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Criminalising Hope
Human Rights Implications of the
Criminalization of Irregular Immigration in
EU Member States and the EU

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Abstract:

The trend to criminalise irregular immigrants among European Union Member States entails important challenges for the protection of human rights in Europe and has created unease among human rights defenders and institutions around Europe and the world. The European Union's security-driven approach on irregular immigration has contributed to such criminalisation, which today is increasing due to the rise of xenophobic parties in many Member States. However, after the Treaty of Lisbon, with the now binding Charter of Fundamental Rights, the European Union has the opportunity to change its approach to a more human rights-centred approach. Although the respect for fundamental rights was not at the base of the preliminary ruling that the European Union Court of Justice issued on 28 April 2011, this judgement could bring an end to the criminalisation of irregular immigration in most Member States. This thesis will analyse how the European Union has contributed to this trend and if, in the future, it will continue to do so or if it could possibly reverse it. Italy will be taken as a case study because it has recently enacted a law criminalising irregular immigration that could be directly affected by the judgement of 28 April 2011.

A mis padres, a mi hermana y a mi abuela, porque a ellos les debo cada uno de mis éxitos.

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ACRONYMS

AFSJ: Area of Freedom, Security and Justice.

CAT: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

CERD: Committee on the Elimination of Racial Discrimination.

ECtHR: European Court of Human Rights.

ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms.

EU: European Union.

EUCJ: European Union Court of Justice.

EUMS or MS: European Union Member States.

EURA: European Union Readmission Agreements.

ESC: European Social Charter.

EU Charter: Charter of Fundamental Rights of the European Union.

FRA: European Union Agency for Fundamental Rights.

Hr: Human Rights.

ICCPR: International Covenant on Civil and Political Rights.

ICESCR: International Covenant on Economic Social and Cultural Rights.

ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

ILO: International Labour Organisation.

RD: Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, the Returns Directive.

TEU: Treaty on the European Union.

TFEU: Treaty on the Functioning of the European Union.

TCN: Third Country Nationals.

TL: Lisbon Treaty.

UN: United Nations.

**CRIMINALISING HOPE:
HUMAN RIGHTS IMPLICATIONS OF THE CRIMINALIZATION OF
IRREGULAR IMMIGRATION IN EU MEMBER STATES AND THE EU**

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1. INTRODUCTION

The trend to criminalise irregular immigrants among European Union Member States (EUMS) and the European Union (EU) entails important challenges for the protection of human rights (hr) in Europe. On February of this year the Council of Europe Commissioner for Human Rights decided to publish a paper on the Criminalisation of Migration in Europe. During the last Universal Periodic Review to Italy,¹ many countries also expressed their concern regarding the criminalization of undocumented immigrants in Italy following the legislation that entered into force in 2009. These events come as a sign of the unease that this phenomenon is causing among human rights defenders and institutions around Europe and the world. This is, therefore, a current and relevant hr issue and possibly the biggest human rights grey area in Europe. Fortunately, on 28 April 2011, the European Union Court of Justice (EUCJ) issued a preliminary ruling that could bring an end to the criminalisation of irregular immigration in EUMS. However, the court has not yet confirmed this interpretation.

The term “criminalization” of migrants refers in general to the stigmatization of undocumented immigrants, and immigrants in general, as criminals. That is, the creation of a “*culture of suspicion and distrust surrounding the movements of third country nationals and irregular migrants in particular*”.² The legal part of this thesis will concentrate on the connotation that refers to the shift from administrative law to

¹ A/HRC/14/4 Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Italy, 18 March 2010.

² Cholewinski, 2007, p.302.

criminal law of the “offence” of irregular entry and stay of immigrants. In other words, the creation of penal sanctions based on the irregular status of these immigrants that did not exist before.³ This thesis will sometimes refer to this as the crime of “clandestinity”. Additionally, there will also be an analysis of the increase of criminal sanctions being imposed on individuals directly or indirectly involved in the irregular immigration process, including third parties engaged in solidarity assistance.⁴ These offences are closely linked to the developing of EU migration law and policies and also affect irregular immigrants and contribute to the culture of distrust mentioned above.⁵

The analysis of this thesis will be geographically limited to the situation in EUMS and in the EU, and it will concentrate on economic migrants, also called voluntary migrants or economic refugees. Thus, it will not consider the so-called forced migration, meaning asylum seekers or refugees. More specifically, it will narrow its findings to the criminalisation of irregular immigrants in the EU and EUMS. It is rare to find a definition of irregular immigrant in EUMS’s legislations. These laws tend to define under which circumstances a person can be considered a regular immigrant, “*leaving the rest as potentially illegal*”.⁶ For the purpose of this research, the term “irregular immigrant” will refer to those entering or staying into the territory of a country without the required permit. As this thesis focuses on the EU and EUMS, the term “third country national” (TCN) will be used consistently to designate those immigrants that

³ Cholewinski, 2007, p.302

⁴ Carrera and Merlino, 2009, p.17.

⁵ Cholewinski, 2007, p.302.

⁶ Guild, 2004, p. 4.

are not national of any of the EUMS. Likewise, it is important to know that those TCN that work in a manner inconsistent with their immigration status may also be included in the category of “illegal immigrant”.⁷ This thesis will always use the terms “irregular” or “undocumented” immigrant and never “illegal immigrant”, because if a human being is defined as illegal, *“the right of everyone ‘to recognition everywhere as a person before the law’ would be violated.”*⁸

Taking all this into account, this thesis will analyse the problem and look then for strategies and arguments to delegitimize this trend. It will mainly concentrate on the legal aspects of the subject. The first chapter will contextualize the issue. First, it will try to explain why governments decide to criminalise irregular immigration, to then give an overview of the situation of the human rights of irregular immigrant and finish with a quick analysis of the EUMS’s legislation on the matter. The second chapter will study the role that the EU had and will have in this trend. It will examine the Lisbon Treaty and the consolidated texts of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It will analyse EU legislation on irregular immigrants, as well as the recent judgement of the EUCJ of 28 April 2011, El Dridi case, interpreting the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals,⁹

⁷ Guild, 2004, p. 3.

⁸ Cholewinski, 2006, p. 4.

⁹ Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008.

known as the Returns Directive (RD). Finally, a case study on Italy as a EUMS will be examined in the third chapter, especially on the implications that El Dridi case had on Italian legislation criminalising clandestinity.

This research was based mainly on European, national and international legal documents, as well as case law. Articles and books on the subject, together with reports and documents by international governmental and non-governmental organizations have also been used for this study. Additionally, interviews with key actors or interlocutors have contributed to a better understanding of the subject and have helped to give some practical suggestions on the problem. Moreover, my participation in the International Workshop “Countering New Legislative Proposals Criminalizing Undocumented Migrants in the Netherlands: Building on Experiences of Resistance Throughout Europe”, which took place in Rotterdam on the 27th of May 2011, has allowed me get an insight on the work that is being done by NGOs on this subject.

I have had the pleasure to interview relevant actors at the Italian level such as Italian judges Nazzarena Zannini, and Lorenzo Miazzi; an Italian immigration lawyer, Marco Ferrero; and public officials of the Italian police in Padova dealing with immigration. I also interviewed actors of the international human rights arena, such as Anne Webber, working for the Council of Europe Commissioner for Human Rights in the theme of immigration and Roberto Chenal, lawyer for the Italian division at the European Court of Human Rights. Finally, I had the great honour to interview the Professor Romano Prodi, former president of the European Commission and former prime minister of Italy.

Finding literature on this specific subject has not been an easy task due to the currency of the events that have been analysed in this thesis, especially in relation to the EUCJ judgement of 28 April 2011. I had to keep up with all the events that have taken place from 28 April on and I have finished my research only on 24 June 2011; a day after the Italian government enacted a Decree Law trasposing the RD. However, I have tried to get ahead and I hope that this thesis may give some answers and some useful ideas also for the future.

2. ANALYSIS OF THE PROBLEM

2.1 WHY GOVERNEMENTS DECIDE TO CRIMINALISE IMMIGRATION AND WHY IS IT WRONG TO DO IT

In September of 2008, Thomas Hammarberg, Council of Europe Commissioner for Human Rights, issued a viewpoint entitled “It is wrong to Criminalize Migration”. In this viewpoint, the commissioner already mentioned the existence of a trend to criminalise irregular entry and stay, as a method to control international migratory movements. It comes natural to most of us to declare that the criminalisation of irregular immigrants is wrong. But, why is it wrong? Is it only morally wrong, or are there juridical, hard law arguments that can be raised against such a policy? This thesis will try to answer these and other questions. This section will first attempt to understand the reasons why governments decide to adopt such policies in the first place, to then answer the question of why is it wrong to do it.

*“Markets and politicians construct (im)migration as a political and security problem”*¹⁰ with the aim of creating *“unity by naming a new enemy, a new threat, the migrant.”*¹¹ During a period of economic growth, immigrants are considered beneficial, but when there is an economic recession they acquire a negative image and are accused of ruining the welfare state.¹² Already in the mid-seventies-early eighties, during the economic and urban crisis of these years, politicians started placing migration control at the centre of public discourse regarding security. The aim was to find a *“simple and visible explanation”* for the consequences of the side effects of their own policies of the sixties.¹³ Additionally, in the context of Globalisation, where the role of the State has been relegated in many fields, politicians use immigration control as a way to show that they still have a say and that *“at least security is their thing”*.¹⁴ The main risk of this induced insecurity is that *“the rule of law becomes secondary to the objective of threat neutralisation”*.¹⁵

This construction has also taken place at the EU level. In fact, the opening of borders within the EU was accompanied by the idea of compensating a security deficit, arguing that the removal of controls would open doors to criminals and immigrants. This

¹⁰ Bigo, 2004, p. 63.

¹¹ Idem, p. 64.

¹² Idem, p. 70.

¹³ Idem, p. 65.

¹⁴ Idem, p. 64.

¹⁵ European Civil Liberties Network, “Oppose the “Stockholm Programme”: Statement by the European Civil Liberties Network on the new EU five-year plan on Justice and Home Affairs”, April 2009. Available at: <http://www.ecln.org/ECLN-statement-on-Stockholm-Programme-April-2009-eng.pdf> (consulted on 15 May 2011), p.3.

discourse has been adopted as the basis for many of the recent legal provisions, converting “*an extremist rhetoric into a symbolic power engaging the authority of the State.*”¹⁶ In particular, common policies on external borders developed as a result to the loosening of internal borders caused by the Single European Act, which established free movement of people between EU states, and the Schengen agreement, which abolished internal border controls.¹⁷ In the 1990s cooperation in this area became a priority, and with the enlargement of the EU towards certain Central European countries there was a feeling of uncertainty about the borders of EU and of fear among the EU citizens, which has been used by governments. Moreover, the process of European integration changed the “loci of control” and the target of that control. The result is that third-country nationals have become under surveillance at their country of origin, at the border and after crossing it, within the borders of the EU.¹⁸

Thus, both the EU and EUMS are promoting an artificial link between irregular immigration, which is mainly a social issue, and repressive law and practices, which includes a progressive transition from administrative to criminal law.¹⁹ Politicians use measures such as the use of criminal law to show their power, as sovereign states, and their determination to ensure state control of migration. They are showing the population that they are acting to solve the real problems, that they are fulfilling their

¹⁶ Bigo, 2004, p. 74.

¹⁷ Boswell, 2005, p.12.

¹⁸ Bigo, 2004, p. 70. Nevertheless, recent events, such as the Danish decision to re-establish border controls, may potentially change the picture of border controls in Europe.

¹⁹ Carrera and Merlino, 2009, p.11.

promises. Some studies say that anti-immigration “moderate” parties are more successful than extreme right or neo-Nazi parties, because voters would not support anti-democratic or too extremist parties.²⁰ Politicians can, thus, afford to make a show of being “tough” on “illegal immigration”²¹ because as long as it only affects immigrants they won’t be seen as extremist parties.

Over the years, EUMS have “*embarked on a course of transforming immigration from a political question to a ‘technical one’, by presenting it as a matter of security technology.*”²² This has been an incentive for European governments to progressively shift policies of justice and home affairs from the national to the European level, because “*there are less constraints on restrictive approaches at EU level than at national*”²³ and because decisions taken at these level receive little public scrutiny. Hence, it is easier for them to cover up controversial decisions in this area behind the argument of “collective decisions” or of “because Brussels says so”. Yet, today it is turning to be a political issue.

Additionally, the recent grow on the criminalisation of undocumented immigrants in the EU and EUMS can be seen as a consequence or a symptom of the xenophobic wave that is hitting Europe and that it is questioning the European project as a whole. The commissioner of the Directorate General (DG) Home Affairs, dealing with immigration,

²⁰ Bos and van der Brug, 2010, pp. 792-793.

²¹ Miller, 2008, p.7.

²² Bigo, 2004, p. 71.

²³ Boswell, 2005, p.12.

has recently stated that “(i)t’s important to see the full picture and not be taken over by populist debates in the media and in national election campaigns.”²⁴ However, as it will be seen in the second chapter, in practice, EU policies also reflect those populist debates against irregular immigration. With this attitude, Europe is committing both a “moral and an economic suicide”. First, because it is going against the values on which the EU is found,²⁵ and second, because, taking into account the European demographic trend, this attitude towards migration “will do nothing more than accelerate its decline.”²⁶

There are two research projects financed by the EU that have studied the criminalisation of irregular immigrants in Europe. The CHALLENGE project²⁷ was a five-year project, running from June 2004 to May 2009, which studied the way in which immigration becomes incorporated into criminal law from a legal and sociological point of view. The CRIMPREV project,²⁸ running from 2006 to 2009, assessed the effects of the criminalisation of migrants in the EU, examining how certain narratives, statistics or practices of the police, judicial authorities, local governments, media and the population have led to a criminalisation of migrants in the EU. Both the CHALLENGE and CRIMPREV projects have been financed by FP6 of the DG for Research. Both studies

²⁴ <http://blogs.ec.europa.eu/malmstrom/college-discussion-on-migration/>

²⁵ Article 2 TEU “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*”

²⁶ Torreblanca, 2011.

²⁷ <http://www.libertysecurity.org/>

²⁸ <http://www.crimprev.eu>

concluded that *“the present discourse favours increased (in)security practices by public authorities, describing undocumented persons as ‘non-rights holders’ and even as ‘non-persons’”*²⁹ and suggested that the EU should change its official terminology. Unfortunately, the EU has largely ignored the outcomes and recommendations of these studies. The gap between EU policies on irregular immigration and EU-funded social science research affects *“policy coherency”* and *“also undermines the capacity of EU policies on migration to add value, to meet social needs and to resolve dilemmas.”*³⁰

It is important to notice that the terms “immigrants” and “the problem of immigration” do not refer to foreigners in general but to the migration of the poor. In this sense, the project CHALLENGE claimed that the policy debate about irregular immigration is structured around a very specific category of migrants; TCN who are poor.³¹ Terminology is a critical aspect in shaping the debate on immigration³² and it affects how public policy responses are justified, developed and implemented.³³ The use of the term “illegal immigrants”, instead of “undocumented or irregular immigrants”, has always been criticized because *“both from a juridical and an ethical point of view, no human being can be considered illegal.”*³⁴ Nevertheless, the EU has constantly used

²⁹ Carrera and Merlino, 2009, p.12.

³⁰ Idem, p.1.

³¹ Idem, p.13.

³² Cholewinski, 2007, p.305.

³³ Carrera and Merlino, 2009, p.11.

³⁴ Solidar, “Irregular migrants have rights: Solidar Position on the European Commission Communication on illegal immigration: a rights-based approach to the question of irregular migration”, 2006. Available at: http://cms.horus.be/files/99931/MediaArchive/migration/illegal_immigration_communication_Solidar_position.pdf (consulted on 25 March 2011) p.1.

terminology such as “illegal immigrant” or “to combat illegal immigration”.³⁵ These terms, followed by the use of military-type operations, have created the perception that the “*EU is at war with irregular migrants and must gather all its forces to repel the attack*”.³⁶ In consequence, people see irregular immigrants as constant enemies and associate them with criminal offenders, which have fewer rights. The danger of this imagery is clear.³⁷

Moreover, taking a quick look at statistics, it is clear that the security approach taken on borders control, linked with irregular migration, is completely disproportionate and unjustified. In 2009, there were around 355 million entries of people into the Schengen area, but only 105 million corresponded to TCN.³⁸ In the first three months of 2010, there were approximately 14,200 irregular entries, 36% less than in the final quarter of 2009.³⁹ Hence, annually there are around 56,000 irregular entries, while there are around 105 million TCN entries and 355 million entries in total. Therefore, it is clear that the immense majority of entries in the Schengen area are not linked with security

³⁵ See Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union, (2002/C 142/02).

³⁶ Cholewinski, 2007, p.305.

³⁷ An example of this dangerous dehumanisation could be the public reaction to the execution of Osama Bin Laden, considered as a non-person with no human rights. This comparison is, though, dangerous because in the case of Osama Bin Laden there was a justifiable link with criminal law, while in the case of irregular immigrants there is not.

³⁸ Council of the EU, Results of the Data Collection Exercise Document 13267/09, Brussels, September 22, 2009.

³⁹ FRONTEX, News release: Irregular immigration hits net low in first quarter of 2010, facilitator detections up 13%, 7 July 2010.

issues but with trade, tourism or family relations, and that the number of people seeking to enter irregularly is statistically insignificant.⁴⁰

In reference to those overstaying, according to the CLANDESTINO project,⁴¹ funded by the DG Research and running from 2007 to 2009, certain EU official documents referring to estimates of undocumented migrants in the EU are based on non reliable sources and do not specify any time frame.⁴² In fact, it is estimated that undocumented migrants amount to around 1% of the total EU population, and the feared substantial growth of irregular migration in the EU, upon which policies dealing with irregular immigration have been justified, has not materialised.⁴³

Besides the terminology used, also the narrative used is important. Criminalising irregular immigration implies an increase of state powers, which usually needs some kind of a narrative that justifies it. This narrative is based on three elements,⁴⁴ which, in this case, refer to an in-group, which is the host-society and regular immigrants, an outsider threat, meaning the irregular immigrants, TCN, and the “legitimate exercise of state power” in response to that threat, in this case the criminalisation of TCN. To

⁴⁰ Guild and Carrera, 2011, p.7.

⁴¹ <http://clandestino.eliamep.gr/>

⁴² Jandl, Vogel and Iglicka, 2008, p.5.

⁴³ Carrera and Merlino, 2009, p.15.

⁴⁴ “Narrative and legitimation in the criminalization of immigrants”, 2011, at:

<http://brokenfence.wordpress.com/2011/01/21/narrative-and-legitimation-in-the-criminalization-of-immigrants/> (consulted on 3 june 2011)

delegitimise this narrative it is necessary to undermine one of these elements. First, the definition of threat could be easily challenged taking into account reliable statistics that deny the data given by EUMS and the EU. Secondly, the differences between the in-group and the outsider threat could also be contested, for example, because falling into irregularity is extremely easy, which means that an “insider” could at any time become an “outsider”. Finally, the purpose of the measures taken by the state could also be questioned in terms of effectiveness or proportionality, since criminalising irregular immigrants in order to prevent them from coming or making them leave the host country does not comply with any of those principles.

