paragraph 2) will illustrate the reasons why their competence is at the heart of a doctrinal and jurisprudential debate (Paragraph 3).

Paragraph 1: A peculiar status within the Italian Judicial system

236. This peculiar status of the Justices of the Peace derives from various converging elements: they are non-professional judges (1), holding a very precarious office (2) and they have a competence for criminal matters of relative gravity regarding immigration law (3) as well as a judicial supervisory role over the expulsion and detention of irregular migrants (4).

1. Non-professional judges

237. Justices of the Peace are an exception within the Italian Judicial body insofar as they are honorary, non-professional judges.

"The office of Justice of the Peace was established in Italy by Law n. 374 of 21 November 1991. In accordance with Article 106 of the Italian Constitution, the Law on the Judiciary provides that 'honorary' magistrates have all the functions that are attributed to professional "single judges". For professional judges, by contrast to Justices of the Peace, the Constitution provides that they must be 'appointed through competitive examinations.' Professional judges or prosecutors have permanent tenure, are appointed after a public examination and receive a fixed remuneration. It is worth noting that, despite their honorary status, Justices of the Peace are 'ordinary' judges and, as such, competent to hear cases that affect rights, as stated in Articles 1 and 4 of the Law on the Judiciary"[199].

238. The aim of the reform that created the Justices of the Peace was to relieve the congestion at all levels of the judicial system by a combination of two elements: the institution of single judges who are not professionals, allowed to rapidly increase the number of judges in the country at a reasonable cost and the accelerated procedures allowed for a fast processing of the cases. In a situation where Italy was facing an ever-increasing number of immigration-related cases, the reform was thought to respond to major challenges of efficiency.

2. *A precarious status*

239. The specific conditions of the status of the Justices of the Peace are indeed an exception within the Italian judicial system and the precariousness of their office inevitably generates doubts over their independence and impartiality. This precarious status originates from two elements: the fact that their office is both temporary and renewable and the system according to which their salary is calculated. "The office of the honorary judge lasts four years. At the expiration, the office can be renewed, upon request, for a second mandate of four years."[200] The salary of the Justices of the Peace is composed of two parts: a fixed

[199] "'Undocumented' Justice for Migrants in Italy" – A mission Report, October 2014, International Commission of Jurists, p.11

[200] Decreto Legislativo del 13 luglio 2017 n. 116 Riforma organica della magistratura onoraria e altre disposizioni sui giudici di pace, nonché disciplina transitoria relativa ai magistrati [...] Articolo18. 1. «L'incarico di magistrato onorario ha la durata di quattro anni. Alla scadenza, l'incarico può essere confermato, a domanda, per un secondo quadriennio.»

amount and a variable according to the activity they perform.[201] These elements have been heavily criticized by scholars and practitionners.

> "This practice, according to international standards […] seriously undermines not only the independence and impartiality of the office of the Justice of the Peace, but also the very core of the right to a fair hearing and the right to an effective remedy guaranteed by international law. Indeed, the remuneration by quantity of outcomes has the objective effect of inducing quantitative instead of qualitative work, with the result that Justices of the Peace may be prone to increase the numbers of hearings, decisions and other outcomes to reach a decent remuneration at the expense of the time and quality that is required in the judicial review of expulsion proceedings and of detention orders […]. In cases regarding undocumented migrants, the current system, with its precarious tenure, unsatisfactory remuneration and […] inherent flaws regarding substantive and procedural safeguards, cannot ensure sufficient independence, impartiality and effectiveness in the supervision of expulsion and detention proceedings"[202].

240. The question of the constitutionality of the measures related to the variable part of the salary of the Justice of the Peace was brought before the Italian Constitutional Court. It found on three occasions that the question of the legitimacy of these provision was manifestly inadmissible[203]. The appeals were based on the alleged violation of the following articles of the Constitution: Art 3 regarding the requirement of rationality, Article 54 on the necessity for citizens in charge of a public office to carry out their task with discipline and honour and Article 111.2 on the exigency for the judges not only to be impartial but to appear so. The main argument of the Constitutional Court to reject these appeals was that

> "in the field of the regulation of the judicial proceedings and the structure of the institutions related to the trial – characterized by the wide discretion left to the legislator with the only limit of the manifest irrationality of the choices made – the question remains inadmissible because it would require of this Court an intervention which is not constitutionally required and which is in essence creative and as such

[201] Decreto Legislativo del 13 luglio 2017 n. 116 Riforma organica della magistratura onoraria e altre disposizioni sui giudici di pace, nonché disciplina transitoria relativa ai magistrati [...] Articolo 23.1. «L'indennità spettante ai magistrati onorari si compone di una parte fissa e di una parte variabile di risultato.»

[202] "'Undocumented' Justice for Migrants in Italy" – A mission Report, October 2014, International Commission of Jurists, (p.17).

[203] See, Corte Costituzionale Italiana, Ordinanze n. 128/2013 ECLI :IT :COST :2013 :128, 242/2013 ECLI :IT :COST :2013 :242 and 48/2014 ECLI :IT :COST :2014 :48

assigned to the legislator"[204].

241. This repeated choice made by the Constitutional Court to avoid the question can be critized and appears rather contradictory to the attitude displayed in the rest of its case-law regarding irregular immigration.

242. As was observed:

"the fact that all the sentences in the field of [migrants'] detention are assigned to the competence of the Justice of the Peace which surely does not offer the same guarantees of independence from the executive power or impartiality as those vested with the ordinary judges, is really a process aimed at rendering the personal freedom of the immigrant trifling"[205].

3. A competence for criminal matters of relative gravity regarding immigration law

243. Although the competence of the Justice of the Peace also entails minor civil law matters, only the one regarding criminal law in the field of immigration will be briefly considered here. Their jurisdiction covers the following offences: illegal entry and stay on the territory of the State (Article 10.bis of the Single Act on Immigration), non compliance with an order or renewed order by the *Questore* to leave the territory (Article 14 co and 5 ter of the Single Act on Immigration), violation of the measures decided by the *Questore* as an alternative to detention (Article 14, co 1 bis of the Single Act on Immigration) and violation of the measures decided by the *Questore* to guarantee the compliance of the voluntary departure within the given time limit (Article 13, co 5, 2 Single Act on Immigration).

4. A welcome judicial supervisory role over expulsion and detention

244. The extension of the competence of the Justice of the Peace is the result of the

[204] « infine, in un ambito, quale quello della disciplina del processo e della conformazione degli istituti processuali -caratterizzato dall'ampia discrezionalità spettante al legislatore col solo limite della manifesta irragionevolezza delle scelte compiute - la questione risulta altresì inammissibile perché diretta a chiedere a questa Corte un intervento non costituzionalmente obbligato, oltre che largamente creativo, come tale riservato al legislatore » Corte Costituzionale Italiana, Ordinanza n. 128/2013.ECLI :IT :COST :2013 :128

[205] « Davvero una *baguatellarizzazione della libertà personale del migrante*, testimoniata anche dal fatto che tutti i provvedimenti in materia di trattenimento sono affidati alla competenza del *giudice di pace*, che certo non offre le medesime garanzie di *indipendenza dal potere esecutivo* e di *imparzialità* della magistratura ordinaria » Luca MASERA, " 'Terra bruciata' attorno al clandestino" in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pacchetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 81).

decision of the Constitutional Court regarding the fact that the previous procedure of expulsion allowed the escort to the border to take place without proper judicial control. The Court held that:

> "[The] procedure […] contravenes to the principles affirmed by this Court […]: the order of escort to the border is executed before the validation by the judicial authority. The foreigner is expulsed from the national territory without the judge having been able to rule over the order restricting his/her personal freedom. Therefore, the guarantee of Article 13 of the Constitution is neutralized with the loss of effect of the order in the case of denied confirmation or absence thereof from the judicial authority after the first 48 hours. And with the personal freedom is also infringed the right of defence of the foreigner in its immutable core. The provision does indeed not provide that the foreigner should be heard by a judge with the assistance of a lawyer. […] However, whatever the procedural scheme chosen, the principles of the judicial protection have to be guaranteed. The effective judicial supervision of the order […] cannot be done away with and the foreigners cannot be deprived of all of their rights of defence. These misgivings […] cannot eventually be overthrown by application of the so-called theory of the dual-track system of protection for the immigrants: a mere rubber-stamp confirmation of the order of accompaniment to the border with the possibility to challenge it subsequently while enjoying adequate rights of defence. The binding nature of Article 13 of the Constitution would be circumvented forasmuch as the appeal against the order of expulsion does not immediately and directly guarantee the right to personal freedom which is affected by the escort to the border"[206].

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[206] «Il procedimento regolato dall'art.13, comma 5-bis, contravviene ai principi affermati da questa Corte […]: il provvedimento di accompagnamento alla frontiera è eseguito prima della convalida da parte dell'autorità giudiziaria. Los straniero viene allontanato coattivamente dal territorio nazionale senza che il giudice abbia potuto pronunciarsi sul provvedimento restrittivo della sua libertà personale. E, quindi, vanificata la garanzia contenuta nel terzo comma dell'art. 13 Cost, e cioè la perdita di effetti del provvedimento nel caso di diniego o di mancata convalida, ad opera dell'autorità giudiziaria nelle successive quarantotto ore. E insieme alla libertà personale è violato il diritto di difesa dello straniero nel suo nucleo incomprimibile. La disposizione censurata non prevede, infatti, che questi debba essere ascoltato dal giudice, con l'assistenza di un difensore. […]. Tuttavia, quale che sia lo schema prescelto, in esso devono realizzarsi i principi della tutela giurisdizionale: non può, quindi, essere eliminato l'effettivo controllo sul provvedimento […], né può essere privato l'interessato di ogni garanzia difensiva. Le censure […] non possono, infine, essere superate facendo ricorso alla tesi del cosi-detto 'doppio binario' di tutela per lo straniero; convalida soltanto 'cartolare' del provvedimento di accompagnamento alla frontiera e successivo ricorso sul decreto di espulsione con adeguate garanzie difensive. Sarebbe infatti elusa la portata prescrittiva dell'articolo 13 Cost. giacché il ricorso sul decreto di espulsione (art.13, comma 8) non garantisce immediatamente e direttamente il bene della libertà personale su cui incide l'accompagnamento alla frontiera". Corte Costituzionale Italiana Sentenza n.222/2004 ECLI :IT :COST :2004 :222 (Considerato in diritto 6).

245. Following this declaration of unconstitutionality, the decision was taken to grant jurisdiction over the control of the orders of detention, extension of the detention and expulsion to the Justice of the Peace by Legislative Decree n. 241/2004. The role of the Justice of the Peace was essentially oriented towards the protection of the immigrants' fundamental rights, thereby assuming that the Justice of the Peace would play the typical role of the judiciary in the Italian judicial system. However, the position of the Justices of the Peace is somewhat contradictory and it seems difficult to reconcile the theoretically protective nature of their role with the celerity of the procedures applicable before them.

Paragraph 2: The accelerated procedures applicable before the Justice of the Peace

246. Before turning to the analysis of some sentences delivered by the Justices of the Peace, an introductory remark is needed on the method followed. The sentences of the Justices of the Peace are neither computerized nor reassembled or available in a database. Most of the time, they are still handwritten and very rarely published. Only a handful of them are accessible online and they are difficult to find as they are generally published by the lawyers in charge of the defence of irregular migrants in a couple of very specialised online law reviews focused on immigration law issues in Italy. This makes it almost impossible to access them. The fact that the names and elements of the personal lives of immigrants appear in their sentences explains only partly the reluctance or blunt refusal by the Justices of the Peace to hand their sentences over, even for research purposes where it would be easy to render them anonymous. As has been emphasized,

> "the difficult availability of the sentences and the circumspection to render them accessible for research purposes entail the quasi impossibility to know in detail how the Justices of the Peace operate with regards the judicial control of the removal and its execution, that is to say, on subjects which, unquestionably impact personal freedom of individuals, as has been so clearly recognized by the Constitutional Court. Such a situation must surely be reported as an anomaly, from the moment that the possibility to control the jurisprudence and the sentences of any order and level by the citizen represents one of the cornerstone of the rule of law"[207].

[207] «La difficile reperibilità delle pronunce e la diffidenza a renderle accessibili ai fini di ricerca comportano la quasi impossibilità di conoscere nei dettagli l'operato del GdP in sede di controllo giurisdizionale sull'espulsione e la sua esecuzione ovvero su materie che, insindacabilmente, incidono sulla libertà personale degli individui, così come chiaramente affermato dalla Corte Costituzionale. Tale situazione va sicuramente denunciata come un'anomalia, dal momento che la possibilità di controllo sull'operato della giurisprudenza e sui provvedimenti

247. Given this context, the following analysis is mainly based on two reports. Only a handful of cases were directly accessed, studied, translated and quoted here. The two reports originate from a project which started in 2014 and initiated by the Law Clinic of the University of Rome 3. The project created an observatory on the jurisdiction of the Justice of the Peace in the field of immigration law. The objective of such structure was to monitor specifically the case-law of the Justice of the Peace involving matters which affected the fundamental rights of the migrants such as detention and expulsion. A preliminary report (in Italian) on the state of the research was published as well as a very short executive summary and is relied on in the following analysis. A very brief executive summary (in Italian) was also published but is not quoted here. One report on each of the five jurisdictions chosen was also published (in Italian) in 2014; on the offices of the Justices of the Peace of Bologna, Firenze, Napoli, Roma and Bari (these do not appear in the following analysis). In 2016, the observatory became the Monitoring Centre on Judicial Control of Migrants'Removal. An executive summary for 2016 was published (in English) on 1 March 2017 and is also quoted in my analysis. It is based on 122 decisions dating back to the first and last quarter of 2015. Additionally, reports were published (in Italian in 2016 for the Justices of the Peace of Bari, Bologna, Prato, Roma and Torino (these do not appear in the study as they were too specific).

248. 18 cases were directly accessed (15 dating back to 2015 and 3 dating back to 2016) and studied. They were found online in the small database created by the Monitoring Centre (which contains 24 decisions). The fact that no decisions of the Justice of the Peace are directly quoted in the following section can be explained by different factors. Most of the decisions consist in a three-page form, very incompletely filled and partially deleted (in theory to render the decisions anonymous – but in two occurrences the passport number or name was still visible) and hand-written. First, it has proven arduous and sometimes impossible to decipher the hand writings of the Justices of the Peace which are messy with numerous parts crossed out. Second, the content itself consists in brief disparate elements of the personal lives of the irregular migrants which are of little interest for this study. The very rare legal elements are references to the applicable legislation and the decision itself (validate or not the administration's request) which is deprived of any reasoning or motive. For all

giurisdizionali di ogni ordine e grado da parte dei cittadini rappresenta uno dei caposaldi dello stato di diritto». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 3).

these reasons, what could be drawn from these decisions is essentially and more interestingly reflected by the two studies quoted which had the advantage of studying hundreds of those decisions. Undoubtedly, the interest of the studies lies in the fact that they provide for a more systemic view of the jurisprudence of the Justices of the Peace. Nevertheless, the reading of these cases can give rise to a couple of observations. The general impression is one of a justice delivered in a hurry, with little regard for the person concerned and the knowledge that the decisions are unlikely to ever be read again, let alone publicized or analysed. The feeling which emerges is that of a justice of poor quality, delivered behind closed doors as those decisions appear to be nothing more than an administrative formality. Considering the impact that they have on the lives of the those concerned, they appear to be strikingly inadequate. Presumably, the fact that "the right to access judiciary data for scientific purposes still proves difficult"[208], seriously impacts – for the worse – the quality of the judgements delivered.

249. Turning now to the analysis provided by the reports, some features will be considered. The competences of the Justices of the Peace include criminal law on immigration bu in the paragraphs below, the choice is made to focus on their role as supervisors of the orders of the administration. The general conditions of the hearings before the Justices of the Peace shall be examined (1) before turning to the three types of hearings in which the Justice of the Peace's role is supposedly protective of the fundamental rights of immigrants. These are hearings on the confirmation of detention (2), hearings on the extension of detention (3) and lastly the hearings prior to the execution of an expulsion order (4).

1. The general conditions of the hearings before the Justices of the Peace

250. A few important elements are explained by and result from the exigency of velocity which should be considered as specific to the procedures before the Justices of the Peace. The demand for celerity is partly justified by the high number of cases pending before them (as a result of the permanent influx of irregular migrants arriving in Italy) and by the necessity to respect the rather short time-limits set out by the law. It is however also the direct result of a choice of criminal policy that increasingly curtails the rights of those subjected to the procedures and the objective of speedy expulsion towards which all efforts are now directed.

[208] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.2)

251. The location of the hearings before the Judge of the Peace is noteworthy.

"With regards the organisation of the hearings of the Justice of the Peace, it is necessary to signal the common practice, […] consisting in carrying out the confirmation and/or extension of the detention hearings within the Centres of Identification and Expulsion […]. Despite the fact that such practice has been banned by the Supreme Judicial Council, these practices persist because practical considerations prevail in order to avoid the transfer of the detainees from the CIE to the office of the competent Justice of the Peace"[209].

252. This being said, the practice does bear one obvious advantage which is that "the presence of the immigrant is effectively guaranteed as well as, in the vast majority of cases, the presence of an interpreter"[210].

253. However, two very negative elements were reported by the study: the duration of the hearings and the rather rare presence of an attorney to assist the immigrant. As a matter of fact, both reports of 2014 and 2016 found that, "the hearings last a very short time, in the majority of the cases within 5 to 10 minutes"[211]. In addition, "the notification of the scheduling of the hearing is communicated with very short notice, often insufficient to guarantee [the presence of the advocate]"[212]. These two observations are rather alarming as they seriously impact the quality- if not the existence itself - of the defence and the depth of the review operated by the judges of the elements of the orders, the execution of which they have to authorize or not.

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[209] «In merito all'organizzazione degli uffici del GdP è necessario segnalare la prassi, […], di svolgere le udienze di convalida e proroga del trattenimento all'interno dei locali del CIE […] Nonostante il Consiglio Superiore della magistratura abbia censurato tale prassi, essa persiste poiché vengono fatte prevalere considerazioni di ordine pratico al fine di evitare il trasferimento dei trattenuti dal CIE all'Ufficio del GdP competente». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 5).

[210] «Viene effettivamente garantita la presenza dello straniero e, nella quasi totalità dei casi, anche dell'interprete». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.12).

[211] «Le udienze si svolgono in tempi molto brevi, nella maggior parte dei casi esse durano tra i 5 e i 10 minuti » Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - Maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 7).

[212] «la notifica della fissazione dell'udienza venga comunicata con brevissimo anticipo, spesso insufficiente a garantirne la presenza. » Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 7).

254. With regard to the first element, specifically concerning the duration of the hearing and despite a legitimate scepticism as to the reality of the respect of the fundamental right to be heard of the irregular migrant in such a short lapse of time, the Court of Justice of the European Union held that on "the question of whether the length of the interview of an illegally staying third-country national has any bearing on respect for the right to be heard, as it applies in the context of Directive 2008/115, [it] is not decisive"[213]. It should be born in mind however, that such decision was taken in a context of a case where the hearing had lasted 30 minutes.

2. *Hearings on the confirmation of detention*

255. In the hearings regarding the confirmation of a detention order, the stakes are obviously considerable for the irregular migrant. Based on the information provided by the report and given the very short amount of time devoted to the hearing, the judge has in practice no time to review and check the elements alleged in the order or consider the existence of new elements. In such circumstances, it can hardly be said that justice is being served.

> "Often, as happens for the motive of the measure, the advocate […] resorts to the use of generic phrases, without articulating an actual defence. Of the 66 minutes analysed, in 16 cases the advocate used the phrase 'the defence rests' or 'the defence opposes to the confirmation' without adding anything else, and in 4 cases, the space dedicated to the defence was entirely empty. In 7 cases, exceptions relating to defects of form of the prerequisite act were mentioned, and in 5 cases, the defence raised objections related to the link with the territory of the immigrant being removed or to the precarious health conditions of the migrant. Overall, when considering the quality of the defence in this kind of procedures, the fact that the notification of the date and time of the confirmation hearing is given with very short notice combined with the impossibility to meet the immigrant beforehand ought to be taken into consideration as they render the preparation of the defence extremely difficult".[214]

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[213] *Khaled Boudjlida,* Case C-249/13, Fifth Chamber, 11 December 2014, EU:C:2014:2431 (§ 67).

[214] «Spesso, come accade per le motivazioni del provvedimento, il difensore […] [fa] ricorso all'utilizzo di formule di stile, senza che venga articolata una vera e propria difesa. Si consideri il dato per cui di 66 verbali analizzati in 16 casi il difensore ha utilizzato la formula "si rimette" o "si oppone alla convalida" senza altro aggiungere e, in 4 casi, lo spazio dedicato alla difesa era completamente vuoto. In 7 casi sono state sollevate eccezioni relative a vizi formali dell'atto presupposto e in 5 occasioni la difesa ha eccepito questioni legate al radicamento sul territorio dello straniero espulso o alle precarie condizioni di salute. In una valutazione più

256. The same assessment is made in the 2016 Report which stated that "often the hearing transcripts show a very limited activity from lawyers, in many cases […] not opposing to the validation of the detention order. In Torino, 60% of files highlights the lack of defensive elaboration"[215].

257. The poor quality of the defence may explain the very high rate of decisions confirming the detention ("Of the 66 decisions analysed […] almost 82% of the hearings resulted in the confirmation of the detention order"[216]) as well as the reasons behind the very few cases where the order was not confirmed.

> "The motives given in the restricted number of decisions refusing to confirm the detention measure (13 out of 66) are generally based on the subsistence of a valid title to remain on the territory (as for example the recognition of an international protection […]) or a defect of form of the act prerequisite to the measure"[217].

258. This remark shows that it is only when the illegitimacy of the order is blatant that the Justice of the Peace refuses to confirm a detention order.

259. These shortcomings are all reflected in the motivations of the decisions - or the absence thereof. "The motive of the decisions analysed is often scanty if not completely absent"[218], in other words, "in more than half of the decisions, the motivation consists in a

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complessiva sulla qualità della difesa in questo genere di procedimenti va considerato anche lo scarsissimo anticipo con cui sono notificate le date e gli orari delle udienze di convalida che, unito all'impossibilità di un previo confronto con l'assistito, fanno sì che risulti di estrema difficoltà la preparazione della difesa »Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 8).

[215] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.5)

[216] Sul totale dei 66 provvedimenti decisori analizzati […] circa l'82% delle udienze di convalida hanno avuto come esito la convalida del trattenimento". Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 8).

[217] "Le motivazioni contenute nel ristretto numero di decisioni di non convalidare la misura del trattenimento (si tratta di 13 pronunce su 66) si basano generalmente sulla sopravvenienza di un titolo valido per la permanenza sul territorio (come il riconoscimento della protezione internazionale […]) o su vizi formali dei provvedimenti presupposti alla misura" Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.11).

[218] "La motivazione dei provvedimenti analizzati è spesso scarna se non addirittura del tutto assente". Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo

very brief boilerplate"[219] . In such conditions, one is not surprised to learn that

> "in the motives which were examined, no references were made to the housing or working conditions or the income of the person detained even if they are part of the object of the hearing of the immigrant. As regards the remarks of the defence, they are considered in the motive only when they refer to defects of form of the prerequisite acts. Remarks of another kind, which may for example refer to the existence of family bonds or a prolonged presence on the territory are contemplated under the heading 'not relevant to the hearing on the confirmation of the detention'".[220] Finally, "one element […] which does not seem to be taken into consideration by the Justice of the Peace in order to appreciate the opportunity of the measure and its duration is the time spent in Italy by the immigrant and the bond thus created with the territory. […] The exceptions raised by the advocates that refer to the respect of private and family life are generally considered by the Justice of the Peace as irrelevant to the motive of the confirmation"[221].

260. These findings were unfortunately confirmed by the 2016 Report which showed no positive evolution with regard to this matter.

> "Even when an adequate defence is provided, the quality of decisions remains unsatisfying, due to little, if any, legal reasoning and usual omission of crucial aspects. Hearing transcript is a template form with pre-set motivations, and in 50% of cases the judge only adds a standard clause, without providing specific reply to lawyers'

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stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 8).

[219] «Oltre la metà dei fascicoli esaminati, inoltre, presenta una motivazione che si riduce a una brevissima formula di rito». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 8).

[220] «nelle motivazioni esaminate non compaiono riferimenti alle condizioni abitative, reddituali e lavorative del trattenuto che pure sono oggetto dell'audizione dello straniero. Per ciò che riguarda i rilievi della difesa essi sono oggetto di valutazione nella motivazione solo quando sono riferiti a vizi formali degli atti presupposti. Rilievi di altro genere, che per esempio fanno riferimento all'esistenza di legami familiari o a una prolungata presenza sul territorio, vengono considerati nei fascicoli esaminati "non pertinenti in sede di convalida del trattenimento". Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 8-9).

[221] «Un elemento che, […], non sembra essere preso in considerazione dal GdP al fine della valutazione di congruità della misura è la durata del periodo trascorso in Italia dallo straniero e il legame conseguentemente instaurato con il territorio. […] le eccezioni sollevate dai difensori che, […] fanno riferimento al rispetto della vita privata e familiare sono normalmente ritenute inconferenti dal GdP in sede di motivazione della convalida". Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.11).

objections. Judicial decisions show no motivation in 30% of files from Bari"[222].

261. Unfortunately, both studies also point out that even when - despite all the difficulties that we have seen - some key elements are brought to the attention of the judge, these are not taken into account.

262. All these elements show a frightening discrepancy between the vision of the Constitutional judge regarding the content and extent of the jurisdictional control supposedly carried out by the Justice of Peace, and the actual way in which the latter operates. The Constitutional Court interpreted the legal requirement of transmission of the *Questore*'s order to the Justice of the Peace as entailing a full control of the legality of the orders. The Court held – in a case regarding an expulsion order - that

> "[s]uch a duty of transmission […] cannot bear an other signification than to allow a full jurisdictional control, and not just a merely exterior acknowledgment which it would be if the judges of the confirmation could allow themselves to limit the control to the ascertainment of the existence of an expulsion order […]. The judge must in fact deny the confirmation in cases where the order of expulsion is not provided at all and in cases where such an order exist but has been adopted without respecting the conditions provided for by the law"[223].

263. While a type of control along the lines set out by the Constitutional Court would satisfy all the exigencies of the Italian Constitution and the international standards regarding the protection of individual freedom, the actual control carried out by the Justice of the Peace is a far cry from what the judges of the supreme Court demand.

264. A last element should be mentioned here as it is in clear contradiction with the wording of the Return Directive which provides that detention is to be considered as last

[222] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.5)

[223] "copia degli 'atti' [significa] non quindi del solo provvedimento di trattenimento, ma di tutti gli atti del procedimento, incluso, evidentemente il provvedimento di espulsione amministrative corredato dalle valutazioni del prefetto sulle circostanze che lo hanno indotto a ritenere che lo straniero potesse sottrarsi all'esecuzione dell'espulsione. Un simile onere di trasmissione, […] non avere altro significato se non quello di rendere possibile un controllo giurisdizionale pieno, e non un riscontro veramente esteriore, quale si avrebbe se il giudice della convalida potesse limitarsi ad accertare l'esistenza di un provvedimento di espulsione […]. Il giudice dovrà in fatti rifiutare la convalida tanto nel caso in cui un provvedimento di espulsione con accompagnamento manchi del tutto, quanto in quello in cui tale provvedimento, ancorché esistente, sia stato adottato al di fuori delle condizioni previste dalla legge". Corte Costituzionale Italiana, sentenza n.105/2001 (Considerato in diritto 5).

resort measure. Concerning those measures, the following elements should be reflected. The first one is how rarely in general, those alternative measures are decided by the Justices of the Peace. The second one concerns the close relationship between the existence of a detention centre within the jurisdiction of the Justice of the Peace and the implementation of alternative measures. The 2016 Report found that "in 2015 not a single alternative measure was implemented in any detention centre hosting city (Bari, Roma and Torino)"[224]. On the contrary, "a significant number of such measures comes from Bologna (which is not hosting a detention centre)"[225]. However, when requested by the authorities, alternative measures are almost always granted by the Justices of the Peace (in 70 cases out of 76[226]). They "mainly consist in the submission of the passport and the obligation to report to the police headquarter (52%)"[227]. This seems to confirm the idea according to which the Justice of the Peace is generally simply following the requests made by the administrative authorities without making use of its prerogatives or showing any sense of initiative.

3. Hearings on the extension of detention

265. For these hearings too, a number of puzzling aspects regarding the treatment of the day-to-day immigration cases have come to light. Three points can be made.

266. The first does not depend on the honorary judges and consists of the lack of factual elements brought to their attention through notoriously incomplete files.

> "Amongst the reasons why the hearings take place with such velocity can surely be included the scarce amount of documentation available to the Justice of the Peace to assess the legitimacy of the continuation of the detention. […]. [The] documents contained in the file relative to the previous decisions are not transmitted to the Justices of the Peace. […] They are therefore therefore not put in a position to assess the formal accuracy of the previous decisions or of the prerequisite orders and the potential defects of form which could affect the procedure on which they have to make a ruling"[228].

[224] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.5)
[225] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.5)
[226] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.5)
[227] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.6)
[228] «Tra le ragioni della celerità con la quale vengono celebrate le udienze si può sicuramente annoverare la esigua documentazione a disposizione del GdP per valutare la legittimità della prosecuzione del trattenimento. […] [I] documenti contenuti nei fascicoli relativi ai provvedimenti decisori precedenti non sono trasmessi a quelli successivi. Il GdP in tal modo non è messo in condizione di valutare anche solo la correttezza formale dei

267. The other peculiarity is a surprising and voluntary failure by the Justices of Peace to look into decisive components of a "reasonable prospect of removal" which is the legal condition for deprivation of liberty of the irregularly staying third-country national, expressly mentioned at article 15§4 of Directive 2008/115.

> "In all the […] orders analysed, the duration of the detention and the plausible prospective of success of the operations of identification and removal are never taken into account in the assessment of the motives in order to evaluate the 'reasonable prospect of removal'"[229].

268. The last point is a logical consequence of the previous remarks. The Justice of the Peace "resorts to the use of a template to draft the minutes of the hearing and to decide on the continuation of the detention"[230]. This element would in itself amount to a perfectly acceptable practice if the template were carefully filled with the particular aspects of the individual case from which the motivation of the decision could be deduced. However, the study highlighted "the extensive recourse to boilerplates even for the motives of the extension of the detention"[231] and the decisions which I read made me come to the same conclusion. When – and it was far from being the majority of the cases – the form was actually filled, it was most of the time done so with a couple of words, rarely more and often repeated.

4. Hearings prior to the execution of an expulsion order

269. The same apparent automaticity can be found with regard to expulsion orders

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provvedimenti decisori precedenti nonché dei provvedimenti presupposti e gli eventuali vizi che potrebbero riflettersi sul procedimento rispetto al quale è chiamato a decidere». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.13).

[229] «In tutti gli altri provvedimenti analizzati, la durata del trattenimento, e la prospettiva di verosimile riuscita delle operazioni di identificazione e rimpatrio, non vengono mai prese in considerazione in sede di motivazione quale elemento da considerare ai fini della valutazione sulla "ragionevole prospettiva di rimpatrio". Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.15).

[230] «il GdP […] ricorre all'utilizzo di un modello prestampato per stilare il verbale di udienza e decidere circa la prosecuzione del trattenimento». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.13).

[231] «l'ampio ricorso a formule di stile anche per le motivazioni relative alla proroga del trattenimento». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.14).

which are only legal if a risk of absconding is demonstrated. In practice

> "[given], the extremely repetitious nature of the phrases used in the administrative order of escort to the border it is possible to affirm that the police headquarters resort to 'a template' for the motive of the subsistence of a risk of absconding"[232].

270. This means that the judicial control that the Justice of the Peace is supposed to carry out is only theoretical and that the hearing mostly serves to confirm the ineluctable execution of the order.

> "In the order of expulsion prerequisite to the detention there is, in general, no reference to material facts to sustain the conditions required to establish the existence of a risk of absconding and the execution of the order. As a matter of fact, a reversal of the burden of proof is operated with regards the subject of the order […]. In the 66 decisions examined, the assessment operated by the police for the order of expulsion regarding the subsistence of a risk of absconding (prerequisite which is a necessary condition for the legitimacy of the detention according to the law) is never the object of a reassessment by the judge"[233].

271. This last remark clearly points towards a suspicion that the so-called supervision by the honorary judge is a rubber-stamp given to the administration.

272. The problem is that if neither the police nor the judge actually review the individual circumstances from which the risk of absconding can be assumed, the requirement set forward by the law is completely disregarded in practice.

> "In the decisions which order the execution of the expulsion […], the list of

[232] «Data l'estrema ripetitività delle formule utilizzate in sede di decreto di accompagnamento coattivo alla frontiera è possibile affermare che le questure ricorrano all'utilizzo di un "modello prestampato" per quanto attiene alla motivazione della sussistenza del rischio di fuga". Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 9).

[233] «Nel provvedimento di espulsione presupposto al trattenimento non vi è, in genere, alcun riferimento ai fatti materiali che sostanziano le condizioni richiamate a fondamento del rischio di fuga e dell'esecuzione coattiva del provvedimento. Di fatto, viene operato un rovesciamento dell'onere della prova a carico del destinatario del provvedimento […]. Nei 66 provvedimenti di convalida esaminati, la valutazione operata dall'autorità di p.s. in sede di provvedimento di espulsione circa la sussistenza del pericolo di fuga (presupposto che, ai sensi della legge, è condizione necessaria per la legittimità del trattenimento) non risulta mai oggetto di rivalutazione da parte del giudice». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p.10).

circumstances from which is deduced the subsistence of the concrete risk of absconding can always be found. They consist in the same boilerplates which are always repeated"[234].

273. This element was confirmed by the 2016 Executive Summary which considered that the Justices of the Peace "rely on strictly formal and superficial investigations"[235].

274. The 2016 Executive Summary also underlined a new element that was found in the 170 judicial reviews over deportation orders made by the Justices of the Peace of Prato and Torino which were analysed. In the context of such procedures, "data show that third country nationals are not heard by judges".[236]

275. Lastly, the report found that 'the major shortcomings involve the length of proceedings – strikingly overcoming legal deadlines (20 days pursuant art. 18, par. 7, D. Lgs. 150/11) – […]. In Prato the average length of the claim is 51 days, in Torino it reaches 95 days"[237]. Combined with the rest of the findings of both studies, this clear violation of the legal requirement shows that irregular migrants are in reality denied the effective exercise of their rights.

276. A significant part of the Italian scholars denounces this automated functioning of the daily justice for irregular migrants where

"little by little, for the umpteenth time a procedural micro system is created in the field of immigration in which the criminal procedure is emptied of its institutional purpose - which is the reconstruction of the facts of the offence - to become the preferential instrument to accelerate and advance the removal of the clandestine immigrant from the Italian territory"[238]. "The hasty creation of a micro system […] in order not to

[234] «Nei provvedimenti che dispongono l'esecuzione dell'espulsione […] si ritrova sempre l'elenco delle circostanze da cui viene dedotta la sussistenza nel caso concreto del rischio di fuga. Si tratta di formule che si ripetono sempre uguali». Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sullo stato della ricerca - maggio 2014, Clinica del diritto dell'immigrazione e della cittadinanza – Dipartimento di Giurisprudenza – Università Roma 3, Enrica Rigo - Lucia Gennari, (p. 9).

[235] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.3)

[236] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.2)

[237] Executive Summary 2016, Monitoring Centre on Judicial Control of Migrants' Removal, 1 March 2017 (p.3)

[238] "pian piano, si stia creando l'ennesimo microsistema processuale in materia di immigrazione, in cui il procedimento penale è svuotato del suo fine istituzionale, che è la ricostruzione di fatti di reato, e diventa strumento privilegiato al fine di accelerare e favorire la fuoriuscita dell'immigrato clandestine dal territorio italiano" Gianluca VARRASO, *"Il nuovo rito a 'presentazione immediata' dello straniero clandestino"*, in

aggravate the workload of tribunals to the competence of whom the new offence was originally assigned and not to increase the population of already congested prisons, has been a damaging choice"[239].

Conclusion of Section 4

277. As a concluding remark, what can be added is that no positive evolution has been found between the 2014 and the 2016 reports on the case-law of the Justices of the Peace. Instead, the same serious shortcomings are exposed. This assessment along with the obvious lack of guarantees in terms of competence, independence, organization and procedure, widely explains why the institution of the Justice of the Peace comes regularly under fire from Italian scholars:

> "[T]he intervention of the judiciary in the conflict between police authority and personal freedom cannot be meek as are the typical connotations of the competence – including criminal competence – of the Justice of the Peace; […] it cannot be left to an honorary judge […]. When *habeas corpus* is at stake, the constitutional meaning of the exclusive jurisdiction imposes to allocate these competences to the professional judge whose status within the judicial system, as defined by the constitution, puts him in a position to exercise a substantial control on the legitimacy of the temporary personal coercion ordered by the police authority"[240].

278. However, in my view the reality is more complex. For as deficient as it may be, the mere existence of a judicial control over the acts of the administration is better than no control at all. While the analysis provided by the reports gives a somewhat systemic view of

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Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pachetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 126).

[239] "La fretta con la quale si è creato un microsistema […], per non aggravare il carico di lavoro del tribunale monocratico a cui il nuovo reato era stato assegnato *ab origine* e a non incrementare, in via ulteriore, la popolazione carceraria all'interno di istituti di pena ormai al collasso, è stata, pero, cattiva consigliera". Gianluca VARRASO, *"Il nuovo rito a 'presentazione immediata' dello straniero clandestino"*, in Oliviero MAZZA e Francesco VIGANO (a cura di) *"Il Pachetto Sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. In legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* G. Giappichelli Editore, Torino, 2009, (p. 87).

[240] "l'intervento della giurisdizione nel conflitto tra autorità di polizia e libertà personale non può essere *mite* secondo le connotazione tipiche delle competenza – anche penali – del giudice di pace, e più in generale, non può essere affidato ad un magistrato onorario, […] : quando è in gioco *l'habeas corpus*, il significato costituzionale della riserva di giurisdizione impone di attribuire le relative competenze al giudice professionale, il cui *status* ordinamentale, cosi come delineato dalla costituzione, lo pone in grado di esercitare un controllo *forte* sulla legittimità della coercizione personale provvisoria disposta dall'autorità di polizia" Angelo CAPUTO, "La protezione costituzionale della libertà personale", *Questione Giustizia*, 6/2008, (p. 157).

the day-to day defective justice which is delivered, it does not contradict the possibly of a few exceptions. Against all odds, a handful of Justices of the Peace have shown an amazing activism – apparently not visible in their day to day office - with a view to changing the legal norms regulating irregular immigration whether at the national or at the European level. This will be more amply considered in the conclusion of this work.

Conclusion of Chapter 2

279. Italian case-law pertaining to irregular migrants emanates from various levels of the judiciary (Justice of the Peace and Supreme Courts) in various fields (administrative, constitutional and criminal). Three observations can be made.