Criminal law and Immigration law have in common that they are both systems of inclusion and exclusion and create distinct categories of people: be innocent versus guilty, or regular versus irregular.⁴⁵ However, while criminal law is intended to prevent and address harm to individuals and society from violence or fraud or evil motive,⁴⁶ irregular immigrants have only disregarded the administrative rules for regular entry and stay in a certain country, which appears to many as a ‘crimeless’ offence.⁴⁷ After the events of September 11, the connection between administrative law and criminal law increased, making it easier to justify identifying “terrorist” with “immigrant”. However, it is interesting to notice that in some cases it was immigration law taking over criminal law. This was the case in the United States, where federal officials used immigration law to detain or deport those alleged to be involved in terrorism, because it

⁴⁵ Stumpf, 2006, p. 380.

⁴⁶ *Idem*, p. 379.

⁴⁷ Carrera and Merlino, 2009, p.13.

allowed them to do it based on citizenship status and ethnicity, which would not be possible within the criminal justice system.⁴⁸

*“The treatment of foreigners, in particular as regards their entry onto the territory and residence, is not part of the constitutional settlements but a field which is governed by state discretion and exceptionalism”.*⁴⁹ As a consequence, this subject is very sensitive to potential human rights violations and it needs special consideration from the human rights system at the supranational level. Moreover, *“administrative measures regarding entry, residence and expulsion of foreigners are not subject to the same civil liberties guarantees of due process as apply in criminal law”.*⁵⁰ In fact, immigration law is an area of law where the consequences of poor decision-making can have terrible human rights implications for the individuals concerned. It is an area where guarantees are specially needed and where discretionary power should be very limited. However, in most countries and also in the EU, the situation is the opposite.

This last statement rises up the question of whether criminalisation could somehow be beneficial for the protection of the human rights of irregular immigrants. In fact, this was initially one of the main questions that this thesis was supposed to give an answer to. However, after having done research on the matter, the outcome is that the negative costs are so overwhelming over the benefits, that it seemed more relevant to concentrate on how to end this criminalisation. In any case, it is true that procedural rights improve

⁴⁸ Stumpf, 2006, p. 385

⁴⁹ Guild and Minderhoud, 2006, p.2

⁵⁰ Idem, p.2.

during the criminal trial,⁵¹ which contrasts with the lower procedural requirements in the field of administrative law on immigration. Nevertheless, these more protective rights apply only for a very limited part of the process, because, in most cases, the criminal sanction is replaced with an order of removal as an administrative measure, and the immigrant is placed in administrative detention.⁵²

It is interesting to read the speech given by Prof. Gaetano Contento, Ordinario di Diritto Penale of Bari University in a 1996 Convention of Criminal Law Studies in Italy.⁵³ His speech refers to criminalisation as the stigmatization of immigration around criminal conducts. He argued that, taking into account that, at that time in Italy, 99% of the immigrants that committed crimes were irregular immigrants; one could state that being an irregular immigrant facilitates the entrance in criminal circles. In that sense, he asked: what sense does it make to enact legislation that, by making regular entrance and stay harder, has the effect of making irregular immigration grow and, in consequence, makes delinquency rates grow as well?

⁵¹ For example, the guarantees of due process of article 6 of the ECHR will be applicable to the trial for the offense of irregular entry and stay, as clandestinity would imply a criminal charge against an irregular immigrant.

⁵² In Italy, following the massive flow of immigrants in Lampedusa procedural rights in immigration processes have been in practice limited. In fact, a recent circolare of the Italian Ministry of Home Affairs, prot. n. 1305 del 01.04.2011, has been used to limit even more the procedural rights of the detainees, asking the lawyers to show an authorisation of the Prefetto and from the Ministry of Home Affairs in order to enter the administrative detention centres where their clients are held. This is an example of the risks of the wide discretionary powers that the authorities have in this field, which, as it has happened in this case, violate not only internationally recognised human rights, but also article 13 of the Return Directive, that will be explained in the second chapter.

⁵³ Contento, 1996, pp. 113-118.

He proposes to make it easier for immigrants to be regular creating more flexible and realistic conditions for regular entry and stay. For example, he considers that requiring immigrants to already have a job before coming to the country of destiny is only going to generate irregular migration, because this is almost impossible for most immigrants. However, what most of them have is the contact of people who live in that country and already have a job. He suggests recuperating the institution of “malleveria”. The idea would be to require immigrants to point someone already living regularly in the country of destiny to respond for his/her good conduct. The person responding for the new comer would suffer certain legal consequences if the newcomer does not behave appropriately. Although that proposal may seem very idealistic, in my opinion, the review of immigration requirements is urgent. The EU and its MS have to accept that with such strict requirements they are only promoting irregular immigration and acknowledge that the need of immigrant labour in Europe is not covered with only the few regular migrants that they let in. Therefore, they should stop marginalizing a part of society that is needed by the rest of society, because this can only have disastrous consequences.

Prof. Contento also believes, as many do, that it would be more effective to spend less money on control mechanisms and more money creating good conditions in the countries of origin, because the best way to make irregular migration lower is eliminating the reasons that force migrants to leave their country of origin. In fact, the term “economic refugee” reflects very well the situation of many irregular migrants. Therefore, creating or avoiding the destruction of jobs in their countries of origin would

prevent them from looking anywhere else. Some NGOs even talk about the right to not migrate, which, in my opinion, is another name for the *right to an adequate standard of living* regulated in article 11 of the International Covenant on Economic, Social and Cultural Rights. In this sense, it could be interesting to investigate the potential extraterritorial obligations of European States in respect to that right in the countries of origin. However, this thesis will not deal with those topics because of limited time and space.

I have already mentioned some of the reasons why it is wrong to criminalise irregular immigration, but the main one is that criminalising irregular immigrants has an obvious negative impact on their enjoyment of their basic human rights. A clear consequence is an increase in the exploitation of undocumented workers. In fact, undocumented immigration provides “*a continued malleable pool of low-wage workers who possess drastically circumscribed constitutional rights by virtue of their immigration status.*”⁵⁴ Additionally, it may cause a lack of resources directed toward preventing crimes against irregular immigrants, due to the dramatic increase in law enforcement resources being brought to “fight against undocumented migrants”.⁵⁵ Moreover, it discourages immigrants from relying on the State for their own safety and creates an ever-growing “illegal” net around them to satisfy their needs. Criminalizing irregular immigrants can also have fatal consequences for the well being of the society in the host country, in the sense that, creating an ever-expanding population of excluded, can only fracture the

⁵⁴ Miller, 2008, p.5.

⁵⁵ Idem, 2008, p.6.

remaining society beyond the imaginable.⁵⁶ In general, this criminalisation may justify a false presumption that undocumented migrants are not holders of rights and it blurs their high degree of vulnerability and marginalisation in the EU.⁵⁷

I would like to finish this section with two examples of the rejection that this trend has caused around the world. The first one took place during the last Universal Periodic Review to Italy,⁵⁸ where many countries, such as Sweden, Brazil or Bangladesh, expressed their concern regarding the criminalization of undocumented immigrants in Italy, following the legislation that entered into force in 2009. Mexico and Brazil expressively recommended to “*take appropriate legislative measures to decriminalize irregular entry and stay in Italy (Brazil); to eliminate the provision criminalizing irregular entry and stay on Italian territory as contained in law No. 94 of 2009, (Mexico).*”⁵⁹

The second example can be found in the Statement of the Civil Society Days at the Global Forum on Migration and Development in Puerto Vallarta, in Mexico, of last year, 2010. The participants stated that they “*deplore the growing criminalisation of irregular migrants, the heavy emphasis on security, enforcement, militarization, detention, border controls and deportation.*”

⁵⁶ Stumpf, 2006, p.378.

⁵⁷ Carrera and Merlino, 2009, p.13.

⁵⁸ A/HRC/14/4 Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Italy, 18 March 2010.

⁵⁹ Idem, p.19.

2.2 HUMAN RIGHTS OF IRREGULAR IMMIGRANTS

This section will make a brief review of the internationally recognised human rights that belong to everybody, independently of the person's status in the country. It will concentrate on those rights that could be allegedly violated by the criminalisation of irregular stay and entrance. The analysis will start with those international instruments affecting irregular immigrants, and then refer to some human rights instruments emanating from the Council of Europe and to the Charter of Fundamental Rights of the EU.

Undocumented immigrants have human rights, because “*(h)uman rights are inherent entitlements which belong to every person as a consequence of being human.*”⁶⁰ It is only possible to deny this if the migration status is used to expressly exclude undocumented immigrants from the personal scope of a certain human right provision. All international human rights instruments contain rights that are applicable to irregular immigrants, using term such as “*everybody*” to refer to the holder of the rights. Additionally, they all include clauses on non-discrimination, most of which incorporate non-discrimination on the basis of “*(...) other status*”, which can refer to immigration status.

⁶⁰ PICUM, Platform for International Cooperation on Undocumented Migrants, “Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework”, Beëlzepub, Brussels, March 2007, p. 9.

The Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights (ICESCR) do not contain any distinction on the basis of nationality or legal status.⁶¹ However, the International Covenant on Civil and Political Rights (ICCPR) does limit certain rights to citizens or to regular migrants.⁶² Every EUMS is a party to these instruments. On the contrary, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), which includes a series of rights that are explicitly applicable for both regular and irregular migrants,⁶³ has not been ratified by any of the EUMS. This refusal to accept an international instrument that specifically recognizes the rights of irregular immigrant is a very negative symptom of the situation in Europe in respect to the protection of the human rights of undocumented immigrants.

Fortunately, there are other human rights instruments, besides the international bill of human rights,⁶⁴ that have been ratified by EUMS, and that also have been interpreted as including human rights obligations towards undocumented immigrants. This is the case of the Convention on the Elimination of All Forms of Discrimination Against Women, whose Committee stated that *“(r)egardless of the lack of immigration status of undocumented women migrant workers, States parties have an obligation to protect*

⁶¹ In the case of the ICESCR, the interpretation of the personal scope of the social rights enshrined in that Covenant has been controversial. See Merlino and Parkin, 2011(b), p.9.

⁶² For example, article 25 ICCPR on citizen’s right to vote, or articles 12 and 13, which expressly refer to the rights of documented immigrants.

⁶³ For example, article 25 ICRMW stipulates that the irregular status of the worker cannot change the legal or contractual obligations of the employer.

⁶⁴ It includes the ICCPR, the ICESCR and the Universal Declaration of Human Rights.

their basic human rights.”⁶⁵ In the same sense, the Committee on the rights of the Child has specified that the rights protected in the Convention on the Rights of the Child apply also to irregular immigrants, unless it is explicitly stated otherwise.⁶⁶

In the case of the Committee on the Elimination of Racial Discrimination (CERD), when interpreting the Convention on the Elimination of All Forms of Racial Discrimination, it indicated that “*(u)nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.*”⁶⁷ Additionally, it specified that State parties have the obligation to “*(e)nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status*”.⁶⁸

Furthermore, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which clearly applies also to irregular immigrant, includes an article enshrining the principle of *non-refoulement*, which is specifically aimed at protecting irregular immigrants.⁶⁹ There are other international conventions that also include provisions specifically intended to protect irregular immigrants. This is

⁶⁵ General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, page 13.

⁶⁶ Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 2005, paragraph 12.

⁶⁷ CERD, General Comment No. 30: Discrimination against non-citizens, 2004, paragraph 4.

⁶⁸ *Idem*, paragraph 7.

⁶⁹ Article 3 CAT.

the case of the Palermo Protocols on smuggling and trafficking to the United Nations (UN) Convention on Transnational Organized Crime. These two Protocols are also binding in the EU, so far as the provisions of the Protocols fall within the scope of EU competences.⁷⁰ Both protocols indicate to have among its purposes the protection of the rights of the victims, be trafficked or smuggled persons, which are mostly irregular immigrants.⁷¹ In fact, they both contain specific provisions establishing measures of protection of victims.

Moreover, Article 5 of the Protocol on Smuggling states that “*(m)igrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.*”⁷². Therefore, it could be interpreted as specifically prohibiting the criminalisation of irregular immigrants that have been victims of smuggling. However, State Parties may try to claim article 6, paragraph 4 of this Protocol, which says that “*(n)othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.*”. This could be used to say that, since irregular immigration is an offence under the State Party domestic law, the State can take criminal actions against irregular immigrants, even if they are victims of smuggling.

⁷⁰ Council Decision 2006/619/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to prevent, suppress and punish trafficking in human beings, especially women and children and Council Decision 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol against the smuggling of migrants by land, sea and air.

⁷¹ Article 2 of both Protocols.

⁷² Article 6 of the Palermo Protocol on Smuggling stipulates the conducts that constitute the crime of smuggling and that should be criminally sanctioned by the States Parties.

Likewise, although not really relevant for this research, which focuses on “economic migrants”, it is interesting to notice that article 31.1 of the 1951 Geneva Convention relating to the Status of Refugee also forbids imposing penalties on refugees because of their irregular entry or stay.

Finally, before going into the European instruments, it is important to mention that there are also some International Labour Organisation (ILO) Conventions that protect the rights of undocumented workers. Such is the case of ILO Convention number 143 on Migrant Workers, which unfortunately, has been ratified by only 5 EUMS, among which Italy. This ILO Convention is divided in three parts, and the first of them, referring to migration in abusive conditions, includes provisions that specifically protect the rights of irregular immigrants.⁷³ Additionally, other ILO conventions also apply to irregular migrants, unless explicitly stated otherwise.⁷⁴ In this sense, the 2004 Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy stated that *“(c)onsideration should be given to the situation of irregular migrant workers, ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily.”*⁷⁵

⁷³ For example, article 9.1 of this Convention 143 establishes the right of irregular immigrants to “enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.”

⁷⁴ Merlino and Parkin, 2011(b), p.13.

⁷⁵ International Labour Conference, “Resolution concerning a fair deal for migrant workers in a global economy”, 2004, p.7.

At the Council of Europe level, subsequently, it seems relevant to first mention the Council of Europe Parliamentary Assembly Resolution 1509 of 2006 on the Human Rights of Irregular Migrants.⁷⁶ In this resolution it is stated that “*international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights.*”⁷⁷ Additionally, this resolution enunciates a number of minimum civil, political, economic and social rights, extracted from various human rights instruments that should be applied by all MS of the Council of Europe in favour of irregular migrants.⁷⁸

Taking this into account, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter (ESC) and Its Additional Protocols will be briefly examined at the light of the relevance they have for irregular immigrants. Yet, also the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 is relevant, as it addresses specifically the rights of those undocumented migrants that have been victim of trafficking.

Both the ECHR and the ESC have been ratified by all EUMS. Furthermore, the EU itself is in the process of acceding to the ECHR. While the ECHR indicates that it

⁷⁶ It is also relevant to mention the work of the Council of Europe Commissioner for Human Rights in favor to the human rights of irregular immigrants, including a position paper on the rights of migrants in an irregular situation, CommDH/PositionPaper(2010)5.

⁷⁷ The Council of Europe Parliamentary Assembly, Resolution 1509 Human rights of irregular migrants, adopted on 27 June 2006, paragraph 5.

⁷⁸ Idem, paragraphs 11, 12 and 13.

applies to everyone within the jurisdiction of the contracting parties,⁷⁹ the ESC excludes irregular immigrants from its personal scope.⁸⁰ However, the European Committee on Social Rights has stated that denying medical assistance to irregular immigrants is contrary to the Charter, as health care is a prerequisite for human dignity, which is a fundamental value in European human rights law.⁸¹

Regarding the ECHR, many of its provisions have already been used to protect the human rights of undocumented immigrants; mostly, article 3 on the prohibition of torture or inhuman and degrading treatment and article 8 on the right to family and private life. Article 3 has been used in regards to conditions of detention, *non-refoulement* or for the protection of basic social and economic rights, while article 8 has been mainly used to limit expulsion or refusal of entrance. Other articles are also relevant for irregular migrants, and may be violated by the criminalisation of irregular stay and entry and other related offences. This is the case of articles 4, on slavery and forced labour, article 5, on right to liberty and security, article 6 and protocol 7, on right to a fair trial and other procedural rights, article 14 and protocol 12, on non-discrimination, article 1 and 2 of protocol 1, on protection of property and right to education, or article 4 of protocol 4, on collective expulsions.

⁷⁹ Article 1 ECHR.

⁸⁰ The Appendix of the ESC specifies that it only applies to regular immigrants that are nationals of other Parties.

⁸¹ European Committee on Social Rights, International Federation for Human Rights (FIDH) v. France, Collective Complaint No. 14/2003, Decision on the merits of 8 September 2004, paragraphs 31 and 32.

Lastly, when applying EU law it is necessary to take into account the Charter of Fundamental Rights of the European Union (EU Charter),⁸² one of the newest human rights instruments in Europe, now legally binding for the EU and the EUMS. Some of the provisions contained in the EU Charter could possibly be invoked in relation to policies on immigration. Mainly article 1, on human dignity, 2, on the right to life, 3, on the integrity of the person, 4, prohibiting torture and other degrading treatment or punishment, 5, on slavery, 6, on right to liberty, 7, on private life, 8, on personal data, 9, on right to marry, 14, on education, 15, on right to work,⁸³ 19, on expulsion, removal or extradition, 21, on non discrimination, 35, on health care and all Title VI on justice. Most of these articles use the terms “everyone” or “no one” when referring to the holder of these rights, thus there is no distinction in reference to the immigration status. Unfortunately, other articles do refer explicitly to “citizen of the Union” or to regular TCN, and there is a whole section enacting “citizen’s rights”. Moreover the EU Charter allows MS to restrict the application of certain articles by stating that rights are provided under the conditions established by national laws and practices.⁸⁴

Article 1 on the dignity of the person and article 21 on non-discrimination are, in my opinion, the main rights that should be taken into account when dealing with irregular immigrants. Unfortunately, they are probably the hr most frequently violated by EU and

⁸² Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ C 364/1, 18 December 2000.

⁸³ However, only the first paragraph of this article refers to “everyone”. The second paragraph specifies that only EU citizens have the right work in a MS. Paragraph 3 recognizes the rights to equal labour conditions to EU citizens only to regular immigrants, contrary to ILO convention number 143.

⁸⁴ Merlino and Parkin, 2011(b), p.3.

EUMS policies on irregular immigration. This is more so if stated as “equal” dignity of all people, as it is enunciated in article 1 of the Universal Declaration of Human Rights, because, as it will be seen in the second chapter of this thesis, discrimination and degrading TCN into members of risk categories and numbers⁸⁵ is very common in the EU and EUMS immigration policies.⁸⁶

Article 49 is especially relevant for the issue of the criminalisation of irregular stay and entrance. This article is named “principles of legality and proportionality of criminal offences and penalties” and its paragraph 3 establishes that “*the severity of penalties must not be disproportionate to the criminal offence*”.

Most of the rights in the EU Charter of Fundamental Rights which can be applied to irregular immigrants are also part of the ECHR, such as article 19, which prohibits collective expulsions and enacts the principle of *non-refoulement*, so many times used by the European Court of Human Rights (ECtHR). However, in the EU Charter some rights are worded more broadly than in the ECHR. In fact, according to article 52.3 of the EU Charter, for the rights that are part of both instruments, the EU Charter can only

⁸⁵ EUMS can decide how many regular immigrants they accept per year. The French home affairs minister has even decided how many immigrants should be expelled during 2011 from France. “Guéant vise 28.000 expulsions d'immigrés clandestins pour 2011”, Le Nouvel Observateur, 26 March 2011, available at: <http://tempsreel.nouvelobs.com/actualite/politique/20110326.OBS0294/gueant-vise-28-000-expulsions-d-immigres-clandestins-pour-2011.html> (consulted on 30 April 2011)

⁸⁶ In the 2010 Report on the Application of the EU Charter of Fundamental Rights, the European Commission admits that there are concerns concerning human dignity and other rights, under the Title on Dignity, on the area of immigration. European Commission, COM(2011) 160 final, p.5.

be interpreted as giving equal or higher protection. However, the impact of these provisions will ultimately depend on how the EUCJ interprets them in particular cases.⁸⁷

There is an interesting, although not very realistic, possibility to avoid the fatal consequences that the criminalisation of irregular immigrants has for the enjoyment of their human rights. The idea is to divide jurisdiction into separable sub entities, in a way that the irregular migrant could engage welfare jurisdiction when claiming his or her basic human right, without subjecting him or herself to immigration jurisdiction.⁸⁸ This is somehow already happening in practice in relation to certain public officers mostly in the health or education field. However, until today, an irregular immigrant cannot go to the police to denounce a violation of any of his or her rights, such as worker rights, without fearing being detained or returned because they are irregularly in the country.

2.3 EU MEMBER STATES POLICIES ON THE CRIMINALISATION OF IMMIGRATION

EU legislation does not impose an obligation on MS to impose criminal penalties on irregular immigrants sanctioning their irregular entry or stay in the EU. Nevertheless, many MS have legislated in this sense and provide for these kinds of penalties in their national legislations. This section will be mainly based on the information provided by 23 of the 27 MS to the European Migration Network Inquiry on an Ad-Hoc Query on

⁸⁷ Fitchew, 2008.

⁸⁸ Noll, 2010, p.248.

criminal penalties against “illegally” entering or staying third-country nationals, which was requested by the European Commission on July 2009.⁸⁹ All legislative acts mentioned in this section have been taken from this Ad-Hoc Query.

Out of the 23 MS that responded, two, Austria and Belgium, requested that the information given was not to be disseminated. Although the answer had to be yes or no to whether their national legislation provided for criminal penalties for third-country nationals who have “illegally” entered or who are illegally staying in their territory, the remaining states’ answers could classify in three groups. The first very reduced group of states are those who declare not to include such provisions in their legislation. These countries are Bulgaria, Hungary, Spain, Portugal, The Netherlands and Slovenia.

However, in the case of the two latter countries, The Netherlands and Slovenia, it is not that clear. The Slovenian Aliens Act considers irregular entry and stay to be misdemeanours and it sanctions them with fines to up to 1200 euros.⁹⁰ The Netherlands is currently planning to criminalize irregular entry and stay in the future law transposing the Returns Directive.⁹¹

⁸⁹ European Migration Network, Ad-Hoc Query on criminal penalties against illegally entering or staying third-country nationals, 2009.

⁹⁰Idem, p.16-17.

⁹¹ Pieter Boeles’s contribution to the International Workshop: Countering New Legislative Proposals Criminalizing Undocumented Migrants In The Netherlands: Building On Experiences Of Resistance Throughout Europe Rotterdam, Netherlands, Friday 27 May 2011.

The second group of states refer to those that do not criminalise the mere irregular entry or stay, but require of an extra element for the imposition of criminal sanctions, such as the use of violence. This is the case of the Czech Republic. The Czech Criminal Code⁹² and the new Criminal Code,⁹³ currently in force, establish criminal sanctions for those crossing the borders with use of force or threat of imminent use of force and to those who enter the country in violation of regulations of international flights. In the first case, the sanctions go from one year to fifteen years imprisonment or a fine, and in the second situation imprisonment from six months to three years. In the Slovak Republic the same conducts are criminalized,⁹⁴ and for the rest of irregular entry and stay, considered as misdemeanours, fines can be imposed.⁹⁵

In the case of Latvia,⁹⁶ its Criminal Law⁹⁷ establishes only two cases in which criminal penalties to irregular immigrants can be imposed. The first one sanctions those immigrants that, within one year, crossed irregularly the state border more than once. The criminal penalty can amount to imprisonment for up to three years, custody, forced labour,⁹⁸ or a fine. The second offence refers to those who use a false identity or do not

⁹² Czeck Act No. 140/1961 Coll. entered into force on January 1, 1962.

⁹³ Czeck Act No. 40/2009 Coll. entered into force on January 1, 2010.

⁹⁴ Slovak Act No 300/2005 Coll. (Criminal Code), Section 354 and 357.

⁹⁵ Slovak Act No. 48/2002 Coll. on the Residence of Foreigners and on Amendments and Modifications to Some Other Acts as Amended, section 76, sub-section 1, letter a) and Section 57, subsection 1, letter c).

⁹⁶ European Migration Network, Ad-Hoc Query on criminal penalties against illegally entering or staying third-country nationals, 2009, p.12.

⁹⁷ Latvian Criminal Code came into force on April 1, 1999, however both sections 284 and 281, regulating the referred offenses, only came into force on January 1, 2005.

⁹⁸ The reference to forced labour as a criminal sanction raises questions of compatibility with article 4 of the

have personal identification documents and the sanction is slightly lower than that of the first offense. In Lithuania only irregular crossing is criminally sanctioned.⁹⁹ However, overstayers might be detained by the law enforcement institution up to 48 hours or on a court order for more than 48 hours.¹⁰⁰

The rest of the 23 countries do provide for criminal penalties for TCN who have “illegally” entered or who are “illegally” staying in their territory, in a broad sense. These countries are: Estonia,¹⁰¹ Finland,¹⁰² France,¹⁰³ Germany,¹⁰⁴ Ireland,¹⁰⁵ Italy,¹⁰⁶ Luxembourg,¹⁰⁷ Malta,¹⁰⁸ Poland,¹⁰⁹ Sweden¹¹⁰ and United Kingdom.¹¹¹ The specific

ECHR.

⁹⁹ Article 291 of the Criminal Code of the Republic of Lithuania.

¹⁰⁰ European Migration Network, Ad-Hoc Query on criminal penalties against illegally entering or staying third-country nationals, 2009, p. 12-13.

¹⁰¹ Estonian Penal Code, section 258 and 260.

¹⁰² Finnish Aliens Act (30.4.2004)Chapter 12, Section 185.

¹⁰³ French CESEDA, Code de l'entrée et du séjour des étrangers et du droit d'asile: Code entry and residence of foreigners and asylum, version consolidée au 19 mai 2011 art. L. 621-1 and -2.

¹⁰⁴ German Residence Act, Aufenthaltsgesetz – AufenthG, of July 30, 2004, which came into force on January 01, 2005, paragraph 95.

¹⁰⁵ Irish Immigration Act 2004, Section 4, 6, 9, 11 and 13.

¹⁰⁶ Italian Legislative Decree No 286/1998 of 25 July 1998 as amended by Law No 94 of 15 July 2009. Chapter 4 will go deeper into the Italian law.

¹⁰⁷ Luxembourg Law of 29 August 2008 which concerns free circulation of people and immigration, in Memorial An°138 of 10 September 2008.

¹⁰⁸ Malta Law of 29 of August 2008 which concerns free circulation of people and immigration, in Memorial An°138 of the 10th of September 2008, chapter 7, "Les sanctions" (penalties), pp 2049-2050.

¹⁰⁹ Polish Penal Code of 6 June 1997 (Journal of Laws 1997, no. 88, item 553), Petty Offences Code of 20 May 1971 (unified text, Journal of Laws 2007, no. 109, item 756) and Act on Aliens of 13 June 2003 (Journal of Laws 2006, no. 234, item 1694).

¹¹⁰ Swedish Aliens Act (2005:716), which entered into force on 31 March 2006, in Chapter 20 Section 1, 2

provisions and sanctions differ among countries. Some countries use only fines as criminal sanctions against the mere irregular stay or entry, and imprisonment for “aggravated” situations, such as irregular entry with use of violence, while other countries have chosen to use imprisonment for the slightest violation of their Immigration Acts. After the EUCJ El Dridi case, many of these laws will have to be changed to be in accordance with EU law.

It is relevant to notice that in most of these countries provisions criminalizing irregular stay and entry have been introduced or modified quite recently. This shows the prevalence of this trend to criminalize irregular immigration in recent years. It is also significant that many of the countries taking part in this survey, when asked for their national provisions on criminal penalties to irregular immigrants, they also mention their criminal penalties for individuals directly or indirectly involved in the irregular immigration process. This reinforces the view of a broad criminalization around irregular immigrants, also present in EU legislation, which arrives to the point of criminalizing the mere irregular stay or the humanitarian assistance to irregular immigrants.

3. THE ROLE OF THE EU

and 4.

¹¹¹ UK Immigration Act 1971 s.24(1).

The term “Europeanization” characterizes a wave of scholarship on the EU, which, since the 1990s, focuses on the impact of the EU in its MS from a top-down perspective.¹¹² The existence of European policies on immigration is today taken for granted, so the main focus is to see how MS applies them, and how they are affecting their domestic politics and policies. EU policies on immigration could easily be blamed for promoting the criminalisation of irregular immigration on EUMS, both because of the language they use and because of their tendency to criminalise all aspects surrounding irregular immigration. However, today the down-top perspective should also be studied, as some EUMS are putting a lot of pressure on the EU to “get tougher” on irregular migration, which may aggravate even more the situation of the criminalisation of irregular immigrants in Europe.

After a brief analysis of the history of the EU law and policies on irregular immigration, this chapter will look into the future of the EU immigration policies after the Lisbon Treaty. It intends to advance possible developments and to give arguments to contrast the criminalisation of irregular migration at the EU level. Furthermore, this chapter will also try to find possibilities of using the EU machinery to change or prevent national laws and policies that criminalise irregular immigrants. In fact, the forth section will analyse the implication for the criminalisation trend of a specific European legislative instrument, the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals or RD, and the judgement of the EUCJ of 28 of April 2011 interpreting this Directive.

¹¹² Ette and Faist, 2007, p. 3.

3.1 HISTORICAL AND GENERAL OVERVIEW OF THE CRIMINAL LAW ASPECTS IN THE EU APPROACH TO IMMIGRATION

Immigration of TCN, criminality and law enforcement have generally been closely associated within the EU law and policy on migration.¹¹³

The intention to abolish internal borders control within the European Economic Community made of immigration control a new area of European common interest.¹¹⁴

The main idea was to create compensatory measures to the elimination of internal borders, for which some intergovernmental groups of consultation were formed. One of these groups was the Trevi Group. This group, which is considered to be the forerunner for intergovernmental cooperation on asylum and immigration between the interior ministries of EUMS, was first dealing with prevention of transborder crime.¹¹⁵ This explains why, during the period of “intergovernmental cooperation”, most measures adopted on the field of immigration were generally repressive and were focused on expulsion or illegal employment.

Also in the framework of the Schengen states, migration and criminal matters were considered together. For example, the Schengen Implementing Convention (SIC), implementing the Schengen agreement, contained 141, of 142 provisions, dealing with compensatory measures. Moreover, the Schengen Information System (SIS) is also a clear example of the close relation between immigration and criminal matters. The SIS

¹¹³ Cholewinski, 2007, p.301.

¹¹⁴ Boeles, den Heijer, Lodder and Wouters, 2009, p.397-398.

¹¹⁵ Cholewinski, 2007, p.303.

was a common database containing alerts on objects related to criminal activities and on TCN considered to be a threat to the national security of an EUMS.¹¹⁶

The Treaty of Maastricht, in 1992, was key for the gradual shifting from an intergovernmental to a community approach of immigration in the field of Justice and Home Affairs.¹¹⁷ It made no distinction between immigration issues and cooperation in criminal and judicial matters, as well as police cooperation.¹¹⁸ The measures taken during this period were also mainly repressive and were again focused on prevention of illegal employment, facilitation of expulsion and readmission.

In 1997, after the Treaty of Amsterdam, border controls, entry and visas became part of the competences of the European Community.¹¹⁹ In this Treaty there was finally a separation between migration and criminal and policing matters. Migration was transferred to the Community pillar, while policing and criminal matters remained in the third pillar. However, that transfer was done with modifications to the normal community decision-making procedure and the role of the Court of Justice. Moreover, unfortunately, this separation of immigration and criminal matters was not done in an attempt to dissociate immigration from criminality, but it was due to the fact that EUMS were not ready to harmonise their criminal law at that stage.¹²⁰

¹¹⁶ Idem, p.303-304.

¹¹⁷ Boeles, den Heijer, Lodder and Wouters, 2009, p.399.

¹¹⁸ Cholewinski, 2007, p.303-304.

¹¹⁹ Boeles, den Heijer, Lodder and Wouters, 2009, p.399.

¹²⁰ Cholewinski, 2007, p.303-304.

Nevertheless, in this process of communitarisation, the UK and Ireland decided to secure protocols opting out of these provisions¹²¹ but keeping the possibility to opt-in, which they have done particularly in the field of irregular immigration.¹²² Also Denmark decided to secure a protocol opting out,¹²³ but as a member of the former Schengen arrangements, remains involved in EU measures building on the Schengen *acquis*,¹²⁴ which was incorporated to the existing *acquis* in EU law.¹²⁵

Unfortunately, the Lisbon Treaty (TL) has brought immigration, policing and criminal matters together again, turning to the unfortunate association of immigration and criminality.¹²⁶ For example, the Commission Decision of 21 January 2011 on adopting the annual work programme for 2011 for the specific programme on the "Prevention of and Fight against Crime"¹²⁷ includes as a priority "*Projects on the cross-border Law Enforcement cooperation, particularly in the access to and exchange of information through the implementation of the principle of availability through(..)and Council*

¹²¹ Protocol on the position of the UK and Ireland annexed to the Treaty of Amsterdam, OJ C 340, 10 November 1997.

¹²² Cholewinski, 2007, p.303-304

¹²³ Protocol on the position of the Denmark annexed to the Treaty of Amsterdam, OJ C 340, 10 November 1997.

¹²⁴ The Schengen *acquis* as it was in 2000 is detailed in OJ L239, 22 September 2000.

¹²⁵ Protocol integrating the Schengen *acquis* into the framework of the European Union, OJ C 340, 10 November 1997.

¹²⁶ The TFEU regulate all these subjects under Title V.

¹²⁷ Commission Decision of 21 January 2011 on adopting the annual work programme for 2011 for the specific programme on the "Prevention of and Fight against Crime" as part of the General Programme "Security and Safeguarding Liberties", C (2011) 131 final, Brussels, 21 January 2011.

Framework Decision 2006/960/JHA (Swedish Initiative) (Equipment for cross-border cooperation in combating terrorism, cross-border crime and illegal immigration)".¹²⁸

Some EU documents use the term "irregular immigration"¹²⁹ and the European Parliament has declared to prefer the use of the term "irregular", as it considers that irregular entry to the territory of the EU does not justify the reference to illegality.¹³⁰ Nevertheless, the EU tends to use terms such as "illegal immigrants" and "fight against illegal immigration".¹³¹ Most international organisations, such as the Council of Europe, and many NGOs have condemned the use of those terms. This is so, because calling a person "illegal" seems to be contrary to the international and regional human rights instruments that claim the equal dignity and human rights of all human beings. Therefore, the terms generally used by the EU are internationally rejected as been contrary to human rights instruments, possibly including the now binding EU Charter. According to the Communication on policy priorities in the fight against illegal immigration of third-country nationals of 2006,¹³² "*the term 'illegal immigration' is used to describe a variety of phenomena*", which include:

¹²⁸ Idem, p.8.

¹²⁹ For example, the 2011 Communication of the European Commission on Migration. COM(2011) 248 final.

¹³⁰ Castagnoli, 2010, p.5.

¹³¹ See Communication on Policy priorities in the fight against illegal immigration of third-country nationals (COM (2006) 402) or the Schengen acquis - Decision of the Central Group of 27 October 1998 on the adoption of measures to fight illegal immigration (SCH/C (98) 117).

¹³² Commission of the European Communities, Communication COM (2006) 402 final on policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19 July 2006.

1. *“Third-country nationals who enter the territory of a Member State illegally by land, sea and air, including airport transit zones. This is often done by using false or forged documents, or with the help of organised criminal networks of smugglers and traffickers.”* This definition seems to include victims of human trafficking as any other undocumented immigrant. The use of the word *“help”* to refer to what the organised criminal networks of traffickers do could be very dangerous for the protection of these victims. Moreover, these victims are protected by different international conventions¹³³ and by EU legislation¹³⁴ and are sometimes given residence permits when they collaborate with the police to prosecute the trafficker, therefore they would no longer be ‘illegal immigrants’.

2. *“persons who enter legally with a valid visa or under a visa-free regime, but “overstay” or change the purpose of stay without the approval of the authorities”.* Many times, immigrants acquire an “illegal” status because of facts completely out of their control, such as being fired, changes in the legislation, etc., or facts that would generally imply no legal consequence at all, such as missing a plane. It would seem reasonable that there was a difference in treatment depending on the circumstances that led to an irregular status. Yet, this is usually not taken into account.

¹³³ See Council of Europe Convention on Action against Trafficking in Human Beings or Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹³⁴ See the recent Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

3. “*unsuccessful asylum seekers who do not leave after a final negative decision.*” The great difference among EUMS on the acceptance or refusal of asylum seekers makes this criterion very unfair. In fact, a person, whose asylum request is denied in Greece, and becomes an “illegal immigrant” in the whole EU territory, could be in more need of asylum than a person whose request was accepted in Finland. Asylum criteria should be urgently further harmonized to avoid more unjust outcomes.

The DG in the European Commission dealing with immigration is the DG Home Affairs, which was created on July 1 of last year, together with the DG for Justice. Before that date, they were only one DG: DG for Justice, Freedom and Security. This division was done because of the increasing importance of policies related to this area in the work of the EU, especially in the field of migration.

According to the website of the DG for Home Affairs, this DG has two main priorities; “*ensuring European security and (...) putting solidarity at the heart of the European migration policy*”¹³⁵, and the Stockholm Action Plan is stated to constitute the roadmap to implement these priorities. The DG for Home Affairs is subdivided in three Directorates.¹³⁶ Directorate A deals with Internal Security, while Directorates B and C deal with issues related to policies on migration, asylum and borders checks.¹³⁷ Directorate B is under the name Immigration and Asylum, and includes the issues of

¹³⁵ http://ec.europa.eu/dgs/home-affairs/index_en.htm, website of DG Home Affairs.

¹³⁶ There is also an Anti-Trafficking Coordinator, which should be regarded as a positive sign of the importance given to this issue at EU level.

¹³⁷ These two Directorates correspond to the issues dealt with in Chapter 2, Title V TFEU.

immigration and integration, asylum and visa policy. Directorate C tackles the issue of Migration and Borders, which comprises border management and return policy, IT projects and large-scale IT-systems and Biometrics.