280. The first element which needs to be recalled here concerns the Italian legislation applicable to irregular migrants. The overview made at the beginning of this Chapter shows that the direction followed by the national legislator has been towards a criminalization of a field which used to be solely administrative. While this trend has been largely criticized, it bore as a paradoxical effect, a greater concern of the Constitutional Court as the sanctions imposed on the irregular migrants impact their fundamental rights. This ever-increasing interest brought to light a field which used to be largely ignored by the supreme court.

281. The second appraisal which can me made is that the Constitutional Court has globally developed a protective attitude toward the irregular migrants by choosing to interpret the Constitution in such way as to insure the best possible guarantee of their rights. Although some exceptions or mitigations of this general affirmation have been pointed out, it remains nonetheless the case that the Court has more often than not looked for ways to attenuate the impact of increasingly aggressive legislation. This leads to think that the Constitutional Court is striving to use at the very best of its possibilities, the potentials offered by the margins of appreciation at its disposal. That is why, contrary to a significant part of the Italian doctrine[241]

[241] "la *politicità* della materia dell'immigrazione, ossia quella *pertinenza* al potere esecutivo che si traduce nella centralità del ruolo dell'autorità di polizia, una centralità emersa in relazione a vari segmenti della normativa esaminata; la *sterilizzazione* dell'intervento della giurisdizione, che, come si è visto, per un verso, ha imposto alla Corte costituzionale interventi finalizzati alla definizione dello *standard* minimo di garanzie associato

who considers – rightfully to a certain extent only – that the jurisprudence is too influenced by political agendas, I believe that the results achieved by the Italian Constitutional Court should be welcome. As a smart and creative use of principles drawn from all fields of law, they serve the objectives they are pursuing without infringing the boundaries outside of which their intervention would cease to be legitimate. However, raising such high expectations cuts both ways. If the reality of the judicial management of irregular migrants keeps its promises, Italy sets an example of how a strong role of the judiciary is beneficial for a democratic state as a whole. If it does not live up to its expectations, it runs the risk of loosing its credibility as what it states remains nothing but yet another declaration of intention.

282. The second appraisement therefore reflects this more critical view over the Italian case-law under study. Indeed, it shows that the reality, at the lowest level – but arguably most important in terms of number of cases which will never be treated by higher Courts and seriousness of the definitive impact on the irregular migrant's lives – seems to be a fairly unrecognizable reflection of the jurisprudence of the country's highest Court's statements. The solemn enunciations endorsed by the supreme Court hardly find an application in the daily, most common treatment of the irregular migrant in the country. Such impression is fed by the lukewarm reports on how everyday immigration cases are dealt with before the Justice of the Peace. While this last observation does not rescind the previous comment on the conspicuousness of Italian's Supreme Court's jurisprudence, it does somewhat limit certain of its ambitions. If it would be naïve and out of place to ignore that a gap inevitably exists between the Court's principles and declarations and the reality that irregular migrants are experiencing everyday, the span which is here recorded is both well-known and ancient. The gravity of the discrepancies and their permanence over time are the result of both uncontrollable factors (the permanent and massive influx of irregular migrants that Italy has had to face over the years now) and the political choices that were made (the status, recruitment, salary and working conditions of the Justices of the Peace). It is without

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all'intervento giurisdizionale e, per altro verso, pone oggi nuovi interrogativi sul rapporto tra il significato 'sostanziale' della riserva di giurisdizione in materia di libertà personale e lo statuto ordinamenta-costituzionale del giudice; l'intreccio tra i diversi rami dell'ordinamento – penale e amministrativo – e la contaminazione, lo svilimento dei rispettivi principi, ossia l'aspetto prevalente nella mappatura dei vari profili di tensione delle discipline relative all'immigrazione illegale con le garanzie costituzionali dei diritti fondamentali dello straniero irregolare". Angelo CAPUTO, "Giurisprudenza costituzionale ed immigrazione illegale", in Elisabetta ROSI e Francesca ROCCHI (a cura di) *Immigrazione illegale e diritto penale un approccio interdisciplinare,* Atti del III Seminario della Sezione Giovani Penalisti, Prato, 11 Novembre 2011, Jovene Editore, Napoli, 2013 (p. 63).

the shadow of a doubt a platitude to state that the first ones do not, for the most part, depend on Italy. It is nevertheless a fact that the second element is open to revision.

CHAPTER 3: THE COURT OF JUSTICE OF THE EUROPEAN UNION – EFFECTIVENESS OF EU LAW AND INCIDENTAL PROTECTION OF MIGRANTS' RIGHTS

Introduction of Chapter 3

283. The intent pursued by this part of the thesis is to provide an analysis of the case-law of the Court of Justice of the European Union on deprivations of liberty following different types of violations of administrative requirements. More precisely, the focus of this reflection shall be on the control of the conditions of legality of such a deprivation of liberty. These choices call for a few explanations. While the Second Chapter on Italy considered both sanctions of deprivations or restrictions of liberty as well as other types of sanctions, the choice has been made here to focus essentially on deprivations of liberty. As already stated in the Introduction, being the most serious sanction that the State can inflict to an individual, it requires the best legal and judicial safeguards.

284. The idea underpinning this chapter is to confront the (very protective) case-law of the Court as regards the sanctions applicable for a violation of an administrative requirement in relation with the status of foreigner committed by a European Union citizen (Section 2) with the decisions of the same Court regarding the same kind of violation committed by a third-country national (Section 3 and 4). The former will be used as the benchmark of the Courts' control with regards to administrative detention to uncover the possible existence of a rule of exception applicable to third-country nationals. The stand taken here is that the sole difference of EU citizen/non-EU citizen should not justify an excessive disparity of treatment by the Court, especially when general principles of EU law are concerned. In this regard, Section 3 will focus on the scarce application of the principle of proportionality while Section 4 will shed light on the use of the principle of effectiveness of European Law to build a case-law of exception.

285. This will be preceded by a brief presentation of European Union Law as applicable to foreigners on the territory of Member States (Section 1). The use of the generic term 'foreigners' here is voluntary and encompasses the two very different regimes applicable

to EU citizens and their family as well as to third country nationals which shall be considered separately in the following Section 1.

Section 1: Foreigners on the territory of EU Member States: two radically different regimes of EU law

286. The radical difference of regime between EU citizens and third country nationals should be outlined from the start. It stems directly from the Treaties and reflects one of the cornerstone of European Union construction: freedom of movement for EU citizens as "the free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty"[242]. Paragraph 1 will provide a brief presentation of European Union Law as applicable to EU citizens in the framework of their freedom of movement while Paragraph 2 will give an overview of the strict regime applicable to third country nationals. It is crucial to underline here that this regime is applicable to all third-country nationals to the notable exception of family members of EU citizens.

Paragraph 1: European Union Law applicable to EU citizens exercising their freedom of movement

287. The regime of EU citizens who have exercised their right to move and reside freely within the territory of a Member State of which they are not nationals is mainly regulated by Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

288. As the recital of the Directive immediately demonstrates, the spirit of the text is to offer the maximum protection to EU citizens moving to another Member States. This

[242] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Recital 2)

very protective regime is related to EU citizenship: "Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States"[243]. In order to guarantee that no discrimination shall apply between EU citizens, the Directive affirms that "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence"[244]. As emphasized from the start by the Directive, "the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures"[245]. It is therefore obvious that the regime applicable to EU citizens is drastically divergent from the one applicable to third country nationals.

289. This is however, as noted before, to the exception of family members of EU citizens. Indeed, in order for this right to freedom of movement to "be exercised under objective conditions of freedom and dignity, [it must] be also granted to their family members, irrespective of nationality"[246]. The applicability of this regime to third country nationals who are family members of an EU citizen is guaranteed by the Directive.[247]

290. The Directive guarantees four situations: the right of entry, the right of residence for up to 3 months, the right of residence for more than three months and the right of permanent residence.

291. The right of entry which is recognized by the Directive is however only applicable "without prejudice to the provisions on travel documents applicable to national border controls"[248]. The requirement consists in granting "Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport"[249]. However, while "no entry visa or equivalent formality may be imposed on Union citizens"[250], the Directive acknowledges that "family members who are not nationals of a Member State shall

[243] Directive 2004/38/EC (Recital 1)
[244] Directive 2004/38/EC (Recital 3)
[245] Directive 2004/38/EC (Recital 11)
[246] Directive 2004/38/EC (Recital 5)
[247] Directive 2004/38/EC (Article 3)
[248] Directive 2004/38/EC (Article 5 § 1)
[249] Directive 2004/38/EC (Article 5 § 1)
[250] Directive 2004/38/EC (Article 5 § 1)

only be required to have an entry visa"[251]. Following the objective to grant the maximum protection to guarantee the effectiveness of the right to freedom of movement to EU citizens and their family, a safeguard is provided for by the Directive.

> "Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence"[252].

292. The right of residence for up to three months is provided for by the Directive which states that such right shall be granted "without any conditions or any formalities other than the requirement to hold a valid identity card or passport"[253]. As usual, this provision should "also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen"[254]. The right of residence for up to three months can be subject to the obligation for the person concerned "to report his/her presence within its territory within a reasonable and non-discriminatory period of time"[255].

293. The right of residence for more than three months is subject to conditions set up by the Directive[256] so as to prevent UE citizens to "become an unreasonable burden on the social assistance system of the host Member State"[257] during an initial period of residence. Additionally, the host Member State may "require Union citizens to register with the relevant authorities"[258] and "shall issue a residence card to family members of a Union citizen who are not nationals of a Member State"[259].

294. The rights of permanent residence is guaranteed by the Directive which states as a general rule that " "Union citizens who have resided legally for a continuous period of

[251] Directive 2004/38/EC (Article 5 § 2)
[252] Directive 2004/38/EC (Article 5 § 4)
[253] Directive 2004/38/EC (Article 6 § 1)
[254] Directive 2004/38/EC (Article 6 § 2)
[255] Directive 2004/38/EC (Article 5 § 5)
[256] Directive 2004/38/EC (Article 7)
[257] Directive 2004/38/EC (Recital 10)
[258] Directive 2004/38/EC (Article 8 § 1)
[259] Directive 2004/38/EC (Article 9 § 1)

five years in the host Member State shall have the right of permanent residence there"[260]. In conformity with the logic of the Directive, such right is also guaranteed "to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years"[261].

295. Failure to comply with any of the administrative requirements envisaged by the Directive may only "make the person concerned liable to proportionate and non-discriminatory sanctions"[262].

296. The Directive recognizes the right of Member States to

> "carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card. In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card"[263].

297. The Directive also states, as a general rule that "Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health"[264]. Interestingly, the Directive anticipates the possible abusive recourse to these motives by the Member States and therefore expressly provides that "these grounds shall not be invoked to serve economic ends"[265]. In this perspective,

> "Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the

[260] Directive 2004/38/EC (Article 16 § 1)
[261] Directive 2004/38/EC (Article 16 § 2)
[262] Directive 2004/38/EC (Articles 5 § 5 ; 8 § 2 ; 9 § 3 ; 20 § 2).
[263] Directive 2004/38/EC (Article 26)
[264] Directive 2004/38/EC (Article 27 § 1)
[265] Directive 2004/38/EC (Article 27 § 1)

particulars of the case or that rely on considerations of general prevention shall not be accepted"[266]

298. The Directive also restricts drastically the cases in which a Member States may expulse an EU citizen or a member of his family. As a general rule, "the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be"[267]. The Directive explicitly lists numerous criteria which ought to be taken into account by the Member State when ordering the expulsion of an EU citizen or his family: "how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin"[268]. Therefore, "the host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security"[269] which are arguably exceptional circumstances.

299. This exceptionally protective Directive for EU citizens and their family stands in stark contrast with the very strict regime applicable to all other foreigners on the territory of EU Member States.

Paragraph 2: European Union Law on irregular immigration: the strict regime applicable to third country nationals

300. The following section regards the European Union bundle of texts on immigration and recalls the heterogeneous nature of these detailed texts and general provisions. It considers in the first part (1) the relevant directives and in the second part (2) the few provisions of the Charter of Fundamental Rights which are concerned with immigration law.

[266] Directive 2004/38/EC (Article 27 § 2 and followings)

[267] Directive 2004/38/EC (Recital 24)

[268] Directive 2004/38/EC (Article 28 § 1)

[269] Directive 2004/38/EC (Article 28 § 2)

1. The directives

301. Three European legal instruments contain provisions regarding the detention of irregular migrants.

302. The Council Directive laying down standards for the reception of applicants for international protection[270] provides for a general rule according to which asylum seekers should have the right to free movement within the territory of the host Member State[271]. However, restrictions to this rule are numerous. First, the same article providing the general rule of freedom also allows for a restriction of this measure as the State can limit to a certain area the movements of the applicants to international protection. Second, the Member State can decide on their residence[272]. Third, even if the Directive formulates a general prohibition of detention of an applicant to international protection on the sole motive of his status[273], the Directive provides for the possibility to straightforwardly detain the applicants[274] falling under one of the six categories listed by the Directive[275]. While some guarantees are formulated for detained applicants[276], the conditions of the detention[277] and the detention of vulnerable persons[278], they are clearly minimal ones. The meagre obligations imposed seem to seek more to accommodate the Member State than effectively guarantee the fundamental right to freedom of applicants to international protection. The most convincing illustration of this affirmation can be found in the fact that the Directive goes as far as providing for the

[270] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
[271] Article 7(1) of Directive 2013/33/EU: "Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive".
[272] Article 7(2) of Directive 2013/33/EU: "Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application".
[273] Article 8 (1) of Directive 2013/33/EU:" Member States shall not hold a person in detention for the sole reason that he or she is an applicant".
[274] Article 8 (2) of Directive 2013/33/EU: "When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively".
[275] See Article 8 (3) of Directive 2013/33/EU.
[276] See Article 9 of Directive 2013/33/EU.
[277] See Article 10 of Directive 2013/33/EU.
[278] See Article 11 of Directive 2013/33/EU.

possibility to detain applicants in ordinary prisons[279]. Additionally, no maximum duration of the detention is provided for in the Directive. Given the loose and lenient formulation of the conditions on which such restrictions on personal freedom can be put in place, this directive does not provide any satisfying safeguard for the right to liberty of applicants to international protection.

303. The second piece of legislation dealing with migrant detention is the Council Directive on common procedures for granting and withdrawing international protection[280]. Despite the same general ban to detain applicants to international protection for the sole motive of their status[281], the protection effectively granted is weak insomuch as it only mentions the need to ensure "that there is a possibility of speedy judicial review"[282] and refers to Directive 2013/33/EU for all other aspects.

304. With regards to the poor protection that these directives offer against abusive practices of detention of migrants (whether irregular migrants or applicants to international protection), the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive)[283] appears to be the most complete and formally most protective European legal instrument. It has been recognized by scholars – and proven by the abundant jurisprudence which arose from the interpretation of its articles – that

> "one of the merits of the Return Directive has been that it strengthens the direct link between national courts and the ECJ [Court of Justice of the European Union] and identifies the role to be played by the judicial mechanisms in the migration sphere, limited until the entry into force of the Treaty of Lisbon […]. [It marked the beginning of] a process of gradually increasing judicialisation in the interpretation and implementation of EU law on migration"[284].

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[279] Article 10 (1) of Directive 2013/33/EU: "Detention of applicants shall take place, as a rule, in specialised facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners".
[280] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
[281] See Article 26 (1) of Directive 1013/32/EU.
[282] See Article 26 (2) of Directive 2013/32/EU
[283] Directive 2008/115/EC of the European and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[284] FORNALE Elisa "The European Returns Policy and the re-shaping of the national: reflections on the role of domestic courts", *Refugee Survey Quarterly*, 2012, Volume 31, No. 4, p. 142

305. Its Preamble contains some important restrictions to the conditions and grounds on which deprivations of liberty can take place. In particular, it states that, within the framework of the Return Directive, "detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient"[285]. The definition of the grounds and purposes of the detention also serves to formally distinguish it from a detention consequential to the commission of a criminal offence. The Directive expressly excludes from its scope of application third-country nationals who "are subject to return as a criminal law sanction or as a consequence of a criminal sanction, according to national law, or who are subject of extradition procedures"[286].

306. Regarding the formal requirements on which detention can be carried out, the Directive states, as a general rule, that the duration of detention should be as limited as possible and that it should take place only while the return procedure is ongoing and realized with due diligence[287]. More precisely, it provides for the possibility to detain a third-country national on two conditions: that such detention takes place in the framework of the return procedure to which the migrant is submitted and only if no other less coercive measure can be applied[288]. The Directive enumerates two possible grounds for detention: "when there is a risk of absconding or the third-country national concerned avoids or hampers the preparation of return or the removal process"[289].

307. However, these are neither limitative cases nor compulsory conditions to be satisfied in order for detention to be considered legitimate. As a consequence, much room is left for discretion. This being said, the Directive establishes some important procedural safeguards on the legality of the detention regarding both its length, which cannot, in any case, exceed an overall period of 18 months[290].

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[285] Recital 16 of Directive 2008/115/EC.
[286] Article 2(2)b of Directive 2008/115/EC.
[287] Article 15 of Directive 2008/115/EC: "Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence".
[288] Article 15(1) of Directive 2008/115/EC : "Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is subject of return procedures in order to prepare the return and/or carry out the removal process […]".
[289] Article 15(1) a and 15(1)b of Directive 2008/115/EC.
[290] Article 15(5) of Directive 2008/15/EC: "Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member States shall set a limited period of detention, which may not exceed six months"; Article 15(6) "Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in

308. The deprivation of liberty shall cease immediately as soon as the possibility to remove the migrant ceases to exist or as soon as the reasons initially justifying detention no longer subsist[291], if the detention is not lawful[292] or if the 18 month period has been exhausted[293].

309. Regarding the conditions of detention, the Directive specifically requires that it shall not be carried out in the same facilities as the ones used for criminal offenders[294]. Such a general rule emphasizes the necessity to distinguish between deprivation of liberty on the grounds of criminal law and deprivation of liberty on the basis of the violation of administrative law. This is further established by other provisions of the Directive which state that the detention of third-country nationals should be accompanied by an attentive protection of basic rights such as the right to contact family members, members of their consular authorities and legal representatives[295]. For these rights to be effectively available to third-country nationals held in detention, the Directives obliges Member State to provide them with all relevant information on their rights and duties[296].

310. The Return Directive also considers the situation of specific categories of more vulnerable individuals to whom additional protection is granted. This is the case of sick people[297], of minors and of families[298] whose protection is greater concerning both the

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accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to : (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries".

[291] Article 15(4) of Directive 2008/115/EC: "When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 non longer exist, detention ceases to be justified and the person concerned shall be released immediately".

[292] Article 15(2) of Directive 2008/115/EC: "The third-country national concerned shall be released immediately if the detention is not lawful".

[293] See *Said Shamilovich Kadzoev (Huchbarov),* Case C-357/09 PPU, Grand Chamber, 30 November 2009, EU:C:2009:741, ECR *2009 I-11189*

[294] Article 16(1) of Directive 2008/115/EC: "Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised facility and is obliged to resort to prison accommodation, the third-country national s in detention shall be kept separated from ordinary prisoners".

[295] Article 16(2) of Directive 2008/15/EC: "Third-country nationals in detention shall be allowed – on request – to establish in due time contact with their legal representatives, family members and competent consular authorities".

[296] Article 16(4) of Directive 2008/115/EC: "Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4" (i.e. "relevant and competent national, international and non-government organisations and bodies")

[297] Article 16(3) of Directive 2008/115/EC: "Particular attention shall be paid to situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided".

duration of the detention[299] and the conditions of the detention[300]. These provisions are concurring with the ones contained in the United Nations Convention on the Rights of the Child and set up a system in which adults can be granted more protective rights on the sole basis of them being with their children. However, the interpretation of these articles has not yet been the object of case-law of the Court of Justice of the European Union while extensive and protective jurisprudence of the European Court of Human Rights exists.

311. Ultimately, Directive 2008/115/EC sets forth minimum standards of protection and its application shall be without prejudice to more favorable provisions for the undocumented migrant insomuch as those provisions are not incompatible with the present regulation[301].

2. The Charter of Fundamental Rights of the European Union

312. The Charter[302], as the European Union's general instrument for the protection of human rights, provides for the obligation to respect some basic freedoms but none of which is specifically concerned with the detention of irregular migrants. However, when interpreted jointly, they give a general idea of the legal framework in which this deprivation of liberty is inscribed. The Charter states a general right to liberty and security[303] while also providing for

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[298] Article 17(1) of Directive 2008/115/EC: "Unaccompanied minors and families with minors shall be detained as a measure of last resort and for the shortest period of time".
[299] See Article 17(1) of Directive 2008/115/EC.
[300] Article 17(2) of Directive 2008/115/EC : "Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy"; Article 17(3) "Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education"; Article 17(4) "Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age"; Article 17(5) : "The best interest of the child shall be a primary consideration in the context of the detention of minors pending removal".
[301] Article 4 of Directive 2008/115/EC (1) "This Directive shall be without prejudice to more favourable provisions of : (a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries (b) bilateral or multilateral agreements between one or more Member States and one or more third countries" (2) "This Directive shall be without prejudice to any provision which may be more favourable for the third-country national laid down in the Community acquis relating to immigration and asylum" (3) "This Directive shall be without prejudice to the right of the member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive." (4) "With regard to third-country nationals excluded from the scope of the Directive in accordance with Article 2(2)(a), Member States shall : (a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and (b) respect the principle of non-refoulement".
[302] Charter of Fundamental Rights of the European Union (2000/C 364/01) signed on 7 December 2000.
[303] Article 6 of the Charter: "Everyone has the right to liberty and security of person".

the possibility to limit it through restrictions prescribed by the law[304]. In addition to this principle, the Charter guarantees the right to asylum by reference to the Geneva Convention and its Protocol[305] as well as a general "protection in the event of removal, expulsion or extradition"[306]. The latter consists on the one hand in the prohibition of collective expulsions and on the other hand in the prohibition to expose anyone to a serious risk of torture and inhuman treatment. Finally, in Chapter VI on Justice, the Charter contains some basic criminal law concepts such as the principles of legality and proportionality of criminal offences and penalties[307] or the *ne bis in idem* principle[308].

313. As for its scope of application, the Charter applies to the institutions and bodies of the European Union and to Member States inasmuch as they are implementing European law[309]. The definition of what exactly constitutes an act of implementation of European law has given rise to an abundant case-law of the Court of Justice. In its latest jurisprudence, the Court ruled that the Charter is to be applied "in all situations governed by European Union law, but not outside such situations"[310]. This is understood as encompassing situations only

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[304] Article 52 of the Charter: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[305] Article 18 of the Charter: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community".

[306] Article 18 of the Charter (1): "Collective expulsions are prohibited" (2) "No one may be removed, expelled or extradited to a State where the is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

[307] Article 49 of the Charter (1) "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable" (2) "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations" (3) "The severity of penalties must not be disproportionate to the criminal offence".

[308] Article 50 of the Charter: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

[309] Article 51 of the Charter (1) "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application in accordance with their respective powers" (2) "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". This article has been interpreted by the Court as to mean precisely that "the provisions of the Charter are addressed, pursuant to Article 51(1) thereof, both to the institutions, bodies, offices and agencies of the EU and to the Member States when they are implementing EU law" - *Europese Gemeenschap v Otis NV and others,* Case C-199/11, Grand Chamber, 6 November 2012, EU:C:2012:684 (§ 45).

[310] *Aklagaren v Hans Akerberg Fransson,* Case C-617/10, Grand Chamber, 26 February 2013, EU:C:2013:105 (§ 19).

partially governed by EU law as long as the Member State is acting "in the scope of Union law"[311]. As such, the Court has already ruled that it is applicable when there is an interpretation of an EU regulation by the Court of a Member State[312], a clear European normative framework even when the Member States have retained a discretionary power[313], an exercise of a right recognized by EU law before a domestic Court[314]or a clear mandate conferred by the EU to the Member States[315].

314. Ultimately, the application of the Charter shall, in any case, not adversely affect human rights and freedoms as already recognized by other legal norms, including the Member States' constitutions[316]. However, the scope of this provision, which seemingly grants some leeway to the Member States to apply the highest level of protection of fundamental rights, has been clarified and substantially narrowed by the case-law of the Court of Justice. While recognizing that the level of protection provided for by the Charter was to be considered as a minimum standard, it conditioned the application of higher national standards of protection to the respect of key principles of EU law, namely primacy, unity and effectiveness[317]. Such an interpretation therefore effectively neutralizes the significance of the rule contained in the Charter and questions the extent to which it could be used by the Courts to promote a higher standard of protection.

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[311] Idem, § 20.

[312] See *J. McB. v L.E.,* Case C-400/10 PPU, Third Chamber, 5 November 2010, EU:C:2010:582, ECR 2010 I-08965 (§ 51 and 52)

[313] See *N. S. v Secretary of State for the Home Department* and *M.E v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* Joined Cases C-411/10 and C-493/10, Grand Chamber, 21 December 2011, EU:C:2011:865, ECR 2011 I-13905 (in particular §64 to 69).

[314] See *Europese Gemeenschap v Otis NV and others,* Case C-199/11, Grand Chamber, 6 November 2012, EU:C:2012:684 (§ 43 to 45)

[315] As is the case in the *Fransson* Judgment cited above.

[316] "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Member States' constitutions" Article 53 of the Charter.

[317] "It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised". *Stefano Melloni v Ministerio Fiscal,* Case C-399/11, Grand Chamber, 26 February 2013, EU:C:2013:107 (§ 60).

Conclusion of Section 1

315. The two regimes which have been briefly presented in this Section are fundamentally different as they pursue opposite objectives: for EU citizens who have not fulfilled their administrative obligations, a maximum protection against expulsion in the name of their freedom of movement, for third-country nationals irregularly staying, an efficient return procedure. The interpretation given by the Court to these EU rules generally mirrored their objectives, widening the gap between these categories of citizens who face radically different judicial review for the commission of identical or comparable administrative offences.

Section 2: The generally protective jurisprudence of the Court of Justice on deprivation of liberty of European citizens for administrative offences

316. This section explains the generally protective jurisprudence of the Court of Justice of the European Union on deprivation of liberty for administrative offences. It describes a rather uniform group of cases in terms of the nature of the offences committed, the reasoning of the jurisdiction and ultimately the development of a coherent line.

317. The jurisprudence of the Court of Justice on imprisonment sanctions for failure to complete administrative formalities is profoundly linked to the creation and development of one of the four fundamental freedoms enshrined in the formation of the internal market: the freedom of movement of people (article 45 TFUE[318]). Initially limited to the freedom of movement of workers it has been progressively extended to encompass today the freedom of

[318] Article 45 TFUE: "1. Freedom of movement for workers shall be secured within the Community. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 5. The provisions of this article shall not apply to employment in the public service".

movement, establishment and residence of any European citizen[319]. The definition of the notion of freedom of movement is not the focus of this series of cases. It is nonetheless the basis of the Court's competence to review the compatibility of a national provision that foresees imprisonment as a sanction for the failure to complete legal formalities concerning access, movement or residence of aliens on the territory of another Member State. Hence its importance.

318. The common traits of this series of cases will be presented in Paragraph 1. The recognition by the Court of a right of the Member States to require aliens to complete formalities will be examined in Paragraph 2. That right has to be balanced with the requirement to respect various fundamental principles of European Law (Paragraph 3). The prohibition of detention as a sanction for certain kinds of administrative offences - a progressive construction of the Court - will be the object of Paragraph 4.

Paragraph 1: A series of cases with common features

319. The particularity of the cases under consideration is that the offences committed are relatively minor (1), that they are perpetrated by citizens of the European Union (2), and that, while being of administrative nature, their violation triggers the application of criminal proceedings (3).

1. The types of offences concerned

320. These offences that have given rise to the case-law under consideration

[319] Tellingly, the cases initially cite Articles 7 and 48 of the EEC Treaty (later becoming articles 14 and 18 EC), later Directive 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 64/221 of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, then Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Directive 90/364 of 28 June 1990 on the right of residence, Directive 90/365 of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and lastly Directive 93/96 of 29 October 1993 on the right of residence for students. While all of the above mentioned Directives have been repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, they are mentioned here to show the evolution of EU migration law.

include:

- the failure by a national of another Member State to complete the administrative formalities of entry on the population register of the host Member State and subsequent violation of an order to leave that State or the prohibition to return to it[320],
- the failure by a national of another Member State to report to the public security authority the place where he/she is staying[321],
- the fact of residing in or entering a host Member State without a passport or a valid residence permit[322],
- the overstaying by a national of another Member State of the 6 months period to enter in another Member State[323],
- the failure to make the declaration of residence imposed on foreign nationals who are employed or supply or receive services and who intend to remain in the host Member State for no more than three months[324],
- the omission to exchange a driving license of the country of origin for one of the country of residence[325],
- the refusal by a citizen who comes back to his country of origin to present and hand over his passport to the national police officer responsible for border controls[326],
- the impossibility for a national of another Member State to provide evidence of nationality by means of a valid passport or identity card when stopped by the police of the Member State where he/she is staying[327].

321. These offences are relatively minor. However, the objective protected by the rules transgressed is linked to the notion of sovereignty understood in the broad sense. This is why these cases become, by essence, sensitive issues on which the States do not tend to show

[320] See *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497.
[321] See *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185
[322] See *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouch,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495
[323] See *Regina and Stanislaus Pieck,* Case C-157/79, First Chamber, 3 July 1980, EU:C:1980:179, ECR 1980-02171
[324] See *Lothar Messner,* Case C- 265/88, First Chamber, 12 December 1989, EU:C:1989:632, ECR 1989-04209
[325] See *Michel Choquet*, Case C-16/78, 28 November 1978, EU:C:1978:210, ECR 1978-02293 and *Sofia Skanavi and Konstantin Chryssanthakopoulos,* Case C-193/94, 29 February 1996, EU:C:1996:70, ECR *1996 I-00929*
[326] See *Florus Ariël Wijsenbeek,* 21 September 1999, Case C-378/97, EU:C:1999:439, ECR1999 I-06207.
[327] See *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215

any kind of leniency as concerns sanctions. Indeed, the rules at stake translate the will of the host Member States to maintain a certain level of control over foreign citizens on their territory or their decision to impose some degree of conversion to its national regulations and practices on the foreign nationals residing on its territory (e.g. the need to exchange a foreign driving licence for a national one).

2. The perpetrator of the offence

322. In a significant number of these cases, the offenders are nationals of other EU Member States who exercise their right to free movement. In rare cases, they are nationals who return to the State which has initiated the proceedings[328].

323. Regarding the category through which the foreign national is invoking his/her freedom of movement, establishment and residence, it has evolved alongside the development of an ever-broader interpretation given by the Court and confirmed by the successive EU Treaties. In the early cases, provisions of Community law were only applicable to a very limited category of persons[329]. More recently, the mere fact that the person is a potential recipient of services justifies the application of the protective regime of EU law[330]. But in any case, the protective regime developed by the Court of Justice is reserved to a privileged category of citizens and deeply related to the advent of the notion of European citizenship.

[328] See Mister Alessandro Belmann, Italian National prosecuted by the Italian State for failure to report the identity of the person to whom he had provided board and lodging in *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185 and Mister Wijsenbeek prosecuted by the Netherlands for his refusal to present and hand over his passport to the police officer in charge of the border controls at Rotterdam Airport in *Florus Ariël Wijsenbeek,* 21 September 1999, Case C-378/97, EU:C:1999:439, ECR1999 I-06207

[329] "But if a broad interpretation is placed upon this provision, namely, by including all those who are likely to be recipients of services […] the practical effect is to extend the right of freedom of movement to all nationals of the Member States because every one is actually or potentially a recipient of services. This does not accord with the wording of Article 59 and is inconsistent with the very structure of the Treaty which provides for freedom of movement in respect of specific categories of professional or trade activities". Opinion of Advocate General Trabucchi delivered on 2 June 1976, *Lynne Watson and Alessandro Belmann,* Case C- 118/75, EU:C:1976:79, ECR 1976 -01185 (p.1204).

[330] "the principle of freedom to provide services laid down in Article 49 EC included the freedom for recipients of services to go to another Member State in order to receive a service there without being hindered by restrictions, and that tourists must be regarded as recipients of services". *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 37).

3. An administrative offence whose violation entails the application of criminal proceedings

324. As has become increasingly common in migration law, while the text that incriminates the offence is to be found in administrative law (i.e. Immigration Rules, Aliens Laws, Public Security Acts, Regulation on international vehicle traffic, Law on Road Traffic, Law on residence of Nationals of the Member States of the EEC….), the corresponding sanctions are criminal penalties, typically consisting in a combination of a fine and of a term of imprisonment.

325. The length of the detention provided for by the national legislations in the cases under consideration went from 1 day[331] to 1 year[332], and the amounts of the fines from a small amount to 360 times the daily income of the person convicted[333]. In other words, while the offences were rather minor, the sanctions incurred were not at all insignificant in terms of impact on the offender.

Paragraph 2: The recognition of the Member States' right to limit the free movement of people by enacting legislation that requires formalities to be completed by foreign citizens

326. The acceptance of the Member States' right to limit the free movement of people by a requirement of formalities was the acknowledgement that certain prerogatives were retained by the Member States, such as their basic power to control movements of persons on their territory (1), their exceptional power of derogation to safeguard public policy or public security (2) and the wide discretionary powers they hold with regard to aliens in general (3).

[331] See *Florus Ariël Wijsenbeek,* 21 September 1999, Case C-378/97, EU:C:1999:439, ECR1999 I-06207

[332] See *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouch,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495

[333] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouch,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495

1. Member States' general power to control movements of persons on their territory

327. In the first case before the Court of Justice that dealt with this question - *Jean Noël Royer* (1976) - the Commission (of the European Communities) easily acknowledged that "administrative control by the Member States of the presence of foreign nationals on their territory is certainly legitimate and even necessary to facilitate the exercise of the right of residence"[334]. This power was later described, in the case of *Lynne Watson and Alessandro Belmann* (1976), as "a normal and permanent attribute of the Member States"[335] by Advocate General Trabucchi, highlighting the Court's cautious attention not to overstep or question the powers attached to Member States' sovereignty.

328. As for the exact content of this power, Advocate General Mayras considered in the case of *Jean Noël Royer* (1976) that national rules could only be legitimate in the framework of the Member States' power to enact legislation in this area if they were to serve precise and limitedly listed objectives: "[N]ational rules may serve no other object than to enable a check to be kept on the presence on the territory of this privileged category of aliens and to ascertain their status as nationals of another Member State"[336].

329. In the second case submitted a couple of months later on the same question, *Lynne Watson and Alessandro Belmann* (1976), the Court held:

> "By creating the principle of freedom of movement for persons and by conferring on any person falling within its ambit the right of access to the territory of the Member State […], Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory"[337].

330. In particular, the Court of Justice accepted that

> "the competent authorities in the Member States may require nationals of the other Member States to report their presence to the authorities of the State concerned [since]

[334] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (p. 503).
[335] Opinion of Advocate General Trabucchi delivered on 2 June 1976, *Lynne Watson and Alessandro Belmann,* Case C- 118/75, EU:C:1976:79, ECR 1976 -01185 (p. 1202).
[336] Opinion of Advocate General Mayras delivered on 10 March 1976, *Jean Noël Royer,* Case C- 48/75, EU:C:1976:40, ECR 1976 -00497 (p. 524).
[337] *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185 (§ 17).

such an obligation could not in itself be regarded as an infringement of the rules concerning freedom of movement for persons"[338].

331. In the third case on the topic - *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouch* (1977) - the Court of Justice clarified at great length the extent of the power retained by Member States and the balance that ought to be maintained to protect European citizens.

> "To enable the Member States to obtain such data [on movement of populations on its territory] and at the same time to put those concerned in a position to prove their legal position with regard to the application of the provisions of the Treaty, two formalities are provided for […]: the persons in question must have a valid identity card or passport and be able to prove their right of residence by a document entitled 'Residence Permit for a National of a Member States of the EEC'"[339].

332. In addition to leaving room for the power to enact such national legislation, "Community law does not preclude the appropriate punishment for infringement by the person concerned"[340]. It is the latter that the Court has progressively and deftly limited, without ever questioning the original authority of the Member States in this field.

2. *Member States' exceptional power of derogation to safeguard public policy and security on their territory*

333. The power retained by the Member States with regard to the protection of public order has been studied at length by scholars[341] as a constant exception whose interpretation has led to extensive controversy with the Court of Justice of the European Union.

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[338] *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185 (§ 18).

[339] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouch,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 4).

[340] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouch,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 7).

[341] See notably S. MANACORDA "Le contrôle des clauses d'ordre public : la 'logique combinatoire' de l'encadrement du droit pénal" in G. GUIDICELLI-DELAGE et S. MANACORDA *Cour de Justice et Justice Pénale en Europe,* Collection de l'UMR de droit compare de Paris (Université de Paris 1/CNRS UMR 8103) Volume 19, Société de Législation Comparée, Paris, 2010.

334. The question was whether

"a failure by a national of a Member State to comply with the legal formalities for the control of aliens constitutes in itself conduct endangering public policy or public security and whether such conduct may therefore justify a decision ordering expulsion or the provisional deprivation of an individual's liberty"[342].

335. Such evaluation had to be made bearing in mind that Directive 64/221 (which has been repealed by now) stated that "[m]easures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned"[343]. As interpreted by the Court, this meant that "this provision obliges the Member States to make their assessment, as regards the requirements of public policy and public security, on the basis of the individual position of any person protected by Community law and not on the basis of general considerations"[344].

336. In line with the case-law of the Court of Justice of the European Union with regard to the question of general consideration, in the case of *Jean Noël Royer* (1976), Advocate General Mayras was explicit in stating that "the motive of 'general prevention' justifying the expulsion of a national of a Member State in order to dissuade other aliens from committing crimes similar to that committed by the party concerned was not compatible"[345] with Community law.

337. In addition, the exception of public policy was to be invoked only in order to "punish anti-social conduct and grave and existing danger" according to the interpretation of Advocate General Mayras[346] in the same case of *Jean Noël Royer* (1976). Following this line, the Court stated in the case of *Regina* (1977):

"In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy

[342] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§18-c).
[343] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Article 3 (1). This Directive has been repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Text with EEA relevance).
[344] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 46).
[345] Opinion of Advocate General Mayras delivered on 10 March 1976, *Jean Noël Royer,* Case C- 48/75, EU:C:1976:40, ECR 1976 -00497 (p.525).
[346] Opinion of Advocate General Mayras delivered on 10 March 1976, *Jean Noël Royer,* Case C- 48/75, EU:C:1976:40, ECR 1976 -00497 (p.526).

presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society"[347]

338. In particular, the Court had already held in the case of *Jean Noël Royer* (1976) that "it is evident […] that the failure to comply with the legal formalities concerning the entry, movement and residence of aliens, does not in itself constitute a threat to public policy and public security"[348]. The Court had also made it manifest that:

"the exception concerning the safeguard of public policy, public security and public health […] must be regarded not as a condition precedent to the acquisition of the right of entry and residence but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty"[349].

339. Moreover, in cases where a measure is taken under the exceptional power recognized to Member States, additional procedural safeguards are mandatory according to the Court which held in the same reference case of *Jean Noël Royer* (1976):

"some of the guarantees provided by the directive [Directive 64/221 on special measures justified on grounds of public policy, public security or public health which has been repealed] for persons protected by Community law, namely the obligation to inform any person subject to restrictive measure of the reasons for it and to give him a right of appeal, are of procedural nature"[350] and as such are imperative.