There are two entire departments dealing with IT systems in Directorate C. The Amended Proposal for a Regulation establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice¹³⁸ is based on Articles 77(2)(a) and (b), 78(2)(e), 79(2)(c), 74, 82(1)(d) and 87(2)(a) of the TFEU. This includes matters of administrative cooperation, visas, asylum and measures of irregular immigration, as well as measures related to judicial cooperation on criminal matters and police cooperation. This proves that, although it seems that migration policies are separated from security issues, Directorate C combines both matters. It also reflects the allocation of resources and the real priorities of the EU regarding migration policies. Indeed, the large importance given to IT systems and Biometrics in the field of migration contributes to narrow the gap between law enforcement and migration control. Moreover, the compatibility of these systems with article 8 of the ECHR¹³⁹ or article 8 of the EU Charter, in particular in reference to the access of the collected data by law enforcement officials, has already been questioned.

¹³⁸ European Commission, Amended Proposal for a Regulation of the EP and of the Council on establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, COM(2010)93 final, 2009/0089/P (COD), Brussels, 19/3/2010.

¹³⁹ Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System and the exchange of data between Member States on short-stay visas, COM (2004) 835 final, OJ/C 181/13, 23/07/2005. A potential violation of articles 7 and 8 of the EU Charter of Fundamental Rights could also be claimed.

Nevertheless, it should be noticed that Commission DGs have adopted different approaches to irregular migration that are not necessarily compatible.¹⁴⁰ Although the approach of the DG Home Affairs is the prevailing one, other DGs, such as DG Employment, Social Affairs and Equal Opportunities or DG Health and Consumer Protection include undocumented immigrants as target in policy intervention, as a vulnerable group. Hence, the right approach already exist within the EU, however, so far, it is only rarely reflected in EU policies.

3.2 THE TREATY OF LISBON AND IMMIGRATION

3.2.1 MAIN CHANGES MADE BY THE TREATY OF LISBON IN THE AREA OF IMMIGRATION

The Treaty of Lisbon entered into force on 1 December 2009 and it has expanded the EU competences on the field of immigration. The policies on immigration and asylum are now contained within Title V TFEU, entitled “The Area of Freedom, Security and Justice” (AFSJ). This area is of shared competence between the EU and the MS.¹⁴¹ Accordingly, it is subjected to the principles of subsidiarity and proportionality.¹⁴² Article 72 TFEU states that the exercise of the responsibilities of the MS with regard to the maintenance of law and order and the safeguarding of internal security are not

¹⁴⁰ Merlino and Parkin, 2011(a), p11.

¹⁴¹ Article 4.2(j) TFEU and article 3.2 TEU.

¹⁴² Article 5 TEU.

affected by Title V TFEU. This could be interpreted as allowing MS to derogate from EU legislation in this area if it is necessary for one of the above objectives, as they have been interpreted by the ECJ.¹⁴³ The EU should develop common policies for asylum and legal as well as illegal immigration,¹⁴⁴ which is a big change from the previous TCE.¹⁴⁵ In this sense, the EU can now legislate for “uniform standards”, and not any more “minimum standards”.¹⁴⁶

The EU can adopt measures on “illegal” immigration, including removal and repatriation of unauthorised residents. Although, the explicit mention to “removal” is new, the practice of the EU was interpreting the previous provision as including removal as well.¹⁴⁷ It also has competence to legislate, among other aspects, for the gradual introduction of an integrated management system for external borders and to define all the rights of third country immigrants legally resident in one MS.¹⁴⁸ Moreover, it can conclude European Union Readmission Agreements and establish measures to promote integration of regular immigrants.¹⁴⁹ From now on the European Parliament must give its consent to readmission agreements¹⁵⁰. However, MS have kept

¹⁴³ Favilli, 2009, p.3.

¹⁴⁴ Article 67.2 and 79.1 TFEU.

¹⁴⁵ Favilli, 2009. p.2.

¹⁴⁶ Fitchew, 2008.

¹⁴⁷ Hailbronner, 2010, p.3. A clear example of this is the enactment of the RD in 2008.

¹⁴⁸ Article 77.1 (c) and Article 79.2 (b) TFEU.

¹⁴⁹ Article 79.3 and 79.4 TFEU.

¹⁵⁰ Article 218. 6 TFEU.

the right to decide how many TCN are they prepared to admit into their territory in order to seek work.¹⁵¹

On the procedural aspects, the TL introduced co-decision and qualified majority over all asylum and immigration decision,¹⁵² meaning, ordinary legislative procedure, for both “illegal” and legal immigration policies.¹⁵³ The European Commission is the only organ that can make legislative proposals on this field. According to article 68 TFEU, the European Council should define the strategic guidelines for legislative and operational planning within this area. For the period 2009-2014, the Council has approved the Stockholm Program, which will be analysed later in this chapter.

The LT has also removed the limitations that the EUCJ had on the field of immigration and asylum imposed by the Treaty of Amsterdam, which required cases on this field to be taken first to the highest court of a EUMS, before they could be brought to the EUCJ. According to article 267 TFEU, the EUCJ has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU, including those acts adopted in the field of immigration, such as the RD.

¹⁵¹ Article 79.5 TFEU.

¹⁵² According to article 77.3 TFEU, the special legislative procedure will only be applied to adopt provisions concerning passports, identity cards, residence permits or any other such document.

¹⁵³ Articles 288, 289, 294 TFEU.

On this basis, any national court or tribunal applying EU law or national law that executes or is within the scope of application of EU law, can request the EUCJ to give a preliminary ruling if it considers it necessary in order to give a judgment. If it is a national court or tribunal against whose decisions there is no judicial remedy under national law, then it will have to bring the matter to the EUCJ. If the question refers to a case referring to a person in custody, the EUCJ will have act with the minimum of delay.¹⁵⁴ The judgement of the EUCJ in El Dridi case, giving a preliminary ruling on the interpretation of the RD, will be analysed later in this chapter.

Moreover, the EUCJ, in application of article 263 TFEU, has also jurisdiction to review the legality of most of the acts of EU institutions and bodies intended to produce legal effects vis-à-vis third parties, including those of the European Council. Natural or legal persons can institute proceedings against acts addressed to them or that directly concerns them and against a regulatory act, not entailing implementing measures, which is of direct concern to them. These possibilities may be relevant for the fight against the criminalisation of irregular immigrants, in the sense that, if one of these acts is related to the issue of criminalisation, it could be brought in front of the EUCJ for violating the EU Charter of Fundamental Rights or general principles of EU law.

Article 258 TFEU stipulates that if the Commission considers that a MS has failed to fulfil an obligation under the Treaties, for example, it has failed to fulfil its obligation to

¹⁵⁴ Preliminary rulings can be dealt with under an urgent procedure, in accordance with Article 104b of the Court's Rules of Procedure.

notify measures transposing a directive adopted under a legislative procedure, “*it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations*”. In the case that the MS does not comply with this opinion, then the Commission can bring the matter before the EUCJ. As it will be studied in later in this Chapter, many MS have not yet transposed the RD, which may cause that the European Commission starts the procedure described in this article against one of these MS.

However, for the matters of judicial cooperation for criminal matters and police cooperation,¹⁵⁵ the EUCJ has no jurisdiction “*to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*”¹⁵⁶ As it was said before, this allows MS to derogate from EU law on immigration under article 72 TFEU and not to be controlled by the EUCJ. In general, as a transitional measure, for the field of judicial cooperation for criminal matters and police cooperation, the jurisdiction of the EUCJ will keep the restrictions it had before the LT for 5 years, starting on 1 December 2009.

The TL has a potentially relevant effect on the protection of human rights in the EU: it made the EU Charter legally binding¹⁵⁷ and directly enforceable by the EU and national

¹⁵⁵ Chapters 4 and 5 of Title V TFEU.

¹⁵⁶ Article 276 TFEU.

¹⁵⁷ Article 6.1 TEU.

courts and provided for the accession of the EU to the ECHR.¹⁵⁸ The EU Charter is now part of national law and, according to article 51.1 EU Charter, it can be directly enforceable in national courts if cases involve the application of EU law. For example, it is now possible to challenge the way a MS has implemented EU law in the MS's own courts and the national judge will have to enforce directly the rights guaranteed by the Charter.¹⁵⁹ Moreover, the EU Charter can be used by EU institutions and bodies to measure their own performance, and the performance of MS when implementing EU law into national law. Certain provisions of the Charter could be invoked to defend the rights of irregular immigrants. However, the 2010 Report on the Application of the EU Charter of Fundamental Rights by the European Commission has only one paragraph,¹⁶⁰ out of 10 pages, which refers to the human rights concerns in the area of immigration. This is definitely not a good sign of the potential benefits of the EU Charter for the respect of irregular immigrants' human right in the EU.

3.2.2 EU COMPETENCE ON CRIMINAL MATTERS AND POSSIBLE IMPACT FOR THE CRIMINALISATION OF IRREGULAR IMMIGRATION

The inclusion of the matters of judicial and police cooperation on criminal matters in Title V TFEU, as a shared competence, and therefore expressly allowing the EU to

¹⁵⁸ Article 6.2 TEU.

¹⁵⁹ http://www.eucharter.org/home.php?page_id=66, website on the EU Charter

¹⁶⁰ European Commission, COM(2011) 160 final Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2010 Report on the Application of the EU Charter of Fundamental Rights, SEC(2011) 396 final, Brussels, 30 March 2011.

legislate on criminal matters, can also have relevant consequences for irregular immigration. Before the TL, the EU did not have the competence to enact hard law measures with direct criminal effects.¹⁶¹ However, since 2003, following a series of decisions of the EUCJ,¹⁶² it was clear that the EU could enact instruments including criminal sanctions in the pursuit of objectives of the European Community.¹⁶³ Even before, there were many instruments, linked to policies on irregular migration, which permitted or encouraged the use of criminal sanctions and there were also measures adopted in the form of Framework Decisions under the third-pillar.¹⁶⁴ For example, Council Directive 2001/51/EC¹⁶⁵ strengthening the sanctions of carriers accused of assisting foreigners, or Council Framework Decision 2002 on combating trafficking in human beings,¹⁶⁶ which defined the offence and established which criminal penalties should be imposed. Most of these measures asked MS to adopt appropriate penalties that are dissuasive, effective and proportionate.

The first hard law measure to explicitly include criminal sanctions in the EU's AFSJ was the Directive 2009/52/EC providing for minimum standards on sanctions and

¹⁶¹ Epidendio, 2011.

¹⁶² See, for example, EUCJ, *Commission v. the Council*, C-176/03, 13 September 2005, §§ 47-48.

¹⁶³ Council of Europe Commissioner for Human Rights, "Criminalisation of Migration in Europe: Human Rights Implications", 2010, p. 28.

¹⁶⁴ Council of Europe Commissioner for Human Rights, "Criminalisation of Migration in Europe: Human Rights Implications", 2010, p. 28.

¹⁶⁵ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187/46, 10 July 2001.

¹⁶⁶ Council Framework Decision (2002/629/JHA) of 19 July 2002 on combating trafficking in human beings, OJ L 203, 01 August 2002.

measures against employers of illegally staying third-country nationals¹⁶⁷, adopted some months before the entry into force of the TL. This instrument is aimed at “fighting against illegal immigration”;¹⁶⁸ it defines the criminal offense of employment of irregular immigrants and asks for criminal sanctions to be imposed on the offenders.

Taking this into account, this paragraph will formulate a hypothesis that could be key in the subject of the criminalisation of irregular immigrants in the EU. According to article 79 TFEU, the EU should develop a common policy aimed at the “*prevention of, and enhanced measures to combat, illegal immigration (...)*”. Article 82 TFEU, on the other side, allows for the enactment of directives establishing minimum rules with regard to the definition of criminal offences and sanctions in the areas where the approximation of criminal laws and regulations of the MS proves essential to ensure the effective implementation of a EU policy in an area that has been subject to harmonisation measures, such as “illegal immigration”. Therefore, theoretically, the EU could enact a directive defining irregular stay and entry in any MS as a crime. The enactment of such a Directive seems even likely if we take into account that a big number of EUMS, including countries such as Germany, France or the UK, already criminalise irregular entry and stay.¹⁶⁹

¹⁶⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24, 30 June 2009.

¹⁶⁸ Article 1 Directive 2009/52/EC.

¹⁶⁹ The respect for the principle of subsidiarity, in the sense of article 5 TEU, could prevent this move.

Moreover, there is another element that could unfortunately reinforce this hypothesis, which can be found in the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.¹⁷⁰ This framework Decision is supposed to punish criminally the facilitation of irregular entry and stay, but not the irregular stay and entry themselves. However, there is a provision stating that this Framework Decision “*shall apply without prejudice to the protection afforded refugees and asylum seekers (...), in particular, Member States' compliance with their international obligations pursuant to Articles 31*”¹⁷¹ of the Geneva Refugee Convention. As it was said before, Article 31 of the Geneva Convention requires States Parties not to impose penalties on refugees based on their irregular entry or presence. Therefore, this provision could imply that MS may as well criminalize the irregular entry and stay of immigrants, except if they are refugees. It appears that the EU understood the risk that criminalizing the facilitation of irregular entry and stay could likely lead EUMS to also criminalize irregular stay and entry, and decided to remind MS about their obligations under international law towards refugees.

This hypothesis could be of great relevance for the issue of the criminalisation of immigrants, and it would worsen even more the situation of irregular immigrants in Europe. However, it should be noticed that if irregular stay and entry were regulated at the EU level, then the EUCJ would be able to make a decision on the compatibility of

¹⁷⁰ Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, (2002/946/JHA), OJ L 328/1, 5 December 2002.

¹⁷¹ Article 6 of Council Framework Decision (2002/946/JHA).

this “offence” with the EU Charter. If the EUCJ considered the offence of clandestinity contrary to the EU Charter, then it would affect all EUMS. Moreover, after the EU accession to the ECHR, also the ECtHR could judge on the compatibility with the ECHR. In that sense, this hypothesis could even be positive for the fight against the criminalisation of irregular immigrants in Europe because it would concentrate the efforts on one EU instrument, instead on each MS individually.

The first provision that could be alleged against a possible EU instrument defining the offence of “clandestinity” is article 67.1 TFEU, stating that the “*Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States*”. Indeed, to avoid such criminalisation, reference should be made to the respect of the legal systems of those MS that *do not* criminalise “clandestinity” and the respect for those fundamental rights that criminalisation can violate by itself or because of the effects it has in practice. For example, it can be argued that the criminalisation of irregular immigrants leads to racist and xenophobic behaviours. In this sense article 67.3 TFEU is also relevant, because, when talking about a high level of security in Europe, it states that the EU should also take measures to prevent and combat racism and xenophobia.

3.2.3 THE STOCKHOLM PROGRAM, THE FUNDAMENTAL RIGHTS AGENCY AND HUMAN RIGHTS COMPLIANCE IN EU IMMIGRATION POLICIES

In December of 2009, the European Council, following on the mandate given to it by article 68 TFEU, defined the strategic guidelines for legislative and operational

planning within the AFSJ for the years 2009-2014. These guidelines were adopted under the name “‘Stockholm Programme’. An open and secure Europe serving and protecting citizens”.¹⁷² This programme, continuing on from the Tampere and Hague Programmes, is the first to be adopted under the LT and it implements the provisions of the new consolidated texts in this area. It is, therefore, very relevant for the object of this thesis to analyse how this program deals with the issue of “clandestinity”, since it defines the position that the EU will take until 2014 when acting on the matter of irregular immigration.

The Stockholm Programme has been criticized because of the emphasis on reducing irregular immigration,¹⁷³ alledging “*the EU faces an increasing pressure from illegal migration flows.*”¹⁷⁴ The Programme establishes certain measures to “more effectively” combat irregular immigration, such as a growing role of the EU border patrol, FRONTEX, or a focus on data systems to allow checks of those entering the EU. However, these allegations to justify harsher measures on the “fight against illegal immigration” are usually not accompanied with data illustrating the reality of that “threat”. In fact, as it was seen in the first chapter, data would suggest the opposite. In general, it can be stated that “*(t)he control-oriented approach on irregular migration,*

¹⁷² Council of the European Union, (2010/C 115/01) The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 5731/10, Brussels, 3 March 2010, OJ C115/1, 4 May 2010

¹⁷³ Migration News, “EU: Stockholm, Population, Discrimination”, January 2010 Volume 17 Number 1, available at: http://migration.ucdavis.edu/mn/comments.php?id=3573_0_4_0 (consulted on 8 June 2011)

¹⁷⁴ The Stockholm Programme (2010/C 115/01), p.5.

which is based on criminalisation, return and readmission, has been the prevalent one in the Stockholm programme”.¹⁷⁵

In terms of hr protection, the general wording of the Stockholm Programme is positive. Indeed, it considers “promoting citizenship and fundamental rights” as one of the political priorities of the EU in the AFSJ. It states that the AFSJ “*must, above all, be a single area in which fundamental rights and freedoms are protected.*”¹⁷⁶ Moreover, it recognises the special needs of vulnerable people and the fact that the rights of “*citizens of the Union and other persons*” should also be exercise outside the EU.¹⁷⁷ However, when it comes to the specific objectives and actions, it is not that clear how these rights will be prioritised.

The Stockholm Programme makes reference to the accession of the EU to the ECHR as been “*a matter of urgency*”.¹⁷⁸ Moreover, the Council invites all EU institutions and MS “*to ensure that legal initiatives are and remain consistent with fundamental rights and freedoms (..) strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the European Convention and the rights and freedoms set out in the Charter of Fundamental Rights.*”¹⁷⁹ This is a very positive statement but, again, it still needs to be implemented in practice.

¹⁷⁵ Merlino and Parkin, 2011(a), p. 10.

¹⁷⁶ The Stockholm Programme (2010/C 115/01), p.4.

¹⁷⁷ Idem, p.4.

¹⁷⁸ Idem, p.8.

¹⁷⁹ The Stockholm Programme (2010/C 115/01), p.8.

The Stockholm Programme asks, therefore, for a continuous monitoring or checking of the compatibility of EU legislation with hr. This could imply that if the implementation of EU legislation already in force turns out to be contrary to hr, that legislation should be revised. In this sense, it is important to look for possible interpretations of criminalisation as going against the EU Charter or the ECHR to possibly reverse Directives such as Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals.

Moreover, arguments of potential hr violations should also be found to avoid that the EU uses in the future its new competence in criminal law to adopt legislation criminalizing “clandestinity”. If it could be proven, for example with statistics,¹⁸⁰ that the criminalisation of irregular immigrants raises racist and xenophobic attitudes as well as acts of discrimination¹⁸¹ against regular migrants or European citizens, then these laws could be considered to be violating the EU Charter and the ECHR, or even the EU Directive on equal treatment between persons irrespective of racial or ethnic origin.¹⁸²

¹⁸⁰ See European Union Fundamental Rights Agency, European Union Minorities and Discrimination Survey, Data In Focus Report 4: Police Stops and Minorities, Vienna, 2010. Available at: <http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS-police.pdf> (consulted on 1 June 2011).

¹⁸¹ Referring, for example, to indirect discrimination, understood as discrimination that occurs where the law is not necessarily targeted at a particular group, yet it has the unjustified effect of unfairly burdening or penalizing the members of that group.