340. To sum up, the scope of the derogation to safeguard public policy and security should be narrowly interpreted and is exercised under the very tight judicial control of the Court of Justice[351].

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[347] *Regina v. Pierre Bouchereau,* Case C-30/77, 27 October 1977, EU:C:1977:172, ECR 1977-01999 (§ 35).
[348] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 47).
[349] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 29).
[350] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 72).
[351] "the scope of this derogation which is to be interpreted strictly, cannot be determined unilaterally by any one of these States free from supervision by the Community authorities. In particular, there is judicial supervision which is the responsibility of the Court." Case C-48/75 *Jean Noël Royer* Opinion of Advocate General Mayras delivered on 10 March 1976 (p.521).

3. Member States' wide discretionary powers in relation to aliens

341. Bowing to sovereignty, the Court has always accepted that Member States have a great latitude with regard to their management of aliens' presence on their territory. In the case of *Jean Noël Royer* (1976), it already held that:

> "Community law does not prevent the Member States from providing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions – other than measures of expulsion from the territory – necessary in order to ensure the efficacity of those provisions"[352].

342. Even when the referring Court openly displayed its opposition[353] to the decision of the Italian authorities to request a formal declaration of residence within three days of entering the national territory, the Court maintained the existence of an extensive power retained by the Member States regarding the control of aliens. This right is independent of the special authority of Member States to guarantee the respect of their public order, security and health, and much wider.

Paragraph 3: The requirement to respect fundamental principles of European Union Law in the determination of applicable sanctions

343. While recognizing a right of the Member States to enact legislation susceptible of limiting the freedom of movement of EU citizens, the Court of Justice subjected this possibility to the respect of certain key concepts of Community law. These principles include the fundamental right to liberty (1), the right to free movement such as conferred by European Union law (2), the principles of proportionality (3) and non-discrimination (4) and finally the minor relevance given to the notion of legitimacy (5).

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[352] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 42).

[353] "May […] the EEC Treaty be interpreted as meaning that it is lawful for Italy to impose on nationals of another Member State of the Community an obligation to make a formal declaration of residence within three days of entering Italian territory, failing which they are liable to a criminal penalty, in view of the fact that a feudal obligation of that kind, whose nature and purpose are manifestly oppressive and which is clearly inspired by xenophobia, cannot be justified on any specific ground of public policy, public security or public health". *Lothar Messner,* Case C- 265/88, First Chamber, 12 December 1989, EU:C:1989:632, ECR 1989-04209 (§ 3).

4. The fundamental right to liberty

344. In the case of *Jean Noël Royer* (1976), the Commission of the European Communities insisted on the fact that the question referred to by the Belgium Court involved an evaluation of the legitimate grounds on which an individual could be deprived of his liberty. According to the Commission, such an assessment went beyond the issues usually tackled by the Court of Justice of the European Union: "The question of deprivation of liberty […] comes within the sphere not only of the right of residence guaranteed by the Treaty but also the protection of fundamental rights of the individual"[354]. It also recalled that "respect for fundamental rights must be ensured within the legal system of the Community"[355] which means that they shall be protected against "infringements caused by the institutions of the Community but also against actions of the Member States and their authorities"[356]. In arguing so, the Commission even quoted the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): "Article 5 (1) (f) of that Convention provides that a person may not be deprived of his freedom if he has entered the State in question in an authorized manner"[357]

345. In these early times, a reminder by the Commission that the Court of Justice needed to take into consideration the ECHR since it had been ratified by all the Member States of the EEC and because it formed "an integral part of Community law"[358] was nothing less than surprising.

5. The right to free movement conferred by EU law on Member States' Citizens

346. In the case of *Jean Noël Royer* (1976), the Court made it clear that the right to free movement is directly conferred by the European Treaty on the citizens of its Member States:

> "These provisions, which may be construed as prohibiting Member States from setting up restrictions or obstacles to the entry into and residence in their territory of nationals of other Member States, have the effect of conferring rights directly on all persons

[354] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (p. 507).
[355] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (p. 507).
[356] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (p. 507).
[357] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (p. 507).
[358] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (p. 507).

falling within the ambit of the above-mentioned articles"[359].

347. This position was maintained by the Court throughout its jurisprudence. It was however mitigated by the subsequent difference established in the case of *Salah Oulane* (2005) between the existence of the right granted and its exercise:

> "Although it is true that the right of nationals of one Member State to reside in another Member State is conferred directly by the treaty, the host member State may still require those Community nationals to comply with certain administrative formalities in order to have that right recognized"[360].

348. The Court considered in the case of *Concetta Sagulo* (1977) that it was the severity of the measure which determined the existence of an obstacle to the freedom of movement and its compatibility with European law: "[S]uch penalties should by no means be so severe as to cause an obstacle to the freedom of entry and residence"[361]. In addition, the Court stated in the case of *Salah Oulane* (2005) that detention – like deportation, for which the principle had been affirmed in the earlier case of *Regina and Stanislaus Pieck* (1980) [362] - when "based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence"[363].

349. This position is representative of the Court's strictness when it comes to enforcing the fundamental rights provided for in the successive treaties that led to the establishment of the European Union,

6. *The adamant requirement of proportionality*

350. In the later case of *Lynne Watson and Alessandro Belmann*, the importance of

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[359] *Jean Noël Royer,* Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 23).

[360] *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§49)

[361] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 12).

[362] "Among the penalties attaching to a failure to comply with the formalities required as a proof of the right of residence of a worker enjoying the protection of Community law, deportation is certainly incompatible with the provisions of the Treaty since […] such a measure would negate the very right conferred and guaranteed by the Treaty". See *Regina and Stanislaus Pieck,* Case C-157/79, First Chamber, 3 July 1980, EU:C:1980:179, ECR 1980-02171 (§ 19).

[363] *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 40).

proportionality was explicitly added by the Court. It emphasized that national regulations requiring the completion of formalities by nationals of other Member States were in principle compatible with EC law, provided "that the penalties attaching to a failure to discharge them are not disproportionate to the gravity of the offence"[364]. Advocate General Trabucchi specified, in the same case, that a measure would be incompatible with EC law if it were "manifestly disproportionate to the object being pursued and, therefore, in conflict with the general principle that the means must be proportionate to the end"[365].

351. In the case of *Concetta Sagulo* (1977), the Court went beyond the appreciation of proportionality *stricto sensu* in an unexpected opinion on German Criminal law – especially when considering that the judgment dates back to 1977 – at an early stage of the European construction. Examining the possibility to provide for aggravated sanctions in case of repeated violations of national provisions, the Court considered that "Community law does not prevent such an increase in penalties which is consistent with general principles of penal law"[366]. However, the Court went on to affirm that

> "this does not affect the obligation of the court to ascertain whether the conditions for such an increase in penalties are fulfilled where there has been a prior conviction on the basis of legal provisions the application of which was not justified under Community law. Even if the force of *res judicata* does not allow such a prior conviction to be completely nullified its effect cannot be extended in such a way that it is regarded as an aggravating circumstance in connection with a subsequent conviction which is justified under Community law"[367].

352. This intrusion into the criminal law of the Member State followed the opinion of Advocate General Reischl in the same case who had asserted that German Criminal law "would lead to the application of penalties quite disproportionate to the criminality of disregard of the formalities with regard to control of aliens"[368].

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[364] *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185 (p. 1200).

[365] Opinion of Advocate General Trabucchi delivered on 2 June 1976, *Lynne Watson and Alessandro Belmann,* Case C- 118/75, EU:C:1976:79, ECR 1976 -01185 (p.1209).

[366] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 7).

[367] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 7).

[368] Opinion of Advocate General Reischl delivered on 14 June 1977, *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, EU:C:1977:131, ECR 1977-01495 (p. 1512).

7. The diffuse appreciation of the non-discrimination principle

353. In the case of *Jean-Noël Royer (*1976*),* the Advocate General confirmed the relevance of the question of non-discrimination in evaluating whether a measure of deprivation of liberty could be compatible with EC law. He briefly stated that

> "in view of the principle of non-discrimination […] these penalties must not be in excess of those applicable to nationals of the member State in question where they do not comply with the administrative requirements prescribed for cases of change of residence"[369].

354. The case of *Lynne Watson and Alessandro Belmann* (1976) really touched upon the question of discrimination on grounds of nationality. The Court refused the application of the principle to the problem. It reckoned that

> "in so far as national rules concerning the control of foreign nationals do not involve restrictions on freedom of movement for persons and on the right […] to enter and reside in the territory of the Member States, the application of such legislation, where it is based upon objective factors, cannot constitute 'discrimination on grounds of nationality'"[370].

355. The Court maintained this interpretation in the subsequent case of *Concetta Sagulo* (1977). The national court was wondering whether there was a violation of the non-discrimination principle in cases in which

> "a person who is subject to Community law is liable to the relatively heavy penalties which the general law on aliens provides for such an infringement whereas a national on infringing similar legal provisions is liable only to the considerably lighter penalties which apply to minor offences"[371].

356. In this case of *Concetta Sagulo* (1977), the Court saw no objection to a differentiated treatment. It stated that:

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[369] Opinion of Advocate General Mayras delivered on 10 March 1976, *Jean Noël Royer,* Case C- 48/75*,* EU:C:1976:40, ECR 1976 -00497 (p.525).

[370] *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185 (§ 22).

[371] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 10).

"In so far as this directive [372] imposes special obligations (such as the possession of a passport or an identity card) on the nationals of a Member State who enter the territory of another Member State or reside there, the persons affected thereby cannot be simply put on the same footing as nationals of the country of residence. There is therefore no objection to such persons being subject to different penal provisions from those applying to nationals who infringe an obligation, possibly having its origin in a law or regulation, to obtain certain identity documents. This conclusion follows all the more forcibly in that several Member States do not impose any such obligation by law on their own nationals so that in these countries there could be no standard of comparison"[373].

357. This surely was in line with Advocate General Trabucchi's opinion in the case of *Lynne Watson and Alessandro Belmann* (1976) where he considered that

"So long as there is no Community nationality, nationals of other Member States will always have a different status from that of a national of the State concerned even where he enjoys the right of free movement and residence on conditions of parity with such a national. Just as that status justifies appropriate supervision of his presence on the national territory […] it also helps to give, in each case, a varying degree of importance to failure to give information."[374]

358. This vision was not shared by Advocate General Mischo in the case of *Lothar Messner* (1989) who thought that it was

"understandable that the Pretore di Volterra [referring court] considers the provision at issue as incompatible with the growing feeling of the citizens of the Member States that they belong to a true community of peoples and are no longer foreigners, in the full sense of the word, in any of the other 11 countries."[375]

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[372] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families. This Directive has been repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[373] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 11-12).

[374] Opinion of Advocate General Trabucchi delivered on 2 June 1976, *Lynne Watson and Alessandro Belmann,* Case C- 118/75, EU:C:1976:79, ECR 1976 -01185 (p.1210).

[375] Case C- 265/88 *Lothar Messner* Opinion of Advocate General Mischo delivered on 12 October 1989, (§ 13).

359. The historical context of this discussion needs to be kept in mind. This was the period just before the fall of the Berlin Wall in the wake of the disintegration of USSR signaling the end of the Cold War. The Opinion of Advocate General Mischo announces the creation of what would become a European Citizenship: a set of rights and privileges equally shared by the citizens of the European space but justifying great differences of treatment with third-country nationals. This is precisely how the Court later understood the principle of non-discrimination: a criteria solely applicable between European citizens.

360. In it subsequent case-law the Court did not expressly refer to the principle of non-discrimination. But it distanced itself from its previous reasoning when asserting in the case of *Florus Ariël Wijsenbeek* (1999) that the penalties imposed by the Member States had to be "comparable to those which apply to similar national infringements"[376].

361. Advocate General Reischl had already considered in the case of *Concetta Sagulo* (1977) that the fines and detention provided for by German law in case of failure to comply with the administrative formalities would be in contradiction with the principle of non-discrimination enshrined in Community law. With regards to penalties, he put on the exact same footing a national who failed to present a valid identity card and an alien who failed to carry a valid residence permit. The fact that the former could only be fined for a minor offence while the latter was liable to imprisonment of up to one year and a fine up to 360 times his/her net daily income, was unacceptable in Community law according to him.

> "If a national does not comply with his obligations in respect of identity cards then under German law he is liable to a fine only for a minor offence. From the point of view of its criminality the disregard of the obligation in respect of evidence of a substantively existing right of residence by a national of another Member State of the EEC cannot be treated differently."[377]

362. In a later case on the same issue brought by the Commission, *Commission v Feferal Republic of Germany* (1998), Germany was found to be again in breach of Community law. While the law had been changed following the case of *Concetta Sagulo* (1977) it still provided that the fine applicable to a German national for the commission of the

[376] *Florus Ariël Wijsenbeek,* Case C-378/97, 21 September 1999, EU:C:1999:439, ECR1999 I-06207 (§ 44).
[377] Opinion of Advocate General Reischl delivered on 14 June 1977, *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, EU:C:1977:131, ECR 1977-01495 (p. 1512).

administrative offence of not carrying or failure to present a valid identity card was to be comprised between 5 DM and 1 000 DM while a foreigner was liable to a fine of up to 5000 DM. Logically, the Court held, here again that

> "by treating nationals of other Member States residing in Germany disproportionately differently, as regards the degree of fault and the scale of fines, from German nationals when they commit a comparable infringement of the obligation to carry a valid identity document, the Federal Republic of Germany has failed to fulfil its obligations"[378]

8. *The question of the legitimacy of detention as a sanction for the breach of an administrative rule: a forgotten consideration*

363. Interestingly, the legitimacy of detention as a sanction for the breach of an administrative rule was never directly addressed by the Court. However, Advocate General Mayras, in his opinion on the case of *Jean-Noël Royer* (1976), considered that "so serious a measure as arrest, detention for the purposes of removal or expulsion from the national territory" is not "a legitimate means of constraint against a person who has merely taken advantage of the right conferred on him by the Treaty"[379].

364. The reasons for the Court's omission (or rather deliberate choice?) to address this fundamental but sensitive question can be multiple and one may only guess what these were. Most likely, the Court must have considered that the question of legitimacy could be a Pandora's box in so far as it would have forced it to pronounce itself on the substantial appropriateness of the measure chosen as sanction and on the motives which could justify a deprivation of liberty. This very obviously slippery theme was better left to the European Court of Human Rights whose jurisdiction best fits the appraisal of the criteria of legitimacy which is arguably beyond the realm of competence of the Court of Justice.

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[378] Com*mission of the European Communities v. Federal Republic of Germany*, Case C-24/97, Sixth Chamber, 30 April 1998, ECLI:EU:C:1998:184 (§ 15)

[379] Opinion of Advocate General Mayras delivered on 10 March 1976, *Jean Noël Royer,* Case C- 48/75, EU:C:1976:40, ECR 1976 -00497 (p.525).

Paragraph 4: The construction of a prohibition of detention as a sanction for the breach of an administrative rule

365. The construction of a rule prohibiting imprisonment as a means to sanction a failure to comply with administrative duties was not linear. It started with a ban of detention directly linked to an expulsion order that would be contrary to the Treaty (1). Later on, a general prohibition of the use of imprisonment as a sanction for administrative offences was contemplated (2). But the Court showed reluctance to come to such a conclusion and its hesitations were rendered apparent by the existence of contradictions (3). Eventually, Advocate General Léger argued that such interdiction was not to be read as a prohibition to temporarily detain an alien for the time needed to proceed to nationality checks (4).

1. Prohibition of imprisonment linked to an expulsion order that would be contrary to the Treaty

366. Since the Court had already judged that a measure of expulsion was incompatible with EC law, it surely seemed easier to associate the prohibition of detention when the latter was a mode of execution of the former. Thus, the Court concluded in the reference case of *Jean Noël Royer* (1976) that

> "as to the question whether a Member State may take measures for the temporary deprivation of liberty of an alien covered by the terms of the treaty with a view to expelling him from the territory it must first be stated that no measure of this nature is permissible if a decision ordering expulsion from the territory would be contrary to the Treaty"[380].

367. On the question of the sanction of imprisonment in itself, the Court only stated in the same case of *Jean Noël Royer* (1976) that the validity of such a measure depended exclusively "on the provisions of national law and the international obligations assumed by the Member State concerned since Community law as such [did] not yet impose any specific obligations on Member States in this respect"[381]. The addition of the word 'yet' in the Courts' judgment allowed the interpret to infer that a more protective view on the question was likely to be taken in the near future.

[380] *Jean Noël Royer*, Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 43).
[381] *Jean Noël Royer*, Case C- 48/75, 8 April 1976, EU:C:1976:57, ECR 1976-00497 (§ 44).

2. The prohibition of imprisonment as a sanction for foreign nationals' failure to notify their presence

368. Indeed, in the case of *Lynne Watson and Alessandro Belmann* (1976) - the judges opted for a clear prohibition of the sanction of imprisonment:

> "As regards other penalties, such as fines and detention, whilst the national authorities are entitled to impose penalties in respect of a failure to comply with the terms of provisions requiring foreign nationals to notify their presence which are comparable to those attaching to infringements of provisions of equal importance by nationals, they are not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons"[382].

369. In the case of *Regina and Stanislaus Pieck* (1980), the Court repeated this paragraph but added: "this would be especially so if that penalty included imprisonment"[383]. This addition indicated the Court's intention to dissipate any doubts that could have arisen from the signs of indecision it had previously shown.

370. As a matter of fact, in the case of *Salah Oulane* (2005), the Court of Justice of the European Union added that "the fact that there may be a subsequent award of damages for illegal detention is irrelevant"[384].

3. The hesitation of the Court to pronounce a sweeping prohibition of detention

371. However, in the case of *Concetta Sagulo* (1977), the Court had taken back the prohibition it had previously proclaimed by giving all powers to the national courts to review the appropriateness of the sanction. If the Court unmistakably ruled that "the national authorities should not impose penalties for disregard of a provision which is incompatible with Community law"[385], it considered, however, that it was up to the competent authorities

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[382] *Lynne Watson and Alessandro Belmann,* Case C- 118/75, 7 July 1976, EU:C:1976:106, ECR 1976 -01185 (§ 21).

[383] See *Regina and Stanislaus Pieck,* Case C-157/79, First Chamber, 3 July 1980, EU:C:1980:179, ECR 1980-02171 (§ 19).

[384] *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 43).

[385] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 6).

of the Member States to determine the appropriate sanction for violation of provisions compatible to Community law.

> "[I]t is the task of the national court to use its judicial discretion to impose a punishment appropriate to the character and objective of the provisions of Community law the observance of which the penalty is intended to safeguard"[386].

372. This opinion was shared by Advocate General Léger - in the case of *Sofia Skanavi* (1995) -who considered that it was "a matter for the national court to determine whether the penalties provided for by the legislation of the Member State in question are so severe as to constitute an obstacle to the fundamental freedoms guaranteed under the treaty"[387].

373. This tendency to refrain from evaluating the severity of the measure questioned was already visible in Advocate General Trabucchi's opinion in the case of Lynne Watson and Alessandro Belmann (1976). "I should regard it as wholly unwise, not to mention rash, to attempt to revise the judgment of a national legislature on this point"[388]. His reluctance could not have been expressed more clearly and was initially shared by the Court of Justice of the European Union, which felt ill at ease to appraise the appropriateness of the sanctions.

374. But in some later cases, signs of hesitation were visible, and were similar to those expressed by Advocate General Warner in the case of *Regina and Stanislaus Pieck* (1980) who recommended that "failure to comply with that obligation [to apply for a residence permit] may not be punished by deportation and may be punished by imprisonment only where the circumstances of the offence make it one of exceptional gravity"[389].

375. The Court's unease in these cases was perceptible and could have led to a retraction. Instead, it seemed to be heading towards a continuity in the ban it had previously affirmed by maintaining the use of the statement it had initially employed.

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[386] *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche,* Case C-8/77, 14 July 1977, EU:C:1977:131, ECR 1977-01495 (§ 12).

[387] Opinion of Advocate Generak Léger delivered on 17 October 1995, *Sofia Skanavi and Konstantin Chryssanthakopoulos,* Case C-193/94, EU:C:1995:331 (§43).

[388] Opinion of Advocate General Trabucchi delivered on 2 June 1976, *Lynne Watson and Alessandro Belmann,* Case C- 118/75, EU:C:1976:79, ECR 1976 -01185 (p. 1210).

[389] Opinion of Advocate General Warner delivered on 4 June 1980, *Regina and Stanislaus Pieck,* Case C-157/79 EU:C:1980:144 - (p. 2203).

4. The possibility for Member States to temporarily detain a national of another Member State

376. In a more recent case brought before the Court on the subject – *Salah Oulane* (2005) - Advocate General Léger felt it necessary to state that the prohibition of detention as a sanction for breach of administrative requirements with respect to immigration

> "must not be understood as excluding the power of the host Member State to detain temporarily, in a suitable place, a national of another Member State in order to carry out the necessary checks concerning his nationality. […] Its purpose is to enable the national of another Member State to prove his nationality by any means"[390].

377. Although the Court did not endorse the statement in its judgment on the case, it indirectly gave way to the Advocate General's position in recognizing that "it is for nationals of a Member State residing in another Member Sate in their capacity as recipients of services, to provide evidence establishing that their residence is lawful"[391].

378. Finally, it went back once more to the question of the ban on detention with a somewhat awkward reference to public policy and a restatement of the link between the prohibition of detention and the perspective of deportation. In the case of *Salah Oulane* (2005), seizing this opportunity to settle this question once and for all, the Court definitely reiterated the principle it had stated.

> "A detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of a failure to present a valid identity card or passport even when there is no threat to public policy, constitutes an unjustified restriction on the freedom to provide services"[392].

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[390] Opinon of Advocate General Léger delivered on 21 October 2004, *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, EU:C:2004:653 (§ 94).

[391] *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 56).

[392] *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 44).

Conclusion of Section 2

379. The Court of Justice of the European Union has consistently reviewed the grounds and proportionality of a sanction of detention imposed on EU citizens in other Member States as a sanction for their failure to comply with legal formalities regarding the entry and stay of foreign nationals. The fact that this evaluation has always been carried out in the most rigorous of ways is apparent in the Court's repeated prohibition of detention for an infringement deprived of any gravity or seriousness[393] and held to be a "minor offence"[394] by the Court itself. Deprivation of liberty was deemed justified only in the exceptional cases of a "genuine and serious"[395] threat to public policy, public security or public health showing the exigency of the test developed by the Court in the course of the years.

Section 3: The evolving approach of the Court of Justice with regards detention of irregularly-staying third country nationals

380. While the Court of Justice's limited application of the principle of proportionality to detention of third country nationals was affirmed from the start (Paragraph 1), a bunch of recent cases has shown an evolution towards a more protective approach (Paragraph 2).

[393] See *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 40) and *Lothar Messner,* Case C- 265/88, First Chamber, 12 December 1989, EU:C:1989:632, ECR 1989-04209 (§ 14).

[394] See *Regina and Stanislaus Pieck,* Case C-157/79, First Chamber, 3 July 1980, EU:C:1980:179, ECR 1980-02171 (§ 19)

[395] See *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie,* Case C-215/03, First Chamber, 17 February 2005, EU:C:2005:95, ECR 2005 I-01215 (§ 42)

Paragraph 1: The limited application of the proportionality criterion to the detention of third-country nationals: an exception to the case-law of the Court of Justice

381. When referring to the detention of third-country nationals, and according to EU law, three different categories must be recognized:

- asylum seekers who are subject to a specific regime in EU law governed by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection as well as Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
- irregular migrants who are subject to the regime set up by 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
- foreigners subject to the so-called 'Dublin Regulations' (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) who are to be returned to another EU Member State

382. Additionally, and according to the classification set out by Elspeth Guild, four types of detention can be distinguished[396]:

- detention upon arrival: this detention takes places in practice to verify that the person seeking entry into the territory of an EU Member State or a Schengen associated State satisfies the conditions set up by Regulation 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

[396] This categorisation is drawn from the report by E. GUILD, *A typology of different types of centres for third country nationals in Europe,* Briefing paper for the European Parliament, Directorate General - Internal Policies of the Union, Policy Unit C, Citizens Rights and Constitutional Affairs, 16 February 2006.

Code). This theoreticcaly short deprivation of liberty is outside the realm of this thesis and won't be considered further.

- detention pending the result of an asylum procedure: this detention is regulated by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. It is also outside the framework of this study.
- detention on the ground of illegal presence on the territory of the Member State: it constitutes a sanction taken in the framework of national criminal law when the entry, stay, transit or any related conduct of the foreigner deprived of a document satisfying the requirements of national immigration law became criminal law offences. This type of detention is within the scope of this study.
- detention prior to deportation: it is an administrative detention regulated by Directive 2008/115/EC of the European and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. This detention takes place during the return procedure faced by the irregular migrant. This type of detention is at the centre of this thesis.

383. In the following study, only detention on the ground of the illegal presence and detention prior to deportation will be considered as they have been the source of much litigation before the Court.

384. Depending on national regulations and on the actors who are in charge of the detention centres – private companies in the United Kingdom, the military in Malta, civil public authorities in France… - deprivation of liberty of third-country nationals can fall under the regime of criminal, civil, administrative or military law. This complicates the possibilities to operate efficient judicial control over them.

385. While the Court of Justice generally acknowledges the proportionality test as an inherent part of the Return Directive (1), it has considerably limited its application in the context of detention of third-country nationals (2).

1. *The recognition of the proportionality criterion as a requirement of the Return Directive*

386. Concerning detention prior to deportation, the principle of proportionality is explicitly mentioned in the preamble of the Return Directive[397] :

> "The use of detention for the purpose of removal should be limited to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient".

387. It can, however, be argued that the use of the word "should" instead of "shall" softens the prescription.

388. In the *Achughbabian* case (2011), the Court of Justice picked up on the principle of proportionality with the following remark: "it is obvious from Article 8(1) and (4) of Directive 2008/115 that the expressions 'measures and 'coercive measures' contained therein refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned" [398].

389. These quotations are clear: Detention of third-country nationals prior to deportation is only admissible if and as long as it demonstrably serves the purpose of removal. This demonstration needs to be made by the authorities.

2. *The limited application of the requirement of proportionality in the case in point*

390. Only the *El Dridi* jurisprudence (2011) gives rises to a minimal analysis of the requirement of proportionality contained in the Preamble of Directive 2008/115/EC. Such a consideration for the principle might be at least partly explained by the fact that the referring court of Trento expressly asked whether a term of imprisonment of one to four years for non-compliance with the removal order was "proportionate, appropriate and reasonable"[399]. The

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[397] See Recital 16 of Directive 2008/115/EC.

[398] *Achughbabian v Préfet du Val de Marne,* Case C-329/11, Grand Chamber, 6 December 2011, EU:C:2011:807, ECR 2011-00000 (§ 36).

[399] "That court is in doubt as to whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation, to the need for attainment of the objectives of Directive 1008/115 and for ensuring the effectiveness thereof, and also to the

referring Court itself considered that it was "extremely severe"[400].

391. The judges of the Court of Justice answered in the case of *El Dridi* (2011) that the principle of proportionality, when applied to restrictive measures, must be understood as the necessity to follow a gradation in the degree in which personal liberty is limited.

> "The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages"[401].

392. Moreover, quoting the case-law of the European Court of Human Rights[402] on its understanding of the content of the proportionality principle, the Court of Justice considered that it was twofold. It entailed that the detention only lasts as long as a deportation or extradition procedure is under way and that the overall duration does not exceed a reasonable length of time.

> "Directive 2008/115 is thus intended to take into account […] the case-law of the European Court of Human Rights, according to which the principle of proportionality required that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued" [403].

393. This meaning of the proportionality principle does not create a new basis for the review by the Court and is more or less limited to a reformulation of the content of the Directive, which already states these conditions. Therefore, if it can easily be said that there is

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principle that the penalty must be proportionate, appropriate and reasonable" *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§23).

[400] "A term of imprisonment of one to four years seems, moreover, to be extremely severe", *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§ 24).

[401] *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§41).

[402] Notably *Saadi v The United Kingdom*, Application no. 13229/03, Grand Chamber, 29 January 2008 ECLI:CE:ECHR:2008:0129JUD001322903

[403] *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§ 43).

a close link between the case-law of the European courts, it cannot be said to enhance the level of protection of the right to liberty and security of third-country nationals. This conclusion is particularly appalling insofar as the Court of Justice had the means to stand up and remodel domestic criminal law systems. As a matter of fact, in the same decision, the Court formally acknowledges the considerable influence that European law has – through common rules on irregular migration – on national criminal law and procedure[404]. The Court could have made use of the path opened by the Directive, and the leeway given by the applicability of the proportionality principle to scrutinise more severely national criminal law provisions. Thus, even though the Court did rule that Directive 2008/115 precludes the application of this criminal law sanction[405], it was not on the basis of the disproportionate character of the measure but on the basis of the fact that this disposition would endanger the realization of the Directive's aim: the removal of the undocumented migrant out of the European space.

Paragraph 2: The protective dimensions of the jurisprudence of the Court of Justice

394. However, in the recent years, some cases have shown a tendency of the Court towards a more protective approach of illegally-staying third-country nationals. Such trend is visible in the explicit references that the Court made to the imperatives of Article 5 § 1(f) of the European Convention on Human Rights (1). The tendency to affirm a high standard of protection has been even more obvious regarding rhe Court's very strict interpretation of the requirement to detain illegally-staying third-country nationals in specialized facilities (2).

[404] "It follows that, notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with European law." *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§ 54).

[405] "Consequently, the answer to the question referred is that Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provided for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period." *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§ 62).

1. The recent explicit references of the Court to the imperatives of Article 5 § 1(f) ECHR

395. In two recent cases, the Court of Justice affirmed, in principle, the alignement of its case-law to the imperatives provided for in Article 5 § 1(f) ECHR. The two cases considered below mainly regard asylum law which is, in principle, excluded from the realm of this thesis. They have been included here as they shed an interesting light on the influence of the ECHR on EU immigration law.

396. In the case of *J.N.* (2016), the Court first had to consider the effect of an asylum application on a return procedure. In this context, the Court recognized that "the introduction of an asylum application by a person who is subject to a return decision automatically causes all return decisions that may previously have been adopted in the context of that procedure to lapse"[406]. However, consistently with the rest of the case-law on Directive 2008/115, the Court reiterated that the principle of effectiveness of the return proceedings was primal

> "in any event, the principle that Directive 2008/115 must be effective requires that a procedure opened under that directive, in the context of which a return decision […] has been adopted, can be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance"[407]

397. Therefore, according to the Court, the application for asylum and the procedure related to it are nothing but a an 'interruption' within the return procedure insusceptible to inflict or modify its course, once the asylum request is denied. The Court's precision that a rejection 'at first instance' is sufficient to resume the return procedure shows the importance granted by the jurisdiction to the effectiveness of the return procedure. As a matter of fact, the Court emphasized that

> "it follows both from the duty of sincere cooperation of the Member States […] and from the requirements for effectiveness […] that the obligation imposed on the Member States […] to carry out the removal must be fulfilled as soon as possible […]. That obligation would not be met if the removal were delayed because, following the rejection at first instance of the application for international protection, a procedure

[406] *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84 (§75)
[407] *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84 (§75)

[…] could not be resumed at the stage at which it was interrupted but had to start afresh".[408]

398. But mostly, the case of *J.N* (2016) gave the Court the opportunity to rule on the intereferences of the European Convention on Human Rights on EU immigration law. It is also one of the rare occurences in which the Court of Justice considered the immigration-related detention under a different angle than merely the question of effectiveness (as will be shown in the coming sections of this Chapter). In this case, the Court first acknowledged that

"in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, […] the meaning and scope of those rights are to be the same as those laid down by that convention. Account must therefore be taken of Article 5(1) of the ECHR for the purpose of interpreting Article 6 of the Charter. In fact, the EU legislature, […] did not disregard the level of protection afforded by the second limb of Article 5(1)(f) of the ECHR"[409].

399. In the case of *J.N.* (2016), this affirmation led the Court of Justice to check the validity of a detention of a third-country national against whom a return decision had been adopted prior to the lodging of an application for asylum according to the requirements set by Article 5(1)(f) ECHR. Making explicit references to the case-law of the European Court of Human Rights, the Court of Justice held that such detention was in line with Article 5 §1(f) as long as deportation or extradition proceedings were in progress. Referring explicitly to the case-law of the European Court of Human Rights, the Court of Justice held that

"the existence of a pending asylum case does not as such imply that the detention of a person who has made an asylum application is no longer 'with a view to deportation' — since an eventual rejection of that application may open the way to the enforcement of removal orders that have already been made" [410]

400. In the case of *J.N.* (2016), the Court of Justice considered therefore that the 'interruption'of the return procedure under EU law by an asylum application which is rejected does not affect the lawfulness of the detention of the person concerned. This is so because this

[408] *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84 (§76)
[409] *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84 (§77)
[410] *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84 (§79)

succession of procedures corresponds to the requirement that "action under that procedure is still 'being taken' for the purposes of the second limb of Article 5(1)(f) ECHR"[411] according to the Court of Justice's interpretation of ECHR case-law. This reasoning of the Court of Justice may seem somewhat hazardous but it has the merit to try to align both jursirpudences on the question of immigration detention. Despite its being speculative, it opens a new field of interactions between the Courts and is therefore of particular interest.

401. In the case of *J.N.* (2016), the Court of Justice also found that the requirement set forth by Article 5(1)(f) ECHR that no element of bad faith or deception on part of the authorities could be found with regard the execution of the measures in question was satisfied. In the same way, the Court of Justice found that the 'strictly circumscribed scope of the provision' of EU law (Article 8(3) of Directive 2013/33) allowing the detention of asylum seekers was in line with the requirement that the detention be 'proportionate to the ground relied on'[412].

402. Therefore, given that the Court of Justice found that the provisions of EU law examined in this case were in line with the requirements of Article 5(1)(f) ECHR as interpreted by the European Court of Human Rights, the Court of Justice concluded to the validity of the provisions of EU law according to the standards of the Charter.

403. The second case which will be considered here is the case of *Al Chodor* (2017). In this case, the Court of Justice had to contemplate the combined impact of Article 5 § 1 (f) ECHR and Article 6 of the Charter of Fundamental Rights on the detention of an asylum applicant subject to a transfer to another EU Member Sate in the framework of the Dublin III Regulation. The Court first recalled the principle already stated in the case of *J.N* (2016) according to which the rights contained in the Charter corresponding to rights guaranteed by the ECHR were to be given the same meaning and scope. However, in the case of *Al Chodor* (2017), the Court also reminded that "EU law may provide more extensive protection"[413] and added that "account must therefore be taken of Article 5 of the ECHR as the minimum

[411] *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84 (§80)
[412] See Paragraph 81 of *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016, ECLI:EU:C:2016:84
[413] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, Case C-528/15, Second Chamber, 15 March 2017, ECLI:EU:C:2017:213 (§37).

threshold of protection"[414]. This precision given by the Court of Justice may reveal a slightly different and potentially more protective approach to detention in relation to immigration law.

404. Indeed, in this case of *Al Chodor* (2017), the Court insisted on the common objective of its case-law, of Article 6 of the Charter of Fundamental Rights and of Article 5 §1 (f) ECHR: "the protection of the individual against arbitrariness"[415]. In this context, the Court of Justice recalled the jurisprudence of the European Court of Human Rights demanding that the national law authorising the deprivation of liberty be "suficiently accessible, precise and foreseeable in its application"[416].

405. Following this reasoning and taking a rather strong stand, the Court of Justice held in *Al Chodor* (2017) that "the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness"[417]. Logically, the conclusion of the Court of Justice in the case was that the specific provision of Dublin III Regulation under scrutiny requires

> "Member States to establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond. The absence of such a provision leads to the inapplicability of [the article allowing for the detention of such individual to take place]."[418]

406. This restrictive approach towards immigration-related detention by the Court of Justice is a strong signal and may hopefully announce a slow change in the case-law of the Court.

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[414] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, Case C-528/15, Second Chamber, 15 March 2017, ECLI:EU:C:2017:213 (§37).
[415] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, Case C-528/15, Second Chamber, 15 March 2017, ECLI:EU:C:2017:213 (§39)
[416] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, Case C-528/15, Second Chamber, 15 March 2017, ECLI:EU:C:2017:213 (§38)
[417] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, Case C-528/15, Second Chamber, 15 March 2017, ECLI:EU:C:2017:213 (§40)

[418] *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, Case C-528/15, Second Chamber, 15 March 2017, ECLI:EU:C:2017:213 (§47).

2. *The strict interpretation of the Directive regarding the conditions of detention of irregular migrants in specialized facilities*

407. Stated at Article 16(1) of Directive 2008/115, the principle according to which Member States are to detain illegally-staying third-country nationals in specialized facilities has been very strictly interpretated by the Court of Justice in two recent cases. Confronted to two situations in which the Member States were trying to circumvent this rule, the Court of Justice strongly excluded any possible derogation and clarified the nature of this rule.

408. In the case of *Thi Ly Pham* (2014), the Court first considered that

> "the obligation requiring illegally-staying third-country nationals to be kept separated from ordinary prisoners […] is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive"[419].

409. Given the interpretation of the Court according to which this rule constitutes a "substantive condition' of the legality of the detention of a third country nationals for the purposes of Directive 2008/115, no derogation may be accepted.

410. In the same case of *Thi Ly Pham* (2014), the Court, taking into account the particular vulnerability of an irregularly-staying third-country national facing deportation and detention, excluded the possibility to circumvent the application of the rule even in the case where the individual had surrendered his/her right. The rule of Article 16(1) cannot allow "a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto"[420].

411. In the case of *Adala Bero* (2014), the Court recalled that the rule was "imposed upon Member States as such, and not upon the member States according to their respective

[419] *Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Case C-474/13, Grand Chamber, 17 July 2014, ECLI:EU:C:2014:2096 (§21)
[420] *Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Case C-474/13, Grand Chamber, 17 July 2014, ECLI:EU:C:2014:2096 (§23).

administrative or constitutional structures"[421]. Therefore, this obligation was to be enforced "even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility"[422].

Conclusion of Section 3

412. By refusing to review the proportionate character of the criminal sanction, the Court can be said to consider either that nationals of the Member States deserve more protection – hence a stricter judicial control – than third-country nationals or that the proportionate or non-proportionate nature of the deprivation of liberty depends on the nationality of the person committing the offence. This way, the Court's refusal to apply the proportionality test could be interpreted as recognizing that not being a European Union citizen is an aggravating circumstance. While the recent evolution of the jurisprudence of the Court with respect the two aspects which have just been reviewed may mitigate this affirmation, the following Section 4 emphasizes how the principle of effectiveness has been used in a teleological way by the Court of Justice.

Section 4: The biased use of the principle of effectiveness of EU law by the Court of Justice

413. The use of the principle of effectiveness – "a very slippery concept in itself"[423] - by the Court of Justice is far from being new and the evolution of its uses, significations and textual origins have been largely studied allowing for a general definition to emerge (Paragraph 1). However, its application in the context of the legality control of detention of third-country nationals is conceivably instrumental for various reasons. First, the Court read it

[421] *Adala Bero v Regierungspräsidium Kassel* (C-473/13), *and Ettayebi Bouzalmate v. Kreisverwaltung Kleve* (C-514/13), Joined Cases C-473/13 and C-514/13, Grand Chamber, 17 July 2014, ECLI:EU:C:2014:2095 (§28)

[422] *Adala Bero v Regierungspräsidium Kassel* (C-473/13), *and Ettayebi Bouzalmate v. Kreisverwaltung Kleve* (C-514/13), Joined Cases C-473/13 and C-514/13, Grand Chamber, 17 July 2014, ECLI:EU:C:2014:2095 (§32)

[423] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 55).

as an empty concept whose invocation could be tailored to suit any aim pursued by a given piece of legislation (Paragraph 2). Second, the incompatibility of certain provisions of national criminal law with EU legislation in the name of effectiveness allowed for a case-law whose protective characteristic were illusory because of the flawed motive on which the cases have been decided (Paragraph 3). Lastly, this narrow – and arguably erroneous – interpretation led not only to the formation of a much less protective control of the legality of detention but also to a weaker protection of the irregular migrants' fundamental rights (Paragraph 4).

Paragraph 1: A general definition of the effectiveness principle in EU law

414. As shall be demonstrated, the effectiveness principle is a multifaceted notion[424]. In this framework, although one could argue that the role of effectiveness as a "governing principle for deciding whether Community action in a given area is justified at all"[425] is pertinent, this function is not directly relevant for the following analysis. Of particular use in the area of EU criminal law where it plays a significant role as "part of the subsidiarity and proportionality test in whether to exercise any competences"[426], it appeared in a completely different light in the case-law on the interpretation of Directive 2008/115. In this context, the effectiveness principle came forth, first and foremost as an "enforcement mechanism"[427] (1) whose intrinsic ambiguity (2) allows it to serve any number of objectives (3) which constitutes its main weakness (4).

1. The textual origins of the effectiveness principle as an enforcement mechanism

415. Although the effectiveness principle is a long standing one and has been said to

[424] Regarding the notion of effectiveness in European Union Law, other recent and relevant studies are worth mentioning here. They include BOUVERESSE, Aude; RITLENG Dominique. *L'effectivité du droit de l'Union européenne* Bruylant: Bruxelles, 2017, 253 p. and KJAER, Anne Lise; SADL Urska; PANAGIS, Ioannis-Damastianos, "Effectiveness" Patterns in the Case Law of the CJEU and the ECtHR: The Impact of Neoliberal Discourse on European Law' *International Journal for Language and Law,* 2019.

[425] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 46).

[426] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 57).

[427] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 42).

be implicitly evoked at Article 4 § 3[428] and tightly linked to the neighbour notion of loyalty, it is, since the Lisbon Treaty, expressly enshrined at Article 13 § 1 of the Treaty on European Union which recognises its existence in the realm of European Union law: "The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."

416. According to this formulation then, the effectiveness principle is understood as an instrument of compliance of EU law along with principles aiming to preserve the coherence of its development. From there on, "there is no doubt that 'effectiveness' is of crucial importance to the survival of the EU legal system through its role as an extended EU law control instrument policing the national legal spheres"[429]. Its use by the Court confirms it in so far as it has become "an umbrella label which, generally speaking, requires that national remedies and procedural rules must not, in practice, render their beneficiaries' enjoyment of Community rights excessively difficult"[430]. As a privileged instrument of interpretation of norms, the notion did not, however, lose its inherent indefiniteness.

2. *The intrinsic ambiguity of the effectiveness principle*

417. Both from the wording of the Treaty and from the use by the Court of the principle, "legitimate doubt can be entertained as to whom the effectiveness requirement is addressed: does it mean 'effective' from the perspective of the person concerned or 'effective' from the point of view of protecting the maximum enforcement of Community law ?"[431]. In other words, the question can be asked whether the only aim of the principle is an objective implementation of EU law or whether there is also an ethical and subjective component contained. Though no clear-cut answer can be given, it can reasonably be assumed from the

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[428] "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". Article 4 § 3 TUE.

[429] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 43).

[430] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 46).

[431] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 44).

analysis below that in the framework of the case-law on Directive 2008/115, the Court has largely privileged a functional and pragmatic vision of the principle to the risk of rendering it purely utilitarian. Nonetheless, the semantic problem remains to the extent that "it is doubtful whether 'effectiveness' constitutes the right label, as effectiveness in the context of state liability means judicial protection of rights while effectiveness as a compliance question constitutes an enforcement issue"[432]. It shall be argued that the mutable quality of the concept has facilitated its employment as a tool to enforce a certain vision of the underlying political choices that EU law in this area inevitably conveys.

3. *The variable nature of the notion of effectiveness*

418. Quite apart from its ambiguous nature, the understanding of the principle is problematic in so far as it "is not a 'uniform' concept. On the contrary, effectiveness may have very different 'qualities' depending on what the EU is trying to achieve"[433]. This malleability is due to the fact that it is essentially an empty concept whose role is to orientate the interpretation of EU law and dictate the specific obligations of the Member States every time it is invoked and whichever area of EU law is touched upon. This makes it obviously enough a very convenient instrument for the Court of Justice to self-justify its interpretation of EU law. Its shapelessness, in this perspective, represents a great asset for the Court which has abundantly used it in the case in point. As has been rightly noted, according to this analysis, "effectiveness could simply be accepted as a changeable concept […] as such capable of use in a multitude of ways by the Court"[434].

4. *Its consequent weakness*

419. However, the very fact that it is multiheaded constitutes at the same time its major defect. Indeed, "it is sometimes argued that the fact that the aspiration for 'effectiveness' of EU law relies on the principle of effectiveness, is its main weakness"[435]. The principal risk of this opportunistic and utilitarian use of the principle is that if

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[432] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 50).
[433] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 45).
[434] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 50).
[435] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 43).

effectiveness "simply requir[es] the proper application of Community law [o]bviously, it is easy to become caught in circular reasoning"[436]. As some authors have bluntly put it "somewhat provocatively, it could be said that it appears as if 'effectiveness' has become an objective in its own right"[437]. This predictable peril related to the systematic recourse to effectiveness as sole justification of a case-law of exception is exemplified in the interpretation of Directive 2008/115. As Article 15 of the Directive has been interpreted entirely in the light of the objective that this piece of legislation was – according to the Court – following, the result is a far-fetched and unconvincingly argued reasoning.

Paragraph 2: The effectiveness principle as an instrument serving the aim of Directive 2008/115

420. Despite its quasi monopolistic use as a legitimating concept of the Court's interpretation, the principle of effectiveness itself is relatively absent from the very wording of Directive 2008/115 (1), leaving a large margin to the Court to propose its own definition of the concept (2) which largely resorted to an appreciation of the objectives that this legislation was pursuing (3).

1. The infrequent occurrence of the effectiveness principle in the wording of the Directive

421. While the Court refused to strictly enforce the exigency of proportionality, it based its legal reasoning justifying the deprivation of liberty of irregular migrants on the principle of effectiveness of European law in general and of Directive 2008/115/EC in particular. Astonishingly however, the principle is pretty much absent from the text of the Directive and is explicitly mentioned only once in the Preamble, along with the principle of proportionality and precisely in the context of 'coercive measures': "The use of coercive measures should be expressly subject to the principles of proportionality and *effectiveness*[438]

[436] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 45).
[437] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 76).
[438] All emphases have been added by the author.

with regard to the means used and objectives pursued"[439].

422. On the other hand, the idea of effectiveness is underlying the whole legislation which inscribes itself, in the line of the Brussels European Council of 4 and 5 November 2004 which "called for the establishment of an *effective* removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity."[440]

423. Interestingly, while the Court has mainly – if not only – retained effectiveness as a way to lower the protection of fundamental rights of illegally-staying third-country nationals, the Directive also invokes effectivity to uphold essential guarantees as in the context of legal aid where it provides that "a common minimum set of legal safeguards on decisions related to return should be established to guarantee *effective* protection of the interests of the individuals concerned"[441] as well as in the context of control mechanisms in which "Member States shall provide for an *effective* forced-return monitoring system"[442] or in the area of remedies where it considered that "the third-country national concerned shall be afforded an *effective* remedy to appeal against or seek review of decisions related to return"[443].

424. In the same perspective and as noticed previously, the recourse to detention has been explicitly subjected to both the principle of proportionality and implicitly to the one of effectiveness in the Preamble of the Directive:

> "The use of detention for the purpose of removal should be limited to the principle of proportionality with regard to the means used and *objectives* pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient"[444].

425. It has also been explicitly reaffirmed at Article 15 governing the rules and conditions of detention prior to removal: "Unless other sufficient but less coercive measures can be applied *effectively* in a specific case, Member States may only keep in detention a

[439] Recital 13 of Directive 2008/115.
[440] Recital 2 of Directive 2008/115.
[441] Recital 11 of Directive 2008/115.
[442] Article 8 § 6 of Directive 2008/115.
[443] Article 13 § 1 of Directive 2008/115.
[444] Recital 16 of Directive 2008/115.

third-country national who is the subject of return procedures"[445].

426. While the proportionality principle has been remarkably ignored by the Court of Justice[446], the effectiveness principle has been extensively relied upon to justify important modifications of the criminal law of the Member States.

2. *A contextual definition of the effectiveness principle in the framework of the case-law on the interpretation of Directive 2008/115*

427. Being *par excellence* the argument used by the Court of Justice to auto-legitimate its interpretation, a definition of the principle would have been welcome, in particular given the absence of a consensual doctrinal one. Yet, one would be hard-pressed to find any trace of it in the case-law of the Court of Justice on Directive 2008/115. Indeed, drawing from the principle of sincere cooperation of Article 4 § 3 TEU, the Court of Justice only gave some elements on the effectiveness principle as containing a threefold obligation for the Member States.

428. It consists, firstly, in the primary obligation to take positive steps to ensure that EU law is fully implemented. As stated by the Court in the case of *Maria Pupino* (2005):

> "[i]t would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters"[447].

429. Secondly, it classically comprises a negative duty to refrain from taking actions or passing legislations which may limit or otherwise threaten the application of EU law.

430. Thirdly the principle of effectiveness has been liberally understood as entailing, in certain cases – like in the ones which will follow – a modification of existing criminal law provisions whose application contradicts the objective that EU law wishes to achieve. What could be considered as an indirect extension of EU competences has been the

[445] Article 15 § 1 of Directive 2008/115.
[446] See previously in Chapter 2.
[447] *Maria Pupino,* Case C-105/03, Grand Chamber, 16 June 2005, EU:C:2005:386, ECR 2005 I-05285 (§42).

main transformative power relied on by the Court to impose its vision of a common European return policy. As was clearly formulated by the Court of Justice in the case of *Achughbabian* (2011):

> "whilst, in principle, criminal legislation and the rules of criminal procedure fall within the competence of the Member States, this area of law may nevertheless be affected by EU law. Therefore, notwithstanding the fact that [nothing] […] precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with EU law. Those States cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness."[448]

431. Still, if the effectiveness principle allows for such a leeway, it also presupposed the prior identification and acknowledgement, by the Court of Justice, of a specific aim allegedly pursued by the European norm in question.

3. The identification by the Court of Justice of one sole objective of the Directive

432. The unique goal of Directive 2008/115 is, according to the Court, the removal of the third-country national outside the borders of the territory of the European Union through the imposition of common standards in the return procedure. As unmistakably identified by Advocate General Mazak in the case of *El Dridi* (2011):

> "Directive 2008/115 has as its objective, as is apparent both from recitals 2 and 20 in the preamble and from Article 1, to establish common rules concerning return, removal, use of coercive measures, detention and entry bans with respect to third-country nationals illegally staying on the territory of a Member State which should serve as the basis of an effective removal policy."[449]

433. While such interpretation is hardly debatable as the Preamble of the Directive illustrates it, removal of irregular migrants was neither the sole nor the unconditioned aim of this piece of legislation. Notably, this objective was to be integrated within a "well-managed

[448] *Achughbabian v Préfet du Val de Marne,* Case C-329/11, Grand Chamber, 6 December 2011, EU:C:2011:807, ECR 2011-00000 (§ 33).

[449] View of Advocate General Mazak delivered on 1 April 2011, *El Dridi,* Case C-61/11 PPU, EU:C:2011:205 (§9).

migration policy"[450], counterbalanced by "fair and efficient asylum systems"[451], surrounded by a certain number of guarantees for person subjected to the removal[452] and take place in the framework of "a fair and transparent procedure"[453]. For this reason, the Court of Justice could have analyzed the aim of Directive 2008/115 as being multiple and comprising the will to strike a balance between the public interest of the Member States and the rights of irregular migrants. Such a perspective could have allowed for a more protective case-law.

434. However, the only changes which did occur in the appreciation of the objective of the Directive were cosmetic changes consisting in a slight adjustment of the vocabulary used and the addition that the procedure should be respectful of fundamental rights[454]. Replacing the word "removal" by "return" might have meant to convey the idea that such process was part of a larger policy aimed at encouraging would-be migrants to stay in their country of origin[455].

435. Lastly, it should be noted that despite the fact that the Court always used the principle of effectiveness to corroborate the line it had chosen and thus serve to justify any decision leading to the effective removal of a third-country national outside the boundaries of

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[450] "Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy". Recital 4 of Directive 2008/115.

[451] "It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement". Recital 8 of Directive 2008/115:

[452] "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". Recital 24 of Directive 2008/115

[453] "Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive". Recital 6 of Directive 2008/115.

[454] "The objective of Directive 2008/115, as is apparent from recitals 2 and 20 and from Article 1 thereof, is to establish common rules concerning return, removal, use of coercive measures, detention and entry bans in relation to third-country nationals staying illegally in the territory of a Member State, such rules to serve as the basis for an effective *return* policy, *complying with fundamental rights"* View of Advocate General Mazak delivered on 26 October 2011, *Alexandre Achughbabian v. Préfet du Val-de-Marne*, Case C-329/11, EU:C:2011:694 (§8).

[455] For more details on the external dimension of the European Union migration policy, see ADEPOJU Aderanti, VAN NOORLOOS Femke, ZOOMERS Annelies « Europe's Migration Agreement with Migrant-Sending Countries in the Global South: A Critical Review », *International Migration,* Vol. 48 (3), 2010 and BOWELL Christina « The 'external dimension' of EU immigration and asylum Policy » *International Affairs* 79, 3, 2003 (p. 619- 638) or GUILD Elspeth « What is a Neighbour? Examining the EU Neighbourhood Policy from the Perspective of Movement of Persons », 10 June 2005 as well as Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries, and Council Document 14673/02 on the Return Action Programme.

the European Union, national courts have given a different reading of the principle. As exemplified by three cases presented by the Giudice di Pace di Revere in Italy, the effectiveness principle was also understood as impeding a Member State to implement a legislation ignoring the protection of the rights of third-country national which is contained in the Directive[456]. This can serve to illustrate that the concept of effectiveness can be filled with various significance and shaped according to the purpose pursued.

Paragraph 3: The prohibition of certain practices in the name of effectiveness: a protective case-law?

436. In the preliminary rulings which led to a judgment of the Court of Justice of the European Union on the interpretation of Directive 2008/115, the Court of Justice sometimes found that national law was incompatible with EU law. Those cases occured in situations in which national laws were trying to circumvent the application of the guarantees provided for by the Directive.

437. The Court of Justice has obviously been the guardian of the rights granted by the Directive. However, as it did so under the heading of the effectiveness principle, it weakened the protective connotation of its case-law. Indeed, whilst the maximum duration of the pre-removal detention (1) and the conditions of application of the entry ban (2) appear to be inspired by more legitimate concerns of respect for human rights of third-country nationals, the prohibition of criminal law detention in the course of the return procedure (3) appears to be the sole consequence of the effectiveness principle, rendering its protecting effect mostly fortuitous. In the same way, the prohibition of national legislations providing for an alternative sanction to the removal of an irregularly staying third-country national appears to be affirmed only for the sake of effectiveness (4).

438. For this reason, (combined with the elements previously analysed), the general

[456] "A la lumière des principes de coopération loyale et d'effet utile des directives, les articles 2, 15 et 16 de la directive 2008/115 […] s'opposent-ils à ce que, après l'adoption de [cette] directive, un Etat membre puisse édicter une règle prévoyant de frapper un ressortissant d'un pays tiers dont l'Etat membre en cause considère le séjour comme irrégulier, d'une amende à laquelle se substitue une expulsion directement exécutable, à titre de sanction pénale, sans aucun respect de la procédure ni des droits des étrangers prévus par [ladite] directive ?" - *Majali Abdel,* Case C-75/12, Order of the Fifth Chamber, 4 July 2012, EU:C:2012:412 (§ 3).

line of the case-law of the Court of Justice in the framework of Directive 2008/115 can be said to be at best wavering and at worst in contradiction with the principles dictated by the Charter of Fundamental Rights of the European Union which it is supposed to guarantee.

1. The eighteen months' absolute limit of the duration of pre-removal detention

439. In the first case to arrive before the Court of Justice, both the specific aims of some Articles of the Directive as well as its overall goal were held to be decisive elements to firmly affirm that no detention longer than eighteen months could take place in the framework of the return procedure. In doing so, the Court held in the case of *Kadzoev* (2009) that the objectives of Article 15 of the Directive 2008/115 were the establishment of a common maximum period of pre-removal detention serving the purposes of creating a uniform return procedure in the European Union while ensuring that the infringement of the right to individual freedom is kept within reasonable temporal limits. In this case, the Court stated that

> "If it were otherwise, the duration of detention for the purpose of removal could vary sometimes considerably, from case to case within a Member State or from a Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter the objective pursued by Article 15 (5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States"[457].

440. This finding, largely imposed by the wording of the Directive, was commendable inasmuch as it allowed to conciliate the imperative dictated by the political choice of putting into place an efficient procedure to return unwanted migrants and the imperative of upholding one of the basic right of third-country nationals. The idea, as formulated by the Court in the case of *Kadzoev* (2009), was that "those provisions [should] be understood […] as stating the maximum acceptable period of detention, namely that 'no-one can be detained for the purpose of removal for more than 18 months'"[458]. In this context then, as formulated by Advocate General Mazak in the same case, "the objective of the provisions relating to the setting of maximum periods of detention for the purpose of removal […] includes ensuring that the individual concerned can enjoy his fundamental right of freedom,

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[457] *Said Shamilovich Kadzoev (Huchbarov),* Case C-357/09 PPU, Grand Chamber, 30 November 2009, EU:C:2009:741, ECR *2009 I-11189* (§ 54).

[458] *Said Shamilovich Kadzoev (Huchbarov),* Case C-357/09 PPU, Grand Chamber, 30 November 2009, EU:C:2009:741, ECR *2009 I-11189* (§65).

any exception being subject to strict conditions."[459]

2. *The strict rules of application of entry bans*

441. In the same line of thought, the Court defended a strict interpretation of the rules of Article 11 of Directive 2008/115[460] according to which entry bans were a mere possibility apart from two cases in which they were mandatory and that they shall not, in principle, exceed 5 years. Entry bans on the territory of the European Union being another restriction of an individual's right to freedom, the Court considered that the interference ought to be limited in time. This obligation ran against the German legislation according to which no time limit to the effect of the entry ban shall be fixed unless the third-country national made an application to such a limitation[461]. In addition, German law provided that "no time limit shall be applicable where the foreign national has been removed on account of a crime against peace, a war crime or a crime against humanity"[462]. In this context, the Court held in the case of *Gjoko Filev* (2013) that German law was incompatible, since "the act of making in

[459] View of Advocate General Mazak delivered on 10 November 2009, *Kadzoev*, Case PPU-357/09, EU:C:2009 :691, ECR 2009I-11189 (§66).

[460] Article 11 Dircetive 2008/115: "Return decisions shall be accompanied by an entry ban:
(a) if no period for voluntary departure has been granted, or
(b) if the obligation to return has not been complied with.
In other cases, return decisions may be accompanied by an entry ban.
2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.
3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.
Victims of trafficking in human beings who have been granted a residence permit pursuant to 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 (1) shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.
Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.
Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.
4. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third- country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement (2).
5. Paragraphs 1 to 4 shall apply without prejudice to the right to international protection, as defined in Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (3), in the Member States".

[461] *Gjoko Filev, Adnan Osmani,* Case C-297/12, Fourth Chamber, 19 September 2013, EU:C:2013:569 (§20).

[462] *Gjoko Filev, Adnan Osmani,* Case C-297/12, Fourth Chamber, 19 September 2013, EU:C:2013:569 (§8).

national law the benefit of a limitation of the length of an entry ban subject to the making of an application by the third-country national concerned is not sufficient to meet the objective of Article 11(2) of Directive 2008/115."[463] The Court then went on to state that said "objective consists inter alia in ensuring that the length of an entry ban does not exceed five years, except if the person concerned constitutes a serious threat to public order, public security or national security".[464] For this reason, the Court considered that the fact that it was the third-country national's choice or possibility to make the application that conditioned the effective implementation of EU law was insufficient to render it compatible. In doing so, it showed an unusually realistic view on the way that this provision would actually be applied and the consequent systematic deprivation of a right initially granted by the Directive.

> "Even supposing that national law provides […] that the third-country national concerned is made aware of the possibility of applying for the length of the entry ban to which he is made subject to be limited and that competent national authorities consistently comply with their duty to make the relevant third-country national aware of that possibility, there is nonetheless no guarantee that such an application will actually be made by that national. In the absence of such an application, the objective of Article 11(2) of Directive 2008/115 cannot be considered as having been achieved."[465]

442. In applying such a high standard of requirement, the Court insured the actual application of EU law as well as an effective protection of the procedural guarantees accompanying the establishment of a common return system. This balanced reasoning was not, unfortunately, the one followed by the Court on the question of criminal law detention in the course of the return procedure in which the Court's only concern appeared to be the swift removal of the irregularly staying immigrant.

3. *The proscription of criminal law detention in the course of the return procedure*

443. In terms of the legal basis used to justify that imprisonment resulting from a criminal sanction could not be carried out during the course of the return procedure, the Court of Justice considered in the case of *Achughbabian* (2011) that it is only in the name of the effectiveness principle that such detention was prohibited.

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[463] *Gjoko Filev, Adnan Osmani,* Case C-297/12, Fourth Chamber, 19 September 2013, EU:C:2013:569 (§31).
[464] *Gjoko Filev, Adnan Osmani,* Case C-297/12, Fourth Chamber, 19 September 2013, EU:C:2013:569 (§32).
[465] *Gjoko Filev, Adnan Osmani,* Case C-297/12, Fourth Chamber, 19 September 2013, EU:C:2013:569 (§33).

"It follows both from the duty of the Member States and the requirements of effectiveness […] that the obligation imposed on the Member States […] to carry out removal, must be fulfilled as soon as possible. That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member States were to preface the implementation of the return decision, or even the adoption of that decision, with criminal prosecution followed, in appropriate cases, by a term of imprisonment. Such a step would delay the removal"[466].

444. The insistence unquestionably put by the Court of Justice on the unacceptability of any delay in the return process, though leading to a prohibition of detention as criminal sanction in the framework of the Directive is much less protective than what spontaneously meets the eye. Since the underlying motive justifying that choice is – contrary to the reasoning on the maximum length of pre-removal detention – the need to proceed, as fast as possible to the "the physical transportation of the relevant individual out of the Member State concerned"[467] as what formulated by the Court of Justice in the case of *Md Sagor* (2012) the protection adfforded is merely a collateral effect of the application of the effectiveness principle.

445. As expressed by Advocate General Mazak in his opinion in the case of *El Dridi* (2011), in this context, the effectiveness principle merely meant the speedy execution of the procedure

"the term of imprisonment provided for in the event of failure to comply with an order of the public authority to leave the national territory within a specified period objectively prevents the enforcement of that return decision, albeit only temporarily. That is certainly not characteristic of the effective return policy which Directive 2008/115 seeks to achieve. Indeed, the legislation providing for the penalty in question deprives Article 8(1) of Directive 2008/115, read in conjunction with Article 15 of that directive, of its practical effect."[468]

446. Moreover, in a strangely executed balancing act, Advocate General Mazak

[466] *Achughbabian v Préfet du Val de Marne,* Case C-329/11, Grand Chamber, 6 December 2011, EU:C:2011:807, ECR 2011-00000 (§ 45).
[467] *Md Sagor,* Case C-430/11, First Chamber, 6 December 2012, EU:C:2012:777 (§ 44).
[468] View of Advocate General Mazak delivered on 1 April 2011, *El Dridi,* Case C-61/11 PPU, EU:C:2011:205 (§42).

estimated in the same case of *El Dridi* (2011) that priority ought to be given to the expeditiousness of the removal process to the detriment of the upholding of public order at a national level.

> "An offence such as that at issue in the present case, namely failure to comply with the decision of the public authority, is designed to protect and also to maintain the authority of the public powers by using criminal-law measures. None the less, it is apparent that the drafters of Directive 2008/115 were more concerned with an effective return policy than with protecting the authority of the public powers by providing […] for detention for the purpose of removal. The Italian legislation, by contrast, gives priority to the authority of the public powers over an effective return policy, by providing in the same situation for a term of imprisonment and therefore deprives Article 15 of Directive 2008/115 of its practical effect."[469]

447. While the supremacy of EU law is genrally held to be indisputable, the directness of this assertion in a context where domestic criminal law provisions unveil such greatly sensitive political choices seems somewhat adventurous. Nevertheless, the Court of Justice followed in the case of *El Dridi* (2011) – in a less venturous formulation – the idea put forward by the Advocate General.

> "Such a penalty, due *inter alia* to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals. In particular […] national legislation such as that at issue in the main proceedings is liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay the enforcement of the return decision."[470]

448. Consistently with the reasoning followed in this case and established as a constant jurisprudence, the Court of Justice developed its reasoning in two other cases.

449. The first one was brought by the Tribunal of Florence in the case of *Celaj* (2015). In this case, the Court had to examine the compatibility of the Italian legislation

[469] View of Advocate General Mazak delivered on 1 April 2011, *El Dridi,* Case C-61/11 PPU, EU:C:2011:205 (§44)

[470] *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§ 59).

providing for detention as a criminal law sanction for the illegal re-entry on the territory of a Member State of an irregularly-staying third-country national who had already been subject to a return procedure. The Court logically held that Directive 2008/115 does not preclude " the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban"[471].

450. In the case of *Celaj* (2015), only two rather formal conditions were given for such provision to be compatible with relevant EU law. First, the Court demanded the respect of the rules of the Return Dircetive concerning entry bans stating that the provision under scrutiny was "admissible only on the condition that the entry ban issued against the national complies with Article 11 of that directive, a matter which is for the referring court to determine"[472].

451. Second, the Court recalled in a laconic phrase that

> "the imposition of such a criminal law sanction is moreover subject to full observance both of fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and, as the case may be, of the Geneva Convention".[473]

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452. These two very easily satisfied requirements cannot be considered as efficient safeguards of the rights of irregularly-staying third-country nationals. The general impression of the case is the re-affirmation of the sole objective pursued by EU law: the actual return of irregular-migrants and when such return failed, the establishement of a criminal policy aiming at deterring any irregular entry or stay in the EU.

453. The last case considered here which confirmed the line chosen by the Court was brought against France. In this *Affum* case (2016), the Grand Chamber held again that the Return Directive proscribes the

> "legislation of a Member State which permits a third country national in respect of whom the return procedure established by that directive has not yet been completed to be imprisoned merely on account of illegal entry across an internal border, resulting in

[471] *Skerdjan Celaj*, Case C-290/14, Fourth Chamber, 1 October 2015, ECLI:EU:C:2015:640 (§33)
[472] *Skerdjan Celaj*, Case C-290/14, Fourth Chamber, 1 October 2015, ECLI:EU:C:2015:640 (§31)
[473] *Skerdjan Celaj*, Case C-290/14, Fourth Chamber, 1 October 2015, ECLI:EU:C:2015:640 (§32)

an illegal stay. That interpretation also applies where the national concerned may be taken back by another Member State pursuant to an agreement or arrangement"[474] under the Dublin Regulations.

454. In this case of *Affum* (2016), the Court also had to give a definition of the notion of illegal entry, stay or residence as the French government tried to exclude the application of Directive 2008/115 by arguing that a mere transfer of an irregular migrant on the territory of a Member State was falling outside the scope of application of the Directive. The idea was obviously that it would have allowed that Member State to take criminal sanctions (including detention) against such irregular migrant. The Court therefore chose to give a rather large definition of the notion of 'irregularly-staying third country national'. The Court stated that

> "any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory. Nor is the fact that such presence is merely temporary or by way of transit among the grounds, […] on which Member States may decide to exclude an illegally staying third-country national from the directive's scope."[475]

455. Therefore, "since a third-country national travelling on a bus across the territory of a Member State in breach of the conditions for entry, stay or residence is clearly present on its territory, he is staying there illegally"[476]. This large definition of the notion allows to include in the field of application of the Directive as many situations as possible and therefore ensures the largest possible application of the common return procedure to irregularly-staying third-country nationals in the Member States.

456. Concerning the question of detention of irregularly-staying third-country nationals falling under the scope of application of the Directive, the Court recalled in the case of *Affum* (2016) its constant jurisprudence

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[474] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§93).
[475] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§48)
[476] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§49)

> "such a third-country national must be the subject of a return procedure, […] which permits, so far as concerns deprivation of liberty, at the very most detention in a specialised facility, a measure which is, however, strictly regulated, […] in order to ensure observance of the fundamental rights of the third-country nationals concerned"[477]

457. The use of the expression "at the very most" and the reminder of the need to ensure "observance of the fundamental rights" of the person concern might mistakenly lead to believe that detention is not the most commonly applied measure in the course of a return procedure under the Directive. However, and as has been amply emphasized previously, and is again expressed in the following quote, the central preoccupation of the Court of Justice is the effectiveness of the return procedure:

> "the Member States cannot permit third country nationals in respect of whom the return procedure […] has not yet been completed to be imprisoned merely on account of illegal entry, resulting in an illegal stay, as such imprisonment is liable to thwart the application of that procedure and delay return, thereby undermining the directive's effectiveness"[478]

458. In order to settle once and for all the question of detention as a criminal sanction to irregularly-staying third-country nationals, the Court of Justice seized the opportunity of the case of *Affum* (2016) to state in a definitive way that

> "it must be made clear that Directive 2008/115 does not prevent the Member States from being able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed"[479]

459. Turning now to the issue of the articulation of the Return Directive with the Schengen Border Code, in the case of *Affum* (2016), the Court gave a clear-cut answer to the French government who was trying to take advantage of the combined application of both EU legal norms. The Court stated that

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[477] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§62)
[478] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§63)
[479] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§65)

"under Article 2(2)(a) of Directive 2008/115, Member States may decide not to apply the directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State."[480]

460. However, such possibility is to be interpreted strictly and is therefore limited to some very precise situations which the Court of Justice listed in this case of *Affum* (2016):

"the apprehension or interception of the third-country nationals concerned must take place 'in connection with the irregular crossing' of an external border, which […] implies a direct temporal and spatial link with that crossing of the border. That situation […] concerns third-country nationals who have been apprehended or intercepted […] at the very time of the irregular crossing of the border or near that border after it has been so crossed."[481]

461. In the case of *Affum* (2016), the Court also clarified that measures of readmission within the Schengen area were still part of the Return procedure and therefore still within the realm of application of Dircetive 2008/115 by stating that "the situation of an illegally staying third-country national who is taken back, pursuant to an agreement or arrangement […], by a Member State other than the one in which he has been apprehended remains governed by the directive"[482]. In this context, the Court recalled, once again that "the Member State concerned must, in the light of the directive's objectives, adopt that decision with diligence and speedily so that he is transferred as soon as possible to the Member State responsible for the return procedure"[483].

462. Therefore, the Member State cannot use such measures to argue the disruption of the return procedure and the following detention as a criminal law sanction of the

[480] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§68)
[481] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§72).
[482] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§86).
[483] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§87).

individual subject to such procedure. As the Court held in the case of *Affum* (2016), "not to transfer that national to the latter Member State until a sentence of imprisonment has been imposed upon him and enforced would delay the triggering of that procedure and thus his actual removal, thereby undermining the directive's effectiveness."[484]

463. The analysis of the case of *Affum* (2016) shows, that once again and consistently with all its juridprudence on the matter, the sole argument of the Court to deem the detention of an irregularly-staying third-country national contrary to EU law is that it constitutes an obstacle to the effectiveness of the return procedure established by Directive 2008/115. This can be seen as a disappointing choice of the Court of Justice which could have had regards for other questions – and notably the protection of the fundamental right to liberty of irregularly-staying third-country nationals – to soften EU migration policy.

4. *The prohibition of national legislations providing for an alternative to removal as a sanction of the illegal stay of a third country national*

464. Following the exact same reasoning as in the bundle of cases regarding detention, the Court of Justice considered that Directive 2008/115 prohibits a domestic legislation from providing for an alternative sanction to removal for the illegal stay of a third-country national.

465. In the case of *Zaizoune* (2015), involving Spanish law, the Court held that such provision

> "is likely to thwart the application of the common standards and procedures established by Directive 2008/115 and, as the case may be, delay the return, thereby undermining the effectiveness of that directive"[485] as "the two measures are mutually exclusive"[486].

466. It is therefore clear that the only reason to prohibit such type of legal norm is that it hampers the return procedure when, according to the circumstances, a fine is the chosen

[484] *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, Case C-47/15, Grand Chamber, 7 June 2016, ECLI:EU:C:2016:408 (§88).
[485] *Subdelegación del Gobierno en Gipuzkoa – Extranjería v. Samir Zaizoune*, Case C-38/14, Fourth Chamber 23 April 2015, ECLI:EU:C:2015:260 (§40)
[486] *Subdelegación del Gobierno en Gipuzkoa – Extranjería v. Samir Zaizoune*, Case C-38/14, Fourth Chamber 23 April 2015, ECLI:EU:C:2015:260 (§41)

sanction instead of removal. Following the Court's reasoning to the letter, there would probably be no question of compatibility of the Directive with a national legislation providing cumulatively a fine and the removal of the person. This is precisely why Paragraph 4 defends the idea according to which the reasoning of the Court leads to a weak protection of irregular migrants' rights.

Paragraph 4: The consequences of the Court of Justice's narrow interpretation of the Directive's objective: a weak protection of irregular migrants' rights

467. By reason of the scanty interpretation given by the Court to the objective followed by Directive 2008/115, the protection of some basic rights of irregularly-staying third-country nationals have been negatively affected. The choices made by the Court, no doubts guided – though the word might be a euphemism – by the political positions of both the Member States and the EU institutions, opened the way to a substandard protection of some fundamental rights.

468. As a matter of fact, the right to personal freedom has been restricted by the express authorization to detain under a criminal law heading any third-country national irregularly-staying on the territory of a Member State outside the scope of the Directive (1), the right of defence has been largely considered as optional (2) and last but not least, the use of the notion of 'abuse of rights' is endangering the particular protection that asylum seekers should be enjoying, as international refugee law prescribes it (3).

1. The express authorization to detain an irregularly-staying third-country on a criminal law basis outside the scope of the Directive

469. Notwithstanding the fact that detention as a criminal law sanction is prohibited in the framework of Directive 2008/115, the Court of Justice stated that the Member States were free to impose such measures once the return procedure had failed. As the Court of Justice explicitly stated in the case of *El Dridi* (2011):

> "That does not preclude the possibility for the Member States to adopt, with respect for the principles and objective of Directive 2008/115, provisions regulating the

situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory."[487]

470. This unneeded addendum to the prohibition of criminal law-based deprivation of liberty during the return procedure, is the logical consequence of the weak argument upon which the ban relied. Indeed, as has been previously demonstrated, the fact that it was the risk of hindrance of the process that made the Court swing in favour of the prohibition explains, in the same way, why the Court saw no inconvenient in an imprisonment measure once the return had failed. As the Court stated in the case of *Achughbabian* (2011):

> "Whilst it is apparent […] that Member States bound by Directive 2008/115 cannot provide for a term of imprisonment for illegally-staying third-country nationals in situations in which the latter must, by virtue of the common standards and procedures established by that directive, be removed and may, with a view to the preparation and carrying out of that removal, at the very most be ordered to be detained, that does not exclude the right of the Member States to adopt or maintain provisions, which may be of a criminal nature, governing, in accordance with the principles of that directive and its objective, the situation in which coercive measures have not made it possible for the removal of an illegally staying third-country national to be effected."[488]

471. What is manifest from this quote is that, in the logic of the Court, if removal was the sole purpose of the Directive, nothing justified the need to prohibit detention from the moment when it became clear that the given objective was unattainable. Yet, one could argue in a more humanistic perspective that nothing justified either the need for the Court to be at the same time so intrusive in and so complacent with the criminal policy of the Member States. In this regard, on the one hand this appendage was uncalled for. On the other hand, it is perfectly in line with other significant elements of its case-law, which unveils a clear disregard for some basic rights of irregularly-staying third-country nationals.

2. *The facultative respect of their rights of defence*

[487] *Hassen El Dridi alias Soufi Karim,* Case C-61/11 PPU, First Chamber, 28 April 2011, EU:C:2011:268, ECR 2011 I-03015 (§60).

[488] *Achughbabian v Préfet du Val de Marne,* Case C-329/11, Grand Chamber, 6 December 2011, EU:C:2011:807, ECR 2011-00000 (§46).

472. The right of defence[489] is guaranteed – amongst others – in the Charter of Fundamental Rights of the European Union and the respect of such right is, according to a constant case-law of the Court of Justice, a fundamental principle of EU law which comprises the right to be heard in all proceedings. However, its application in the framework of Directive 2008/115 has been restrictively interpreted by recent case-law of the Court of Justice.

473. This process took place in a context of the case of *M.G.N.R* (2013) where it was established that, since the Directive does not provide for any specific article concerning the rights of defence and is only concerned with a general clause of respect for fundamental rights[490], it was up to the Member State to ensure that the right of defence was accessible to third-country nationals whose detention order was to be renewed.

> "Where, as in the main proceedings, neither the conditions under which observance of the third-country nationals' right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by European Union law, those conditions and consequences are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (*principle of effectiveness*). Nonetheless, while the Member States *may allow* the exercise of the rights of the defence of third-country nationals under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine *the effectiveness of Directive 2008/115*." [491]

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[489] "Respect for the rights of the defence constitutes a fundamental principle of EU law, and the right to be heard in any proceedings forms an integral part of it. That right is affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration. The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely". View of Advocate General Wathelet delivered on 23 August 2013, *M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, EU:C:2013:553 (§44).

[490] This Directive sets out 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 (Article 1 Directive 2008/115).

[491] *M. G., N. R. v Staatssecretaris van Veiligheid en Justitie,* Case C-383/13 PPU, Second Chamber, 10 September 2013, EU:C:2013:533 (§35-36).