¹⁸² EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000. It should be noticed that, unfortunately, according to article 3.2, the Directive “*is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment*

The ECtHR, in the case D.H. and others against the Czech Republic, has already accepted the use of statistics to prove discrimination.¹⁸³

In this sense, it is relevant to keep in mind the potentiality of the European Union Agency for Fundamental Rights (FRA). This agency's main tasks are collecting data on fundamental rights, conducting research and analysis and providing advice on these issues. Its importance in the field of hr protection in the area of immigration and asylum in the EU is also evident taking into account that at least four of its nine thematic areas are directly related to this field.¹⁸⁴ Moreover, in the Stockholm Programme, the Council of the European Union calls on the EU institutions to “*make full use of the expertise of the European Union Agency for Fundamental Rights and to consult, where appropriate,*

which arises from the legal status of the third-country nationals and stateless persons concerned.”

Therefore, discrimination against immigrants is somehow considered legitimate.

¹⁸³ D.H. and Others v. Czech Republic, 57325/00, Council of Europe: European Court of Human Rights, 7 February 2006. Also ECtHR, Third Section, CASE OF N. v. SWEDEN, Application no. 23505/09, 20 July 2010, paragraph 58.

¹⁸⁴ Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, (2008/203/EC), OJ L 063, 7 March 2008, established that the thematic areas of the FRA, among are: a) racism, xenophobia and related intolerance, b) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination), c) compensation of victims, d) the rights of the child, including the protection of children, e) asylum, immigration and integration of migrants, f) visa and border control, g) participation of the EU citizens in the Union's democratic functioning, h) information society and, in particular, respect for private life and protection of personal data and i) access to efficient and independent justice.

*with the Agency, in line with its mandate, on the development of policies and legislation with implications for fundamental rights”.*¹⁸⁵

One sign of the positive effect that this agency could have in the fight against the criminalization of “clandestinity” is the terminology used, in the sense that, while in general the EU uses the term “illegal immigrant”, the FRA uses “irregular immigrants”.¹⁸⁶ Additionally, in the FRA opinion on The Stockholm Programme and other documents, it makes important recommendations that go against the criminalization in the broader sense, such as to make compulsory the clause of Article 1.2 of the Council Directive defining the facilitation of unauthorised entry, transit and residence, which excludes sanctioning humanitarian activities directed to irregular immigrants.¹⁸⁷

Moreover, the FRA has already elaborated statistics related to EU and EUMS legislation on irregular immigration. These statistics could be used as evidence of their negative effects on racial and ethnic discrimination¹⁸⁸ and xenophobia.¹⁸⁹ Therefore, the

¹⁸⁵ The Stockholm Programme (2010/C 115/01).

¹⁸⁶ The European Union Fundamental Rights Agency, “The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda”, Vienna, 14 July 2009. Available at:<http://www.fra.europa.eu/fraWebsite/attachments/FRA-comments-on-Stockholm-Programme.pdf> (consulted on 31 May 2011), p.10.

¹⁸⁷ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, in OJ L 328, 5 December 2002.

¹⁸⁸ In the 2010 Report on the Application of the EU Charter of Fundamental Rights, the European Commission expressed its concern for the respect for non-discrimination on various grounds, including race, and based this concern on data provided by the FRA. European Commission, COM(2011) 160 final, p.6.

expertise of the FRA and its role as adviser to policy-makers of the EU could play an important role in avoiding a criminalisation of irregular entry and stay at the EU level and even reversing the already existing legislations dealing with the criminalisation in a broad sense.

As it was said before, the EU needs to change its approach to immigration to a clear right-based approach¹⁹⁰ that avoids fuelling the increasing criminalisation of irregular immigrants. In order to reverse the trend, this approach should include detailed rules on procedural and substantive guarantees and clearly establish the rights of TCN, including those of irregular immigrants. Moreover, the principle of non-discrimination should be appropriately applied, following article 21 of the EU Charter, avoiding unjustifiable and disproportionate exceptions, with close scrutiny by the EUCJ. It is necessary to create a common EU policy on regular migration for labour purposes, which intends to avoid the

¹⁸⁹ For example, in above n. 186, p.11, the FRA recommends to “ensure that implementation of the Employers’ Sanctions Directive does not result in cumbersome procedures discouraging employers from considering job applications submitted by migrants. The recent survey carried out by the FRA revealed that 22 % of Sub-Saharan African respondents and 18 % of North African respondents experienced discrimination when looking for work or at work in the past 12 months.”

¹⁹⁰ Cholewinski, 2007, p.334.

current precarious status of regular migrants,¹⁹¹ who risk to fall into irregularity at any moment following the numerous legislative changes at national level.¹⁹²

3.3 EU LAWS AND POLICIES ON THE CRIMINALISATION OF IRREGULAR IMMIGRATION AND HUMAN RIGHTS IMPLICATIONS

During many years, the EU has created legislation that criminalized almost all activities related to irregular immigration, creating circles of criminal law around irregular immigrants. However, national legislation has taken a step forward and has decided to fill in that centre part, criminalizing also the irregular immigrant as such. They have ended the hypocrisy of criminalizing the smuggling of undocumented immigrants, the employment of these immigrants, etc, putting the irregular immigrant as the victim of such crimes, when the real purpose was not to protect the immigrant, but to make it impossible for them to arrive or to have a decent life in Europe. In this section I will analyse EU law and policies that affect the criminalisation of irregular immigrants in a broad sense.

EU policies on external border controls, visas and, in general, the prevention of irregular immigration, treat TCN as members of risk categories.¹⁹³ In fact, the project

¹⁹¹ The Proposal of a Council Directive, COM (2007) 638 final, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, 2007/0229 (CNS), Brussels, 23 October 2007, could potentially be a good step in this direction. However, it is unfortunate that it excludes from its application many categories of immigrants, such as refugees and also that it allows for so many aspects to be decided by MS, such as, the conditions under which it is granted, renewed or cancelled.

CRIMPREV reported that several police actions are based on constructed stereotypes and prejudices towards TCN.¹⁹⁴ In this field, the rights that apply to EU nationals are not in practice the same that apply to immigrants; especially those related to data protection, non-discrimination and private life.¹⁹⁵ The clearer conflict emerges in relation to the non-discrimination on the base of race, colour, ethnic or social origin, religion or belief, and membership of a national minority. In this sense, it appears that in practice *“the ‘burden of proof’ falls on the immigrant to demonstrate that he or she is somehow different from the profile of the category with which he or she is identified.”*¹⁹⁶ The case of the “black” visa list of countries whose nationals need visas for short-term visits is a clear example of this.¹⁹⁷ As the European Civil Liberties Network has stated, *“it is a selective war against migration, because the EU’s restrictive measures specifically target those fleeing from poverty and persecution: whilst industrialised countries remain ‘white-listed’, poor countries are relegated to the EU’s visa ‘black-list’.”*¹⁹⁸

¹⁹² Cholewinski, 2007, p.334.

¹⁹³ Ibidem, p.306-307.

¹⁹⁴ Carrera and Merlino, 2009, p. 19.

¹⁹⁵ The EU Charter of Fundamental rights, articles 7, 8, 9 and 21.

¹⁹⁶ Cholewinski, 2007, p.307.

¹⁹⁷ The nationals of these countries require visas also for short-term visits based on the presumption that nationals coming from those countries are more likely to overstay or because of public security considerations.

¹⁹⁸ European Civil Liberties Network, “Oppose the “Stockholm Programme””: Statement by the European Civil Liberties Network on the new EU five-year plan on Justice and Home Affairs”, April 2009. Available at: <http://www.ecln.org/ECLN-statement-on-Stockholm-Programme-April-2009-eng.pdf> (consulted on 15 May 2011), p.2.

Discrimination between EU nationals and non-EU nationals is very clear on the different threshold for refusal of entry. For example, a TCN could be refused entry merely because he/she is seriously *suspected* of having committed a criminal offence carrying the penalty of at least one year.¹⁹⁹ However, a EU national can only be refused entry in regard to a *present and sufficiently serious threat* caused by his personal conduct and not because of previous convictions.²⁰⁰ These policies are ineffective and based on threat prevention, the legitimacy of which could be easily questioned. Moreover, the discrimination present in this area can be blamed for two negative consequences. First, the treatment given to the TCN can be considered contrary to hr, in the sense that it does not consider the person as an individual whose rights can only be limited because of his/her personal behaviour, but because of his/her membership to a risk category. It does not allow the TCN to use his freedom of choice and denies the equal dignity of all human beings. Secondly, it could be promoting irregular migration

¹⁹⁹ Regulation (Ec) No 562/2006 Of The European Parliament And Of The Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) in relation to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September 2000, alerts in the Schengen Information System, article 96, 2 (b). There are disturbing interpretations of the criteria given in this article, to the point that it has been reported by Statewatch that some countries include rejected asylum seekers or truck drivers who did not pay traffic fines, in Cholewinski, 2007, p. 308.

²⁰⁰ 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EECart, OJ L 158/77, 30 April 2004, articles 27.

because it closes the door for regular migration to a big number of people whose only choice to come to Europe will be through irregular means.

There are also relevant hr concerns in the increasing cooperation of the EU with neighbouring states related to migration issues, which in certain cases have contributed to the criminalisation of irregular immigrants in those states. This has been the case of Morocco, which, apparently in response to EU concerns on the transit of irregular migrants through the country,²⁰¹ adopted in 2003 a law imposing criminal sanctions, such as fines or imprisonment, to irregular migrants.²⁰² Also Romania and Bulgaria, during the EU accession process, and with the implicit support of the EU,²⁰³ introduced measures sanctioning and imposing restrictions on their own nationals when they had committed an offence against the immigration law of any MS.²⁰⁴ These sanctions

²⁰¹ Cholewinski, 2007, p.325.

²⁰² Bulgarian Law 02-03 on the admission and residence of foreigners and irregular migration. Cholewinski, 2007, p. 325.

²⁰³ These measures were mentioned in the Commission's reports that led these countries to be in the list of countries which did not need a visa to enter the EU, and also in the Commission's Regular Reports on the progress of these two countries towards accession, eg European Commission, Report to the Council regarding Bulgaria in the perspective of the adoption of the Regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt of that requirement, COM (2001) 61, 2 Feb 2001, European Commission, Report from the Commission to the Council- Exemption of Rumanian Citizens from Visa Requirements, COM (2001) 361, 29 June 2001 or European Commission, 2003 Regular Report On Romania's Progress Towards Accession, SEC(2003) 1211/1, 5 Nov 2003.

²⁰⁴ Cholewinski, 2007, p.330-331. It is interesting to notice that Bulgaria does not criminally sanction irregular entry or stay of third country nationals into the country. I was not able to find any data on Rumania. A question of double incrimination (*non bis in idem*), which the EU Charter has extended, could come across if the EU country where the Bulgarian nationals entered irregularly also criminalized irregular entry

included imprisonment of between three months and three years or/and confiscation of the passports for up to five years. These restrictions of freedom of movements, if adopted by a European country, would very likely violate article 2.2 of Protocol 4 to the ECHR on the right to leave any country, including its own, and in any case could also infringe article 12.2 of the ICCPR.

The EU external relations in immigration issues continue today to deal mainly with the control of potential immigrants from countries of origin or third countries of transit and with guaranteeing the return of irregular immigrants or rejected asylum seekers. For example, in the European Pact on Immigration and Asylum of 2008, the European Council agreed to “*intensify cooperation with the countries of origin and of transit in order to strengthen control of the external border and to combat illegal immigration by increasing the European Union's aid for the training and equipping of those countries' staff responsible for managing migration flows*”.²⁰⁵ Thus, although there are also programs with countries of origin regarding development and immigration, most of the aid given to these countries is dedicated to “*deter or prevent illegal immigration, in particular by capacity-building in those countries.*”²⁰⁶

In this sense, it is interesting to briefly analyse the 2011 Communication of the Commission on the evaluation of EU Readmission Agreements (EURAs). The

and stay.

²⁰⁵ Council of the European Union, European Pact on Immigration and Asylum, 13189/08 ASIM 68, Brussels, 24 September 2008, p.10.

²⁰⁶Idem, p.14.

Communication is the answer to the invitation that the Council made in the Stockholm Programme to the Commission to present an evaluation on this issue.²⁰⁷ A EURA is an agreement between countries of origin or transit and the EU and it imposes reciprocal obligations to readmit their respective nationals or, in some cases, also third country nationals and stateless persons. These agreements, key for the return of people with irregular migrant status, are considered to be a major element in the “fight” against irregular immigration in the EU.

Among the recommendations made by the Commission in this Communication, one of them is very troubling. It recommends that the EU inserts readmission obligations into its framework agreements with third countries, sanctioning those countries that do not show sufficient cooperation when tackling irregular migration.²⁰⁸ It gives the possibility of suspending cooperation if the country denies collaborating in the “fight” against irregular immigration, which is very disturbing. It shows the priorities of the EU and its position on the negotiating table; depriving a developing country of assistance if the country does not obey to the orders of the EU. They are using the vulnerability of some countries, to get rid of the vulnerable people that Europe doesn’t want anymore.

Therefore, the EU is exporting its restrictive approach towards external border, visa and irregular migration policies to third countries, consciously undermining fundamental

²⁰⁷ The Stockholm Programme (2010/C 115/01), p. 31.

²⁰⁸ European Commission COM(2011) 76 final Communication From The Commission To The European Parliament And The Council Evaluation of EU Readmission Agreements, Brussels, 23 February 2011, p.8.

human rights in these countries. This is also damaging the credibility of the EU as an international actor that promotes human rights around the world.

However, there are three recommendations in this Communication that, at least in theory, should be recognised as positive steps. The first one refers to the respect of hr when implementing EURA, and the subsequent suspension of its implementation in case it would lead to a violation of these rights.²⁰⁹ In connection with this recommendation, it is proposed that all EURA referring also to the readmission of TCN should contain a clause explicitly stating that the treatment of TCN should be in compliance with at least the main hr instruments.²¹⁰ The last positive recommendation suggests that, taking into account the preference for voluntary return expressed in the Return Directive, EURA should include an article giving preference to this modality of return. Moreover, it suggests that parties should commit not to impose sanctions for non-compliance with migration rules on persons who return voluntarily.²¹¹ This last recommendation could be very relevant for the criminalisation of irregular immigrants in the country of destination as well as in the country of origin or transit. It creates a limitation or exclusion to the criminal offence of irregular entry and stay for those irregular immigrants who return voluntarily.

Another area where immigration and criminal law touch is in the criminalisation of assistance to irregular immigrants, and here the EU has taken the lead. The main

²⁰⁹ European Commission COM(2011) 76 final, p.12.

²¹⁰ *Idem*, p.13

²¹¹ *Idem*, p.13.

decisions taken in this area are the Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence and the Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. They sanction the intentional provision of assistance to migrants in respect to their unauthorised entry into, transit across and residence within the territory. Although these measures may seem to be in the same line with the Palermo Protocol on Smuggling, this is not the case. While this protocol considers the protection of the smuggled people as one of its purposes and offers them certain measures of protection,²¹² the EU provisions don't do any of those things. In fact, in the EU Directive, only the offence of facilitating unauthorised residence requires the element that the assistance is done with an economic aim, but not in the other two cases.²¹³ Even if the aim is to provide humanitarian assistance, the conduct could be criminally sanctioned, unless the MS established such an exemption.²¹⁴ This has led many NGOs to protest against what they call "crimes of solidarity".²¹⁵

These regulations that potentially criminalise humanitarian assistance could be considered contrary to the principle of solidarity, which is one of the fundamental values of the EU, mentioned in the Preamble of the EU Charter and in national

²¹² Article 2 and 16 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.

²¹³ On the contrary, article 6 of the Palermo Protocol on Smuggling establishes the offence of smuggling with human beings only when is done "*in order to obtain, directly or indirectly, a financial or other material benefit*".

²¹⁴ Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, Art. 1.2.

²¹⁵ <http://www.delinquants-solidaires.org/> and Feket, 2009.

constitutions such as the Italian Constitution.²¹⁶ These regulations are not easily justifiable. They do not sanction the assistance to the commitment of a criminal activity, because irregular entry or residence is not yet considered a criminal offence by any EU provisions and some EU countries regulate it as an administrative offense. At the same time, it is not protecting the irregular immigrant, because it sanctions, not only the assistance for economic aims, but all kinds of assistance, thus it is just isolating and neglecting irregular immigrants. Moreover, these provisions contribute to an increasing spiral of unlawful activities, while solidarity and charity organisations can be punished if they do not choose well the recipients of their services.

Unfortunately, it is not easy to find strong hr arguments that could be invoked in front of a court against these provisions. There is no obvious violation of any hr of the offender, as there is no such thing as the “human right to do solidarity actions”. Only in the case of personal strong ties between the “offender” and the irregular immigrant who is been assisted, it could seem possible to claim a violation of the right to private life or family life.²¹⁷ There would be more hr violations alleageable in relation to the irregular immigrant that, as a consequence of the fear inflicted by these provisions, would not be assisted when needed. The problem in this case is that the irregular immigrant is not the direct subject of the provisions, and for example, it would be difficult to fulfil the

²¹⁶ Article 2 of the Italian Constitution of 1948.

²¹⁷ Article 7 of the EU Charter and article 8 of the ECHR. Unfortunately, in the Case Of Gillberg V. Sweden of 2010, the court said that there seems to be no case law that recognize that a criminal conviction in itself interferes with Article 8 of the Convention. Gillberg V. Sweden, 41723/06, Council of Europe: European Court of Human Rights, 2 November 2010, paragraph 104.

requirement of the victim status and the exhaustion of domestic remedy to complain before the ECtHR. However, there is case-law that could be alleged, such as the case of *Ternovszky V. Hungary*, where the court recognized the victim status of a pregnant woman who claimed that she would not benefit from adequate professional assistance for a home birth due to a law criminalizing doctors assisting home births.²¹⁸

Other instruments contributing to the criminalisation of immigration are the Directive of 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals and the Council Directive 2001/51/EC strengthening the sanctions of carriers accused of assisting foreigners. Although, they are not necessarily solidarity crimes, because they usually imply an economic gain, they do contribute to the culture of distrust. Additionally, in the case of the Directive on illegal employment, it has negative consequence for equal labour opportunities, also for regular immigrants and nationals of ethnic or racial minorities, for which it could be considered manifestly disproportionate with regard to the objective it seeks to pursue.²¹⁹

When dealing with smuggling, trafficking or illegal employment, the EU priority is the criminalisation of those committing these acts, meaning the traffickers, the smugglers or the employers of irregular immigrant. Unfortunately, in this area of criminal law, there seems to be a problem to identify who is the subject of those criminal sanctions and who is the victim that must be protected. The consequence is that the same person who

²¹⁸ *Ternovszky V. Hungary*, 67545/09, Council of Europe: European Court of Human Rights, 14 December 2010, 2010, paragraph 21.

²¹⁹ Carrera and Merlino, 2009, p.19.

is constructed as a victim of trafficking, may be two seconds later, considered a criminal him/herself under the offence of irregular immigration.²²⁰ The victim is needed in order to constitute all the elements of the offence, but is no more considered as such when it comes to the obligation to protect him/her. There is clearly an instrumentalisation of those irregular immigrants and, most of the time, states violate their positive obligations to protect those under their jurisdiction.