474. In the context of this case of *M.G.N.R* (2013), the Court considered that two concurring faces of the effectiveness principle led, on the one side to facilitate as much as possible the exercise of the right in question and on the other side to avoid any possible impediment to the realization of the objective of Directive 2008/115 that such an exercise might cause. This inevitably constraint the Court to appraise which 'effectiveness' deserved to be most protected bearing in mind that, according to the Court, the granting of equal conditions of exercise of the right of defence to third-country nationals was merely optional ("Member States *may* allow"). As phrased by the Advocate General in his opinion: "Although […] the general rule is indeed that the contested decisions must quite simply be annulled, it is also settled case-law that respect for the right to be heard is not an absolute requirement and may be restricted."[492]

475. Since the Court acknowledged right from the start the existence of a violation of the right to be heard, and later reckoned that respect for fundamental rights was not compulsory, the question consisted in knowing whether the objective pursued by the Directive was sufficiently important or legitimate to justify an infringement of these rights. Following closely the opinion of the Advocate General on the matter, the Court reminded in the case of *M.G.N.R*. (2013) that it is settled case-law that

> "fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."[493]

476. In order to assess the respective value of each of these imperatives, the Court added, in an astonishingly simplistic formulation, that "the removal of any illegally staying third-country national is a matter of priority for the Member States, in accordance with the scheme of Directive 2008/115"[494], as if the end could justify any means at all, including the violation of the fundamental right of an individual.

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[492] View of Advocate General Wathelet delivered on 23 August 2013, *M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, EU:C:2013:553 (§68).
[493] *M. G., N. R. v Staatssecretaris van Veiligheid en Justitie,* Case C-383/13 PPU, Second Chamber, 10 September 2013, EU:C:2013:533 (§33).
[494] *M. G., N. R. v Staatssecretaris van Veiligheid en Justitie,* Case C-383/13 PPU, Second Chamber, 10 September 2013, EU:C:2013:533 (§43).

477. Additionally – and always in the name of the effectiveness principle – in order to cover up this distorted interpretation of the theoretically compulsory nature of the obligation for Member States to ensure individuals on their territory full exercise of their fundamental rights, the Court held that detention order should be lifted only if it could be proven that the exercise of his or her right by the interested party, would have made a difference. The Court therefore held that the absence of a hearing of the person subject to the return decision in the course of the procedure did not automatically mean that his or her right of defence had been violated. As formulated in the case of *M.G.N.R.* (2013) by the Court of Justice;

> "The national court's review of an alleged infringement of the right to be heard during an administrative procedure adopting a decision to extend a detention measure […] must therefore consist in ascertaining, in the light of all of the factual and legal circumstances of each case, whether the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different."[495]

478. As the Court summarized it in the case of *Mukarubega* (2014), "the question whether there is an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case […], including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question"[496]

479. This appalling rationalization aims to conceal the fact that the mere circumstance that a person who is a vulnerable position – being held in detention – was unable to exercise his/her right of defence is in itself a violation of his/her fundamental rights, for which no convenient arrangement for the Member State should be found by the Court of Justice. However, this is what the Court decided to uphold in the name of the principle of effectiveness in the case of *M.G.N.R.* (2013):

> "To require that every infringement of the right to be heard automatically brings about the annulment of the decision extending the detention and the lifting of that measure, even though such a procedural irregularity might actually have had no impact on that

[495] *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie,* Case C- 383/13 PPU, Second Chamber, 10 September 2013, EU:C:2013:533 (§44).

[496] *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Case C-166/13, Fifth Chamber, 5 November 2014, ECLI:EU:C:2014:2336 (§54).

extension decision and the detention fulfils the substantive conditions laid down in Article 15 of Directive 2008/115, would be liable to undermine the effectiveness of the directive."[497]

480. The following case of *Mukarubega* (2014), gave the Court the opportunity to give additional precisions on its interpretation of the right to be heard in the course of return proceedings. The Court began by recalling the nature of the right to be heard which "guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely"[498]. More specifically, the Court reminded that the aim was that

> "the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person concerned is in fact protected, the purpose of that rule is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content"[499]

481. In the context of the case of *Mukarubega* (2014), the Court held that the practical obligation falling on the national authorities consisted in an obligation

> "to pay due attention to the observations […] submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision […] the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence"[500]

482. The affirmation by the Court of the existence of a 'corollary' obligation to give a detailed motivation for the decision taken is interesting as it has been given little attention in

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[497] *M. G., N. R. v Staatssecretaris van Veiligheid en Justitie,* Case C-383/13 PPU, Second Chamber, 10 September 2013, EU:C:2013:533 (§41).

[498] *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Case C-166/13, Fifth Chamber, 5 November 2014, ECLI:EU:C:2014:2336 (§46)

[499] *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Case C-166/13, Fifth Chamber, 5 November 2014, ECLI:EU:C:2014:2336 (§47)

[500] *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Case C-166/13, Fifth Chamber, 5 November 2014, ECLI:EU:C:2014:2336 (§48)

the context of the Return Directive. While one can have reasonable reasons to doubt the reality of its application (see in particular the previsous study on the case-law of the Italian Justice of the Peace), the mere jurisprudential recognition of such an obligation is praiseworthy.

483. The Court also seized the opportunity to remind Member States that "observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement"[501]. This duty translates in the fact that "when the authorities of the Member States take measures which come within the scope of EU law, they are, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests"[502]. This reminder appears to be made with a view to reinforce the application of the rights of defence of irregularly-staying third-country nationals in the framework of return proceedings. However, the addition of the word 'significantly' by the Court is somewhat puzzling as the threshold is usually merely set to require that interests must be 'affected' by a decision. Does it mean that the Court intended to raise that threshold? The question is open to debate until further jurisprudence on this specific matter.

484. Further details concerning the practical application of the right to be heard were given in the framework of Directive 2008/115 in the case of *Boudjlida* (2014). In this case, the Court, maintaining the line established in the previous cases held that the right to be heard

> "does not require a competent national authority to warn the third-country national, prior to the interview arranged with a view to that adoption, that it is contemplating adopting a return decision with respect to him, or to disclose to him the information on which it intends to rely as justification for that decision, or to allow him a period of reflection before seeking his observations, provided that the third-country national has the opportunity effectively to present his point of view on the subject of the illegality of his stay and the reasons which might, under national law, justify that authority refraining from adopting a return decision".[503]

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[501] *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Case C-166/13, Fifth Chamber, 5 November 2014, ECLI:EU:C:2014:2336 (§49)

[502] *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis,* Case C-166/13, Fifth Chamber, 5 November 2014, ECLI:EU:C:2014:2336 (§50)

[503] *Khaled Boudjlida,* Case C-249/13, Fifth Chamber, 11 December 2014, EU:C:2014:2431 (§69)

485. While this finding cannot be deemed surprising considering the previous case-law of the Court on the matter, the second conclusion of the Court can amount to a new restriction on the right to be heard.

486. As a matter of fact, in the same case of *Boudjlida* (2014), the Court of Justice held that

> "an illegally staying third-country national may have recourse, prior to the adoption by the competent national authority of a return decision concerning him, to a legal adviser in order to have the benefit of the latter's assistance when he is heard by that authority, provided that the exercise of that right does not affect the due progress of the return procedure and does not undermine the effective implementation of Directive 2008/115".[504]

487. This new restriction allowed by the Court of the right of defence does not concern this time the right to be heard but the effective access to an attorney itself. As it has been amply seen before in the study of the case-law of the Justice of the Peace, the access a legal adviser is highly problematic and cannot be considered as an acquis in most cases before this jurisdiction which gives priority to the velocity of the procedure. The recognition of the legality of such practice by the Court is however surprising and highly debatable.

488. It can therefore generally be considered that the content and application of the right of defence are dictated solely by the "objective of Directive 2008/115, namely, the effective return of illegally-staying third-country nationals to their countries of origin"[505]. Given that, as recalled in the case of *M.G.N.R* (2013), " the removal of any illegally staying third-country national is a matter of priority for the Member States" [506], the restrictive approach followed by the Court in this field makes perfect sense however questionable it may be.

3. The recourse to the notion of abuse of right to undermine the rights of asylum seekers

489. Relying on a combination of the notion of abuse of right and of the imperative

[504] *Khaled Boudjlida,* Case C-249/13, Fifth Chamber, 11 December 2014, EU:C:2014:2431 (§70)
[505] *Khaled Boudjlida,* Case C-249/13, Fifth Chamber, 11 December 2014, EU:C:2014:2431 (§45)
[506] *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie,* Case C- 383/13 PPU, Second Chamber, 10 September 2013, EU:C:2013:533 (§43)

of effectiveness, the Court endangered the right to liberty of asylum seekers. While it is hardly disputable that Member States should have the means to respond to situations "where there is clear and consistent evidence that the framework of rules for the granting of asylum is being used as a tool to render application of the Return Directive ineffective, to the extent of creating an abuse of the right of asylum"[507], these measures should not have allowed for an excessive turnaround in which States are opportunely given the possibility to bend the rules in the name of effectiveness. That is nonetheless what the Court has practically authorised.

490. Whereas the Court accurately recognized the fact that Directive 2008/115 "does not apply to a third-country national who has applied for international protection"[508] which evidently means that an irregular migrant who made a request for asylum cannot not be maintained under the pre-removal detention regime of Article 15 of the aforementioned Directive, it considered nonetheless that, in order not to deprive the return policy of its effectiveness, such finding did not entail that he ought to be released from that detention. As phrased by Advocate General Wathelet in the case of *Arslan* (2013):

> "Although it is undisputed that detention for the purpose of removal governed by the Return Directive and detention of an asylum seeker fall under different legal rules, I consider that, in order not to render national provisions […] ineffective, […] the national authorities must have a short period, limited to what is strictly necessary, to adopt a decision to detain the person concerned based on national asylum provisions, before terminating his detention under the Return Directive."[509]

491. This accommodating adjustment of the rules governing asylum seekers is based, on top of the imperative of effectiveness, on the finding of an 'abuse of right', a classical theory which requires, as laid down by Advocate General Wathelet in the case in point,

> "first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved. It requires, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by creating artificially

[507] Opinion of Advocate General Wathelet delivered on 31 January 2013, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,* Case C-534/11, EU:C:2013:52 (§65).
[508] *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,* Case C-534/11, Third Chamber, 30 May 2013, EU:C:2013:343 (§ 49).
[509] Opinion of Advocate General Wathelet delivered on 31 January 2013, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,* Case C-534/11, EU:C:2013:52 (§73).

the conditions laid down for obtaining it. It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of European Union law is not thereby undermined."[510]

492. Following closely the Opinion of Advocate General Wathelet, the Court held in the same case of *Arslan* (2013) that the theory of 'abuse of right' was well known in European law (even if it was more commonly referred to as fraud) and that it did prevent the person committing it to benefit from the provisions it was invoking.

"It is clear from the case-law of the Court that European Union law cannot be relied on for abusive or fraudulent ends and that national courts may, case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of European Union law."[511]

493. This finding added to yet another use of the effectiveness principle as the key of the interpretation of all the rights Member States have under Directive 2008/115, led the Court to consider that it was indeed possible to apply pre-removal detention to an asylum seeker.

"The objective of that directive, namely the effective return of illegally staying third-country nationals, would be undermined if it were impossible for Member States to prevent, […] the person concerned from automatically securing release by making an application for asylum. […] It follows […] that […] Directives 2003/9 and 2005/85 do not preclude a third-country national who has applied for international protection […] after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears […] that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return."[512]

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[510] Opinion of Advocate General Wathelet delivered on 31 January 2013, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,* Case C-534/11, EU:C:2013:52 (§76).

[511] Opinion of Advocate General Wathelet delivered on 31 January 2013, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,* Case C-534/11, EU:C:2013:52 (§75).

[512] *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,* Case C-534/11, Third Chamber, 30 May 2013, EU:C:2013:343 (§ 60 and 63).

Conclusion of Section 4

494. Appearances can be misleading and so is the case if one only considers the result of the case-law of the Court of Justice on the interpretation of Directive 2008/115. At first glance, the consequences on the laws of Member States have been the disappearance of imprisonment based on criminal law as a sanction for irregularly-staying third-country nationals. But this result is illusory because such disappearance is only momentary as detention based on criminal law will be – and in reality is – imposed again outside the scope of the return procedure. More accurately, by avoiding to query the righteousness of the constraint imposed on the right to individual liberty, the Court leaves untouched the political choices lying behind the legal provisions and dodges any accusation of inappropriate inferences or judicial activism. In doing so, the Court however inscribes itself within the movement of criminalization of irregular migration.

495. This trend may slowly be overturned. One indication being the opinion delivered by Advocate General Bot before the Court on the interpretation of the Directive in which he vehemently opposes to the practice of holding third-country nationals in ordinary prisons whenever spaces in specialized facilities are lacking[513]. He insisted that the need to unmistakably differentiate administrative from criminal law-based detentions is a key principle thereby opening a space for debate on the merits of a common practice in the Member States of the European Union. His point is based on two arguments. One is purely legal and is based on the fact that a Member State is required to comply with its international and EU obligations:

> "to concede that Member States need not trouble to separate a migrant from ordinary prisoners on the ground that he has consented to being with them would enable the national authorities to circumvent the requirement referred to in Article 16(1) of the Directive and, in the end, excuse a serious infringement by those States of their obligations under the Directive and their international commitments"[514].

[513] Opinion of Advocate General Bot delivered on 30 April 2014, in Joined Cases C-473/13 and C-514/13 and in Case C-474/13 *Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve* and *Pham v Stadst Schweinfurt, Amt für Meldewesen un Statistik,* EU:C:2014:295 (§63).

[514] Opinion of Advocate General Bot delivered on 30 April 2014, in Joined Cases C-473/13 and C-514/13 and in Case C-474/13 *Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve* and *Pham v Stadst Schweinfurt, Amt für Meldewesen un Statistik,* EU:C:2014:295 (§190)

496. The other argument takes into consideration the particular situation of migrants and the necessity to distinguish their detention from a criminal law detention. Regarding the situation of migrants, the Advocate General insists on their specific fragility :"It seems to me hard to accept that, quite apart from the distress which a migrant experiences in the light of his forced removal and the weakness of his position, a Member State may […] ask him to waive a guarantee that EU law expressly confers on him"[515]. While he acknowledges "as a principle that the enforcement of a sentence is not in itself detrimental to human dignity"[516], he expresses some serious reservations on the possibility to draw a parallel between a migrant who is "is person serving a sentence [and a migrant who] is innocent of any offence under ordinary law"[517]. He therefore argues against the possibility for the State "to place the detention of a third-country national awaiting removal on the same footing as a measure enforcing a sentence, so that the illegally staying migrant is treated in the same way as a criminal, being detained in a place, in conditions and under a regime identical to those reserved to ordinary prisoners"[518].

497. The effort made by the Advocate General in this case to distinguish clearly the situations of irregularly-staying third-country nationals from people convicted under criminal law is a first noticeable step way from the movement of crimigration which has prevailed in the approach taken by the Court of Justice in the past decade.

[515] Opinion of Advocate General Bot delivered on 30 April 2014, in Joined Cases C-473/13 and C-514/13 and in Case C-474/13 *Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve* and *Pham v Stadst Schweinfurt, Amt für Meldewesen un Statistik*, EU:C:2014:295 (§189)
[516] Opinion of Advocate General Bot delivered on 30 April 2014, in Joined Cases C-473/13 and C-514/13 and in Case C-474/13 *Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve* and *Pham v Stadst Schweinfurt, Amt für Meldewesen un Statistik*, EU:C:2014:295 (§196)
[517] Opinion of Advocate General Bot delivered on 30 April 2014, in Joined Cases C-473/13 and C-514/13 and in Case C-474/13 *Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve* and *Pham v Stadst Schweinfurt, Amt für Meldewesen un Statistik*, EU:C:2014:295 (§196)
[518] Opinion of Advocate General Bot delivered on 30 April 2014, in Joined Cases C-473/13 and C-514/13 and in Case C-474/13 *Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve* and *Pham v Stadst Schweinfurt, Amt für Meldewesen un Statistik*, EU:C:2014:295 (§195)

Conclusion of Chapter 3

498. While the line of cases studied in this chapter does not pretend to reflect the entire case-law of the Court of Justice on the treatment of irregularly staying third-country nationals, it allows nevertheless to unveil certain aspects of the role of the judges of this jurisdiction. As is amply shown for years now, the European Union policy towards the legal treatment of irregularly-staying third-country nationals has been an ever stricter one, relentlessly aiming at one sole objective: the effective return of those staying irregularly on the territory of the European Union. Politically pushed by the Member States at EU level to enforce a zero tolerance policy but given a chance by the Italian national jurisdictions - through the mechanism of article 237 TFUE - to interpret EU directives concerned by the issue in a more protective way, the Court finds itself in a delicate but strategic position. It is in this context and bearing in mind the full awareness of the Court of the power that such a situation inevitably grants, that these cases have been analysed.

499. First, they show a more or less congruous ensemble of cases where the Court tends – even when such protection has been the collateral and paradoxical result of a rather strict application of EU law - to accord a greater protection of the rights of the irregularly-staying third-country national. Secondly, this line of cases outlines that the Court has often limited the propensity of the national legislator (and in particular the Italian one as seen in Chapter 2) to shrink those rights at a rate of knots. However, this protection has been a limited one, and the Court of Justice like the European Court of Human Rights has systematically built a case-law of exception for third-country nationals. The jurisprudence of the European Court of Human Rights shall be seen in the coming chapter.

CHAPTER 4: THE EUROPEAN COURT OF HUMAN RIGHTS – PRINCIPLE OF SOVEREIGNTY AND INCOMPLETE SAFEGUARD OF IRREGULAR MIGRANTS' RIGHTS

Introduction of Chapter 4

500. The coming Chapter is concerned with the jurisprudence of the European Court of Human Rights on sanctions consisting in deprivations of liberty as the result of the commission of an administrative offence. As in the previous Chapter, the analysis focuses on the control of the legality of such a detention. Taking as the legal basis for the control operated by the Court the European Convention of Human Rights, Section 1 of the Chapter shows that this instrument is a universal but unspecialized instrument with regard to immigration law. There again, in order to unveil the role of the judge, the aim is first to find a benchmark of the "usual control of legality" undertaken by the Court for a lot of different administrative violations (Section 2). In a second movement, the objective is to compare this control to the one operated when the deprivation of liberty is the result of the violation of an administrative requirement falling within the scope of immigration law (Section 3). Finally, an interpretation of the line of cases chosen for the study is proposed. Section 4 therefore underlines the fact that the principle of sovereignty has been extensively used by the Court as a justification of the exceptional nature of the control operated in immigration cases.

Section 1: The European Convention on Human Rights, a sweeping instrument with great potential for the protection of irregular migrants

501. This initial section aims to give an understandable view of the the legal instruments on which the case-law of the Court relies on when operating a control of the legality of the sanction. However, in order to grasp the reasons why the European Convention has been considered as a universal but unspecialized instrument, a brief detour is made by the history of the Court with regard immigration cases (Paragraph 1). Then again, before turning to the relevant articles of the Convention for the purpose of the string of immigration cases chosen for this study, some short remarks go back to the drafting of the Convention and the

reasons of its focus on "citizens" (Paragraph 2). Finally, the relevant articles of the Convention and the Additional Protocols are considered (Paragraph 3).

Paragraph 1: The European Court of Human Rights

502. *Abdulaziz, Cabales and Balkandali*, the first case where the migrant's application was taken into consideration only dates back to 1985[519]. Based on Article 8 about the right to respect for private life and family life, it considered the situation of a family reunification on which the Court took a rather restrictive view towards the rights of the migrant's family. It also recognized an essential principle in the jurisprudence of the Court in the field of immigration – and irregular immigration especially – the right of the State to restrict the right of entry, transit and residence of an alien on its territory as an enshrined principle of international law. It is however noteworthy that this principle has been heavily contested by numerous authors who consider that:

> "[t]he place of choice attributed to the principle gives the impression that the Court conceives of the rights guaranteed in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control, rather than the Court conceiving the state control prerogative as tempering human rights norms which would themselves be the foundational principle. […] this is a problematic logical inversion from a human rights perspective"[520].

503. According to the author of this remark, Marie-Bénédicte Dembour, this reasoning "really implicated the whole way in which Europe approaches migrants"[521]. The fact that this principle has been the starting point of any reasoning of the Court on immigration issues undeniably points to a bias in which the Court is approaching the case. Put in another way, "the Strasbourg reversal has for effect to consider the migrant applicant first

[519] *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* Applications nos. 9214/80, 9473/81 and 9474/81, Grand Chamber, 28 May 1985 ECLI:CE:ECHR:1985:0528JUD000921480.
[520] Marie-Bénédicte DEMBOUR, *When Humans Become Migrants – Study of the European Court of Human Rights with an Inter-Americain Counterpoint,* Oxford University Press, 2015, First Edition, p.4.
[521] Marie-Bénédicte DEMBOUR, *When Humans Become Migrants – Study of the European Court of Human Rights with an Inter-Americain Counterpoint,* Oxford University Press, 2015, First Edition, p.5.

of all as an 'alien' who is subject to the control of the state, rather than just a human being"[522].

Paragraph 2: Short remarks on the history of the drafting of the Convention: a focus on "citizens"

504. As has been amply analysed by Marie-Bénédicte Dembour, the history of the drafting of the Convention on Human Rights is key to understand the predominant place assigned to the citizen to the detriment of the migrant.

> "Up to this point, a state's treatment of its own citizens had been considered its own business and no one else's under international law. The emerging human rights regime eroded the sacrosanct principle of state sovereignty. […] Although aliens were not necessarily excluded from the nascent human rights scheme, they were not its primary consideration. Citizens were."[523]

505. It is the Italian delegation, probably because of the fact that they were at the time one of the rare emigration country of Western Europe, who asked to change the words 'living in' for 'residing within'[524] in order to 'widen as far as possible the categories of persons who are to benefit by the guarantee contained in the Convention'[525]. The other contributing factor of this Italian initiative can be found in "the policy of internment of 'enemy aliens' which had been pursued in World War I and again in World War II"[526] and from which Italian nationals suffered from in June 1940 among other nationalities fighting against the Allies. The idea finally retained was "to make provision for the fact that, in accordance with a universally admitted practice, the exercise of the fundamental rights by foreigners (non-nationals) may be subject to certain restrictions not applicable to

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[522] Marie-Bénédicte DEMBOUR, *When Humans Become Migrants – Study of the European Court of Human Rights with an Inter-Americain Counterpoint,* Oxford University Press, 2015, First Edition, p.5.
[523] Marie-Bénédicte DEMBOUR, *When Humans Become Migrants – Study of the European Court of Human Rights with an Inter-Americain Counterpoint,* Oxford University Press, 2015, First Edition, p.42.
[524] Council of Europe, *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, The Hague: Martinus Nijhoff, 1979, Volume III, 200.
[525] Council of Europe, *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, The Hague: Martinus Nijhoff, 1979, Volume III, 200.
[526] Marie-Bénédicte DEMBOUR, *When Humans Become Migrants – Study of the European Court of Human Rights with an Inter-Americain Counterpoint,* Oxford University Press, 2015, First Edition, p.45.

nationals"[527]. This idea is clearly reflected in the central article of the Convention concerning deprivation of liberty.

Paragraph 3: The relevant article of the European Convention on Human Rights regarding deprivations of liberty in general

506. Article 5 § 1 ECHR sets up the fundamental right to liberty and security and lists a limited number of situations in which such right might lawfully be restricted by the State.

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."[528]

507. As expressed by the Court in a constant case-law and reminded in the recent case of *J.N.* (2016),

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[527] Council of Europe, *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, The Hague: Martinus Nijhoff, 1979, Volume III, 266.

[528] Article 5 (1) European Convention on Human Rights

"Article 5 of the Convention enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Subparagraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds."[529]

508. Although this study will essentially focus on Article 5 § 1(f) ECHR, it must be noted that the Convention establishes, in addition to the requirements set up in this sub-paragraph, a certain number of other conditions which have to be satisfied in order for the deprivation of liberty to be lawful.

"2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained […] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.[530]

Paragraph 4: The relevant articles of the European Convention on Human Rights and its Protocols regarding deprivation of liberty of irregular migrants

509. The European Court of Human Rights reviews the legality of the detention of an irregular migrant on the basis of various articles of the European Convention on Human Rights. Under Article 5 § 1(f) which recognizes as an exception to the right of liberty and security the detention of an irregular migrant either to prevent his unlawful entry or to enforce a deportation measure, the Court considers the legal basis of the deprivation of liberty. Under

[529] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§74).

[530] Articles 5(2), 5(3), 5(4) and 5(5) ECHR.

Article 5 § 2 and 5 § 5, the Court evaluates whether satisfying procedural safeguards and compensation schemes exist to prevent arbitrary detention exist. Under Article 3 prohibiting "torture, inhuman or degrading treatment or punishment", the Court verifies the material conditions under which the detention is carried out. The present research focus on the legal basis of the detention which is essentially dealt with by Article 5 § 1(f) and only occasionaly takes under consideration and in a very limited manner the material conditions of detention.

510. Drafted in 1963, Protocol 4 of the European Convention on Human rights was the first international treaty to address collective expulsion. While the question of expulsion won't be considered in this research as it does not fall within the chosen definition of sanction[531], it is worth mentioning this text as a protective tool which has been used by the Court to enforce irregular migrant rights, notably in the famous case of *Hirsi Jamaa v Italy*[532].

Conclusion of Section 1

511. While it has been said that the Court has only lately started to rule on immigration cases, its jurisprudence ever since 1985 has been an extensive one on this field as will be considered in the coming sections. The fact that the Convention was centred on the notion of citizen and therefore not particularly equipped for questions related to the irregular migrant explains only partly the choices made by the Court on its control of legality of deprivation of liberty in immigration cases. As is affirmed later in this Chapter, the Court made the chose to exercise the most careful of scrutiny when it comes to deprivation of liberty for administrative offences whereas it is much more permissive when it comes to administrative offences in the particular area of immigration law.

[531] See the Introduction for more comments on the definition of sanction in the ambit of this work.

[532] *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, Grand Chamber, 23 February 2012 ECLI:CE:ECHR:2012:0223JUD002776509

Section 2: The careful scrutiny exercised by the European Court on the grounds and conditions of deprivation of liberty under Article 5 § 1

512. The jurisprudence which will be examined in this section regards cases where the Court had to review the compatibility – with Article 5 of the European Convention on Human Rights – of a deprivation of liberty ordered as the result of the commission of an administrative offence. As a preliminary remark, it shall be reminded that this article upholds the fundamental rights to liberty and security which have been considered to be "of primary importance in a 'democratic society'"[533]. The aim and the difficulty of this inquiry lied in the requirement to find material on alleged violation of Article 5 § 1 ECHR which were concerned with administrative offences triggering the application of a sanction depriving the person of its liberty without it falling under the heading of psychiatric commitment. Obviously, since the latter involves concerns which are dissimilar to the ones regarding the actual commission of an act contrary to an administrative legislation, they had to be discarded as useless for the purposes of this study. As a consequence, unlike before the Court of Justice of the European Union, it proved arduous to find a coherent bundle of cases which could constitute relevant material for a comparison on the quality and the specificity of the review operated by the European Courts on cases of deprivation of liberty for violation of an administrative rule outside the litigation relative to irregular migration detention. In this sense, this Section is more erratic as the offences triggering the imprisonment are hardly related to the failure to comply with a mere formality and that the court's logic is murkier.

513. Despite the scarcity of the jurisprudence and the evident caution required in the confrontation with the case-law of the European Court of Justice, the common traits of this chosen series of cases will be studied (Paragraph 1), before turning to the observation of a control which features are correlated both with the ordinary review operated by the Court under Article 5 § 1 ECHR (Paragraph 2) and with an unusually thorough control (Paragraph 3).

[533] *Hakobyan and Others v. Armenia*, Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004 (§ 118).

Paragraph 1: The salient features of this series of cases

514. Although this group of cases is somewhat heterogeneous, they bear some central resemblances that allow for them to be analyzed together; all offences are administrative ones (1) and lead to the deprivation of liberty (2) of offenders whose characteristics are akin (3).

1. *The nature of the acts considered as administrative offences*

515. The cases which can be found here below relate to acts consisting predominantly in resisting police orders in the course of an arrest. Nothing on the violation of an administrative formality leading to a sanction of imprisonment – apart, evidently, from the very large case-law regarding Article 5 § 1(f) - could be found. This inevitably impacts on the degree to which a comparison can be made between the jurisprudences of the two Courts since the offence hereby committed could arguably be qualified as more serious ones.

516. The nature of the acts considered as offences were respectively the followings:

- "forceful resistance to the lawful order or demand by a member of the police forces"[534]
- "possession of a suspect substance"[535]
- "maliciously disobeying of a lawful order or demand of a police officer"[536]
- "breach of public order in court"[537]
- "non-compliance with a lawful order by a police officer"[538]
- "failure to pay the community charge […] due to [the applicant's] culpable neglect, 'as he clearly had the potential to earn money to discharge his obligation to pay'"[539].

[534] See *Menesheva v. Russia*, Application no. 59261/00, First Section, 9 March 2006 ECLI:CE:ECHR:2006:0309JUD005926100 and *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502

[535] See *Kvashko v. Ukraine,* Application no. 40939/05, Fifth Section, 26 September 2013 ECLI:CE:ECHR:2013:0926JUD004093905

[536] See *Hakobyan and Others v. Armenia,* Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004

[537] See *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407

[538] See *Malofeyeva v. Russia,* Application no. 36673/04, First Section, 30 May 2013 ECLI:CE:ECHR:2013:0530JUD003667304

[539] *Benham v. The United Kingdom,* Application no. 19380/92, Grand Chamber, 10 June 1996 ECLI:CE:ECHR:1996:0610JUD001938092 (§ 12).

2. *The personal characteristics of the offenders*

516. Logically, as the wrongdoings involved are not formalities concerned with the need to regularize the presence of an alien on the given territory of a State, all applicants are nationals of the State which convicted them. The only relevant feature that they share is either their being in some ways involved in political activities (understood in the broad sense of activism) and/or their being accused or convicted of a crime prosecuted under their national criminal law to the exception of one case in which the detention was ordered on a debtor unwilling or unable to pay the community charges he was due to pay[540].

3. *Deprivation of liberty as a sanction of the wrongdoing*

517. This collection of cases involves administrative detention as a sanction for the violation of an act prosecuted in the relevant Administrative Code. The length of these deprivations of liberty goes from 3[541] to 30 days[542].

Paragraph 2: The ordinary features of the control of the lawfulness of detention

518. Once ascertained that the arrest or detention considered amounted to deprivation of liberty within the meaning of Article 5 § 1 ECHR, the European Court of Human Rights applied the criteria it normally uses to check its lawfulness. In this regard, the Court reminded that "in proclaiming the right to liberty, paragraph 1 of Article 5 contemplates the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion"[543]. For such a requirement to be satisfied, the deprivation of liberty must fall within the ambit of one of the exceptions listed in the Convention (1). Furthermore, the detention ought to be lawful that is to say that it must be the result of a procedure respecting domestic rules (2) – which need to possess certain qualities (3)- not be contrary to the aim of Article 5 § 1 ECHR (4) and be the consequence of a court order delivered by a competent judge (5).

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[540] See *Benham v. The United Kingdom,* Application no. 19380/92, Grand Chamber, 10 June 1996 ECLI:CE:ECHR:1996:0610JUD001938092

[541] Application no. 40939/05, *Kvashko v. Ukraine* (§ 5).

[542] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 17).

[543] *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502 (§ 52).

1. The permitted grounds of detention

519. Any deprivation of liberty must, according to a well-established jurisprudence of the Court, be covered by any of the permitted grounds listed as exceptions in Article 5 § 1 ECHR[544]. In addition, the Court has repeatedly affirmed that the list is exhaustive and ought to be strictly interpreted: "the lists of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision"[545].

520. In this regard, the Court considers that administrative detention "would generally be considered to fall under Article 5 § 1(a) of the Convention"[546] that is to say "the lawful detention of a person after conviction by a competent court of law". Alternatively, detention based on administrative grounds could correspond to the heading of Article 5 § 1 (c) when the individuals are "arrested on a basis of a suspicion that they had committed the offences of breach of public order and contempt of court"[547]. On the question of lawfulness, the Court has developed a list of criteria that will be only briefly considered below since so much literature has already been devoted to the topic.

2. Consistent with national substantive and procedural law

521. As the European Court stated in a countless number of cases, Article 5 § 1 "requires that detention should be "lawful, including compliance with 'a procedure prescribed by law'. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof"[548].

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[544] "The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f) of Article 5 § 1 of the Convention, be lawful" *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 62).

[545] *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502 (§ 52).

[546] *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502 (§ 55).

[547] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 65).

[548] Application no. 36673/04, *Malofeyeva v. Russia* (§ 89).

3. National substantive and procedural law must be accessible, foreseeable and precise

522. The European Court constantly upheld that the criteria of lawfulness "primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law"[549]. It went on the precise that "quality of the law' in this sense implies that where a national law authorizes deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness"[550]. In particular, it insisted on the fact that: "The standard of 'lawfulness' set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[551]

4. The detention shall not contrary to the aim of Article 5 § 1: protection of the individual against arbitrariness

523. Indeed, the jurisprudence of the European Court on Article 5 § 1 is explicit on the fact that "compliance with national law is not […] sufficient. Article 5 § 1 of the Convention requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness"[552]. It was made very clear by the Court that:

> "the notion of 'arbitrariness' in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention […] While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute 'arbitrariness' for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. Moreover, the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved"[553].

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[549] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 62).
[550] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 62).
[551] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 62).
[552] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 63).
[553] *Hakobyan and Others v. Armenia,* Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004 (§ 121).

524. This clear recognition by the European Court of the variable nature of the notion of arbitrariness reflects accurately the degree to which the control of the legality of the detention is susceptible of change according to the basis of the detention. As will be seen later in this Chapter, the control operated under the heading of Article 5 § 1(f) is manifestly less demanding than under the usual control of the Court.

5. Pursuant to a court order delivered by a competent judge

525. This last classical element of the notion of arbitrariness is quite straightforward and creates a sort of presumption of legality of the deprivation of liberty: "A period of detention will in principle be lawful if it is carried out pursuant to a court order"[554].

Paragraph 3: The thorough aspects of the review

526. Some aspects of the control operated by the Court though seem out of the ordinary and remarkable in so far as they denote a greater demand for the legitimacy of the sanction imposed. This examination is particularly attentive in checking whether the purported motive of the detention matches the admitted aims that a deprivation of liberty can pursue (1), whether the decision was taken in good faith, (2) and to a lesser extent whether the court correctly applied the provisions of domestic law (3).

1. The necessary conformity of the order to detain and the execution of the detention to the purposes of the restrictions permitted under Article 5 § 1[555]

527. In going beyond what the appearances seem to disclose, the European Court is putting in place an extremely rigorous test of legality based on the realities of the cases and taking into consideration the political landscape in which they are inscribed rather than on the facts depicted. Such a choice had previously been made by the European Court, which indicated in the case of *Doronin* (2009) that "it may be necessary to look beyond the

[554] *Benham v. The United Kingdom,* Application no. 19380/92, Grand Chamber, 10 June 1996 ECLI:CE:ECHR:1996:0610JUD001938092 (§ 42).

[555] "The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraphs of Article 5 § 1". *Hakobyan and Others v. Armenia,* Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004 (§ 122).

appearances and the language used and concentrate on the realities of the situation"[556]. The European Court's defiance – largely manifested by its use of an extended lexical field expressing the doubt such as "formally", "theoretically" or "assuming"[557] used in the context of the case of *Menesheva* (2006) – allowed to uncover that administrative detention was often used as a pretext masking another illegal purpose or as a way to hinder another fundamental right such as freedom of expression or public assembly.

528. In the first type of cases, the illegality of the detention resided in the fact that the purported violation of a provision of administrative law was a fictitious reason serving a hidden agenda of the authorities[558] such as obtaining access to facilities or properties pertaining to the individual in the case of *Menesheva* (2006). In *Doronin* (2009), the interrogation of someone in the framework of a criminal investigation without granting him the protective guarantees attached to the status of a suspect[559] was held to be "incompatible with the principle of legal certainty and arbitrary" which "runs counter to the principle of the rule of law"[560].

529. In the second type of cases, the European Court found that detention had been imposed on the applicants in order to prevent them from enjoying another fundamental right. In the case of *Hakobyan* (2012), it considered that administrative detention was used "in order to prevent or discourage their participation in demonstrations"[561]. This interference amounted to a violation of Article 11 which logically rendered arbitrary their deprivation of liberty under Article 5 §1.

"the applicants fell victim to an administrative practice by having been twice

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[556] *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502 (§ 55).

[557] See for all three expressions *Menesheva v. Russia*, Application no. 59261/00, First Section, 9 March 2006 ECLI:CE:ECHR:2006:0309JUD005926100 (§ 85).

[558] "Charging her with the administrative offence was clearly just a pretext for having her available for that interrogation". *Menesheva v. Russia*, Application no. 59261/00, First Section, 9 March 2006 ECLI:CE:ECHR:2006:0309JUD005926100 (§ 85).

[559] "The Court further notes that the facts of the case suggest that the applicant's administrative detention was used to ensure his availability as a criminal suspect without, however, safeguarding his procedural rights as a suspect, notably the right to defence" - *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502 (§ 56) confirmed by "it appears that the applicant was placed in administrative detention to ensure his availability for questioning as a criminal suspect […] which has been found on many occasions by the Court to be an arbitrary deprivation of liberty" - Application no. 40939/05, *Kvashko v. Ukraine* (§ 68).

[560] *Doronin v. Ukraine,* Application no. 16505/02, Fifth Section, 19 February 2009 ECLI:CE:ECHR:2009:0219JUD001650502 (§ 56).

[561] *Hakobyan and Others v. Armenia,* Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004 (§ 107).

consecutively subjected to a measure, namely an arrest followed by a short-term conviction, which was arbitrary […]. It pursued aims unrelated to the formal grounds relied on to justify the deprivation of liberty and clearly involved an element of bad faith on the part of the police officers"[562].

530. On the question of bad faith, the European Court developed a very demanding test which shall be considered below.

2. The imperious exigency of good faith in the judge's exercise of jurisdiction

531. Indeed, the conviction following a mock trial lead the European Court to find – additionally to a potential violation of Article 6 – a violation of Article 5 § 1 in the case of *Menesheva* (2006). This shows the acuity of the control operated under the heading of this Article and the European Court's willingness to ensure that every step of the process is compatible with the multiple exigencies attached to the respect of the principle of individual freedom. Yet, it has proven difficult to differentiate a violation of Article 5 for the bad faith displayed by a judge exercising his power from a typical violation of Article 6 based on the same reasoning.

532. As a matter of fact, while the verification that the judge issuing the order was competent to do so, the appraisal of the way in which he exercised his jurisdiction is not usually linked to the requirements of Article 5. And there lies the difficulty. Whilst the European Court recognizes that "the substantive correctness of this order generally falls outside the Court's review"[563], it exceptionally extended the scope of its control in cases were the bad faith of the judge was manifest.

533. In the case of *Menesheva* (2006), the European Court considered that

"This case is different from the cases where the impugned decisions were taken by judicial authorities in good faith, following the procedure prescribed by law. The judge, in the instant case, on the contrary, exercised his authority in manifest opposition to the procedural guarantees provided for by the Convention. Therefore, the

[562] *Hakobyan and Others v. Armenia*, Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004 (§ 123).

[563] *Menesheva v. Russia*, Application no. 59261/00, First Section, 9 March 2006 ECLI:CE:ECHR:2006:0309JUD005926100 (§ 92).

ensuing detention order was inconsistent with the general protection from arbitrariness guaranteed by Article 5 of the Convention"[564].

534. Following this precedent and expanding its application, the European Court decided that the negligence exhibited by a judge in ordering an administrative detention would amount to also violation of Article 5 in the case of *Kakabadze* (2012) where it held that "it is thus evident that the judge was negligent in reviewing both the factual and the legal basis for the applicant's detention […] and exercised her authority in manifest opposition to the elementary procedural guarantees against arbitrariness provided for by the Convention"[565].

535. This conclusion logically led the European Court of Human Rights to retain in the same case of *Kakabadze* (2012) that the "subsequent imposition of detention for thirty days was made in an arbitrary manner, without the requisite exercise of good faith on behalf of the domestic authorities"[566].

536. Following this line but tightening even further the elements of its test, the European Court retained that the existence of so much as a negligence in the manner in which the domestic court handled the case was an element sufficiently significant to constitute a violation of Article 5 § 1 as it affirmed in the case of *Hakobyan* (2012):

> "While there are not sufficient elements to conclude that the domestic court which imposed the detention acted in bad faith; it undoubtedly showed negligence in reviewing both the factual and the legal basis for the […] detention […]. In such circumstances, the Court cannot but conclude that the applicant's deprivation of liberty as a whole was arbitrary and therefore unlawful within the meaning of Article 5§1"[567].

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[564] *Menesheva v. Russia*, Application no. 59261/00, First Section, 9 March 2006 ECLI:CE:ECHR:2006:0309JUD005926100 (§ 92).

[565] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 69).

[566] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 69)

[567] *Hakobyan and Others v. Armenia,* Application no. 34320/04, Third Section, 10 April 2012 ECLI:CE:ECHR:2012:0410JUD003432004 (§ 123).

537. It is therefore safe to say that the level of exigency of the test construed by the European Court of Human Rights with regard to the requirement of good faith is remarkable and allows for an in-depth control of the legality of the motives leading to the detention order.

3. And giving a correct application of the law in question

538. The last requirement has clearly been granted less importance by the European Court and is based on the fact that detention will be considered to have been arbitrary whenever "domestic authorities have neglected to attempt to apply the relevant legislation correctly"[568] as was held in the case of *Kakabadze* (2012). The principle seems straightforward, still, the Court struggled to delimitate its power of review regarding this particular question as is visible in the case of *Benham* (1996):

> "It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 para. 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with."[569]

539. Therefore, while recognizing that the task of applying national provisions was mainly incumbent on domestic courts, the European Court of Human Rights retained the possibility of considering a detention arbitrary in cases where it found elements of what could amount to a manifest misapplication of the legal norm.

540. However, it is clear from the case-law of the European Court that for such an error to be sufficient for the detention to become arbitrary, an element of bad faith or obvious negligence is required. An honest mistake, or a disputable choice of interpretation, even if later dismissed by a higher national court, will not change the lawful nature of the detention as was recalled in the case of *Benham* (1996):

> "A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold

[568] *Kakabadze and Others v. Georgia,* Application no. 1484/07, Third Section, 2 October 2012 ECLI:CE:ECHR:2012:1002JUD000148407 (§ 63).

[569] *Benham v. The United Kingdom,* Application no. 19380/92, Grand Chamber, 10 June 1996 ECLI:CE:ECHR:1996:0610JUD001938092 (§ 41).

applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law"[570].

Conclusion of Section 2

541. As this analysis of the jurisprudence shows, the European Court of Human Rights set up a complex and demanding system of conditions to which restrictions to one's freedom is deemed to be considered legal and legitimate in the framework of Article 5 § 1 of the Convention. As a matter of fact, it seems clear that the European Court scrutinises with greater meticulousness the conditions and grounds of deprivation of liberty as a result of the violation of an administrative rule than it generally does for other types of detention under the heading of Article 5 § 1. This might be explained by the fact that in most cases, the political context reported by numerous non-governmental organisations incited the Eurropean Court to be distrustful of administrative detention. Yet, regardless of the reasons, they resulted in the development of a very severe test of legality which was sadly not been entirely transposed to the case-law of Article 5 § 1 (f).

Section 3: The control of the European Court over detention of irregular migrants under Article 5 § 1(f): an unusual composite of protective elements and surprising exceptions

542. The specificities of the control operated by the European Court under Article 5 § 1(f) ECHR are not easy to detect. Indeed, generally speaking, this control forms a rather protective safeguard against the State arbitrary as the Euroepan Court applies to the control over detention of irregular migrants many of the criteria which form the basis of its usual control of any detention (Paragraph 1). This control is therefore similar in more than one aspect, to the one studied in Section 2 for detention for administrative offences other than immigration-related ones. However, the distinctive features of the case-law on detention of irregular migrants under the heading of Article 5 § 1(f) lie in the European Court's refusal to

[570] *Benham v. The United Kingdom,* Application no. 19380/92, Grand Chamber, 10 June 1996 ECLI:CE:ECHR:1996:0610JUD001938092 (§ 42).

consider several aspects which are otherwise part of its control (Paragraph 2). While this can appear at first sight as a small difference between the two types of control operated by the European Court, the case is made here that this difference is significant and justifies on itself to call the case-law on immigration detention a jurisprudence of exception.

Paragraph 1: The similar aspects of the European Court's control over detention of irregular migrants to their ordinary one: the application of the same criteria

543. As for the 'common' control of the European Court over the legality of any detention, the one operated for immigration-related detention is a very thorough one. In reviewing the conformity of a detention to Article 5 § 1(f), the European Court chose to give a wide understanding of the notion of detention (1). On the contrary, the European Court gave a very strict definition of the two sole situations in which a detention related to immigration matter may fall within the list of accepted exceptions to the right to liberty (2). The European Court's control is also exercised with regards the exigency that such detention be lawful which entails the verification of numerous elements (3). Lastly, in the framework of the control of legality over immigration related detention, the European Court requires that the detention be in line with the purpose of protecting the individual against arbitrarness (4).

1. The wide understanding of the notion of detention by the European Court

545. The large definition of the notion of detention allows the European Court to limit drastically the situations in which a deprivation of liberty may fall outside the ambit of its review. It therefore stretches as far as possible the field of application of Article 5 § 1(f) and extends the protection it guarantees to as many situations of deprivation of liberty as possible.

546. The recent case of *Khlaifia* (2016), was brought by three Tunisian nationals against Italy. In 2011, the applicants boarded rudimentary vessels on the coasts of Tunisia headed to the Italian coasts. They were escorted by Italian coastguards to Lampedusa where they were detained in a detention centre before being flown to Palermo where they were held again on board two vessels awaiting their removal by air to Tunisia. The applicants claim they

were confined in the detention centre and on board the vessels in breach of Articles 3 and 5, that they were subject to a collective expulsion and had no remedy by which to complain of the violation of their fundamental rights.

547. In this case, the European Court of Human Rights recalled its constant case-law regarding the meaning to be given to the notion of 'detention' of Article 5 § 1 considering that it "is concerned with a person's physical liberty"[571]. It also reminded that the definition of what amounts to detention is crucial to determine whether or not Article 5 § 1 was applicable. The European Court considered that

> "The difference between deprivation of liberty and restrictions on freedom of movement […] is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task, in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection"[572].

548. Concerning the relevant elements to take into consideration for the purpose of such categorisation, the European Court held in the same case of *Khlaifia* (2016) that "in order to determine whether a person has been deprived of liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question"[573].

549. In order to assess the nature of the confinement to which the applicants were subjected, the European Court used the elements provided for by the Italian Government (respondent State) and the findings of two independent bodies. The European Court carefully analysed the concrete possibility for the applicants to leave freely the facilities in which they were in order to determine whether or not "the applicants were being held […] involuntarily"[574]. It also took under consideration the duration of the confinement of the

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[571] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§64).
[572] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§64).
[573] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§64).
[574] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§68)

applicants (respectively 12 days and 9 days) which was considered as "not insignificant"[575] by the European Court. All these elements led the European Court to the conclusion that

> "the classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures imposed on them […]. Moreover, the applicability of Article 5 of the Convention cannot be excluded by the fact, […] that the authorities' aim had been to assist the applicants and ensure their safety […]. Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty"[576].

550. Interstingly, in this case of *Khlaifia* (2016), the European Court came back on one element presented by the Italian governement as part of their argument aiming at excluding the application of Article 5 § 1(f) to the very common detentions upon arrival of irregular migrants by sea in Italy. While the Court did not contest the alleged protective purpose of such detention, it unambiguously stated that the prupose of the detention cannot, in any case, eclipse the very nature of the measure depriving an individual of its fundamental right to liberty and hence, the application of the safeguards contained at Article 5 § 1 ECHR.

551. In the older case of *Amuur* (1996) which originated from four Somali nationals, the European Court had already considered the specific situations of international waiting zones. In this case, the applicants arrived at Paris airport on 9 March 1992. They expressed their wish to claim asylum. The border police refused to admit them on French territory and held them in a hotel in a waiting area. On 25 March, the applicants asked for asylum but the French authority ruled that it lacked jurisdiction as the applicants had not obtained a temporary residence permit. On 26 March, the applicants applied to the judge seeking an order for their release from confinement. On 29 March, the Ministry of Interior refused them a leave to enter and the applicants were sent back to Syria. On 31 March, the judge ruled that the applicants' detention was unlawful and ordered their immediate release.

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[575] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§70)

[576] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§71)

552. In this *Amuur* case (1996), the European Court had stated that such restriction of the freedom of immigrants at the border could, if certain conditions were satisfied, be considered as lawful. It specifically held that

> "Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations […]. States'legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions."[577]

553. In *Amuur* (1996) in particular, the European Court added that the duration of such restrictions of liberty should be as short as possible as it applied to indidivuals in a situation which is essentially different from the ones of convicted criminals:

> "Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country."[578]

2. *The strict definition of the two situations in which the detention of irregular migrants falls within the exception of Article 5 §1(f)*

554. Following to the letter the wording of Article 5 § 1(f), the European Court strictly interpreted the two situations under which a deprivation of liberty for immigration purposes may fall within the authorised exceptions listed at Article 5 § 1 of the Convention. The first one being in the case of detention to prevent the irregular entry of an individual on

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[577] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§43).

[578] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§43).

the territory of a State (2.1). The second situation being the one of detention carried out in the framework of a deportation procedure (2.2).

2.1. Detention to prevent irregular entry

555. The case of *Thimothawes* (2017) concerns an Egyptian national who brought an action against Belgium. On 1 February 2011, he arrived at Bruxelles airport giving a false Canadian passport. The same day, he made a request for asylum under his real identity. His entry on the territory was denied and he was served with an order to be detained at the border. On 17 February, his asylum request was rejected. On 1 March, the applicant made a request to be released arguing his detention had been automatic. The Court of Appeal of Bruxelles rejected his request and confirmed the legality of the detention on 20 March. On 26 March, the applicant refused to be returned to Turkey and was placed in a closed detention centre. On 6 April, the applicant asked to be released again arguing a violation of Article 5 § 1(f) and that detention was not suitable to his mental status. On 15 April, the Court ordered the immediate release of the applicant considering that the legal basis for the detention was not appropriate. The State appealed the decision and the applicant remained in detention. On 3 May, the Court of Appeal declared that the detention was legal while the opportunity of such detention was outside the realm of its competence. The Court of Cassation confirmed the decision on 25 May. Meanwhile, on 5 May, the applicant had introduced a second request for asylum on the basis of new evidence. This new request for asylum was rejected again as well as his requests to be released which was confirmed by the Cassation Court. On 4 July, the applicant was released as he had reached the maximum legal duration of the pre-removal detention. Concerning the condition of his detention, the applicant had 11 consults with a psychologist at the transit centre and 21 consults while he was detained in the closed centre.

556. In this case of *Thimothawes* (2017), the European Court reminded that

"the first motive authorised by Article 5 § 1 (f) concerns the case of the detention of a person to prevent him/her from entering irregularly on the territory of a State. The Court considered that, as long as a State has not authorised the entry on its territory, it is deemed to be 'irregular' and that the detention of an individual wanting to enter that

territory but needing an authorisation which he/she does not yet possess can aim to 'prevent such individual from entering irregularly'"[579].

557. This understanding of a detention to prevent irregular entry is perfectly in line with the European Court's decision in the case of *Khlaifia* (2016). It clarifies that every deprivation of liberty of an individual who is not in possession of the required documents to regularly enter a State or presenting documents requiring further validity or authenticity checks, even if such deprivation of liberty takes place at the border (whether in an airport detention centre or onboard a boat anchored in a harbour or anywhere else) falls within the scope of Article 5 §1(f) of the Convention.

2.2. Detention with a view to deportation

558. The second situation admitted by the European Court as falling under the heading of Article 5 § 1(f) is the deprivation of liberty in the framwork of a deportation procedure. Following a constant jurisprudence in this matter, the European Court recalled in the case of *Thimothawes* (2017), that the second situation in which detention may fall within the ambit of Article 5 § 1(f) "concerns the detention of a person against whom deportation proceedings are in progress"[580]. However, two conditions are attached to such kind of detention: the continuing existence of deportation proceedings in progress (2.2.1) and the prosecution of such proceedings with due diligence by the national authorities (2.2.2). While the first one of these conditions has rarely been the object of much debate, the meaning of the expression 'due diligence' and the concrete appreciation of the European Court in this regard has been at the centre of much litigation in the framework of Article 5 §1(f) ECHR.

2.2.1. as long as deportation proceedings are in progress

[579] "Le premier motif autorisé par l'article 5 § 1 f) concerne l'hypothèse de la détention d'une personne pour l'empêcher de pénétrer irrégulièrement dans le territoire. La Cour a estimé que, tant qu'un État n'a pas autorisé l'entrée sur son territoire, celle-ci est « irrégulière », et que la détention d'un individu souhaitant entrer dans le pays mais ayant pour cela besoin d'une autorisation dont il ne dispose pas encore peut viser à « empêcher l'intéressé de pénétrer irrégulièrement »" - *Thimothawes c. Belgique*, Requête n. 39061/11, Deuxième Section, 4 Avril 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§59)

[580] "concerne la détention d'une personne contre laquelle une procédure d'éloignement est en cours" - *Thimothawes c. Belgique*, Requête n. 39061/11, Deuxième Section, 4 Avril 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§60)

558. As recalled by the European Court in many cases in the same way as in the case of *Khlaifia* (2016), "any deprivation of liberty […] will be justified only as long as deportation or extradition proceedings are in progress". [581]

2.2.2. if such proceedings are prosecuted with due diligence

559. The reason behind the existence of such an important case-law on the meaning of the notion is because the appreciation of the European Court determines whether or not there has been a breach of Article 5 §1(f). Indeed, in the same case of *Khlaifia* (2016), the European Court reminded that "if such proceedings are not prosecuted with "due diligence", the detention will cease to be permissible"[582].

560. The case of *Auad v Bulgaria* (2011) concerns a stateless person of Palestinian origin. The applicant arrived in Bulgaria in July 2009 and applied for asylum. On 29 October 2009, he was denied the refugee status by the Bulgarian State but granted humanitarian protection. On 17 November, the State Agency for National Security ordered the applicants'expulsion on grounds of national security and the applicant's detention pending deportation. On 20 November, the applicant was arrested and placed in a special detention facility. On 19 May 2011, in view of the impending expiry of the maximum permissible period of detention pending deportation (18 months), the State Agency for National Security made an order for the applicant's release. The applicant was set free on 20 May 2011. The applicant alleged a violation of Article 8, 13 and 5 § 1 arguing that his detention had ceased to be justified and had become arbitrary.

561. As recalled by the European Court in this case of *Auad* (2011) "whether the deportation proceedings have been prosecuted with due diligence […] can only be established on the basis of the particular facts of the case".[583] Following this affirmation, the European Court went on to consider that

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[581] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§90)

[582] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§90)

[583] *Auad v. Bulgaria*, Application no. 46390/10, Fourth Section, 11 October 2011, ECLI:CE:ECHR:2011:1011JUD004639010 (§131)

"it appears that the only steps taken by the authorities during the eighteen months in issue were to write three times to the Lebanese embassy […] with requests for the issuing of a travel document for the applicant […] While the Bulgarian authorities could not compel the issuing of such a document, there is no indication that they pursued the matter vigorously […] Moreover, […] the Government has not provided evidence of any effort having been made to secure the applicant's admission to a third country. The authorities can thus hardly be regarded as having taken active and diligent steps with a view to deporting him. It is true that the applicant's detention was subject to periodic judicial review, which provided an important safeguard […] However, that cannot be regarded as decisive."[584].

562. The preceeding quote calls for two short remarks. The first one is that depite the fact that the European Court never gave any formal definiton of the notion of 'due diligence', some adjectives used here may help to define its contours which would imply the necessity to 'vigorously pursue the matter' and take 'active and diligent steps'. Both expressions unveil a rather high threshold set up by the European Court to satisfy the requirement of 'due diligence'. The second remark concerns the fact that the existence of a periodic judicial review of the detention does not relieve the national authorities of their obligation with regards the deportation proceedings and therefore shows the importance that the European Court attaches to this requirement.

563. Indeed, and as expressed by the Court, this requirement is of such paramouunt importance because it is considered as the basis of the detention. As formulated by the Court in the case of *Auad* (2011), "the grounds for the applicant's detention – action taken with a view to his deportation – did not remain valid for the whole period of his deprivation of liberty due to the authorities' failure to conduct the proceedings with due diligence."[585] Logically then, when the motive of the detention fails to appear as being effectively pursued by the authorities, a violation of Article 5 § 1(f) is inevitably established by the European Court.

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[584] *Auad v. Bulgaria*, Application no. 46390/10, Fourth Section, 11 October 2011, ECLI:CE:ECHR:2011:1011JUD004639010 (§132)

[585] *Auad v. Bulgaria*, Application no. 46390/10, Fourth Section, 11 October 2011, ECLI:CE:ECHR:2011:1011JUD004639010 (§135)

564. In a more recent case, the Court demonstrated once again the thorough nature of its review of the actions effectively undertaken by the national authorities to proceed with the deportation of an individual being detained under Article 5 §1(f) ECHR.

565. The case of *J.N.* (2016) originates from an applicant who was an Iranian national. He arrived in the UK on 7 January 2003 and claimed asylum on 15 January but his claim was rejected on 15 March and his appeal too on 1 October. On 31 March 2005, the applicant was served with a deportation order and he was detained the same day. On 13 September 2007, the applicant commenced judicial review proceedings challenging his continued detention. On 6 November, the Iranian Embassy agreed to issue a travel document provided that the applicant was prepared to sign a "disclaimer" consenting to his return. On 11 December, the Administrative Court ordered the applicant's release from detention subject to a number of conditions. The applicant refused to sign a "disclaimer" on 14 December, but was released on 17 December. On 14 January 2008 he was detained again. On 26 February, the claim for judicial review launched on 13 September 2007 was dismissed. On 4 June, the applicant refused again to sign a disclaimer. On 13 October, the applicant indicated that he would be willing to return to Iran if he were to be compensated for the periods of detention which he had undergone. The administration refused to agree to any such request. In January, February, March, May, June and September 2009 the authorities made further attempts to engage the applicant in a voluntary return. However, on each occasion he indicated that he was not willing to co-operate or sign a disclaimer. In March, June and October 2009 the applicant made applications for bail. On each occasion the application was dismissed. The reasons given for the dismissal of the applications included the fact that the applicant could end his own detention by signing the disclaimer. The applicant initiated proceedings and on 4 December 2009 the High Court granted the applicant permission to apply for judicial review and ordered to release him. The Court held that the applicant's detention had been unlawful from 14 September 2009. In a decision dated 13 May 2011 the applicant was awarded damages for this unlawful detention.

566. This case of *J.N.* (2016) is of particular interest for this study for various reasons. The first reason is because of the choice of the European Court to take into account – for the purposes of evaluating the existence of 'due diligence' in the authorities's pursuance

of the deportation proceedings – of periods of detention on which the European Court declared that the applicant's complaints were inadmissible. The European Court held that

> "even though it has declared the applicant's complaints relating to the first period of detention (from 31 March 2005 until 17 December 2007 […]) to be inadmissible for non-exhaustion […], in considering his complaints concerning the second period of detention (up to 14 September 2009), it may take account [the fact], that he had previously spent more than two years and eight months in immigration detention […]. Consequently, there was greater impetus on the authorities to pursue his deportation with "due diligence"[586].

567. Therefore, not only did the European Court take this period of detention under consideration but it even went as far as affirming that it should have given the authorities an additional motive to show 'due diligence' in the proceedings.

568. This affirmation is stronger when considering the second reason why this case is particularly interesting. The European Court decided that the applicant's deliberate choice to refuse to cooperate with the authorities - even at the price of his freedom – could not justify a lower exigency with regards the requirement of 'due diligence'. As expressed by the European Court "while it is true that the applicant repeatedly refused to cooperate with the authorities' attempts to effect a voluntary removal, the Court does not consider that this can be seen as a "trump card" capable of justifying any period of detention, however long"[587]. The European Court's only concession was to

> "accept that the applicant's previous offending, the risk of his further offending and the fear that he would abscond were all factors which had to weigh in the balance in deciding whether or not his continued detention was "reasonably required" for the purpose of effecting his deportation. Nevertheless, in light of the fact that, with the exception of a period of just under one month, the applicant had been in immigration detention since 21 March 2005, and having particular regard to the clear findings of the Administrative Court concerning the authorities' "woeful lack of energy and

[586] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§105)

[587] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§106)

impetus" from mid-2008 onwards, the Court considers that it is from this point that it cannot be said that his deportation was being pursued with "due diligence"."[588]

569. Following this affirmation, the Eruopean Court therefore unsurprisingly declared a breach of Article 5 § 1(f) ECHR.

3. The exigency that the detention be lawful

570. This requirement was stated in the case of *Amuur* (1996) in which the European Court detailed the content of the notion of 'lawfulness of the detention' under Article 5 §1(f)ECHR. The European Court held, as general principle that "where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law"[589].

571. In the course of its case-law on this question, the European Court consolidated the notion of lawfulness and came to consider that it meant that several requirements had to be met. Namely, that the detention had to be prescribed by domestic law (3.1), that the detention has to be conform to the substantive and procedural rules of national law, but also of international law or EU law (3.2), that domestic law itself had to be conform to the general principles of the Convention (3.3) and finally that the order of detention could not be automatic (3.4).

3.1. The detention has to be prescribed by domestic law

572. In the case of *Amuur* (1996) already, the Court had held that the expression 'in accordance with a procedure prescribed by law' meant that "any arrest or detention [had] to have a legal basis in domestic law"[590].

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[588] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§107)

[589] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§50)

[590] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§50)

3.2. The detention has to be conform to the substantive and procedural rules of national law, but also of international law or EU law

573. In the case of *Thimothawes* (2017), the European Court reminded that, in the framework of Article 5§1(f) ECHR, the notion of "legal basis" entails 'not only domestic law provisions but also any other applicable legal norm including those originating from international law […]. Domestic law can evidently also originate from EU Law"[591].

574. However, the control of the European Court in this field is rather limited as the case of *Muzamba Oyaw* (2017) shows. The case was brought by a national of Congo against Belgium. When the applicant arrived in Belgium in 2010 he asked for asylum and for a residence permit as the partner of a Belgian national. Both were denied and various orders to leave the territory were delivered to him without any effects. In 2014, the applicant was arrested for his illegal stay, given an order to leave the territory, an entry ban of 2 years and an order of detention in view of his deportation was taken. The applicant was placed in detention on August 26. He brought an action before the Belgian Courts to be released on the basis of Article 8 ECHR by the Court rejected it. The decision was confirmed by the Court of Appeal and the Cassation Court. On October 24, the detention was prolonged by 2 months. On October 30, the applicant brought another action to be released on the basis that he authorities had not considered any less coercive measure. The motive of the decision was indeed stereotypical and no consideration had been given to the possibility to apply a less coercive measure. On 13 November 2014, the applicant was released.

575. In this case of *Muzamba Oyaw* (2017) the European Court held that

"where the Convention, as in Article 5, refers to domestic law, the conformity to domestic law is part of the obligations of the Member States meaning that the Court has a competence, when required, to check if such obligation is fulfilled. However, its competence in this field is limited by the system of protection of the Convention according to which it is primarily up to national authorities, and in particular domestic jurisdictions, to interpret and apply these legal norms. On this point, the role of the Court is limited to the verification that the interpretation by the national authorities of

[591] "l'article 5 § 1 renvoie non seulement aux normes de droit interne mais également, le cas échéant, à d'autres normes juridiques applicables aux intéressés, y compris celles qui trouvent leur source dans le droit international […]. Les normes de droit interne peuvent à l'évidence trouver aussi leur origine dans le droit de l'Union européenne - *Thimothawes c. Belgique*, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§70)

the legal norms invoked in the case has not been arbitrary or manifestly unreasonable to the point of rendering to the applicant's detention irregular"[592].

576. As the European Court summarized it in the case of *Thimothawes* (2017), "the role of the Court is limited to the verification of the compatibility of the effects of such interpretation with the Convention"[593].

3.3. Domestic law itself has to be conform to the general principles of the Convention

577. As stated by the European Court in the case of *Amuur* (1996), the meaning to be given to the requirement of conformity to domestic law is different in Article 5 ECHR than it is in other Articles of the Convention (such as in Articles 8 and 11). In the case of Article 5, the notion also relates to "the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention."[594]

578. Therefore, and as recalled in the case of *J.N.* (2016), "in assessing the "lawfulness" of detention, the Court may have to ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein"[595].

3.3.1. legal certainty is a general principle of particular importance

579. As a constant case-law of the European Court has established, the general principle of legal certainty is of particular importance in the context of Article 5 § 1(f) ECHR. Among others, in the case of *Auad* (2011), the European Court held that

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[592] "Là où la Convention, comme en son article 5, renvoie directement au droit interne, le respect de celui-ci forme partie intégrante des obligations des États contractants, de sorte que la Cour a compétence pour s'en assurer au besoin; toutefois, l'ampleur de la tâche dont elle s'acquitte en la matière trouve des limites dans l'économie du système européen de sauvegarde car il incombe au premier chef aux autorités nationales, notamment aux tribunaux, d'interpréter et appliquer ce droit. Sur ce point, le rôle de la Cour se limite à examiner si l'interprétation des dispositions légales invoquées par les autorités internes en l'espèce n'ait pas été arbitraire ou manifestement déraisonnable au point de conférer à la détention du requérant un caractère irrégulier." - *Muzamba Oyaw v. Belgique,* Requête 23707/15, Second Section of the Court, 28 February 2017, ECLI:CE:ECHR:2017:0228DEC002370715 (§37)

[593] "le rôle de la Cour se limite à vérifier la compatibilité avec la Convention des effets de cette interprétation *Thimothawes c. Belgique*, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§71).

[594] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§50)

[595] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§ 76)

"Where deprivation of liberty is concerned, legal certainty must be strictly complied with in respect of each and every element relevant to the justification of the detention under domestic and Convention law. In cases of aliens detained with a view to deportation, lack of clarity as to the destination country could hamper effective control of the authorities' diligence in handling the deportation."[596]

3.3.2. the law has to possess certain qualities: it has to be sufficiently accessible, precise and foreseeable

580. In addition to the general principle of legal certainty, a constant jurisprudence of the European Court of Human Rights states that the domestic law providing for the deprivation of liberty related to immigration law has to satisfy a certain number of criteria. In this regard, as recalled by the European Court in the case of *J.N* (2017), the notion of 'quality of the law' has been considered to imply that

"where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness […] Factors relevant to this assessment of the "quality of law" – which are referred to in some cases as "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention […]; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention".[597]

581. As stated in the case of *Amuur* (1996), the European Court's review of these criteria is very strict as "these characteristics are of fundamental importance […] particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies."[598]

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[596] *Auad v. Bulgaria*, Application no. 46390/10, Fourth Section, 11 October 2011, ECLI:CE:ECHR:2011:1011JUD004639010 (§133)

[597] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§77)

[598] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§50)

582. The recent case of *Khlaifia* (2016) provides a striking example of how thorough the control of the European Court has proven to be with regard the satisfaction of these criteria of quality of the law, and in particular the notion of foreseeability. According to the European Court,

> "it is […] essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, […], a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[599]

583. In practical terms, this led the European Court to consider in great depth the Italian legislation regarding the detention of irregular migrants in the Lampedusa centre in the framework of the case of *Khlaifia* (2016). The European Court considered that this detention "which in principle should have been limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his or her presence in Italy, sometimes extended to over twenty days 'without there being any formal decision as to the legal status of the person being held'".[600]

584. This finding led the European Court to consider, always in the case of *Khlaifia* (2016), that

> "persons placed in a CSPA, which is formally regarded as a reception facility and not a detention centre, could not have the benefit of the safeguards applicable to placement in a CIE, which for its part had to be validated by an administrative decision subject to review by the Justice of the Peace […]. Consequently, the applicants were not only deprived of their liberty without a clear and accessible legal basis, they were also unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down […] in Article 13 of the Italian Constitution […]. Under that provision, any restriction of personal liberty has to be based on a reasoned decision of the judicial authority, and any provisional measures taken by a police authority, in exceptional cases of necessity and urgency, must be validated by the judicial authority within forty-eight hours.

[599] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§92)

[600] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§104)

Since the applicants' detention had not been validated by any decision, whether judicial or administrative, they were deprived of those important safeguards."[601]

585. Therefore, the European Court held that this detention was unlawful and amounted to a breach of Article 5 §1(f) ECHR as

"the provisions applying to the detention of irregular migrants were lacking in precision. That legislative ambiguity has given rise to numerous situations of *de facto* deprivation of liberty and the fact that placement in a CSPA is not subject to judicial supervision cannot, even in the context of a migration crisis, be compatible with the aim of Article 5 of the Convention: to ensure that no one should be deprived of his or her liberty in an arbitrary fashion."[602]

586. The strong rejection of the European Court of the argument often put forward by respondent States regarding the existence of a 'migration crisis' to lower the threshold of protection of the migrants' human rights has been constant in its case-law and is key to affirm the existence of an actual system of safeguard of these rights by the European Court.

3.4. The order of detention cannot be automatic

587. The case of *Thimothawes* (2017) allowed the European Court of Human Rights to remind a principle already affirmed in its case-law on Article 5 §1(f) and which constitutes a very important protection for the right to liberty of migrants. The European Court recalled that

588. "sweeping or automatic detention orders of asylum seekers without an individual appraisal of the particular needs of the person subject to the measure can contravene Article 5 §1(f). Correlatively, the Court has held that the competent authorities had to consider whether a less radical measure could be taken instead. This requirement aims to detect whether the individual in question has a particular vulnerability which impedes his/her detention (as for example foreign accompanied minors […]; foreign unaccompanied

[601] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§105)

[602] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312 (§106)

minors […]; foreign people who are ill […]). In other cases, the Court censured a policy of generalised detention of migrants."[603]

589. In the case of *Thimothawes* (2017) in particular, the European Court considered however that the detention of the applicant did not contravene Article 5 § 1(f). The European Court held that while the "successive detention orders were phrased in a laconic and stereotyped manner and did not allow the applicant to know the reasons justifying in concrete terms his detention"[604] it considered that "this circumstance did not prevent the competent jurisdictions […] to exercise their control - even if such control is limited to a control of legality – taking into account the requirements of the case-law of the Court"[605].

590. The European Court added, in the case of *Thimothawes* (2017), that "the applicant should have established that he was in a particular situation which could have lead *prima facie* to the conclusion that his detention was not justified"[606]. Therefore, while the requirement of the European Court is rather demanding for the national authorities, the onus to prove the existence of a impediment to the detention falls on the migrant and therefore somehow limits the protection afforded.

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[603] "des décisions généralisées ou automatiques de placement en détention des demandeurs d'asile sans appréciation individuelle des besoins particuliers des intéressés pouvaient poser problème au regard de l'article 5 § 1 f). Corrélativement, la Cour a estimé que les autorités compétentes devaient rechercher s'il était possible de leur substituer une autre mesure moins radicale. Cette exigence vise à détecter si les intéressés présentent une vulnérabilité particulière qui s'oppose à la détention (par exemple, s'agissant de mineurs étrangers accompagnés […]; en ce qui concerne des mineurs non accompagnés […], et à propos d'étrangers maladies […]). Dans certaines affaires, la Cour a mis en cause la politique généralisée de détention de migrants" *Thimothawes c. Belgique*, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§73)

[604] "les décisions successives de privation de liberté sont ainsi formulées de manière laconique et stéréotypée, et ne permettaient pas au requérant de connaître les raisons justifiant concrètement sa détention."
Thimothawes c. Belgique, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§77)

[605] "cette circonstance n'a pas empêché les juridictions compétentes […], d'exercer leur contrôle, fût-il limité à un contrôle de légalité, en tenant compte des exigences de la jurisprudence de la Cour" *Thimothawes c. Belgique*, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§78)

[606] "le requérant aurait dû établir qu'il était dans une situation particulière qui pouvait *prima facie*conduire à la conclusion que sa détention n'était pas justifiée"
Thimothawes c. Belgique, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§79)

4. <u>The requirement that the detention be in line with the purpose of protecting the individual against arbitrariness</u>

591. As was stated in reference case of *Amuur* (1996), "where the "lawfulness" of detention is in issue, […] the Convention […] requires […] that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness" [607].

592. In the recent case of *J.N.* (2016), the European Court acknowledged that while it had not

> "formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved".[608]

593. Indeed, arbitrariness had been considered to mean that no element of bad faith or deception on the part of the authorities should be found (4.1), that there should not be any gross or patent irregularity in the proceedings (4.2), that both the order to detain and the execution of the detention have to genuinely conform with the purpose of Article 5 §1(f) (4.3) and finally that there should be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (4.4).

4.1. No element of bad faith or deception on the part of the authorities

594. This principle was clearly stated in the case of *Conka* (2002). The case was brought by Slovaquian nationals of Roma origin against Belgium. The applicants had arrived in Belgium at the beginning of November 1998. On 12 November 1998, they requested political asylum in Belgium. On 3 March 1999, their applications were declared inadmissible and they were ordered to leave the territory within 5 days. On 5 March, the applicants lodged

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[607] *Amuur v. France*, Application n. 19776/92, Chamber, 25 June 1996, ECLI:CE:ECHR:1996:0625JUD001977692 (§50)

[608] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§79)

an appeal. On 18 June, the decision refusing the applicants permission to remain was upheld. On 24 June, they were served with a new order to leave the territory within 5 days. The applications they filed for legal aid and for the review of the decision refusing them permission to remain on the territory were both dismissed. At the end of September 1999, the local police sent a notice to a number of Slovakian Roma families, including the applicants requiring them to attend the police station on 1 October 1999. The notice was drafted in Dutch and Slovak and stated that their attendance was required to enable the files concerning their applications for asylum to be completed. At the police station, the applicants were served with a new order to leave the territory accompanied by a decision for their removal to Slovakia and their immediate detention for that purpose. A few hours later, the applicants were taken to a closed transit centre. On 5 October 1990, the applicants were deported to Slovakia.

595. In this case of *Conka* (2002), the European Court distinguished clearly two siuations: the situation concerning 'criminal activities' and the situation of irregular migrants. It held that while it did not exclude

> "its being legitimate for the police to use stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of asylum-seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention. In that regard, there is every reason to consider that while the wording of the notice was "unfortunate", it was not the result of inadvertence; on the contrary, it was chosen deliberately in order to secure the compliance of the largest possible number of recipients."[609]

596. Incidentally, it should be noted here that the European Court affirms here its position regarding the fact that it does not consider irregular migration as a belonging to the field of criminal law.

597. More to the point however, in the case of *Conka* (2002), the European Court clearly affirmed that the requirement that the detention be in line with the purpose of protecting the individual against arbitrariness

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[609] *Conka v. Belgium,* Application n. 51564/99, Third Section, 5 February 2002, ECLI:CE:ECHR:2002:0205JUD005156499 (§41)

598. "must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5.[610]

599. According to the European Court of Human Rights, the principle of effectiveness – so dear to the Court of Justice – is not an end that can justify any means at all.

4.2. No gross or patent irregularity in the proceedings

600. The notion of 'gross or patent irregularity' in the proceedings has been applied by the European Court of Human Rights to a broad variety of situations. The following cases are meant to provide for an overview of these.

601. In the case of *Seferovic* (2011), the applicant is of Roma origin from former Bosnia-Herzegovina who brought an action against the Italian Republic alleging that her detention was irregular and that there is no legal remedy available to her in Italian domestic law. Leaving in a Roma Camp in Rome since 1995, the applicant tried to file a request for asylum on 14 September 2000. On 26 September 2003, the applicant gave birth to a child who died on 6 November 2003. The applicant where then ordered to come to the police station as she had no identity documents. When the applicant came to the police station on 11 November 2003, she received an expulsion order and was placed in a detention centre the same day. On 13 November 2003, the Court of Rome heard the applicant with the assistance of her lawyer and an interpret. The same day the applicant filed a request against the legality of her expulsion and detention orders. On 3 December 2003, the Court authorised the extension of the detention for another 30 days to complete the identification procedure. By a decision of 24 December 2003, the Court ordered the suspension of the expulsion order and the immediate release of the applicant who was released the same day. The Court considered that both orders where illegal as, in any case, the order of expulsion should have been

[610] *Conka v. Belgium,* Application n. 51564/99, Third Section, 5 February 2002, ECLI:CE:ECHR:2002:0205JUD005156499 (§42)

suspended for 6 months after the birth of her last child according to Italian law. On 10 March 2006, the applicant was granted asylum.

602. In this case of *Seferovic* (2011), the European Court recalled that "a period of detention is in general legal if it is taken in execution of a judicial decision. The ulterior observation of a failure by the judge cannot impact, in national law, the validity of the detention to which the individual was subjected in the meantime"[611]. The European Court had to rule

> "on the question of whether the order of detention taken following the expulsion order constituted a legal basis for the deprivation of liberty of the application until the cancellation of the aforementioned orders. The sole fact that these orders were later revoked do not affect, as such, the legality of the detention. In order to determine whether Article 5 § 1 has been respected, it is necessary to make a fundamental distinction between the orders of detention which are manifestly invalid and the detention orders which are prima facie valid and effective until they are quashed by another internal jurisdiction"[612].

603. Considering that the national authorities were informed of the recent childbirth of the applicant and that, according to national law, this prevented the expulsion of the applicant for a period of 6 months and hence her detention, the "national authorities had no auhtority to place the applicant in detention"[613]. The European Court therefore held that this situation amounted to a gross and patent irregularity and that there had therefore been a violation of Article 5 § 1(f) ECHR.