Fortunately, the recent EU Directive 2011/36/EU on trafficking seems to change this approach and explicitly protects victims of trafficking from prosecution under immigration law offences.²²¹ Recital 14 of this Directive establishes that *”Victims of trafficking in human beings should (..)be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation(..)”*.

However, in general, as the project CHALLENGE concluded, *“the protection of the undocumented migrant (..) does not appear to be the driving force behind the intensification of EU action in the field of criminal law from the perspective of migration policies.”*²²²

²²⁰ Guild and Minderhoud, 2006, p.3.

²²¹ Article 8 of Directive 2011/36/EU.

²²² Carrera and Merlino, 2009, p.19.

3.4 RETURNING IRREGULAR IMMIGRANTS IN THE EU AND EL DRIDI CASE

3.4.1 EU POLICIES ON THE RETURN OF IRREGULAR IMMIGRANTS

The EU has always given great importance to the return of rejected asylum seekers and irregular immigrants because it considered it to be crucial for the credibility of a common asylum and migration law and policy. It has, as a consequence, neglected other areas such as the creation of a feasible EU policy on legal migration for labour, which would possibly decrease the number of irregular immigrants and therefore the volume of returns.²²³

Before the RD, the return of TCN within the EU was based on a mix of both legally binding and soft law measures. The soft law approach was mainly focused on the implementation of a Return Action Programme adopted on 28 November 2002 by the Council.²²⁴ This programme suggested developing a number of short, medium and long term measures, including common EU-wide minimum standards or guidelines, in the field of return of irregular residents.²²⁵ Subsequent to this Programme, there was an intense operational activity of cooperation between immigration and law enforcement officials in MS. The approach concentrated mostly on measures of forced return, which

²²³ Cholewinski, 2007, p.318.

²²⁴ European Union Return Action Programme, adopted by the Justice and Home Affairs Council on 28 November 2002.

²²⁵ http://ec.europa.eu/home-affairs/policies/immigration/immigration_intro_en.htm, website of DG Home Affairs.

contrasted with the position of the Council of Europe given in the 20 guidelines on forced return that established that the host state has to promote voluntary return.²²⁶

The legally binding measures were focused on readmission agreements in order to return irregular immigrants either to their countries of origin or the third countries from where they arrived to the EU.²²⁷ There were other binding measures directed towards MS cooperation on the expulsion process, based on mutual recognition of expulsion decisions,²²⁸ assistance in cases of transit for the purposes of removal by air²²⁹ and the organisation of joint flights.²³⁰ All these measures also focussed on forced return, particularly on the effectiveness of the return and the reduction of economic costs, disregarding the protection of hr in the expulsion processes. These objectives of efficient and quick return had also the aim of discouraging potential irregular immigrants from coming.²³¹

The Directive on assistance in cases of transit for the purposes of removal by air was very strong on the focus given to forced return, to the point that it stated in its preamble

²²⁶ Council of Europe, Twenty Guidelines on Force Return, September 2005.

²²⁷ Cholewinski, 2007, p.319.

²²⁸ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 02 June 2001.

²²⁹ Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by Air, OJ L 321, 06 December 2003.

²³⁰ Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ L 261, 06 August 2004.

²³¹ Cholewinski, 2007, p.321.

that the sovereignty of MS, in particular “*with regard to the use of direct force against third country nationals resisting removal should remain unaffected*”²³² and, in article 7, it allows for the use of force against TCN beyond self-defence. Moreover, the Directive on the organisation of joint flights has been criticized for posing a risk of institutionalising collective expulsions in the EU, contrary to article 4 of protocol 4 ECHR and article 19 of the EU Charter. Taking into account all these risks of hr violations, it seems troubling that they did not prescribe clearer hr guarantees, particularly on the procedural level.²³³

Already in 2005, the Commission made a proposal for a directive on common standards and procedures for returning irregular immigrants.²³⁴ Initially, it seemed difficult to find the consensus necessary for its approval, due to the divergent views of key governments²³⁵, but finally, on 16 December 2008 the Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals (RD) was adopted, showing a clear preference for voluntary return.²³⁶

Article 1 of this Directive establishes its subject matter, which is to set out common standards and procedures to be applied in MS for returning TCN, in accordance with

²³² Council Directive 2003/110/EC, recital 3.

²³³ Cholewinski, 2007, p.323.

²³⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM (2005) 391 final, 1 September 2005.

²³⁵ Cholewinski, 2007, p.324.

²³⁶ Recital 10 and article 7 of the RD.

fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.²³⁷ Therefore, I would say that the respect for hr in the procedures of return is by itself part of the aim of this directive, and MS's legislation that could lead to a violation of these rights should be considered as undermining the effectiveness of EU law, according to article 4.3 TUE. In this sense, article 5 RD specifically refers to the obligation of MS to take due account of the best interests of the child, family life and the state of health of the TCN, and to respect the principle of *non-refoulement*.²³⁸ Moreover, article 4 states that only more favourable conditions to the ones established in the Directive are possible.²³⁹

It is also important to know that this Directive does not apply to every return within EUMS.²⁴⁰ Article 2 of this Directive states that it does not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.²⁴¹ Moreover, according to article 2.2 RD, MS may decide not to apply the Directive to TCN who entered irregularly or whose return is a matter of criminal or extradition law.²⁴² Nevertheless, article 4.4 RD stipulates that for the return of TCN who entered irregularly, MS have to respect the principle of *non-refoulement* and ensure that their treatment and level of protection is no less favourable than certain provisions

²³⁷ Article 1 RD.

²³⁸ Boeles, den Heijer, Lodder and Wouters, 2009, p. 412.

²³⁹ However, article 4.3RD stipulates a limit to the more favourable conditions that MS can establish, saying that they have to be compatible with the Directive.

²⁴⁰ Moreover, there are 3 MS to who this Directive does not apply: UK, Ireland and Denmark.

²⁴¹ Article 2.3 RD.

²⁴² Boeles, den Heijer, Lodder and Wouters, 2009, p. 412.

of the Directive. However, for those TCN whose return is a matter of criminal or extradition law the guarantees of the RD do not apply. Yet, MS maintain their general obligation to respect the hr of irregular immigrants, as it has been studied previously in this thesis.

I will now very briefly explain the different steps of the return procedure according to the RD. First, MS issue a return decision to irregularly staying TCN,²⁴³ which must include a period for voluntary return.²⁴⁴ If the irregularly staying TCN doesn't leave within the period granted or if, according to specified conditions, the MS did not grant such a voluntary return, then MS will have to enforce a forced return,²⁴⁵ using always the least coercive measures at their disposal. This measures may include administrative detention, which should follow the guarantees given by article 15 and 16, including that irregular immigrants should always be separated from ordinary prisoners.²⁴⁶ This guarantee can be seen as refusal to the criminalisation of irregular immigrants, in the sense that irregular immigrants should not be treated as criminal, and thus shall not be detained together with ordinary prisoners.

This Directive has been severely criticized by NGO's²⁴⁷ and international organisations. One of the main critics was based on the maximun detention period of 18 months

²⁴³ Article 6 RD.

²⁴⁴ Article 7 RD.

²⁴⁵ Article 8 RD, this shall or may be accompanied with an entry ban, according to article 11 RD.

²⁴⁶ Article 16.1 RD.

²⁴⁷ See, Amnesty International, "EU Office Reaction To Return Directive Vote", 18 June 2008, available at: <http://www.amnesty.eu/en/press-releases/all/amnesty-international-eu-office-reaction-to-return-directive-vote-0363/?cfid=12&id=366&cat=4&l=1> (consulted 2 June 2011)

allowed by article 15 RD. It should also be criticized that it regards returning irregularly staying TCN as the only possible solution, or even as an obligation to MS. In this sense article 6 of the RD states that “*Member States shall issue a return decision to any third-country national staying illegally on their territory*”. There are few exceptions allowed, including the possibility that MS decide to grant “*an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons.*”²⁴⁸

Also the “Global approach to migration”²⁴⁹ shows a focus on return of irregular TCN. This approach has the aim of bringing together the different policies related to the issue of migration in a coherent manner. The most relevant instrument introduced by this Global approach is the so called “mobility partnership” with third countries. These instruments include measure such as development aid, temporary entry visa facilitation, circular migration, “fight against illegal migration” and, of course, readmission agreements. According to these instruments, third countries must also carry out specific information campaigns on irregular immigration and discourage it, strengthen border controls and take stronger measures to tackle forged documents, while the EU could offer nationals of those countries better access to the EU.²⁵⁰ Therefore, this approach is another indication of the EU focus on return when dealing with irregular immigration.

²⁴⁸ Article 6.4 RD.

²⁴⁹ Council of the European Union, Council Conclusions on enhancing the Global Approach to Migration, 2878th General Affairs Council meeting, Luxembourg, 16 June 2008.

²⁵⁰ Castagnoli, 2010, p.4-5.

Also in 2008, the Council of the European Union, under the French presidency, adopted the “European Pact on Immigration and Asylum”, which gives the same “solutions” to the issue of irregular immigration than the RD. One of the five basic commitments of this pact is “*to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit*”, referring to returning irregular immigrants as the only legitimate measure.

This obsessive focus on the return of irregular immigrants, not paying attention to other solutions such as regularisations, as it has been recommended by the Parliamentary Assembly of the Council of Europe,²⁵¹ neglects completely the needs of those that can not be returned. The FRA has called attention to the “*the treatment of irregular migrants who for technical or similar reasons cannot be removed from the EU territory*”²⁵² and has asked for further examination of their situation in full respect of the *non-refoulement* principle.

3.4.2 EL DRIDI CASE

The 28 April 2011 was a very important day for the issue of the criminalisation of irregular immigrants in the EU. That day, the EUCJ issued a judgement which declared that articles 15 and 16 of the RD should be interpreted²⁵³ as precluding a MS’s

²⁵¹ Parliamentary Assembly of the Council of Europe, Recommendation 1807 (2007) “Regularisation programmes for irregular migrants”, adopted on 1 October 2007.

²⁵² Above n.186, p. 10.

²⁵³ The EUCJ had already issued a preliminary ruling interpreting article 15 of the RD, which was declared

legislation to provide for a sentence of imprisonment to be imposed on irregularly staying TCN on the sole ground that he/she remains, without valid grounds, on the territory of that MS, contrary to an order to leave that territory within a given period.²⁵⁴ This means that, from now on, EUMS will be violating EU law if they impose imprisonment penalties to irregular immigrants merely based on their irregular migration status. Although this is not necessarily the end of criminalisation of irregular immigrants in the EU, it is a big step forward. The next paragraphs will analyse this judgement in the light of the repercussions it may have in EUMS's legislations that criminalise irregular immigration.

In this judgment, the EUCJ gives a preliminary ruling under article 267 TFEU. It follows a request by an Italian court, before which Mr El Dridi had appealed a decision that sentenced him to a year imprisonment for not complying with an order of removal. Since Mr El Dridi was being held in custody, the Italian court also asked that the preliminary ruling be dealt with under an urgent procedure in accordance with article 104B of the Court's Rules of Procedure.²⁵⁵

The RD has not been yet transposed by many MS,²⁵⁶ Italy among them, although the time to do it prescribed the 24 December 2010. However some national courts, such as

as self-executing, in the EUCJ, Kadzoev case, C-357/09 PPU, 30 November 2009.

²⁵⁴ EUCJ, Case C-61/11 PPU, paragraph 63.

²⁵⁵ Court Of Justice, Consolidated Version Of The Rules Of Procedure Of The Court Of Justice (2010/C 177/01), OJ C 177/1, 2 July 2010.

²⁵⁶ By March of 2010 most EUMS had not yet transposed the RD. European Migration Group, "Ad-Hoc Query on Return Directive", compilation produced on 22 March 2010.

Italian²⁵⁷ or French courts,²⁵⁸ have agreed that many provisions of the RD are self-executing, such as articles 15 and 16, and have, therefore, already started applying it. Indeed, it is in the application of the RD by the Italian judge that the question for a preliminary ruling emerges. In this sense, the EUCJ states that “*according to settled case-law, where a Member State fails to transpose a directive by the end of the period prescribed or fails to transpose the directive correctly, the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals against the State (...).*”²⁵⁹

One of the questions that should be considered in this case is the nature of the provisions involved. As it has been mentioned before, after the TL, the EU has competence to enact acts on criminal matters. Nevertheless, according to articles 9 of protocol n°36, the acts adopted before the entry into force of the treaty, such as the RD, will continue to have the same legal effects that they had before.²⁶⁰ However, the Court declares that “*although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by European Union law (...).*”²⁶¹ Therefore, if the act of the EU is within EC competences, according to the principle of prevalence of community law over national law, the implementation of that act could affect criminal

²⁵⁷ Tribunal of Torino, 15 January 2011.

²⁵⁸ Conseil d'État, avis 21 March 2011.

²⁵⁹ EUCJ, Case C-61/11 PPU, paragraph 46.

²⁶⁰ Epidendio, 2011.

²⁶¹ EUCJ, Case C-61/11 PPU, paragraph 53.

provisions of national law.²⁶² Thus, even if the RD does not contain provisions of criminal nature, the effective application of its provisions may affect criminal provisions of MS's legislations. In fact, Case C-61/11 PPU does refer to criminal provisions of Italian law that are contrary to the RD.

To start the analysis of the judgement, it is important to first take a close look at the question for a preliminary ruling. This question is composed by two sub questions. The frame of both questions are articles 15 and 16 of the RD, and the respect for the *“principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable”*.²⁶³ One of the sub question, to which the ruling of the judgement refers to, asks whether the above mentioned principles and the provisions in the RD preclude *“the possibility of a sentence of up to four years’ imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with”*.²⁶⁴ The main element that drives the ruling is that such a penalty *“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”*.²⁶⁵

²⁶² Epidendio, 2011.

²⁶³ EUCJ, Case C-61/11 PPU, paragraph 25.

²⁶⁴ Ibidem.

²⁶⁵ Idem, paragraph 59.

Nevertheless, that question leaves open the possibility of criminalising irregular immigration through other criminal sanctions different to the one of imprisonment. In that sense, it is relevant to notice the second second sub question, which asks whether the above mentioned principles and provisions of the RD exclude “*the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available.*”²⁶⁶ Unfortunately, both the agents of the Commission and of Mr El Dridi, ignored this question. The lawyers of Mr El Dridi even stated during the proceedings that the question was not if a MS can impose any criminal sanction to the TCN not cooperating in the return procedure, but only referred to imprisonment penalties such as the one stipulated in the Italian law.²⁶⁷

The EUCJ, although it did not make explicit reference to this question in the final ruling, did give an answer to it. It first specified that if none of the measures provided in the RD led to the removal of the TCN “*against whom they were issued, the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States’ territory.*”²⁶⁸ Moreover, it explicitly says 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*

²⁶⁶ EUCJ, Case C-61/11 PPU, paragraph 25.

²⁶⁷ Prejudicial procedure C-61/11 (PPU) – El Dridi Hassen, Hearing of 30.3.2011, 10.30, El Dridi’s Defense.

²⁶⁸ EUCJ, Case C-61/11 PPU, paragraph 52.

the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays(...)".²⁶⁹ A positive answer to this question would have implied a clear prohibition of criminalising irregular immigrants, yet the court decided not to do so. Some scholars say that the recent tensions between Italy and the EU in immigration matters could have influenced the decision of the EUCJ.²⁷⁰

However, there is also reference to the need that the penalty, whatever penalty it is, adjusts to the principles of proportionality, appropriateness and reasonableness. The judgement refers explicitly to recital 13 of the RD, which "*makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.*"²⁷¹ Therefore, although other criminal sanctions are allowed, they would still have to be effective and proportional.²⁷² In this sense, an economic criminal sanction imposed for the offense of irregular stay or entry could possibly be considered ineffective for the purpose of return,²⁷³ more so if it is imposed before the possibility for voluntary return is granted.

Moreover, a certain limit to criminalisation could also be inferred from paragraph 52 read together with paragraph 60 of this judgement, allowing it only when all other

²⁶⁹ Idem, paragraph 54.

²⁷⁰ Masera and Vigano, 2011.

²⁷¹ EUCJ, Case C-61/11 PPU, paragraph 57.

²⁷² Also article 49.3 of the EU Charter establishes that the severity of penalties must not be disproportionate to the criminal offence.

²⁷³ In fact, in practical terms, high economic penalties, as many EUMS have, are probably out of reach for most irregular immigrants, which proves the total ineffectiveness of these measures.

measures have failed. Indeed, paragraph 52 says that in case none of the measures provided in the RD led to the removal of a TCN, MS can adopt “*measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States’ territory*”²⁷⁴ and paragraph 60 explicitly states that MS can adopt “*provisions regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory*”.²⁷⁵

Furthermore, it seems that this preliminary ruling does not explicitly question whether the Italian provision analysed in this judgement was contrary to hr. In the judgement, there are only general references to the respect of human and fundamental rights in the recitals of the preamble and in articles 1 and 4 of the RD. Recital 2 and article 1 of the RD define the purpose of this Directive as the establishment of “*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*”.²⁷⁶ Therefore, it may have been more appropriate to ask whether imposing criminal sanctions to TCN merely based on their irregular status is contrary to a return procedure in accordance with human rights obligations.

Nonetheless, certain scholars consider that the EUCJ based its ruling also on the respect of the human right to personal liberty, but it preferred to hide its role as a fundamental

²⁷⁴ EUCJ, Case C-61/11 PPU, paragraph 54.

²⁷⁵ Idem, paragraph 60.

²⁷⁶ Article 1 RD.

rights guardian and concentrate on condemning the inefficiency of the Italian provision to the achievement of the objective of the RD.²⁷⁷ Two paragraphs may support this view. The first one specifies that administrative detention, which is the most serious constraining measure allowed under the RD, is strictly regulated in article 15 and 16 in order to guarantee the fundamental rights of the TCN concerned.²⁷⁸ Additionally, the EUCJ makes explicit reference to the case-law of the ECtHR and to the ‘Twenty guidelines on forced return’ of the Council of Europe, stating that “*the maximum period laid down in Article 15(5) and (6) of Directive 2008/115 serves the purpose of limiting the deprivation of third-country nationals’ liberty in a situation of forced removal*”.²⁷⁹

In any case, following this judgement, national courts, as common judges of EU law, will have to apply EU law and reject all national law contrary to it.²⁸⁰ As the judgements of the EUCJ are considered to be part of EU law, and more so when they are the result of a preliminary ruling, the national courts of all EUMS, except for the UK, Ireland and Denmark, will have to apply their national law in accordance to the interpretation given by the EUCJ. Moreover, when doing this, national courts will also have to apply the principle of the retroactive application of the more lenient penalty,²⁸¹ which as recalled by the EUCJ in its judgment, forms part of the constitutional traditions common to all Member States.²⁸²

²⁷⁷ Masera and Vigano, 2011.

²⁷⁸ EUCJ, Case C-61/11 PPU, paragraph 42.

²⁷⁹ Idem, paragraph 43.

²⁸⁰ Article 4 TEU.

²⁸¹ Also article 49.1 EU Charter establishes this principle.