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[611] "Une période de détention est en principe régulière si elle a lieu en exécution d'une décision judiciaire. La constatation ultérieure d'un manquement par le juge peut ne pas rejaillir, en droit interne, sur la validité de la détention subie dans l'intervalle." - *Seferovic c. Italie,* Requête n. 12921/04, Deuxième Section, 8 February 2011, ECLI:CE:ECHR:2011:0208JUD001292104 (§30)

[612] "la question de savoir si l'arrêté de placement en détention fondé sur l'arrêté d'expulsion constituait une base légale pour la privation de liberté de la requérante jusqu'à l'annulation desdits arrêtés. La seule circonstance que ces arrêtés aient été ultérieurement annulés n'affecte pas, en tant que telle, la légalité de la détention pour la période précédente. Pour déterminer si l'article 5 § 1 de la Convention a été respecté, il est opportun de faire une distinction fondamentale entre les titres de détention manifestement invalides – par exemple, ceux qui sont émis par un tribunal en dehors de sa compétence – et les titres de détention qui sont *prima facie* valides et efficaces jusqu'au moment où ils sont annulés par une autre juridiction interne" *Seferovic c. Italie,* Requête n. 12921/04, Deuxième Section, 8 February 2011, ECLI:CE:ECHR:2011:0208JUD001292104 (§38)

[613] "les autorités n'avaient pas le pouvoir de placer la requérante en détention" - *Seferovic c. Italie,* Requête n. 12921/04, Deuxième Section, 8 February 2011, ECLI:CE:ECHR:2011:0208JUD001292104 (§39)

604. The case of *Hokic* originates from two nationals of Roma origin from former Bosnia Herzegovina who brought an action against the Italian Republic for their detention prior to removal which allegedly violated Articles 3, 5 and 8 ECHR. Both applicants were living with their children in a Roma camp in Rome. On 11 January 2005, the police entered the camp and arrested the two applicants who had no valid residence title. They notified them with orders of deportation based on the motives that the applicants had not asked or been granted any residence title and that they had entered Italy 'avoiding border controls'. The same day, the Questore ordered their detention and on 14 January 2005 the Justice of the Peace confirmed their detention. On 2 February 2005 each applicant made a request before the Justice of the Peace. On 7 February, the Justice of the Peace extended the detention of one applicant for a month and released the other on medical grounds. On 24 February, the Justice of the Peace annulled the expulsion order for the applicant who had already been released. The Justice of the Peace found that, contrary to what the order indicated, the applicant had obtained a residence title which had expired in 1997. The mention on the order was therefore incorrect as it should have stated as a motive the non-renewal of her residence title. The fact that the order had a double motive also made it contradictory. Therefore, the act had to be considered as illegal and be cancelled. The same decision on the same basis was taken on 22 February for the applicant who was still be detained. The decision, which had to be comunicated to the parties, ordered the immediate release of the applicant. On 3 March, the second applicant was released.

605. The European Court considered separately both periods of detention. The first one was the detention in view of their deportation. The second period was the detention after the cancellation of the deportation order.

606. Regarding the first period of detention, the European Court noted that the order of detention was taken by the Questore who, in domestic law, has the competence to do so. Their cancellation by the Justice of the Peace was based on the finding that the applicants had been in possession of a valid residence title which had expired. In this context, the European Court considered that

> "the authorities have not acted in bad faith and have tried to apply correctly the relevant domestic legislation […]. All the evidence point to a misunderstanding leading the national authorities to believe that the applicants had always been in an

irregular situation. This does not mean, however, that the detention was illegal or that the order of detention was invalid or that the expulsion orders on which this detention order was based were *prima facie* invalid."[614]

607. Accordingly, this situation did not constitute a gross and patent irregularity, therefore, no violation of Article 5 § 1(f) was found by the European Court regarding this first period of detention.

608. Regarding the second period of detention, the applicant argued that there was a 48-hour delay in her release and that this detention was illegal. The Governement argued on the contrary that there was only a 24-hour delay and that "in any case, the deprivation of liberty in question is not serious, as it took place in a detention centre and not in a penitentiary facility. Besides, the Gouvernements admits that, had it been a serious detention, the delay in question would have been incompatible with Article 5 ECHR"[615]. Recalling that the list of exceptions contained at Article 5 § 1 ECHR was exhaustive and that only a strict interpretation could guarantee an effective safeguard aganst arbitrariness, the European Court held that it was within its competence to "scrutinize the allegations of delay in the execution of a decision to release an individual from detention with a particular attention. […] If the Court acknowledges that a certain delay in the execution of a decision to release an individual is often inevitable, this delay has to be reduced to a minimum"[616]. According to the European Court's estimate, the delay in the case at hand was of 48 hours minimum and 60 hours maximum. The European Court then noted that the applicant was detained in the same city as the jurisdiction which ordered her release and that the sole formality which had to be completed was the communication of the decision to the parties. Additionally, the Court

[614] "La Cour n'estime pas que les autorités ont agi de mauvaise foi ou qu'elles ne se sont pas employées à appliquer correctement la législation pertinente […]. De toute évidence, un malentendu a amené les autorités internes à croire que les requérants avaient toujours été en situation irrégulière. Ceci ne signifie pas, cependant, que la détention était illégale ou que le titre ordonnant la privation de liberté était invalide ou que les arrêtés d'expulsion sur lesquels ce titre se fondait étaient *prima facie* invalides" - *Hokic et Hrustic c. Italie,* Requête n. 3449/05, Dexuème Section, 1December 2009, ECLI:CE:ECHR:2009:1201JUD000344905 (§24)

[615] qu'en tout cas, la privation de liberté en question n'est pas grave, car elle a eu lieu dans un centre de rétention et non pas dans un établissement pénitentiaire. Par ailleurs, il admet que, s'il s'agissait d'une détention grave, le retard en question serait incompatible avec l'article 5 de la Convention" - *Hokic et Hrustic c. Italie,* Requête n. 3449/05, Dexuème Section, 1December 2009, ECLI:CE:ECHR:2009:1201JUD000344905 (§29)

[616] "Il incombe dès lors à la Cour d'examiner des griefs relatifs à des retards d'exécution d'une décision de remise en liberté avec une vigilance particulière[…]. Si la Cour reconnaît qu'un certain délai dans l'exécution d'une décision de remise en liberté est souvent inévitable, ce délai doit être réduit au minimum" - *Hokic et Hrustic c. Italie,* Requête n. 3449/05, Dexuème Section, 1 December 2009, ECLI:CE:ECHR:2009:1201JUD000344905 (§30)

considered that the "delay is the responsibility of the judicial authority and that the late transmission of the decision cannot be explained by the need to clarify the interpretation of such decision"[617]. In this context, the Court held that there had been a violation of Article 5 §1 ECHR.

609. The last case which will be studied in this section concerns the right to be heard. Interestingly, as it is much more demanding for the anthorities, this case-law of the European Court of Human Rights seems to be in contradiction with the one of the Court of the Justice on the same issue (see Chapter 3). The case of *Richmond Yaw et autres c. Italie*[618] (2016), was brought by four nationals of Ghana who alleged a violation of Articles 5 § 1, 5 § 4 and 5 § 5 ECHR. They arrived in Italy in June 2008. On 20 November 2008, the Prefect ordered their expulsion and imposed their detention in order to proceed to their identification. On 24 November 2008, the Justice of the Peace confirmed their detention. By a decision of 17 December 2008, the Justice of the Peace accepted the extension of the detention requested by the Questore without however warning neither the applicants nor their lawyer. The applicants went before the Italian Cassation Court which cancelled the decision of the Justice of the Peace taken in violation of the applicants' right of defence including the right to be heard. Following the same line of reasoning, the European Court of Human Rights held that the "omission to convoke the applicants and their lawyer and set up a hearing are to be considered as a gross and patent irregularity"[619] and therefore concluded to the violation of article 5 § 1(f).

4.3. Both the order to detain and the execution of the detention have to genuinely conform with the purpose of Article 5 §1(f)

610. In the case of *J.N.* (2016), the European Court straightforwardly held that "the condition that there be no arbitrariness further demands that both the order to detain and the

[617] "Le délai observé repose sur l'autorité judiciaire et la transmission tardive de la décision ne s'explique pas par la nécessité d'éclaircir de questions portant sur l'interprétation de celle-ci" - *Hokic et Hrustic c. Italie,* Requête n. 3449/05, Dexuème Section, 1December 2009, ECLI:CE:ECHR:2009:1201JUD000344905 (§33)

[618] *Richmond Yaw et autres c. Italie*, Requêtes nos 3342/11, 3391/11, 3408/11 et 3447/11, Première Section, 6 Octobre 2016, ECLI:CE:ECHR:2016:1006JUD000334211

[619] "Elle estime que l'omission de convoquer les intéressés et leur avocat et celle de fixer une audience s'analysent en une « irrégularité grave et manifeste" - *Richmond Yaw et autres c. Italie*, Requêtes nos 3342/11, 3391/11, 3408/11 et 3447/11, Première Section, 6 Octobre 2016, ECLI:CE:ECHR:2016:1006JUD000334211 (§76).

execution of the detention genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1".[620]

4.4. There must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention

611. With regard this requirement, the European Court granted a particular attention to the question of the detention of minor children in administrative detention facilities. As a principle, the European Court considers that "the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1(f) only where the national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be implemented"[621].

612. Two recent cases, resulting one in the finding of a violation and the other of a non violation of Article 5 § 1(f) give an example of how serious the control of the European Court has proven to be with regard this particularly sensitive issue.

613. The case of *A.M* (2016) was brought by three Russian nationals against France. The applicants considered that their 8 days' administrative detention awaiting their removal violated Articles 3, 5 and 8 ECHR. The first applicant of Chechen origin arrived with her minor daughter to France and asked for asylum on 10 October 2011. On 8 December 2011, she gave birth to a second daughter. On 19 January 2012, her asylum request was denied on the basis that she had already made one in Poland. The Dublin Regulations were therefore applied and she was asked to return to Poland. On 18 April 2012, the applicant was arrested with her two daughters and placed in detention. On 19 April 2012, the applicant refused to board the plane taking her back to Poland and was against placed in detention with her daughters. The applicant brought an action to be released based on the violation of Article 8 which was rejected. The judge of detention and freedom authorised the extension of the detention on 21 April 2012 for 20 days. This decision was confirmed by the Court of Appeal. On 24 April 2012, following the applicant's procedure under Article 39, the Court asked the French government to find an alternative to the detention of the applicant and her two daughters. The prefect ordered a house arrest for the applicant who left the detention centre.

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[620] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§80)

[621] *A.B. and others v. France,* Application n. 11593/12, Fifth Section, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312 (§123)

614. In the case at hand, the European Court considered that,

"the Prefect had ruled out the possibility to take a less coercive measure by reason of a combination of factors among which the refusal of the applicant to contact the border police in order to organize her departure, the absence of identity documents and the precarious nature of her accommodation. Under these circumstances, the Court considers that the national authorities have effectively checked that the deprivation of liberty was of the family was a last resort measure to which no other less restrictive measure could been substituted"[622].

615. Following this finding, the European Court concluded to the non violation of Article 5 § 1(f).

616. However, in a similar case, the European Court came to a different conclusion and affirmed with more strength the existence of an exception to the rule according to which the necessity of the detention does not need to be established for it to be in conformity with the requirements of Article 5 § 1(f).

617. The case of *A.B* (2016) originates in an application against France brought by a couple of Armenian nationals and their son. The applicants alleged that their administrative detention pending their removal was in breach of Articles 3, 5, 8 and 13 ECHR. After their arrival in France on 4 October 2009, they filed applications for asylum which were rejected as well as their subsequent requests for re-examination. On 3 May 2011, the Prefect issued orders rejecting the applicants' requests for leave to remain and obliging them to leave French territory. On 18 October 2011 the French Administrative Court, on an appeal from the applicants, refused to overturn those orders. The first applicant was arrested by the police in connection with a theft on the evening of 16 February 2012 and was taken into police custody that same day. The second and third applicants were arrested the next day at the reception centre for asylum seekers where the family had been living. The applicants were taken that

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[622] *A.M. et autres c. France,* Requête 24587/12, Cinquième Section, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD002458712 (§68) : "le préfet a écarté la possibilité de recourir à une mesure moins coercitive en raison de la conjonction de plusieurs facteurs, dont le refus de la première requérante de se mettre en relation avec le service de la police aux frontières afin d'organiser son départ, l'absence de document d'identité et le caractère précaire de son logement. Dans ces circonstances, la Cour estime que les autorités internes ont recherché de façon effective si le placement en rétention administrative de la famille était une mesure de dernier ressort à laquelle aucune autre moins coercitive ne pouvait se substituer."

same day to the administrative detention centre. The first two applicants challenged their detention orders and in parallel lodged an urgent application for a stay of execution. They claimed that they had a fixed address at the reception centre (CADA) and that their detention would be incompatible with the best interests of their child. On 21 February 2012, the Administrative Court dismissed the application lodged by the first two applicants for the annulment of the administrative detention order. Responding more specifically to the argument raised by the applicants concerning the child's best interests, the Administrative Court found it to be inapplicable, as the decisions appealed concerned only the parents' situation. On 22 February 2012, the Liberties and Detention Judge authorised the extension of the applicants' detention for a period of 20 days, after finding inadmissible the request for voluntary intervention on behalf of the child, and having dismissed the argument that the conditions of detention were incompatible with the presence of a minor child. The decision was upheld on 24 February 2012 by the Court of Appeal. On 24 February 2012 the applicants submitted to the Court, under Rule 39, a request for the suspension of the detention orders concerning them. On 29 February 2012, the European Court decided not to indicate the requested interim measure. On 5 March 2012, the applicants were released, after expressing their wish to return to Armenia, and after seeking voluntary return assistance for that purpose. However, they did not leave France, on account of the third applicant's state of health. On 13 July 2012, the first applicant was granted leave to remain as the parent of a sick child. On 15 November 2012, the Court of Appeal annulled the administrative detention orders of 17 February 2012 in respect of the first two applicants.

618. As the European Court recalled in the case of *A.B* (2016) and according to constant case-law, for the purpose of Article 5 § 1(f) it is "in principle […] immaterial […] whether the detention was reasonably considered necessary, for example to prevent the person concerned from absconding or from committing an offence".[623] An exception to this general rule has been found by the European Court in the situation when a minor is concerned. In such case, the European Court affirmed that it "has regard to the specific situation of the detained person. Thus, by way of exception, when a child is involved it considers that the deprivation of liberty must be necessary to fulfill the aim pursued, namely to secure the

[623] *A.B. and others v. France,* Application n. 11593/12, Fifth Section, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312 (§120)

family's removal"[624]. This major exception to the case-law of Article 5 §1(f) is more than welcome and shows the specific attention that the European Court generally displays to people in vulnerable situations. As noted by the European Court:

> "the situation of children is intrinsically linked to that of their parents, from whom they should not be separated as far as possible. That link, which is in the children's interest, has the consequence that, where the parents are placed in detention, their children are themselves *de facto* deprived of liberty. That deprivation of liberty stems from the legitimate decision of the parents, having authority over their children, not to entrust them to the care of a third party. The Court can accept that such a situation is not, in principle, incompatible with domestic law. It nevertheless emphasises that the environment in which the children then find themselves is a source of anxiety and tension that may cause them serious harm"[625].

619. Bearing in mind these considerations, in the case of *A.B* (2016), the European Court held that

> "there was no indication in the detention orders that the prefect had verified, in view of the child's presence, whether an alternative measure that would have been less coercive than detention was possible. Accordingly, while having regard to the reasons given in the prefect's decision to place the applicants in a detention centre, the Court takes the view that the evidence before it is not sufficient for it to be satisfied that the domestic authorities had effectively verified that the administrative detention of the family was a measure of last resort with no possible alternative"[626].

620. The European Court therefore concluded here to the violation of Article 5 § 1(f).

621. Regarding the conditions of the detention, the Court also stressed in *Thimothawes* (2017) that "the place and conditions of detention have to be appropriate as such

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[624] *A.B. and others v. France,* Application n. 11593/12, Fifth Section, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312 (§120)

[625] *A.B. and others v. France,* Application n. 11593/12, Fifth Section, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312 (§122)

[626] *A.B. and others v. France,* Application n. 11593/12, Fifth Section, 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312 (§124)

measure does not apply to authors of criminal offences but to foreigners who are fleeing their country because they are often fearing for their lives"[627].

Paragraph 2: The distinctive feature of the European Court's control over detention of irregular migrants: the non-application of certain key principles

622. It must be noted from the onset that the refusal of the European Court to apply some criteria is a noticeable and surprising exception to an otherwise very protective case-law (as seen in Paragraph 1). Although the principle of proportionality is not mentioned anywhere in the European Convention on Human Rights, it has come to be considered by some scholars as a general principle of the Convention[628]. Nevertheless, it is absent from the review operated by the European Court of Human Rights on detentions for immigration purposes (1). Following the same line, the Court deems that the principle according to which the detention ought to be necessary, does not apply in the case of the deprivations of liberty under the heading of Article 5 §1(f) (2). Finally, the Court expressly rejected any obligation on behalf of the State to show the existence of an automatic domestic judicial review of the detention (3) as well as the setting up of a legal time-limit to the detention for the purposes of Article 5 § 1(f) (4). Put together, these limitations of the Court's review over detention for immigration-related purposes draws the contours of a case-law of exception and mitigates the protective nature of the control it operates on those detentions.

1. The exclusion of the demand for proportionality of immigration detention

623. According to the European Court in the case of *Chahal* (1996), it is only necessary "to determine whether the duration of the deportation proceedings was excessive" [629]. However, the fact that the focus of the European Court is on the length of the proceedings rather than on the deprivation of liberty radically impacts the perspective. As demonstrated by

[627] "le lieu et les conditions de détention doivent être appropriés, car une telle mesure s'applique non pas à des auteurs d'infractions pénales mais à des étrangers qui, craignant souvent pour leur vie, fuient leur propre pays". - *Thimothawes c. Belgique*, Requête n. 39061/11, Deuxième Section, 4 Avril 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§64)

[628] See Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 301).

[629] *Chahal v. the United Kindgom*, Application n. 22414/93, Grand Chamber, 15 November 1996, ECLI:CE:ECHR:1996:1115JUD002241493 (§113)

the case of *Chahal* (1996) itself, this change of perspective is decisive for the outcome of the case. In the case in point, the European Court recognized that the applicant

> "has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 para. 1 (f)."[630]

624. As was recently and clearly reformulated by the Court in the case of *J.N* (2016), the Grand Chamber considered in *Chahal* (1996) that "the principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time"[631]. In the case of *J.N.* (2016), the European Court also added, as an additional argument to reinforce the appropriate character of its position, that the Court of Justice of the European Union "has made similar points in respect of Article 15 of Directive 2008/115/EC (in the 2009 case of *Kadzoev*) and in respect of Article 9(1) of Directive 2013/13 (in the 2016 case of *J.N.*)".[632] While this reference to the case-law of the Court of Justice shows the existence of mutual influences between the Courts at the European level, it can also be seen as the need to justify a choice that is not easily defensible.

625. As the European Court logically affirmed in the case of *Bislan Batalov* (2005), the non-applicability of the proportionality requirement meant that an irregular migrant detained on the basis of that paragraph of Article 5 could not challenge the proportionality of his detention order. According to the Court, "Article 5(1)(f) does not afford a detained alien the right to contest the proportionality of the detention order, unlike other Convention issues, for example under Article 8 § 2 of the Convention"[633].

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[630] *Chahal v. the United Kindgom*, Application n. 22414/93, Grand Chamber, 15 November 1996, ECLI:CE:ECHR:1996:1115JUD002241493 (§123)

[631] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§82)

[632] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§82)

[633] *Bislan Batalov v Lithuania,* Application no. 30789/04, Decision as to the admissibility of the application by the Second Section of the Court, 15 November 2005 (§ 2)

626. It is obvious from these extracts that the European Court not only clearly acknowledges its refusal to apply the proportionality test to this kind of detentions but that the degree of protection granted to the individual subject to it is lower than the one usually assumed by the Convention.

2. No need for the detention to be necessary

627. In addition to the refusal by the European Court to require that the detention related to immigration matters be proportionate, constant case-law of this jurisdiction considers that there is not need for the detention to be necessary for it to be lawful. As was famously stated by the Court in 1996 in the case of *Chahal (1996)*,

> "Article 5 (1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 (1)(f) provided a different level of protection from Article 5 (1)(c)"[634].

3. No requirement of the existence of an automatic judicial review of the detention

628. As surprising as it may be, the European Court has constantly reaffirmed in its case-law on detention based on Article 5 § 1(f) ECHR that the existence of an automatic judicial review of the legality of the deprivation of liberty is not required. As the Court unambiguously recalled in the case of *J.N.* (2016):

> "the Court has made it clear that the existence of an effective remedy by which to contest the lawfulness and length of detention may be a relevant procedural safeguard against arbitrariness […] it has not, to date, held that Article 5 § 1(f) requires automatic judicial review of detention pending deportation. In fact, […] , it has found that the existence of such a remedy will not guarantee that a system of immigration detention complies with the requirements of Article 5 § 1(f) of the Convention; […] the fact that the applicant's detention was subject to automatic periodic judicial review […] could not be regarded as decisive"[635].

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[634] *Chahal v The United Kingdom,* Application no. 22414/93, Grand Chamber, 15 November 1996 ECLI:CE:ECHR:1996:1115JUD002241493 (§ 112).

[635] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§87)

629. This interpretation obviously cuts both ways. At first glance, evidently, it gives States more leeway to carry on detentions of irregular migrants without a regular judicial control hence grants less protection to the persons detained under the headin of Article 5 §1 (f). Under a different perspective, it could also be seen as giving the European Court the opportunity to review more thoroughly and completely the entire legal system surrounding the detention without being stopped by the existence (which could be purely formal) of an automatic domestic judicial control. This intention of the European Court can be read in the following assertion taken from the same case of *J.N* (2016) : "the Court may take the effectiveness of any existing remedy into consideration in its overall assessment of whether domestic law provided sufficient procedural safeguards against arbitrariness".[636]

630. The position of the European Court on this matter has consisted in giving some guidance on the meaning to be given to the notion of 'effective remedy'. In the framework of its case-law on detention based on Article 5 § 4 of the Convention, the European Court put forward three elements which give some idea of the kind of mechanism which would qualify as 'effective remedy against arbitrariness' which is not to be understood as a "uniform, unvarying standard to be applied irrespective of the context, facts and circumstances" [637]. As phrased in the case of *J.N.* (2016):

> "First, the remedy must be made available during a person's detention to allow that person to obtain speedy review of its lawfulness. Secondly, that review must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question […] Thirdly, the review should also be capable of leading, where appropriate, to release. Finally, it must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision".[638]

631. As the European Court's stand on this issue is manifestly a questionable one, the jurisdiction took an unsual care in justifying it, leaning on the letter of the text of the Convention itself. As the European Court argued in the case of *J.N.* (2016):

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[636] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§94)

[637] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§88)

[638] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§88)

"That no implicit requirement of automatic judicial review is to be read into Article 5 § 1 in regard to the category of deprivation of liberty covered by paragraph (f) is in accord with the specific safeguard as to judicial protection afforded by Article 5 § 4, which is worded in terms of an "entitlement" for persons deprived of their liberty to take proceedings enabling them to contest the lawfulness of their detention"[639].

632. Following the same apparent need to justify and defend the position it had taken, the European Court made numerous references to international norms and even EU instruments to back its choice. In the same case of *J.N.* (2016), the European Court considered that it found

"no support in any international instrument for the applicant's assertion that automatic judicial review of immigration detention is necessary. The Returns Directive requires the participating EU Member States either to provide for automatic judicial review of the lawfulness of detention or to grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be decided on. Likewise, Guideline 9 of the Twenty Guidelines on Forced Returns simply requires that a person in immigration detention be entitled to take proceedings by which the lawfulness of detention shall be decided speedily by a court, and according to Parliamentary Assembly Resolution 1707 detainees must be able periodically to effectively challenge their detention before a court." [640]

4. <u>No time limit of the detention</u>

633. Following apparently the same line of reasoning as for the automatic judicial review of the detention, the European Court interpreted Article 5 §1(f) as excluding the requirement to set a time limit to the detention under this heading. As the European Court unequivocally held in the case of *Auad* (2011) "Article 5 § 1 (f) of the Convention does not contain maximum time-limits" [641]. The European Court considered that "the question whether

[639] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§94)
[640] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§95)
[641] *Auad v. Bulgaria*, Application no. 46390/10, Fourth Section, 11 October 2011, ECLI:CE:ECHR:2011:1011JUD004639010 (§128)

the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case"[642].

634. As a consequence of this interpretative choice, the European Court held, in the recent case of *J.N.* (2016) that "even where domestic law does lay down time-limits, compliance with those time-limits cannot be regarded as automatically bringing the applicant's detention into line with Article 5 § 1(f) of the Convention"[643]. However, while "the Court would reject the […] submission that the "quality of law" requirement under Article 5 § 1 of the Convention requires Contracting States to establish a maximum period of immigration detention"[644], the European Court considers that "the existence - or absence – of time-limits on detention pending extradition [is] relevant to the assessment of the 'quality of law'"[645]. According to the European Court, this element "is one of a number of factors which the Court might take into consideration in its overall assessment of whether domestic law was "sufficiently accessible, precise and foreseeable" (in other words, whether there existed "sufficient procedural safeguards against arbitrariness"). However, in and of themselves they are neither necessary nor sufficient to ensure compliance with the requirements of Article 5 § 1(f)"[646]. In this perspective,

> "the existence of otherwise of fixed time-limits cannot be considered in the abstract but should instead be viewed in the context of the immigration detention system taken as a whole. For example, it is possible that some of those States which have fixed time-limits for detention pending expulsion might not offer detainees an effective judicial remedy by which to challenge their detention. The Court has therefore resisted interpreting Article 5 so as to impose a uniform standard on Contracting […] rather, it has preferred to examine the system of immigration detention as a whole, having regard to the particular facts of each individual case".[647]

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[642] *Auad v. Bulgaria*, Application no. 46390/10, Fourth Section, 11 October 2011, ECLI:CE:ECHR:2011:1011JUD004639010 (§128)

[643] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§83)

[644] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§93)

[645] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§84)

[646] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§90)

[647] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§92)

635. In the exact same way as concerning the existence of an automatic judicial review, in the same case of *J.N.* (2016), the European Court felt again the need to justify the choice it made regarding the absence of requirement to set a mawimum time-limit for detentions under Article 5 § 1(f). In its argument to defend the postion taken, the European Court referred to the Returns Directive as well as to recommendations made by the Council of Europe to exclude the imposition of such requirement on Contracting States.

> "It is true that in accordance with the Returns Directive, […] the majority of EU Member States may not detain third-country nationals for the purposes of a returns procedure for more than eighteen months […] and that there has been some criticism of the United Kingdom's decision not to adopt a time-limit for the detention of immigrants […]. However, while the Returns Directive may be regarded by such critics as reflecting a preferable approach to the detention of immigrants than that currently available in the United Kingdom, that does not mean that the system set up under the Returns Directive, including in particular its provision of time-limits, is to be taken as being imposed by sub-paragraph (f) of Article 5 § 1 of the Convention or as representing the only system conceivable in Europe as being compatible with sub-paragraph (f). In this connection, it is noteworthy that the creation of fixed time-limits is not specifically recommended by the Council of Europe in either its Twenty Guidelines on Forced Returns or in Parliamentary Assembly Resolution 1707 on the detention of asylum seekers and irregular migrants in Europe"[648].

636. Here again, this exclusion can be seen as granting less protection to those detained or on the contrary more freedom to the European Court to assess the system surrounding such kind of detention as a whole and in greater depth. As a matter of fact, in the case of *J.N.* (2016), the exclusion of such legal exigency seems to allow the European Court seems to appraise the UK system in details.

> "The Court observes that in the United Kingdom, a person in immigration detention may at any time bring an application for judicial review in order to challenge the "lawfulness" and Article 5 § 1(f) compliance of his detention. In considering any such application, the domestic courts must apply [certain principles]. These principles require that detention be for the purpose of exercising the power to deport; the period

[648] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§91)

of detention must be reasonable in all the circumstances; a detainee must be released if it becomes apparent that deportation cannot be effected within a reasonable period; and the authorities must act with due diligence and expedition to effect removal. Failing compliance with the requisite conditions, the detention becomes unlawful under domestic law, with the attendant obligation on the authorities to release the individual. The test applied by the United Kingdom courts is therefore almost identical to that applied by this Court under Article 5 § 1(f) of the Convention in determining whether or not detention has become "arbitrary"."[649]

637. Having regard to all these elements together, the European Court concluded that "it cannot be said that in, the absence of fixed time-limits and automatic review of immigration detention, domestic law was not sufficiently accessible, precise and foreseeable in its application or that there existed inadequate procedural safeguards against arbitrariness".[650]

638. As a conclusion, while the exclusion of these two requirements (the existence of an automatic judicial review of the detention and thesetting of a maximum time-limit to the detention) are at first glance very problematic for the safeguard of the right to freedom of those detained under the heading of Article 5 § 1(f) ECHR, the recent case of *J.N.* (2016) has proven on the contrary to allow the Court to assess comprehensively the national system of detention it was confronted to. However, this case alone does not suffice to counter any argument that the interpretative choices made by the European Court concerning its review of the legality of detention under Article 5 §1(f) is less thorough than its usual one. In particular, the exclusions of the principles of necessity and proportionality to the detention of irregularly-staying immigrants remains highly debatable.

Conclusion of Section 3

639. With regard the refusal of the European Court to apply certain prerequisites to its control of the legality of the detentions carried out in the framework of Article 5 §1(f) ECHR, a similarity can be found with the jurisprudence of the Court of Justice of the

[649] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§97)

[650] *J.N. v. the United Kingdom,* Application n. 37289/12, First Section, 19 May 2016, ECLI:CE:ECHR:2016:0519JUD003728912 (§99)

European Union. Both case-laws reveal a lower level of protection than the one applied for detention based on other grounds or carried out against citizens of the European Union. Therefore, this comparison of jurisprudences discloses, beyond a common trend to refuse the application of the proportionality principle – among others - a form of self-censorship developed by both Courts with regards immigration-related detentions. Whether justified by a peculiar understanding of national sovereignty or by a dangerously flexible concept of effectiveness of the law, the jurisprudences of the European courts on deprivation of liberty in the framework of irregular migration are exceptions to their usual case-law. Illuminating this difference of treatment, in the case of *Rusu* (2008), which fell outside the realm of immigration law, the European Court of Human Rights emphasized the gravity of a measure depriving an individual of his/her right to liberty and the need for such measure to be proven absolutely inevitable, an exigency that cannot be found in the general case-law regarding irregularly- staying migrants.

> "The Court reiterates that detention of an individual is such a serious measure that – in a context in which the necessity of the detention to achieve the stated aim is required – it will be arbitrary unless it is justified as a last resort where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained"[651].

640. Undoubtedly, the review of the legality of any deprivation of liberty under the heading of migration law falls into a lesser protected category of detention to which both Courts have chosen to grant an inferior degree of safeguard. The consecration of a case-law of exception can be unveiled in the case-law of these Courts and it appears as a common denominator. Nevertheless, while the reasons behind this shared trend are diverging, the positioning of the Court in the field of irregular migration is dictated by the same political imperatives.

[651] *Rusu v Austria,* Application no. 34082/02, First Section, 2 October 2008 ECLI:CE:ECHR:2008:1002JUD003408202 (§ 58)

Section 4: The recourse to the principle of Member States' sovereignty

641. While the Court of Justice seems to resort to the principle of effectiveness to justify the extensive use of detention against irregular migrants and a more acquiescent position on the infringements of certain fundamental rights of irregularly-staying migrant, the European Court of Human Rights used a certain understanding of national sovereignty to justify its own drifting away from the usual strictness of its case-law on Article 5 § 1 ECHR.

642. Regarding the possibility to deprive an individual of his liberty on the basis of immigration law, the European Court unambiguously held in the case of *Thimothawes* (2017), that

> "the possibility for States to detain immigration candidates who have exercised – through a request for asylum or any other means – the authorisation to enter the State, is an indispensable corollary to the sovereign right of the States to control the entry and stay of foreigners on their territory"[652].

643. As has been recognized at the international level, "by categorizing immigration detention as a legitimate form of state control, international human rights laws reaffirms the sovereign right of the state to control the entry and sojourn of foreign national on its territory"[653]. The assertion according to which immigration detention is an apparatus of State sovereignty is precisely at the origin of the European Court's timorous approach in this field. Notwithstanding the fact that sovereignty is conceived as a legitimating argument for the case-law of exception developed by the European Court in particular in the last ten to fifteen years, the understanding of the notion could vary and with it the degree of exigency of the control operated by the Court on the legality of immigration detentions.

644. In this context, the reference to a questionable and outdated vision of State sovereignty encompassing a strong reference to the theory of the territory (Paragraph 1) can

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[652] "La faculté pour les États de placer en détention des candidats à l'immigration ayant sollicité – par le biais d'une demande d'asile ou autrement – l'autorisation d'entrer dans le pays, est un corollaire indispensable du droit dont jouissent les États de contrôler souverainement l'entrée et le séjour des étrangers sur leur territoire" - *Thimothawes c. Belgique*, Requête n. 39061/11, Second Section of the Court, 4 April 2017, ECLI:CE:ECHR:2017:0404JUD003906111 (§58)

[653] See Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 273).

only appear as an unsatisfactory way to justify a case-law of exception (Paragraph 2) without considering the actual merits of such approach (Paragraph 3).

Paragraph 1: The evocation of an obsolete vision of State sovereignty

645. The link between State sovereignty and the right of the State to limit the entry at his borders is hardly questionable and is profoundly enshrined in international public law. However, in order to better grasp the contours of State sovereignty and its relationship with the physical space of the State, a brief examination of the theory of the territory will unveil that there is more than one way to envisage the meaning of the power that a State has over its territory (1). This will allow to call into question the reading given by the European Court of the power that a State derives from its sovereignty over a particular piece of land (2).

1. The traditional link between State and space: a theory of the territory

647. Undoubtedly, no unique definition of the notion of territory can be given for it encompasses so many different realities: from open borders spaces where only the external frontiers delimit the group of States from the rest of the world to the building of walls to separate one country from another, the projection of the territory of a State can take multiple forms. However, two contradicting realities must be acknowledged: first that the delimitation of a territory remains a privileged form of expression of the sovereignty of a State and second that in the course of the nineteenth century, the development of international and human rights law redefined the relationship between the State and its land. It both strengthen it in the sense that States became accountable for the way they treated any individual present on their territory, and it weakened it in so far as it sought to defend the existence of some universal rights.

> "As a whole, the 'territorial trap' assumes as an established fact that the globe is subdivided in reciprocally exclusive territorial spheres. Such a representation is submitted to numerous challenges originating both from social actors and institutions: the former as bearers of claims which transcend national borders, the latter as actors of

a supranational integration process which profoundly modifies the same borders."[654]

648. That being said, the theory of the territory is not uniform and reflects the various possible conceptions of the relationship existing between the State and the land on which it is located. From those different forms of correlation, the signification of the territory varies considerably from being the physical projection of the State on a given piece of the earth to being a mere delimitation of an area where the authority of the State is exercised or even just a purely theoretical legal creation. Three theories shall be here presented in a short and simplified way:

1) "Territory as *part* is based on a conception of the State as a real and concrete entity […] according to which the territory (along with the people and the government) is a *constitutive* element of the State. Such a doctrine is articulated around two distinct corollaries which respectively confer *materiality* to the territory, for which its existence appears in the physical world and not only in the purely logical one, and *essentiality*, for which it is characterized as *essence* of the State instead of the simple *belonging*, and the rights of the State on the territory are referred to the sphere of the personality of the given State and not to the one of property[655].

2) "The second group of theories which […] relates the territory to the notion of frontier does not, however, consider it a constitutive element of the State, neither does it recognize to it a really concrete nature, but conceive it as a conceptual and abstract entity: in other words, as the spatial setting of the right of the State to reign"[656].

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[654] "Nel suo insieme, la 'trappola territoriale' assume come un dato di fatto che il globo sia suddiviso in sfere territoriali reciprocamente esclusive. Tale rappresentazione è sottoposta oggi a numerose sfide, che provengono sia da attori sociali che istituzionali: i primi in quanto portatori di rivendicazioni che trascendono i confini nazionali, i secondi in quanto protagonisti di un processo di integrazione sovranazionale che modifica profondamente quegli stessi confini". RIGO Enrica, ZAGATO Lauso "Territori" in POMARICI Ulderico (a cura di), *Atlante di filosofia del diritto,* Volume II, G. Giappichelli Editore, Torino, 2012 (p. 261).

[655] "Il territorio come *parte* si fonda su di una concezione dello Stato come entità reale e concreta che […] secondo il quale il territorio (insieme al popolo e al governo) è elemento *costitutivo* dello Stato. Tale dottrina si articola in due corollari distinti che conferiscono rispettivamente al territorio *materialità,* per cui la sua esistenza si dà nel mondo fisico e non in quello puramente logico, e *essenzialità,* per cui esso si caratterizza come *essenza* dello Stato in luogo della semplice *appartenenza*, e i diritti dello Stato sul territorio sono riferiti alla sfera della personalità dello Stato stesso e non a quella della proprietà" RIGO Enrica, ZAGATO Lauso "Territori" in POMARICI Ulderico (a cura di), *Atlante di filosofia del diritto,* Volume II, G. Giappichelli Editore, Torino, 2012 (p. 262).

[656] "Il secondo gruppo di teorie che […] riportano il territorio alla nozione di confine non lo ritengono invece un elemento costitutivo dello Stato, né gli riconoscono una natura reale concreta, ma lo concepiscono come un'entità concettuale e astratta: ovvero come l'ambito spaziale del diritto dello Stato di imperare". RIGO Enrica,

According to this conception, "territory is only the area of validity of the legal order[657].

3) "The third and last way […] to conceptualize the relationship between state and territory is the idea of territory as *figment:* an entity produced by legal norms"[658] in which "the ambit of the territory is not at all predetermined but is artificially created by law"[659].

649. While this presentation does obviously not render the complexities and merits of these theoretical developments, they give just a glimpse both of where the shift in the meaning given by the European Court of Human Rights originates from, and how it could be differently understood. Indeed, the first theory presented is without a doubt the one which inspired the European Court. The physical land understood as one of the three constitutive elements of State sovereignty entitled to believe that the limitation of its access was a condition of existence of the very State. At the other end of the spectrum, the hypothesis in which the territory has no material reality and is solely a production of the State would surely have led to a laxer vision of the authority it is entitled to exercise on it.

2. *The distortion of this theory by the European Court of Human Rights*

650. Essentially, the frailty of the European Court's reading of the principle of sovereignty is that it confuses the inherent right of the State to control who gets to enter and reside on its territory with the power to deny a non-citizen some of his basic human rights. While the right of the State not to accept someone on its territorial space and welcome him as a new member of his polity is not contested, the legitimacy of the State to deny him the fullest protection and access to his rights is highly criticized here. In this context, "it does not manage to escape the fundamental contradiction, which lays at the heart of liberal theory,

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ZAGATO Lauso "Territori" in POMARICI Ulderico (a cura di), *Atlante di filosofia del diritto,* Volume II, G. Giappichelli Editore, Torino, 2012 (p. 264).