²⁸² EUCJ, Case C-61/11 PPU, paragraph 61.

Therefore, taking into account that many EUMS's legislations provide for imprisonment for the crime of irregular stay or entry, it is expected that, subsequent to this judgement, many national courts will have to disapply their national legislations so they are in accordance to the RD as interpreted in this case.²⁸³ For example, in France, the judgement was applied immediately.²⁸⁴ Although the government denied that the judgement was applicable to France, French courts started straightway to apply it and release many irregular immigrants that were under arrest.²⁸⁵ Moreover, different French NGO's, associations and trade unions announced the consequences that this judgement should have in France and considered that it was a won battle against the criminalisation of irregular immigration.²⁸⁶

However, giving a strict interpretation of this judgement, criminalising through indirect measures, such as through solidarity crimes or imposing other criminal sanctions different from imprisonment are still possible. Indeed, the legislative provisions of countries like Finland, Poland or even Italy, which sanction the offence of clandestinity

²⁸³ EUCJ, Case C-61/11 PPU, paragraph 61.

²⁸⁴ Court D'appel de Nîmes, Cabinet du Premier President, Ordonnance de Référé rendue au fond le 06 Mai 2011.

²⁸⁵ La Cimade "Quand le système de renvoi des étrangers se fissure", 25 May 2011, Available at: <http://www.cimade.org/nouvelles/3281-Quand-le-syst-me-de-renvoi-des--trangers-se-fissure> (consulted 3 June 2011)

²⁸⁶ Adde, Fasti, Gisti, La Cimade, Pratiques, Le Cahiers De Médecine Utopique, Saf, Smg And Syndicat De La Migistrature, Action Collective: "Vers La Fin De La Pénalisation Du Séjour Irrégulier", Paris, 29 Abril 2011, Available At: <Http://Www.Gisti.Org/Spip.Php?Article2283> (Consulted On 8 June 2011)

with an economic criminal penalty, could be interpreted as not been affected by this judgement. Moreover, as it was said before, this judgement does not apply to certain EUMS, namely the UK and Ireland²⁸⁷ and Denmark.

4. CASE STUDY: ITALY AS A EU MEMBER STATE

Italy has had a long emigration history and has only rather recently become an immigration country. Italian immigration policy is formally quite restrictive, although, in practice, due to the strong demand for foreign workers, Italian authorities tend to indulge in irregular employment. As it has been recently recommended in the Final Report of the CLANDESTINO project,²⁸⁸ Italy has to reform its immigration policy to avoid such contradiction. It should allow for more flexible legal immigration and use measures such as forced removal only as supplementary and not as main policy instruments. Most importantly, this Report also suggests that the “*(c)riminalization of undocumented migration should be avoided in both policy practices and political discourse.*”²⁸⁹

4. 1 ITALIAN LAW ON CRIMINALIZATION OF IMMIGRANTS

²⁸⁷ In general, in the case of the UK and Ireland, the judgements of the EUCJ interpreting legislative instruments on immigration or asylum do not apply, unless they opted in those instruments.

²⁸⁸ CLANDESTINO Project, Final Report, 23 November 2009, available at:

http://clandestino.eliamep.gr/wp-content/uploads/2010/03/clandestino-final-report_-november-2009.pdf
(consulted on 12 June 2011) pp. 69-73.

²⁸⁹ Idem, p. 73.

This section will analyse the most relevant provisions of the Italian legislation on immigration relative to the phenomenon of criminalising irregular immigrants, at the light of the Italian doctrine and the Italian Constitutional court case law. These provisions can be found in the Italian Immigration Act of 1998 (TUI).²⁹⁰ The first provision that will be analysed will be article 14.5(b), which stipulates a penalty of imprisonment for any irregular immigrant who does not abandon the Italian territory after the time specified in an order to leave the territory has expired. This provision has been considered contrary to the RD by the EUCJ in el Dridi case and had being repeatedly criticized by Italian jurists for been contrary to the Italian Constitution. The second provision that will be examined is article 10*bis*, which requires that a criminal economic penalty be imposed on any person that has entered or stayed in Italy in contrast with the Italian rules on Immigration. The EUCJ has not yet made any reference to this provision, although there is a preliminary ruling pending on the matter.

In order to understand better the criminal offence established by article 14.5(b) TUI, it is necessary to analyse the Italian provisions regulating the return procedure, prior to the transposal of the RD. All the provisions regulating this procedure can be found in the TUI. Article 13 (2) and (4) of this law established that when a person entered or stayed irregularly in the country, his/her expulsion would be ordered by the Prefetto, local representative of the Government, and carried out by the Questore, the head of the local

²⁹⁰ Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998), as amended by Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI No 170 of 24 July 2009)

police, with deportation by the law enforcement authorities. Those that overstayed with no risk of absconding should return voluntarily within fifteen days, however, the possibility for voluntary return, in practice, was given in very limited cases. These provisions illustrate the main divergence of the Italian system of return with the RD: the preference for forced-return.

If the removal order through forced-return had been issued, but it was not immediately possible to effect the expulsion by deportation or return because it was necessary to provide assistance to the immigrant, conduct further checks on his identity or nationality, acquire travel documents, or because of the unavailability of the carrier or other suitable means of transport, according to article 14.1, the Questore would order the detention of the foreign national for the length of time which is strictly necessary, in the nearest detention center. The reasons given for the application of administrative detention in the Italian legislation were mainly objective and did not include those given in article 15.1 of the RD, which are primarily subjective in nature. Moreover, they contrasted the character of exceptional measure given to administrative detention by the RD in general.

If the administrative detention is not possible or if the immigrant was already detained but it was not possible to return or expel him by deportation, then article 14.5 (a) established that the Questore would order the foreign national to leave the territory of the State within five days. This order would specify the consequences of the irregular stay on the territory of the State in terms of penalties and it could include the presentation to the person concerned of the documents necessary to go to the diplomatic

mission or consular post of his country in Italy, and also to return to the country to which he belongs or, if that was not possible, to the country from which he came. It should be noticed that the wording of the provision was “*may include*”, which leads to the question of how can the person return if the police doesn’t give him or her the documents necessary to do so?

Therefore, when the state failed to return the person or it was not possible to detain him/her, usually due to lack of space in detention centres, then an order of removal providing for a kind of “voluntary return” would be issued. That is when article 14.5(b) became relevant, introducing a criminal provision which applied to the TCN, who “*without valid grounds*” remained in Italy without the necessary requirements, contrary to the order mentioned above. Italian judges have used the element of “without valid grounds”, which was a constituent element of the offence, to acquit many irregular immigrants. However, this element made the offence quite vague²⁹¹ and left irregular immigrants at the mercy of the competent judge. Moreover, it was up to the immigrant to prove that he/she had valid grounds to stay, which is contrary to the general principle of criminal procedure, according to which it should be the prosecutor the one proving the responsibility of the accuse and, therefore, the inexistence of any valid grounds.²⁹²

The criminal sanction established by article 14.5 (b) was a term of imprisonment. In the case of those who entered irregularly into the Italian territory did not apply for a

²⁹¹ Lanza, 2011, p. 296.

²⁹² Idem, p. 297.

residence permit, did not declared his presence on the territory within the required period, where there was no force majeure, or those whose residence permit had been revoked or cancelled, they would be liable to a term of imprisonment of one to four years. A shorter term of imprisonment of six months to one year would apply to those whose residence permit expired more than 60 days previously and application for renewal has not been made, or was rejected.

It was a criminal offence that sanctioned the immigrant that was not able to return by his own means, in the cases where the state failed to return him itself. In other words, the state was blaming on the immigrants its own inability to return them. Some Italian jurists consider that the legislator was applying an objective responsibility.²⁹³ They believe the offence was punishing the omission of a conduct that is in practice impossible, as it was asking people, usually in destitute situation, to acquire a travel document in order to leave the country in five days, when the state was not able to return them in 60 days.²⁹⁴

In any case, save where the foreign national was placed in detention, a new order to leave the country would be issued. This new order would be subject to the same provisions that applied to the first order. If the foreigner found him/herself again in the situation described by article 14.5(b), meaning that he/she had not left the territory contrary to the new order to do so within five days, independently of whether it was

²⁹³ Lanza, 2011, p. 298.

²⁹⁴ Idem, p. 298.

with or without *valid grounds*, then a new criminal provision will apply, which is established in article 14.5 (c). This article prescribes a term of imprisonment of one to five years with a subsequent third order of removal. Fortunately, in December of last year, the Italian Constitutional Court²⁹⁵ ruled that undocumented migrants in destitute situations could not be punished for not leaving the Italian territory after an order of expulsion was issued against them, referring to the element of “without valid grounds” that had been eliminated from article 14.5 (c). The criminal offense prescribed in this article 14.5 (c), will also be considered contrary to the RD by the Italian courts, as it will be seen in the next section.

For these two criminal offences, according to article 14.5(d), the arrest was mandatory and an expedited procedure had to be followed. Thus, these provisions are an example of how the State puts the burden of its own aggravated incapacity to return irregular immigrants, on the immigrant themselves.

The criminal offense prescribed in article 10*bis* TUI was introduced by the Law N. 94 of 15 July 2009 on public security, known as the “Security Package”.²⁹⁶ This provision introduces an explicit criminalisation of undocumented immigrants, the so called “crime of clandestinity”, which sanctions the foreigner who enters or remains in the State, infringing the regulations of the TUI and Law N° 68/2007, regarding short-term stays,

²⁹⁵ Judgement of the Italian Constitutional Court n. 359, 17 December 2010.

²⁹⁶ Law No 94 of 15 July 2009 on public security, Ordinary Supplement to GURI No 170 of 24 July 2009, Article 1, subparagraph 16.

with a fine from 5000 to 10000 euros and an expulsion order with an entry ban of at least 5 years as an alternative sanction, according to article 16.1 of TUI.

Law 94/2009 has also modified other provisions of the TUI oriented towards limiting the rights of undocumented immigrants and harshening the sanctions against those directly or indirectly related with them. This law has been internationally criticized, including during the recent UPR to Italy, as it was mentioned before. Not to mention NGOs, which have made very serious accusations of violations of human rights in relation to this law.²⁹⁷ Also the Council of Europe Commissioner for Human Rights has repeatedly criticized this law and other previous measures that went in the same direction.²⁹⁸

Only to mention some of the most shocking measures introduced by the Italian government: Law N° 125 of 24 July 2008 introduced the offence of housing irregular migrants sanctioned with 6 months to three years imprisonment and the seizure of the house,²⁹⁹ while Law 94/2009 created the obligation for money-transfer agencies to

²⁹⁷ See Everyone group, “Italy: Law 94/2009 is a serious violation of Human Rights”, 17 October, 2009. Available at:

http://www.everyonegroup.com/EveryOne/MainPage/Entries/2009/10/17_Italy__Law_94_2009_is_a_serious_violation_of_Human_Rights.html (consulted on 27 April 2011) or the blog

<http://nopacchettosicurezza.noblogs.org/>.

²⁹⁸ See Council of Europe Commissioner for Human Rights, Report on Italy 2009 or his Issue paper of 2010 on Criminalisation of Migration in Europe where it states that “*(i)n general the ‘security package’ in Italy presents a number of difficult challenges regarding the criminalisation of foreigners*”

²⁹⁹ This raises a violation of the right to housing of the ICESCR, article 11, and of article 1 of the EU Charter, which protects an evolutionary concept of human dignity that could include housing.

inform the police if TCN do not show their residence permit when doing a money-transfer.³⁰⁰ Moreover, the Security Package of 2009 also increased the penalties for foreign nationals who, upon request of law enforcement officials, did not show his/her identification document and residence permit, with imprisonment of up to one year and a fine of 2000 Euros.³⁰¹ However, the Italian Corte di Cassazione recently declared that this offence is not applicable to irregular immigrants.³⁰²

At the national level and before the RD became self-executing, the Italian Constitutional Court dealt with the constitutional legitimacy of article 10*bis* TUI, which it declared constitutional.³⁰³ In order to better understand the decision taken by this court, it is useful to take a look at the recent history of the relations between the court and the Italian governments related to the intersection concerning immigration and criminal law.

Already in 2004, the Italian Constitutional Court invited the Italian legislator to rethink the use it was making of criminal law in immigration issues. The context of this request was a judgement by the court that declared unconstitutional the mandatory arrest for the offenders of article 14.5(b) TUI, which at the moment was only a contravention. The political parties in power at the moment, which are also in power now, considered the

³⁰⁰ Law 94/2009 of 24 July 2009, article 1, subparagraph 20.

³⁰¹ *Idem*, article 1, subparagraph 22, h).

³⁰² Italian Corte di Cassazione, 24 February 2011.

³⁰³ Italian Constitutional Court, Judgement n. 250, 8 July 2010.

judgement to be an illegitimate intrusion by the Constitutional court in the powers of the legislative authority on matters related to criminal policies.³⁰⁴

Consequently, following this judgement, the government in power enacted a Decree law increasing the criminal penalty stipulated against those irregular immigrants not abandoning the Italian territory after an order of removal has been issued against them, making it a criminal offense and not any more a contravention.³⁰⁵ The penalty was to be imprisonment from one to four years. From that moment on, the Italian Constitutional Court has always denied the unconstitutionality of article 14.5(b) TUI under the argument that the legislator has wide discretionary powers in the field of criminal law.³⁰⁶ Taking this into account, according to some authors, it was not surprising that the court also denied the unconstitutionality of article 10*bis* TUI.³⁰⁷

Law 94/2009 introduced not only the “crime of clandestinity” but also an aggravating circumstance in the Criminal Code in relation to the irregular status of an offender. Both provisions were brought in front of the court questioning if, in the light of the Italian Constitution and international human rights instruments, the irregular status of an immigrant could have criminal consequences, be it as an autonomous criminal offense or as an aggravating circumstance. It seems reasonable that the same answer would have been given to both questions, however this was not the case, and the court decided

³⁰⁴ Masera, 2010, p.1374.

³⁰⁵ Decree Law n.241, 14 September 2004, became Law n.271, 12 November 2004.

³⁰⁶ Masera, 2010, p.1374.

³⁰⁷ *Ibidem*.

to declare the unconstitutionality of the aggravating circumstance³⁰⁸ and the legitimacy of the “crime of clandestinity”. This decision of not eliminating both provisions, considered to be the most important measures introduced by the 2009 Security Package, seems to have been motivated by the fear of being again the centre of political attacks by the political parties in power, which damage the credibility of this important institution.³⁰⁹

The following paragraphs will give a brief explanation of the main arguments used by the objectors of the crime of clandestinity and those given by the court when considering the constitutional legitimacy of article 10*bis* TUI. The Italian Constitutional Court holds its decision mainly on the fact that the choice to criminalize irregular immigrants lies within the state’s margin of appreciation. The court states that it cannot interfere in this margin, except in those cases where the choices made are clearly unreasonable or arbitrary, and it considers that this is not the case.³¹⁰ Therefore, according to the Court, to regulate irregular immigration through criminal law instead of through administrative law is part of the state’s margin of appreciation and thus legitimate.³¹¹

The court justifies the discrepancy in the decisions on the aggravating circumstance of irregular status and the crime of clandestinity, saying that the first is making a

³⁰⁸ Italian Constitutional Court, Judgement n. 249, 8 July 2010.

³⁰⁹ Masera, 2010, p.1374.

³¹⁰ Di Chiara, 2010, p. 1057.

³¹¹ *Ibidem*.

presumption of danger, which is unconstitutional, while the other is only sanctioning the commission of an illegal act that attacks a legitimate interest of the State.³¹² The court argues that the legitimate interest is the good management of migrant flows, which is really an instrumental juridical good, through which the legislator intends to protect the whole of public goods constitutionally relevant, which could be negatively affected by uncontrolled immigration.³¹³ This reveals that the whole reasoning behind the protection of that legitimate interest, the public goods that *could be negatively affected*, also seems to be based on a presumption of danger of irregular immigrants. Thus, one could argue that the arguments used to declare unconstitutional the aggravating circumstance could also be applied to article 10*bis*.

The Italian Constitutional Court also rejects the argument that the offense under article 10*bis* violates article 2 of the Italian Constitution, which refers to the principle of solidarity and the protection of human rights. It states that these principles must be applied in accordance with a correct balance of values³¹⁴ and it affirms that immigration law provisions provided on the basis of an organized migration flow and appropriate reception and integration of foreigners are not per se contrary to these principles.³¹⁵ However, one could claim that this new provision has in practice the potential to violate

³¹² Di Chiara, 2010, p. 1057.

³¹³ Italian Constitutional Court, Judgement n. 250, 8 July 2010, 6.3.

³¹⁴ Italian Constitutional Court, Judgement n. 353, 1997, in Di Chiara, 2010, p. 1057

³¹⁵ Italian Constitutional Court, Judgement n.192 and n. 44, 2006 and n. 217, 2001, in Di Chiara, 2010, p. 1057.

the very basic human rights of irregular immigrants and the effect of going against an adequate integration of immigrants, also regular immigrants.

The Constitutional Courts indicated that other EUMS also criminalize irregular entry and stay in their territories. In fact, as it was shown in Chapter one, in many other countries of the EU, irregular entry and stay constitutes a criminal offense, such as in France, the United Kingdom or Germany.

Other arguments rejected by the court refer to the violation of article 3 of the Italian Constitution regarding equality, for example, the unjustified difference in treatment between the crime of irregular immigration, regulated in article 10*bis* TUI, and article 14.5(b) TUI, which regulates the failure, "without valid grounds", of following the order to leave the country given by a superintendent.³¹⁶ In this sense, it is argued that article 10*bis* TUI does not respect the principles of culpability and proportionality, because it considers illegal a conduct that may not be reproachable to the agent for legitimate objective or subjective reasons. In fact, article 10*bis* accepts no exclusions and it is applicable even to minors. Fortunately, in practice, in certain cases, both the police and the judiciary try to find ways around it in order to avoid extremely unreasonable and unjust condemnations.

The non applicability for the crime of clandestinity of article 162 of the Italian Penal code, which allows for the offender of a contravention punished with a fine to pay part

³¹⁶ Di Chiara, 2010, p. 1057.

of it before the final judgement with the subsequent extinction of the offence, is considered to raise questions of discrimination and violation of article 3.³¹⁷ The reason for this exclusion is that the offence is of continuous nature. However, the application of a continuous offence with no possible justification could be clearly unfair and unreasonable for those immigrants that cannot be expelled or have no resources or no documents to leave voluntarily.

Recently the Constitutional Court has again rejected an appeal on the constitutional legitimacy of article 10*bis* TUI declaring it manifestly inadmissible.³¹⁸ A Justice of Peace of Florence was the one presenting the appeal and some of his arguments are important, so they will be mentioned here. First, he alleged that the choice to criminalize clandestinity is unreasonable by itself and contrary to the fundamental principles of the Italian criminal system, such as article 27.3 of the Italian Constitution that establishes that criminal penalties shall be oriented to the re-education of the offender. He also claimed that the use of criminal law to regulate a certain behaviour shall only be used as *extrema ratio*, when there are no other means to achieve the intended objective. In this sense, the criminalisation of clandestinity is not justified, as it does not imply any social danger and the objective being the return of the irregular immigrant was already achieved through the application of article 13.4 TUI, and thus, through administrative law.

³¹⁷ Di Cagno, 2010, p. 687-693.

³¹⁸ Italian Constitutional Court, Judgement n.193, 15 June 2011.

In conclusion, Italian provisions criminalising irregular immigrants have caused a lot of movement in the Italian juridical field, due to the widespread conception that these provisions are contrary to established principles of law and fundamental rights.

4.2. THE AFTERMATH OF EL DRIDI CASE IN ITALY

4.2.1 ITALIAN JUDGES APPLYING EL DRIDI CASE

El Dridi Case,³¹⁹ the most important judgement in Europe for the fight against the criminalisation of irregular immigrants, followed a request made by an Italian court in reference to the compatibility of article 14.5 b) TUI with the RD. This preliminary question was one of the many that Italian judges rose to the EUCJ since the expiration of the deadline to transpose the RD.³²⁰ As a consequence, the effects of this judgement have been especially relevant in Italy, bringing some order into the administrative and judicial chaos following the non-transposition of the RD in Italy,³²¹ and pushing the Italian government to finally transpose the RD.

The facts behind this judgement concerned a TCN called Hassen El Dridi. Mr El Dridi had entered Italy irregularly and in 2004 was subject to a deportation decree. On the basis of article 14.5 (a), in 2010 the Questore had issued an order against him to leave the territory of the State within five days. The order was based on the facts that Ms El

³¹⁹ EUCJ, Case C-61/11 PPU.

³²⁰ Masera and Vigano, 2011.

³²¹ Raffaelli, 2011, p.2.

Dridi had no identification documents, no means of transport were available and it was not possible for him to be accommodated temporarily at a detention centre, as no places were available.³²² However, Mr El Dridi did not comply with the order and, on the basis of article 14.5 (b), he was sentenced by the District Court of Trento to one year's imprisonment. He then appealed before the Appeal Court of Trento. It was this Appeal Court that asked for a preliminary ruling to the EUCJ.

As a result, the EUCJ declared that the RD should be interpreted as precluding a MS's legislation to include provisions such as article 14.5(b). The ruling is based primarily on the EU principle of sincere cooperation and on the objective of ensuring the effectiveness of EU law.³²³ In this sense, it declared that the Italian provision was undermining the effectiveness of the RD. Therefore, the EUCJ used a classical hermeneutical instrument of EU law, "the useful effect" principle, which allows the EUCJ to give specific answer to the most problematic issues that EU legislative instruments leave unanswered, using vague formulations aimed at reaching compromises.³²⁴

In what refers to the application of the judgement in Italy, first it is important to remember that national courts should ensure the application and full effect of EU law within their jurisdiction and, if it is not possible to interpret it accordingly, disapply any

³²² EUCJ, Press Release No 40/11, Judgment in Case C-61/11 PPU, Hassen El Dridi alias Soufi Karim,

³²³ Article 4.3 TEU.

³²⁴ Masera and Vigano, 2011.

national provision that is contrary to it.³²⁵ Moreover, national courts will also have to apply the principle of the retroactive application of the more lenient penalty. The judgement of 28 of April 2011 has generated an *abolitio criminis* on the facts criminally sanctioned in article 14.5 (b). Therefore, the Italian law, to which EU law is part, including the *dictum* of the mentioned judgement, does not contain anymore a criminal offense which provides 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.

At the time of the ruling, there were between 1500 and 3000 people arrested under article 14 and tens of thousands of condemnatory judgements.³²⁶ Fortunately, Italian judges started immediately to rule the non-application of article 14.5(b), also retroactively. This was the case of the Criminal Court of Sassari,³²⁷ which few days after the judgement, declared that the offence prescribed in article 14.5. (b) was not prescribed by law anymore as a criminal offence. In this case, both the defence lawyer and the Public Prosecutor made reference to the EUCJ judgment in the case C-61/11/PPU.

³²⁵ EUCJ, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, Judgement C-106/77, 9 March 1978.

³²⁶ Masera and Vigano, 2010.

³²⁷ Criminal Tribunal of Sassari, Ndiaye C.M, 2 May 2011.

Moreover, following this EUCJ judgement, the Italian Corte di Cassazione³²⁸ decided that also the facts sanctioned in article 14.5 (c) are not any more prescribed by law as a criminal offense. The Court considered unnecessary a new judgement from the EUCJ in reference to article 14.5 (c) TUI, because this article is also clearly contrary to the RD. The Court also stated that, taking into account the principle of the retroactive application of the more lenient penalty, the fact that the infringed removal orders were prior to the entry into force of the RD, does not prevent the acquaintance of the accused.

Likewise, on 9 May 2011, a Tribunal in Rome³²⁹ declared that, based on the EUCJ judgement El Dridi, also the criminal offence prescribed in article 13.13 TUI should be disapplied. This article sanctions the irregular re-entrance in the Italian territory, in violation of an entry ban, with one to four year imprisonment. The Italian tribunal considers that this provision could jeopardize the attainment of the objective of the RD in the same way than article 14.5 (c).

Therefore, Italian judges have disapplied all national provisions that were contrary to the RD, and not only article 14.5.(b). They have used, although it is not familiar for Italian jurists,³³⁰ the EU law instrument of the “useful effect”, to disapply national provisions that risked undermining the objective of ensuring the effectiveness of EU law.

³²⁸ Italian Corte Suprema di Cassazione Sezione Penale, Notizie di Decisione n°9/2011, 28 april 2011, judgements n. 1590/2011, n.1594/2011 and n.1606/2011.

³²⁹ Criminal Tribunal of Rome, 9 May 2011.

³³⁰ Masera and Vigano, 2011.

Finally, on 23 June 2011, the Italian government enacted a Decree Law³³¹ intended to transpose the RD and complete the transposition of the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Although there is no mention to El Dridi case in the preamble of the Decree Law, it is clear that the ruling has been taken into account. In fact, this Decree maintains the crimes of article 14.5 (b) and (c) changing the penalty from imprisonment to an economic penalty and an order of expulsion as an alternative, like for article 10*bis*.³³² Additionally, the competence to deal with these criminal offences is given to the Justice of Peace.

This new decree also introduces, among others measures, the extension of the maximum period of administrative detention from 6 months to 18 months, and allows irregular immigrants to ask for voluntary assisted return programs. According to Italian experts,³³³ this new Decree law shows the actual situation of the government, mainly of the party of the Interior Minister.³³⁴ On the one side, they have to accept the instructions coming from the EU, but on the other side, they need to prove that they are taking measures to put into practice their anti-immigration electoral promises. This Decree

³³¹ Decree Law 23 June 2011, n. 89. Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari.

³³² Article 3.d) 5) Decreto-Legge 23 giugno 2011, n. 89.

³³³ Melting Pot, "Pubblicato il decreto legge sui rimpatri. Irregolari nei CIE fino a 18 mesi", 24 June 2011, available at: <http://www.meltingpot.org/articolo16880.html>, (consulted on 25 June 2011)

³³⁴ La Lega Nord. This party is in the government in a coalition with el Partito della Libertà of Berlusconi.

Law is clearly softer than the Security Package of 2008 or 2009. However, it is still based on the same misunderstanding of irregular immigration, focusing on return and looking for ways to continuously punish the irregular immigrant, but completely ignoring the root causes of this issue.

4.2.2 POSSIBLE INCOMPATIBILITY OF ARTICLE 10 bis AND THE RETURN DIRECTIVE AFTER EL DRIDI CASE

After the publication of the EUCJ judgement of 28 April 2011, Italian politicians, besides hardly criticizing the ruling saying that it made the return of irregularly staying TCN impossible, they quickly clarified that this judgement did not affect the criminal offence stipulated in article 10*bis*, but only that of article 14.5(b).³³⁵ However, certain Italian judges, even before the El Dridi case, already had doubts concerning whether article 10*bis* could also be considered contrary to the RD. In order to clarify this uncertainty, the 16 March of 2011, the Italian Justice of Peace of Mestre Trucillo sent a request to the EUCJ for a preliminary ruling on the compatibility of this provision with the RD.³³⁶ The referring court asked to the EUCJ if the RD must be interpreted as precluding a MS's legislation, such as article 10*bis* of TUI.

³³⁵ La Repubblica, "Ue: "Clandestini non punibili con carcere" Maroni: "Rischio espulsioni impossibili"", 28 April 2011, Bruxelles. Available at:

http://www.repubblica.it/esteri/2011/04/28/news/corte_ue_boccia_reato_di_clandestinit-15471497/?ref=HRER1-1 (consulted on 29 April 2011)

³³⁶ Reference for a preliminary ruling from the Giudice di pace di Mestre lodged on 24 March 2011, Criminal proceedings against Asad Abdallah, Case C-144/11.

The Italian judge considered that the economic criminal penalty of this offence, substitutable with an order of expulsion, derives directly from the irregularity of the stay, and according to the RD, in that case what Member States have to do is to adopt a return decision in the sense of article 6.1 RD. Moreover, the referring judge wonders whether article 2.2 b) of the RD should be interpreted as excluding the application of the safeguards provided in the RD to the expulsion of TCN imposed as an alternative sanction, such as the one stipulated in article 16.1 of the TUI, following the commission of an offence punishing the mere entry or stay in the national territory of the state, as the one provided in article 10*bis* TUI. In this way, the referring judge considers that the Italian legislator has tried to avoid the application of the safeguards given by the RD, including the preference for a voluntary return.

There are other judges and jurists that have argued that article 10*bis* is contrary to the RD and, thus, shall be dissapplied. For example, the Justice of Peace of Torino, in 22 February 2011, ruled that article 10*bis* does not comply with the guarantee of voluntary return given by article 7 RD, and has acquitted a TCN accused of the crime of clandestinity. Also Rosa Raffaelli, a Post Doctoral Researcher in Criminal Law at Scuola Sant'Anna, concludes that *“(if the Court will confirm its interpretation in its future decisions, criminalizing irregular immigration and punishing it with either detention or expulsion will no longer be a viable option in the national immigration policies of EU Member States.”*³³⁷

³³⁷ Raffaelli, 2011, p.18.

In this sense, the Italian judge Lorenzo Miazzi³³⁸ believes that article 10*bis* TUI is clearly not in accordance with the RD and thus, it is his obligation, as a EU national judge, to disapply this provision, not been necessary to ask the EUCJ for a preliminary ruling. This judge admits that, *prima facie*, El Dridi Case does not affect directly the crime of clandestinity under article 10*bis* TUI, because this offence is only punished with an economic penalty and not with imprisonment. However, he considers that this provision is also contrary to the principle of sincere cooperation, and it risks undermining the effectiveness of the Directive.

First, he argues that the order of forced return given as an alternative sanction to the offence of article 10*bis* TUI³³⁹ cannot be considered to be excluded from the application of the guarantees stipulated in the Directive, in the sense of article 2.2. b) of the RD. This is because, on the one hand, the possibility of non-applicability given by that article of the RD needs a legislative instrument that specifically defines which orders of return must be considered to be under that possibility of exclusion, which does not exist in Italy. On the other hand, he refers to the El Dridi case, when the EUCJ stated that “*the criminal penalties referred to in that provision (article 2.2 b) RD) do not relate to non-compliance with the period granted for voluntary departure*”³⁴⁰. He claims that the court implied that not all criminal penalties are included under article 2.2 b), but only those not related to the irregular entry or stay. Additionally, Miazzi argues that, in

³³⁸ Email from Lorenzo Miazzi, Italian judge, 21 June 2011.

³³⁹ Article 16.1 TUI: order of expulsion with an entry ban of at least 5 years.

³⁴⁰ EUCJ, Case C-61/11 PPU, paragraph 49.

accordance with the principle of the “useful effect” of EU law, article 2.2.b) should be interpreted restrictively.

Additionally, the Italian Interior Minister declared that the crime of clandestinity, introduced in 2009, had the aim of eluding the application of the RD to most expulsions in Italy, and thus, avoiding having to change most national legislative provisions on return. This shows, according to Miazzi, a clear violation of the principle of sincere cooperation. He argues that the enactment of a law stipulating such a crime was legitimate before the entry into force of the RD. However, Miazzi claims that once the RD entered into force, the introduction of a crime punishing the irregular entry and stay of TCN, which is the status directly regulated by the Directive, implies a violation of article 4.3 TUE, because it is undermining the effectiveness of the RD. This is more so when it is clear that the intention was to avoid the application of the guarantees of the Directive. Furthermore, he states that the order of return given as a substitutory sanction for the Italian crime of clandestinity is contrary to those guarantees, specifically article 7.1,³⁴¹ as it does not allow for a voluntary return.

Therefore, Lorenzo Miazzi concludes that the introduction of the crime of clandestinity by the Italian legislator, creating a criminal return process parallel to the administrative one, based on the same behaviour, is intended to undermine the ordinary administrative procedure regulated by the RD, in order to avoid the application of the guarantees

³⁴¹ Article 7.1 RD establishes that, except certain cases, a period for voluntary return should be given to all TCN. This provision has been considered self-executing by Italian judges, such as Justice of Peace of Alessandria, 6 May 2011.

offered by that Directive. In conclusion, in his opinion, article 10*bis* is clearly not in accordance with the RD and must, therefore, be dissapplied by Italian national judges.

I would also like to bring here two of the limitations to criminalisation of clandestinity that I argued were given by the EUCJ in El Dridi case. The first referred to the need that any criminal penalty adjusts to the principles of proportionality, effectiveness and reasonableness. In this sense, as it has already been argued by the Italian Justice of Peace of Florence in front of the Italian Constitutional Court,³⁴² the penalty stipulated by article 10*bis* is not reasonable or proportionate as a criminal penalty. Likewise, it does not seem effective, as most irregular immigrants won't be able to pay it, and the substitutory penalty of removal was not necessary because there was already an administrative mechanism to remove irregular TCN in place.

The second possible limit to criminalisation requested that irregular entry and stay should only be criminalized when all other measures have failed.³⁴³ This is not the case of the Italian crime of clandestinity, which is designed as the immediate consequence of irregularity, parallel to the administrative procedure.

In conclusion, there are strong arguments to consider that the RD precludes a MS's legislation such as article 10*bis*, criminalising irregular stay and entry with an economic penalty and an order of forced removal as an alternative penalty.

³⁴² EUCJ, Case C-61/11 PPU, paragraph 57.

³⁴³ *Idem*, paragraph 52 and 60.

6. CONCLUSION

The problem of irregular immigration is mainly caused by an unequal distribution of global welfare and sustained poverty. It is thus a social problem. However the EU and EUMS have decided to adopt a security-driven approach, which should urgently be revised. The EU immigration policy uses an obscure formula combining narrow channels of regular immigration together with repressive immigration policies. The result of that formula is an immigrant population constrained into irregularity, easily exploitable, which at the same time, serves as the scapegoat for all the mistakes made by the European governments and the EU itself. Therefore, the EU should, once for all, develop evidence-based policies that reduce the tensions between the elimination of undocumented migration and the respect of the rights of these immigrants.³⁴⁴

The AFSJ of the EU is the area where governments are allowed to use the most invasive forms of state action towards individuals allowed in democratic constitutional systems³⁴⁵ and thus, its development should be accompanied by the developing of a stronger monitoring human rights system. Before the Treaty of Lisbon, EU law on the field of immigration had to be adopted unanimously. As a consequence, vague formulations aimed at solving conflicts over controversial issues were very common.³⁴⁶ Most of those EU measures on immigration set minimum standards, however, they were full of vague formulations referred to human rights, leaving unclear the specific rights

³⁴⁴ Carrera and Merlino, 2009, p.2.

³⁴⁵ Monar, 2010.

³⁴⁶ Hailbronner, 2010, p.5.

and obligations that EUMS had to respect and fulfil. After the Treaty of Lisbon, EU competence on migration has been extended to create uniform standards, and decisions will be adopted with qualified majority. This leads to an increased responsibility of the EU on the human rights compliance in the field of immigration. The new binding nature of the EU Charter, together with the now unrestricted jurisdiction of the EUCJ, allows for a consequent increase of accountability of the EU on the respect of human rights in this field. This will, hopefully, help to put human rights compliance at the heart of the legitimacy and legality of EU law and policy on immigration.³⁴⁷

The European integration process by itself is a long-term vision project, yet currently politics in general are dominated by short-term vision policies and Europe is no exception. Xenophobic measures against immigrants, such as the criminalisation of irregular immigrants, are a clear example of these very popular short-term vision policies. In fact, during the last years, xenophobic forces have entered or reinforced their power in many Member States, such as Finland, the United Kingdom, Italy, the Netherlands or Denmark. Recent developments, such as the request by Sarkozy and Berlusconi of revising Schengen, or the Danish decision to reintroduce some forms of border controls, show that immigration issues taken from a nationalistic and intolerant perspective are at the heart of the questioning of the European project.

Therefore, the EU has to realize that in order to continue with the European project, important measures should be taken also in the field of migration, and mostly of

³⁴⁷ Council of Europe Commissioner for Human Rights, 2010, p. 27.

irregular migration. The EU has to redefine its position, which should have European values and the EU Charter of Fundamental Rights as the guiding tools. Article 7 of the TEU provides for a sanctioning mechanism in case of serious and persistent breach by a MS of the values of article 2 TEU, meaning tolerance, solidarity, non-discrimination or respect for human rights and human dignity. However, under the current state-of-affairs, governments and European institutions seem to be only willing to “*sanction those countries that fail to comply with the rules on budget deficit*”.³⁴⁸ This should change and governments and European institutions should clearly condemn all xenophobic actions taken by MS and should use all the mechanisms at their disposal to do so.

The EUCJ case of 28 April 2011 has shown the positive effect that the EU could have in the fight against the criminalisation of irregular immigrants in EUMS. Following this case, it can be stated that MS cannot adopt criminal provisions that may delay or obstruct the return of TCN according to the Returns Directive. Consequently, this judgement could be interpreted as procluding all kind of criminalisation of irregular immigrants in most of EUMS’s legislation.

Some Italian judges have already applied this interpretation. They have acquitted irregular immigrants from the crime of clandestinity, arguing that it was contrary to EU law. In general, Italian judges prosecutors and scholars have shown high ethics in dealing with the criminalisation of irregular immigrants. The competent judges have repeatedly requested to the Italian Constitutional Court about the constitutionality of

³⁴⁸ Torreblanca, 2011.

these provisions. They have tried to find procedural ways to absolve irregular immigrants and when the RD became self-executing, they have applied it and asked for preliminary rulings to the EUCJ. This also reflects the importance of an independent judiciary in a democratic country. A judiciary that makes continuous reference to human rights. They used the EU institutions to avoid the terrible consequences of a populist and xenophobic government.

The criminalisation of undocumented immigrants can be seen as a turning point in any national policy on immigration. It is a political decision that defines the way society confronts the phenomenon and it also determines the way immigrants will relate to the hosting society. The EU is going through a difficult moment, both from an economic and an “ideal” point of view. It is destined to depend on immigration for its economic recovery and it may also depend on its approach to immigration for its moral or ideal revival. A change of policy that clearly rejects the criminalisation of irregular immigration and starts looking at irregular immigration as a social issue that should be solved with long-term, development-based measures, may be a good solution.

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