[657] "il territorio è solamente l'ambito di validità spaziale dell'ordinamento" RIGO Enrica, ZAGATO Lauso "Territori" in POMARICI Ulderico (a cura di), *Atlante di filosofia del diritto,* Volume II, G. Giappichelli Editore, Torino, 2012 (p. 264).

[658] "La terza e ultima modalità […] per concettualizzare il rapporto tra Stato e territorio è l'idea del territorio quale *figmentum:* un'entità prodotta da norme giuridiche" RIGO Enrica, ZAGATO Lauso "Territori" in POMARICI Ulderico (a cura di), *Atlante di filosofia del diritto,* Volume II, G. Giappichelli Editore, Torino, 2012 (p. 264).

[659] "gli scopi del territorio non sono affatto predeterminati ma sono prodotti artificialmente dal diritto" RIGO Enrica, ZAGATO Lauso "Territori" in POMARICI Ulderico (a cura di), *Atlante di filosofia del diritto,* Volume II, G. Giappichelli Editore, Torino, 2012 (p. 265).

between the preaching of universality and the practice of closure".[660] As underlined by Marie-Benédicte Dembour, "these paradoxes are understood by reference to the inherent contradiction in liberal theory between universalisms (all human beings have human rights) and particularism /closure (only some people belong to the constituted liberal polity and can access the rights this polity bestows)."[661]

651. As a matter of fact, this conception runs counter some of the most central claims that the Convention is making by stating that 'Everyone has the right to liberty and security of person"[662]. The fact that some exceptions to this rule are made in the article including the one to prevent a person to effect "an unauthorised entry into the country"[663], by no means equates that a substandard level of protection for those unwanted should be sanctioned (see Paragraph 2 on the non application of some criteria of legality of a deprivation of liberty to immigration detention). Moreover, it is hardly sensible to affirm that the prerogative of the State to refuse someone in its entity should be translated by a differentiated exercise of its sovereignty. Indeed, in what way does an inferior protection of the right to freedom express the undeniable right of the State to control its borders?

652. Additionally, the sovereignty principle could be very much understood as meaning the exact contrary: the fact, as the Convention is claiming, that every person entering the territory of a State on which it is applicable is responsible for its fair enforcement whoever the person concerned. Any other understanding such as the one of the European Court which legitimates the development of a case-law of exception characterized by a second-rate protection of the right to liberty "could serve as a validation of the claim that human right's contemporary institutionalization in the global territorial order results in an inability to protect those individuals who are 'out of place'"[664].

653. In this context, sovereignty could have been caught as an instrument to guarantee even more effectively the rights enshrined in international conventions and laws.

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[660] DEMBOUR, Marie Bénédicte 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality agenda' (2012), *Human Rights Law Review* (4), p. 691.
[661] DEMBOUR, Marie Bénédicte 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality agenda' (2012), *Human Rights Law Review* (4), p. 689.
[662] ECHR Article 5 § 1.
[663] ECHR Article 5 § 1 (f).
[664] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 312).

As formulated by Galina Cornelisse, "although it may seem paradoxical, when it comes to the interests of the illegal immigrant and the asylum seeker, exposing territorial sovereignty to the full force of the original promise of human rights may be the only remedy to modern constitutionalism's obdurate and structural blind spots."[665]

Paragraph 2: The recourse to a classical concept to justify a case-law of exception

654. Although it appeared that numerous senses could be given to the concept of sovereignty, the one retained by the European Court is oriented towards the affirmation of a strong link between the State and its territory. In this context, it is perceived that the choice of the European Court to shield its curtailed application of the rules of interpretation generally attached to Article 5 § 1 with a systematic use of a twisted vision of sovereignty (1) is misguided. It leads to a disputable legitimation of a form of detention for which some of the regular conditions of legality of deprivation of liberty do not apply (2).

1. The affirmation of a 'territorialized sovereignty' by the European Court of Human Rights

655. At a time when States' sovereignty seems to be a fading reality and the protection of their borders a common European task, the European Court's vision of sovereignty seems to be somewhat obsolete. Indeed, as has been perceptively noted, "the Court's understanding of this specific aspect of sovereignty as entailing a nearby absolute right of states to control their territorial borders results in a clear failure to address the legitimacy of the coercive means that are used to assert this right"[666].

656. There is therefore a clear relationship between the conception that the right of the State to detain would-be migrant stems from the notion of sovereignty and the fact that this type of detention obeys to different criteria than the ones generally applying to the

[665] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 312).

[666] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 310).

exceptions listed at Article 5 § 1 ECHR.

> "It is precisely in the Court's portrayal of detention as a 'necessary adjunct' to the sovereign state's 'undeniable right of control' over its territory that we may find the deep cause for the substandard level of human rights protection for immigration detainees in Strasbourg. Its perception of territorialized sovereignty as a natural and innocent concept leads the Court to afford national states a very wide margin of appreciation when deciding to resort to deprivations of liberty in the immigration concept."[667]

657. While it can be argued that the affirmation of a strong correlation between immigration detention and sovereignty was a conscious choice of the European Court which wanted to remain carefully outside of such a sensitive field, it could also be suggested that the Court became prisoner of its own argument and felt that since it touched upon questions of sovereignty, it had to remain tongue-tied. The first proposal seems to be the more convincing first because the European Court did not, in the past, hesitate to overturn or contradict its own affirmations and second because in other highly political fields, the Court made a point of being particularly rigorous in its appraisal of the compatibility of a State practice with the exigencies of the Convention.

658. Notwithstanding the fact that immigration detention in itself can be held to be an unacceptable transgression of the right to liberty, it is much more in the way that the Court takes the 'undeniable' prerogative of the State to recourse to a derogatory form of detention for granted, that lies the issue.

2. *The ensuing legitimation of immigration detention under derogatory rules*

659. The heart of the matter lies in the fact that the Court used two uncontested assumptions of international public law to draw some fairly liberal consequences as to the extent and modes of application of the prerogatives of the States in the field of migration policy.

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[667] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 310).

660. Starting from the assessment that "the Convention does not guarantee the right of an alien to enter or reside in a particular country"[668], and considering that "States enjoy an 'undeniable sovereign right to control aliens' entry into and residence in their territory'" [669], the European Court affirmed the existence of one duty and two far reaching rights belonging to the States.

661. Regarding on the one hand, the obligation of the State, the Court held, in a curious phrase, that "the Contracting States are under *a duty to maintain public order*[670], in particular by exercising their right, as a matter of well-established international law, to control the entry and residence of aliens"[671]. Concerning, on the other hand, the prerogatives enjoyed by the States, "the Court reiterates that the Contracting States are entitled to control the entry and residence of non-nationals on their territory *at their discretion*[672]" and held that "it *is normal* that States, […] have the right to detain would-be immigrants who – whether or not by applying for asylum – have sought permission to enter the territory" [673].

662. These rights have been submitted to certain conditions stemming from the fact that "the detention of a person constitutes a major interference with individual freedom and must always be subject to rigorous scrutiny"[674]. These conditions have been held to be the obligation to exercise the right to detain "in conformity with the provisions of the Convention, including Article 5" and only "if action is being taken with a view to their deportation"[675]. In this context, "detention in centres used for aliens awaiting deportation will be acceptable only where it is intended to enable the States to combat illegal immigration while at the same time complying with their international obligations."[676] While the use of vocabulary related to war

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[668] *Alim v Russia,* Application no. 39417/07, First Section, 27 September 2011 ECLI:CE:ECHR:2011:0927JUD003941707 (§77).
[669] *Mikolenko v Estonia,* Application no. 10664/05, Fifth Section, 8 October 2009 ECLI:CE:ECHR:2009:1008JUD001066405 (§65).
[670] All emphases have been added.
[671] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* Application no. 13178/03, First Section,12 October 2006 ECLI:CE:ECHR:2006:1012JUD001317803 (§81).
[672] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* Application no. 13178/03, First Section,12 October 2006 ECLI:CE:ECHR:2006:1012JUD001317803 (§96).
[673] *Idiab v. Belgium,* Applications nos. 29787/03 and 29810/03, First Section, 24 January 2008 ECLI:CE:ECHR:2008:0124JUD002978703 (§ 70).
[674] *Idiab v. Belgium,* Applications nos. 29787/03 and 29810/03, First Section, 24 January 2008 ECLI:CE:ECHR:2008:0124JUD002978703 (§ 70).
[675] *Mikolenko v Estonia,* Application no. 10664/05, Fifth Section, 8 October 2009 ECLI:CE:ECHR:2009:1008JUD001066405 (§65).
[676] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* Application no. 13178/03, First Section,12 October 2006 ECLI:CE:ECHR:2006:1012JUD001317803 (§81).

to refer to the policies aiming at discouraging irregular immigration and the implicit recognition of their legitimacy is debatable, especially coming from the European Court of Human Rights, it remains nonetheless uncontestable that this jurisdiction has developed, as seen in this Chapter an effcticient system of protection of the migrants'human rights.

663. However, it is also undisputable that the European Court clearly stated that the rule applying to immigration detention is an exception to the common rule and that this derogation is justified by the fact that States are fully entitled to implement and manage their migration policy as they see fit. As the European Court phrased it in the case of *Saadi* (2008):

> "Whilst the general rule set out in Article 5 § 1 is that everyone has the right to liberty, Article 5 § 1 (f) provides an exception to that general rule, permitting States to control the liberty of aliens in an immigration context. […] It is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not."[677]

Paragraph 3: Missing the point: The European Court's avoidance policy

664. Amid the vast existing case-law of the European Court of Human Rights on immigration detention, not a single case contains the slightest sign of an interrogation on the very legitimacy or appropriateness of the use of coercive measures in this field of law. This systematic avoidance may very well be dictated by the wording of the Convention which recognizes the possibility to legally deprive a migrant of his or her liberty. Yet, it could still be held to amount to a refusal to balance individuals' right to liberty and the interests of the State (2). Furthermore, the reason why the European Court decided to depart from some basic principles of its solidly enshrined jurisprudence on deprivation of liberty could be said to equate to the affirmation of an "immunity of territorial sovereignty" [678] (1) the defense of which is questionable.

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[677] *Saadi v The United Kingdom*, Application no. 13229/03, Grand Chamber, 29 January 2008 ECLI:CE:ECHR:2008:0129JUD001322903 (§ 64).

[678] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 274).

1. The affirmation of the "immunity of territorial sovereignty"[679]

665. The expression accurately describes the existence of a blind spot in the case-law of the European Court and highlights some pretty evident contradictions. In this regard, the constraint to strictly interpret the exceptions listed at Paragraph 1 of Article 5 ECHR has been a constant requirement of the European Court.

> "Paragraph 1 of this Article circumscribes the circumstances in which individuals may be lawfully deprived of their liberty. Seeing that these circumstances constitute exceptions to a most basic guarantee of individual freedom, *only a narrow interpretation is consistent with the aim of this provision*"[680].

666. However, it appeared not to apply in relation to Article 5 § 1 (f). Indeed, in the framework of an interpretation of the terms 'unauthorised entry', the Court held that the expression ought not to be given an interpretation that would excessively limit the application of the exception. As the European Court stated it in the case of *Saadi* (2008):

> "until a State has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to 'prevent his effecting an unauthorised entry'. […] *To interpret the first limb of Article 5 §1 (f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision* and on the power of the State to exercise its undeniable right of control."[681]

667. Consistently with this reading, the European Court markedly expressed the fact that the rules applying to Article 5 § 1 (f) were more accommodating for States[682]. As was stated in the same case of *Saadi* (2008), "the Chamber accepted that the State had a broader discretion to decide whether to detain potential immigrants than was the case for other interferences with the right to liberty."[683]

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[679] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 274).

[680] *Sadaykov v. Bulgaria*, Application no. 75157/01, Fifth Section, 22 May 2008 ECLI:CE:ECHR:2008:0522JUD007515701(§20).

[681] *Saadi v The United Kingdom*, Application no. 13229/03, Grand Chamber, 29 January 2008 ECLI:CE:ECHR:2008:0129JUD001322903 (§ 65).

[682] For a more thorough analysis on this point, see Part III, Chapter 2 Section 2.

[683] *Saadi v The United Kingdom*, Application no. 13229/03, Grand Chamber, 29 January 2008

668. This lax position of the Court on this particular point has been heavily criticized by scholars who have held that "the Court's understanding of this specific aspect of sovereignty as entailing a nearly absolute right of states to control their territorial borders results in a clear failure to address the legitimacy of the coercive means that are used to assert this right[684]". Additionally, some of the very judges who decided this Grand Chamber judgment of *Saadi* (2008) expressed, in a partly dissenting opinion, their skepticism towards such an unqualified interpretation of the prerogatives of the State under the heading of sovereignty.

> "Hence, the judgment does not hesitate to treat completely without distinction all categories of non-nationals in all situations – illegal immigrants, persons liable to be deported and those who have committed offences – including them without qualification under the general heading of immigration control, which falls within the scope of States' unlimited sovereignty"[685].

2. *The Court's refusal to question the legitimacy of immigration detention in itself: a failure to balance individual's right to personal liberty with State's sovereignty*

669. At the origin of the Court's lenient conception of the conditions of application of the exception stated at Article 5 § 1 (f) may be its refusal to challenge the very suitability of deprivations of liberty in the context of immigration and seek an equilibrium between respect for the human rights of irregular migrants and the State's elective power in matters of immigration. As was eloquently formulated by Galina Cornelisse,

> "By balancing the state's sovereign right to control the entry and residence of foreign nationals in its territory with the individual's right to personal liberty, international legal norms that apply immigration detention fully acknowledge the individual interests that are involved in sovereignty's territorial frame. As such, they have the potential to undermine the perceived neutrality and self-evidence of sovereignty's territorial frame in modern law"[686].

ECLI:CE:ECHR:2008:0129JUD001322903 (§ 45).

[684] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 310).

[685] *Saadi v The United Kingdom*, Application no. 13229/03, Grand Chamber, 29 January 2008 ECLI:CE:ECHR:2008:0129JUD001322903– Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä (p.32).

[686] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 274).

670. The path chosen by international law is certainly different from the one followed by the Court, which unmistakably held that no such balance ought to be found in relation to immigration detention. The legal argument on which the Court founded this assumption is however relatively extravagant. How could the 'unauthorized' character of the entry of a person on the territory of a State justify his/her being denied the right to have the protection of his rights fully observed? The argument put forward by the European Court in the case of *Saadi* (2008) is far from being a convinving one.

> "The Chamber continued that detention of a person was a major interference with personal liberty, and must always be subject to close scrutiny. Where individuals were lawfully at large in a country, the authorities might detain only if a 'reasonable balance' was struck between the requirements of society and the individual's freedom. The position regarding potential immigrants, whether they were applying for asylum or not, was different to the extent that, until their application for immigration clearance and/or asylum had been dealt with, they were not 'authorised' to be on the territory."[687]

671. In this context, it is urgent to remind that "the territorial frame of sovereignty cannot remain insulated against those processed of legal accountability that were accepted as being applicable to the content of sovereignty in a purely domestic context a long time ago"[688].

Conclusion of Section 4

672. If the conception of sovereignty of the European Court of Human Rights has been described and criticized as an inadequate understanding of the challenges posed by irregular migration today as well as an inappropriate instrument of legitimation of a case-law of exception, the possibility of a new vision of State sovereignty remains. According to Galina Cornelisse,

"Drawing on Roberto Unger's idea of 'destabilization rights', the […] aim […] is to

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[687] *Saadi v The United Kingdom*, Application no. 13229/03, Grand Chamber, 29 January 2008 ECLI:CE:ECHR:2008:0129JUD001322903 (§ 45).

[688] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 311).

argue that the capacity of the refugee and the irregular migrant – while interned by European states on European territory – to appeal to the guarantees embodied in modern human rights law, however marginal such guarantees may be in their specific cases, has the potential to destabilize the institution of territorial sovereignty, and therewith it may in time strike at the conceptual innocence and perceived neutrality of territorial borders in constitutional discourse, domestically as well as internationally."[689]

673. This standpoint would allow for a renewed definition of an essential concept and would enable, while maintaining the basic prerogative of the State to choose the members of his polity and the premise that the right to enter and reside in another State is not guaranteed in international law, for a fairer and more convincing jurisprudence to emerge. In this perspective, an actual balance between the protection of the interests of the State and the rights of the individual could be found.

Conclusion of Chapter 4

674. While it has been shown in this Chapter that the jurisprudence of the European Court of Human Rights is arguably not as protective as it could and should have been towards irregularly-staying migrants who are people in vulnerable situations, it ought to be recognised that it still constitutes a system of safeguards. As disappointing as it may be in comparison to what could have been expected if the judges had shown more activism, it still guarantees a certain level of protection of the human rights of irregularly-staying migrants. This system of safeguard is composed of two elements/

675. The first one is specific to these cases and consists in the existence of a serious control over the legality of the deprivation of liberty in immigration law. The point of this Chapter was to show that the depth of the control was significantly lower than the one usually exercised on deprivation of liberty for administrative offences outside the realm of

[689] Galina CORNELISSE, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty,* Immigration and Asylum Law and Policy in Europe, Volume 19, GUILD Elspeth, NIESSEN Jan (editors), Martinus Nijhoff Publishers, 2010 (p. 28).

immigration law. But there again, if such a supervision is considered as insufficient in absolute terms, it is – relatively to what is happening in many other countries outside the reach of the Court - still proving an actual safety net against the most serious infringements of individual liberty. The use of the notion of sovereignty, while criticized in this study is not however synonymous of a free rein to Member States of the Council of European but an extenuating factor within the control operated by the Court.

676. The second one of these elements is related to the role of the Court in general and is not specific to this line of cases. It regards the very existence of the possibility of a recourse to a higher authority when the national Courts have failed to provide the protection owed to every human being of his/her fundamental rights. The mere existence of such a control should, in theory at least, already act as a deterrent. However, one could easily and rightfully argue that the reality proves to be different, as States increasingly ignore the rulings of the Court, in every field of intervention and in particular in immigration law. Nevertheless, the argument put forward by this thesis is that while the judgments of the European Court of Human Rights alone may have little impact on their own, interestingly, they still form, alongside the decisions of the Court of Justcie of the European Union and the Italian jurisprudence a bulwark against the downward slide of the treatment of irregularly-staying migrants everywhere in Europe. As will be briefly considered in the coming concluding Chapter of this thesis, while the arguments used by the different Courts studied in this work vary, their reasoning share some common features which renders more significant the existence of an interplay between them.

CHAPTER 5: CONCLUSIONS

A common origin for the judges' central position and for their interactions

677. The field of immigration law – as many others but more than most of them – is at the crossroads of a network of legal norms which operate simultaneously, sometimes discordantly and involve a multi-level judicial system. All the players involved are struggling in an arena where multiple layers of laws and regulations have accumulated over the years, rendering obscure and in any case complex the jurisdictional treatment of the irregular migrant at the national and European levels essentially. This specific context puts the judge at the junction of many legislations – as at least three layers of laws are applicable to immigration law: national, European and international - whose contradictions and gaps form the premise of his duty of interpretation, the starting point of his interactions. Most importantly, they constitute the possibility to effectively reshape the norms which are under scrutiny. At the origins of the judges' interplays and at the roots of the centrality of their function therefore lie the multiple norms forming the basis of his work.

The pivotal position of the judges

678. The premise of this research was that the judges were seemingly in a key position to influence immigration law as applicable to irregular migrants – whether on its content or on its application. Such hypothesis turned out to be a fair one with regards national judges, whereas it appeared to be much more mitigated concerning supra-national judges. As a matter of fact, one of the most interesting findings was the way the judges used their positions. While the Italian judges (Constitutional and the Justices of the Peace) employed their situation to affirm their role as bulwarks against the legislator's questionable choices in the field of immigration policy, the judges of the Court of Justice of the European Union and of the European Court of Human rights appeared to be much more cautious and timorous in their approaches.

The affirmation of the incisive role of the Italian Constitutional judges

679. As has been illustrated at Chapter 2, the Italian Constitutional judges have shown to be steadfast in not trespassing the limits of their competence while seizing every opportunity to admonish the legislator. Indeed, the fact that the legal norm under scrutiny could not be censured on grounds of unconstitutionality did not preclude the judges – on many occasions - from expressing their opposition to the trends followed by the legislator. As a matter of fact, when the Italian Constitutional Court considered the sanctioning treatment provided for in the offence of unjustified non-compliance with the administrative order to leave the territory it seized the occasion to severely lecture the legislator;

> "the comparison between the criminal norms in question cannot be conducted in the perspective oriented towards the review of the unjustified disparities of treatment censurable by the constitutional judge, but can potentially serve the legislator to systematically consider all the norms establishing criminal sanctions for violations of administrative orders in the field of public security without forgetting however that the offence of unjustified permanence on the national territory of the expulsed foreigner concerns the sole conduct of non compliance with the order to leave the territory by the *Questore*, with a type of offence which leaves out of the consideration the actual or presumed dangerousness of the responsible individuals. In other terms, what could serve as a substance of useful reflection for the legislator cannot render admissible a sentence of this Court."[690]

680. It is thus interesting to notice that the position of the Italian Constitutional judge has steadily been oriented towards a visible opposition to the legislator. No complacency could be reproached to the judges, who, contrary to the European ones, astutely ad repetitively played with the limits of their competences to remain a rampart against the criminalization of irregular immigration. As emphasised along this work, the appraisals of the

[690] "la comparazione con le norme penali suindicate non può certo essere condotta in chiave di confronto rivolto alla rilevazione di ingiustificate disparità di trattamento censurabili dal giudice delle leggi, ma può servire eventualmente al legislatore per una considerazione sistematica di tutte le norme che prevedono sanzioni penali per violazioni di provvedimenti amministrativi in materia di sicurezza pubblica, senza dimenticare peraltro che il reato di indebito trattenimento nel territorio nazionale dello straniero espulso riguarda la semplice condotta di inosservanza dell'ordine di allontanamento dato dal questore, con una fattispecie che prescinde da una accertata o presunta pericolosità dei soggetti responsabili. In altri termini, ciò che può costituire materia di utile riflessione per il legislatore non può rendere ammissibile una pronuncia di questa Corte". Corte Costituzionale Italiana, Sentenza n. 22/2007, ECLI:IT:COST:2007:22 (Considerato in diritto 7.2)

Italian Constitutional Court on the legislations passed in the field of immigration law were often drafted with particular strength as shows the following extract:

> "It is however necessary to recognize that the normative framework in the field of criminal sanctions for the illegal entry or stay of the foreigner on national territory, resulting from the successive modifications of the last years […] presents such imbalances, disproportions and discordances as to render problematic the examination of compatibility with the constitutional principles of equality and proportion of the sanction and with the rehabilitative function of the sanction."[691]

681. The tone of the Italian supreme jurisdiction thus stands in fierce opposition to the mild one used by both European Courts. As eloquently formulated by the Italian Constitutional Court, "the strict observance of the limits of the powers of the constitutional judge does not exempt this Court from noticing the opportunity of a prompt intervention of the legislator to eliminate the imbalances, the disproportions and the disharmonies".[692]

The restraint of the judges of the European Court of Human Rights and of the Court of Justice of the European Union

682. In the course of the second section of Chapters 3 and 4 dedicated to the supra-national Courts, the objective was to draw the landscape of judicial control for detentions based on the violation of an administrative provision not regarding the conditions of entry or stay of third-country nationals. The purpose of such a study was to oppose the methods and the degree of severity used by the supreme European Courts in their appreciation of the legality of an individual's detention outside their review within the framework of either the Returns Directive[693] or Article 5 §1 (f) of the European Convention on Human Rights. While

[691] "Occorre tuttavia riconoscere che il quadro normative in materia di sanzioni penali per l'illecito ingresso o trattenimento di stranieri nel territorio nazionale, risultante dalle modificazioni che si sono succedute negli ultimi anni, […] presenta squilibri, sproporzioni e disarmonie, tali da rendere problematica la verifica di compatibilità con i principi costituzionali di uguaglianza e di proporzionalità della pena e con la finalità rieducativa della stessa". Corte Costituzionale Italiana, Sentenza n. 22/2007 ECLI:IT:COST:2007:22 (Considerato in diritto 7.3)

[692] "La rigorosa osservanza dei limiti dei poteri del giudice costituzionale non esime questa Corte dal rilevare l'opportunità di un sollecito intervento dal legislatore, volto ad eliminare gli squilibri, le sproporzioni e le disarmonie". Corte Costituzionale Italiana, Sentenza n. 22/2007 ECLI:IT:COST:2007:22 (Considerato in diritto 7.4)

[693] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common

both norms are part of what is generically called migration law, the case-law studied fell outside its scope of application and called for the implementation of the more general principles of these legal orders. It implied for the first set of cases, nationals of the European Union prosecuted for a failure to comply with an administrative formality in another Member State and for the second one, nationals of the very State prosecuting them for administrative offences.

683. While many criticisms can be made on the extent to which such jurisprudences can be compared, it nevertheless allowed for the conception of what could be set up as the standard control of the legality of a deprivation of liberty for a wide range of administrative offences. The fact that so many different types of offences have been considered obviously cuts both ways. On the negative side, it renders less justifiable the choice to bring together for comparative aims violations which only have in common the fact that they are classified by domestic laws as administrative offences when no uniform definition of the term can reasonably be proposed. On the positive side, it offers an extensive perspective of the way the two supreme European Courts view an interference with the individual right to liberty when such restriction is not based on the more traditional ground of an act contrary to criminal law. In order to compare the extent and depth of the controls operated by the Courts on deprivation of liberty on the grounds of 'common' administrative offences with the one applied for administrative offences related to immigration law, the establishment of a benchmark was essential.

684. Such a confrontation was to be read in the perspective of the following third sections of Chapters 3 and 4 on the case-law of both of these Courts on detention under the heading of migration law. The argument underlying this approach being that these irregular immigration offences are to be considered as administrative offences by nature for the offence is constituted by the non conformity or absence of documents establishing the regularity of the entry, transit or stay of an individual on the territory of a State of which he or she is not a national of. It made attempts at determining first whether a common trend existed in this area between the Courts, and second whether this tendency was orientated towards a more lenient vision of the recourse to detention in irregular migration law. Moreover, using these elaborated structures of control as a reference point for a comparison to be made with the one

operated in the field of administrative offences related to the field of irregular migration highlighted the differences in the Courts' understanding of legality and the meaning given to the notion of arbitrary.

685. The result of this comparison was to unveil the existence of a double standard on judicial control over deprivation of liberty for administrative offences between the European Court of Human Rights and the Court of Justice of the European as each Court constructed a 'caselaw of exception'. Such jurisprudence is characterized by a lesser protection of the fundamental right of the person subject to a deprivation of liberty whenever such deprivation of liberty is taking place in the framework of immigration law. However, despite the parallelism of their reasoning, each Court used a specific argument to justify the existence of such a discrepancy: effectiveness of European Union law for the Court of Justice of the European Union and 'state sovereignty' for the European Court of Human Rights.

686. Whilst the study illuminated the common features and weaknesses of the reviews operated by the European Courts in the field of detention based on irregular migration, these concluding remarks aim at unveiling the different grounds retained by the Courts to legitimate the creation of a case-law of exception. The peculiar aspects of what this analysis revealed were that each Court essentially uses one unique concept to justify its whole case-law on the topic and that both principles hinder at the political sensitivity of the subject matter. They explain the corollary cautiousness of the jurisdictions as well as the flimsiness of their legal arguments.

687. The dissimilarity of the Court's justifications should not lead to dismissing the argument defending the existence of a form of dialogue between them. However diverse their arguments may be, they rely on the same conception of the circumspect role of the judiciary in this area largely over-determined by political agendas. In this framework, effectiveness and sovereignty can be said to have been used to shield European Union's migration policy – in the case of the Court of Justice of the European Union – and national migration policies – in the case of the European Court of Human Rights. Indeed, the recourse to the principle of effectiveness of European law by the Court of Justice of the European Union could be argued to be mainly instrumental and the choice of State's sovereignty by the European Court of Human Rights could be said to resemble a blanket argument authorizing all kinds of

deviations from the normal control operated under Article 5 § 1 of the European Convention on Human Rights.

688. Though the analysis has shown that the two European Courts have legitimized the particular deficiencies of their control of legality of detention of irregularly-staying third-country nationals on differing criteria, some parallels can be drawn.

689. The first one that can be cited is the fact that in international law, the effectiveness principle "constitutes a fairly straightforward concept often used as an argument for justifying the effective control of a certain territory"[694]. This strangely echoes the fact that, as has been argued, the sovereignty argument – which is precisely caught in its dimension as power to supervise a given land - has been used by the European Court of Human Rights as a legitimating tool of immigration detention under derogatory rules whereas the effectiveness principle has been the privileged instrument of the Court of Justice of the European Union to justify some grave infringements of migrants' fundamental rights.

690. The second element is that while the arguments remain distincts, the trend is identical: it shows the creation of a substandard understanding of the rights enjoyed by irregularly-staying migrants and a greater tolerance for some inadequate State practices as a result of the larger margin of appreciation left by the Courts to national authorities in this field.

691. The third and last prevailing feature consists in the fact that the Courts' constant reliance on the concepts of effectiveness and sovereignty to auto-legitimate a remodeling of their classical jurisprudence and a drifting away of the principles they usually uphold unveils a weak legal reasoning. Indeed, both notions could easily be caught in a different light and be reversed to legitimate a wholly opposite vision of irregularly-staying migrants' rights.

[694] HERLIN-KARNELL, Ester, *The constitutional dimension of European Criminal Law*, Hart, Oxford, 2012 (p. 43).

The result of the judges' interactions: more protection for the fundamental rights of the irregular migrants

692. The finding that the interactions between the judges in the European landscape has led to grant more protection to the irregular migrant's fundamental rights is illustrated by two of these relations. One is at national scale and concerns the exchanges between the Justice of the Peace and the Italian Constitutional Court and the second one is at a European level and regards the many cases brought by the Italian Justice of the Peace before the Court of Justice of the European Union. Generally speaking, it should even be noticed that most of the cases which came before the Court of Justice regarding the law applicable to irregularly-staying migrants was brought by Italian Jurisdictions. Between November 2009 and April 2014, on the 23 requests for preliminary rulings that the Court of Justice received, 18 came from Italian jurisdictions: 9[695], came from Justices of the Peace, 8[696] came from Courts all over the country, and 1[697] came from the Court of Cassation. In addition, while the activism of the Justice of the Peace before the European Court of Human Rights is less visible because the procedure generally speaking does not put the judge in a central position, it can nevertheless be seen in some of the decisions studied in this thesis. For example, in the case of *Khlaifia* (2016)[698], the European Court made references to the decisions of the Justice of the Peace of Agrigento whose decisions and motivations were in essence very close to the ones of the European Court.

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[695] *Asad Abdallah,* Case C-144/11, Order of the Fifth Chamber, 8 September 2011, EU:C:2011:565; *Ahmed Ettaghi,* Case C-73/12, Order of the Fifth Chamber, 4 July 2012, EU:C:2012:410; *Abd Aziz Tam*, Case C-74/12, Order of the Fifth Chamber, 4 July 2012, EU:C:2012 :411; *Majali Abdel,* Case C-75/12, Order of the Fifth Chamber, 4 July 2012, EU:C:2012:412; *Procura della Repubblica c. Xiamie Zhu e.a.* (Case C-51/12) *Beregovoi Ion* (Case C-52/12) *Sun Hai Feng* (Case C-53/12) *Yang Liung Hong* (Case C-54/12), Order of the President of the Court, 6 February 2013, EU:C:2013:61

[696] *Procura della Repubblica c. Mohamed Ali Cherni,* Case C-113/11, Order of the President of the Court, 26 May 2011, EU:C:2011:356; *Procura della Repubblica c. Lucky Emegor,* Case C-50/11, Order of the President of the Court, 21 June 2011, EU:C:2011:408; *Procura della Repubblica c. Mohamed Mrad,* Case C-60/11, Order of the President of the Court, 21 June 2011, EU:C:2011:409; *Procura della Repubblica c. John Austine,* Case C-63/11, Order of the President of the Court, 21 June 2011, EU:C:2011:410; *Procura della Repubblica c. Ibrahim Music,* Case C-156/11, Order of the President of the Court, 21 June 2011, EU:C: 2011:412; *Procura della Repubblica c. Assane Samb,* Case C-43/11, Order of the President of the Court, 6 July 2011, EU:C:2011:456; *Procura della Repubblica c. Elena Vermisheva,* Case C-187/11, Order of the President of the Court, 6 July 2011, EU:C:2011:457; *Procura della Repubblica c. Yeboah Kwadwo*, Case C-120/11, Order of the President of the Court, 13 July 2011, EU:C:2011:480

[697] *Procuratore generale della Repubblica presso la Corte suprema di cassazione c. Demba Ngagne, Case C-140/11,* Order of the President of the Court, 29 June 2011, EU:C:2011:434

[698] *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312

The activism of the Italian Justices of the Peace towards the Italian Constitutional Court

693. Illustrating the interactions between the jurisdictions at a national level, it is noteworthy that a significant part of all the decisions alleging the violation of a constitutional norm by a provision of national immigration law before the Italian Constitutional Court emerged thanks to a procedure started by a Justice of the Peace. As a matter of fact, one of the most commented decisions of the Italian Constitutional Court in the field of immigration law (Decision n. 250/2010), arose thanks to the Justice of the Peace of Torino. In this case, it could even be argued that the allegation of a violation of the directive was purely instrumental. Indeed, the Justice of the Peace claimed the existence of a violation of a directive of European Union law which period of transposition had not yet expired. It is therefore plausible to believe that such argument was merely a pretence aiming at giving an opportunity to the Constitutional judge to review the Italian legislation. The activism of the Justice of the Peace appears also to be patent in the phrasing of the alleged violation of the Italian Constitution:

> "article 2 of the Constitution which recognizes and guarantees the respect of inviolable human rights and requests the fulfillment of binding duties of political, economic and social solidarity would be violated by reason of the situation of extreme indigence in which most of the irregular migrants find themselves"[699].

694. The argument which is undeniably somewhat naïve, had the merit to force the review of the constitutional judge, if not on the violation of this precise provision of the constitution but on another much more relevant one.

695. Another example of the Justice of the Peace's activism can be found in a much older decision of the Italian Constitutional Court in which the argument put forward was both absurd and smart. The argument put forward by the Justice of the Peace resided in the claim that the possible transformation of a criminal detention of an irregularly-staying migrant into the expulsion from the Italian State constituted a treatment of favour in violation of the constitutional principle of equality before the law of the foreigner and the national citizen. The Justice of the Peace audaciously argued that:

[699] «Risulterebbe violato, infine, l'art. 2 Cost., che riconosce e garantisce i diritti inviolabili dell'uomo e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale : e ciòe, a causa dello stato di estrema indigenza in cui versa la quasi totalità degli immigrati clandestini». Corte Costituzionale Italiana, Sentenza n. 250/2010, ECLI:IT:COST:2010:250 (Ritenuto in fatto 2.1)

"as far as inviolable human rights are concerned, the principle of equality is also applicable to the foreigner; the provisions under scrutiny seems to violate such principle in granting the foreigner subject to a temporary detention a privileged treatment as it allows them to escape at will the temporary procedure of detention in order to benefit from the alternative expulsion from the State"[700].

696. This rather ironical argument shows the relentlessness with which the Italian subaltern courts use the instrument of the constitutional review operated by the Constitutional Court to affect the legal norms applicable to irregularly-staring migrants.

697. The last paragon which will be taken here is the attempt to argue that the offence of illegal entry and stay sanctions a personal condition and not an act was made by the Justice of the Peace of Lecco who considered that

"[t]he Constitution […] would be violated by the fact that the provision under scrutiny criminalizes a particular personal and social condition – the condition of the illegal immigrant deriving from the mere violation of the norms which regulate the entry and stay on the territory of the State – and not the commission of an act harming a value protected by the Constitution"[701].

698. The attempt was commendable but the main argument put forward did not convince the Italian Constitutional judges who refused to consider that the provision under scrutiny was unconstitutional. The argument concerned the fact that the provision was a case in point for the criminalization of a personal feature as it sanctioned an individual for his/her 'personal and social conditions'. The problem was however that the argument was intrinsically contradictory as the Justice of the Peace himself recognized in the same sentence that those 'conditions' stemmed directly from 'the mere violation of the norms'.

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[700] «quando si tratta di diritti inviolabili, il principio di eguaglianza vale pure per lo straniero, la disposizione contestata sembra contrastare con tale principio nel concedere allo straniero sottoposto a custodia cautelare un trattamento privilegiato permettendo ad esso di sottrarsi con una propria determinazione al regime cautelare carcerario per avere in alternativa l'espulsione dello Stato». Corte Costituzionale Italiana, Sentenza n. 62/1994 ECLI:IT:COST:1994:62 (Ritenuto in fatto 1).

[701] «Risulterebbe violat[a] [la Costituzione] -, in quanto la disposizione censurata sanzionerebbe penalmente una particolare condizione personale e sociale – quella di straniero 'clandestino', derivante della mera violazione delle norme che disciplinano l'ingresso e il soggiorno nel territorio dello Stato – e non già la commissione di un fatto offensivo di un bene costituzionalmente protetto". Corte Costituzionale Italiana Sentenza n. 250/2010 ECLI:IT:COST:2010:250 (Considerato in diritto 2).

699. While all these recourses before the Constitutional Court did not necessarily result in the recognition of the unconstitutionality of the provision under scrutiny, they show the activism of the Justices of the Peace despite the fact that their status, procedures and jurisdiction have been quite seriously questioned in this very thesis.

The activism of the Italian Justices of the Peace towards the Court of Justice of the European Union

700. At the national level, the judge has to apply national law taking into account his/her role as a European judge. This bears three immediate consequences for him/her: the possibility for a preliminary ruling before the Court of Justice of the European Union (according to the procedure set forth by Article 267 TFUE) in case of doubt, the obligations deriving from the direct effect of certain European Union norms and the necessity to interpret national provisions in accordance with European Union law. However, the mechanism thanks to which the interplays between the Court of Justice of the European Union and the Italian jurisdictions have been instigated and favored ought to be mentioned. Indeed, the existing mechanism of preliminary proceedings (Article 267 TFUE)

> "has been strengthened by the adoption on 1 March 2008 of an urgent preliminary ruling procedure […] [PPU] that enables national courts to clarify certain matters as urgent and add specific legal remedies to safeguard fundamental rights when these rights are at stake. […] [T]his new urgent procedure […] will reinforce multi-level interactions, one of the main peculiar aspects of the so-called 'vertizontal' model of jurisprudence of the EU »[702].

701. The effect has therefore been « a significant change in the institutional framework: interactions with the ECJ [Court of Justice of the European Union] involve a shift of power from the legislative and the executive branches of the government to the national judiciary »[703].

[702] FORNALE Elisa "The European Returns Policy and the re-shaping of the national: reflections on the role of domestic courts", *Refugee Survey Quarterly*, 2012, Volume 31, No. 4, p. 143

[703] FORNALE Elisa "The European Returns Policy and the re-shaping of the national: reflections on the role of domestic courts", *Refugee Survey Quarterly*, 2012, Volume 31, No. 4, p. 143

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