

“Crimmigration” in the European Union through the Lens of Immigration Detention

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The Global Detention Project (GDP) is a research initiative that tracks the use of detention in response to global migration. Based at the Graduate Institute's Programme for the Study of Global Migration in Geneva, Switzerland, the GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) encouraging scholarship in this field of immigration studies; and (3) facilitating accountability and transparency in the treatment of detainees.

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1 Introduction

Immigration scholars have long focused their attention on the apparent growing convergence between criminal justice and migration control systems. In particular, they have pointed to the tendency of formally administrative infractions to be included in criminal law, as well as to the intertwining of practices and discourses belonging to these two distinct spheres. The impact on migrants has often been harmful, ranging from tighter migration policies and the conflation of migration with criminality to negative public perception of non-citizens.

This phenomenon, often dubbed “crimmigration,”¹ involves two main issues: (1) formal criminalization, or the application of criminal procedures (leading to sanctions like incarceration or fines) for immigration-related violations; and (2) the apparent increasing reliance on measures that are more commonly associated—rightly or wrongly—with criminal law enforcement (like detention) for immigration law infractions. Borrowing from T. Miller, this second trend refers to “greater criminal punitiveness” within a formally administrative system of immigration regulation.²

While much of the discussion of crimmigration has emerged from the work of scholars in the United States, more recently the term has been applied in Australia, Canada, and some European countries.³ This [Global Detention Project](#) working paper aims to contribute to this growing body of research by focusing on immigration and asylum law at the [European Union](#) (EU) level, with a special focus on immigration detention, or “the deprivation of liberty of non-citizens for reasons related to their immigration status.”⁴ The paper applies a narrowly circumscribed understanding of crimmigration—“crimmigration law”—that refers to the letter and practice of laws and policies at the intersection of criminal law and immigration law.⁵ Immigration detention has two forms under EU law—detention pending asylum procedures and pre-removal detention—which are regulated by the (Recast) Reception Conditions Directive (RCD) and the Returns Directive (RD), respectively.⁶

¹ See, for example, Juliet P. Stumpf, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign

² Miller, Teresa A. “Citizenship & Severity: Recent Immigration Reforms and the New Penology.” *Georgetown Immigration Law Journal* 17 (2003): 611–666, p. 619.

³ Michael Welch, “The Sonics of Crimmigration in Australia: Wall of Noise and Quiet Manoeuvring,” *British Journal of Criminology* 52, no. 2 (2012): 324–344; Thomas Derrick, “The Foreign-Born in the Canadian Federal Correctional Population,” in *Social Control and Justice: Crimmigration in the Age of Fear*, ed. Maria João Guia, Maartje van der Woude, and Joanne van der Leun (The Hague: Eleven International Publishing, 2013), 199–229; Alan Desmond, “Irregular Immigrants and Their Irish Citizen Children,” in *Social Control and Justice: Crimmigration in the Age of Fear*, ed. Maria João Guia, Maartje van der Woude, and Joanne van der Leun (The Hague: Eleven International Publishing, 2013), 303–316.

⁴ The Global Detention Project’ definition of migration- related detention, <http://www.globaldetentionproject.org/resources/glossary.html>.

⁵ Stumpf, “Social Control and Justice: Crimmigration in the Age of Fear: Introduction,” p. 7. For the discussion on the scope of the definition of crimmigration and arguments for extending it to include also “social signs” of crimmigration, such as social practices, political discourses and perceptions, see Joanne van der Leun and Maartje van der Woude, “A Reflection on Crimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing,” in *Social Control and Justice: Crimmigration in the Age of Fear*, ed. Maria João Guia, Maartje van der Woude, and Joanne van der Leun (The Hague: Eleven International Publishing, 2013), 41–60, p. 43–46.

⁶ “[Reception Conditions Directive](#)” refers to the recast of Directive 2003/9/EC, adopted in June 2013, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116;

The rules on immigration detention provided for in both directives are referred to as “immigration detention regime.”

An initial observation that emerges when applying the concept of crimmigration at the EU level is that the EU immigration detention regime partially restricts the scope of crimmigration. Recent rulings by the Court of Justice of the EU show that the Returns Directive poses some limits on Member States’ power to punish status-related offences with imprisonment.⁷ Although in principle criminal legislation falls under the scope of the states’ competence, domestic penal provisions must be in compliance with EU law. In particular they must not jeopardize the achievement of the objectives pursued by the directive. On this basis, the Luxembourg judges found that imprisonment for the failure to comply voluntarily with the return decision or for irregular stay itself—imposed during or prior to return proceedings—is not compatible with the Returns Directive; that criminal prosecution leading to a term of imprisonment would delay removal; and that instead of putting the person concerned into jail, states should pursue their efforts to enforce return in line with the directive.⁸

Nevertheless, this interpretation of the Returns Directive has only a limited impact on the criminalization of migration. In fact, states are free to impose a sentence of imprisonment if removal of the person concerned fails, and while in the course of return proceedings they may rely on other penal sanctions that would not prevent return process, like fines.⁹

This working paper, however, focuses on the second facet of crimmigration mentioned earlier—the incorporation of measures more closely related to criminal justice into immigration proceedings and the “consciously asymmetric form” of this incorporation, as described by S. Legomsky. The paper tests Legomsky’s observation that “immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.”¹⁰ In other words, as this paper contends, while it appears to be the case that the EU detention regime, like detention regimes elsewhere in the world, has in recent years increasingly taken on the trappings of some aspects of criminal justice systems, it is a severely incomplete appropriation, a fact that has important repercussions for both the wellbeing of detainees and our understanding of the evolution of detention in the EU sphere.

“Returns Directive” refers to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107. EU legislation also allows for detention in the context of Dublin Regulation proceedings, it is however not relevant for the purposes of this paper.

⁷ Valsamis Mitsilegas, “The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law,” in *Social Control and Justice: Crimmigration in the Age of Fear*, ed. Maria João Guia, Maartje van der Woude, and Joanne van der Leun (The Hague: Eleven International Publishing, 2013), 87–113, p. 98–110.

⁸ Court of Justice of the European Union, *Hassen El Dridi Alias Soufi Karim*, Case C-61/11 PPU, April 28, 2011, para. 58–59 and 63; Court of Justice of the European Union, *Alexandre Achughbabian c. Préfet Du Val-de-Marne*, C-329/11, December 6, 2011, para. 39, 45 and 51.

⁹ Court of Justice of the European Union, *El Dridi*, para. 60; Court of Justice of the European Union, *Achughbabian*, para. 48; Court of Justice of the European Union, *Md Sagor*, C-430/11, December 6, 2012, para. 36.

¹⁰ Legomsky, Stephen H. “The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms.” *Washington and Lee Law Review* 64 (2007): 469–528, p. 469.

Although detention measures sanctioned under EU law appear punitive in nature, the protective features of the criminal process are not assured under this law (although some states in the region do provide some of these features). This discrepancy is re-affirmed by states' insistence—which is now mirrored at the EU level—that immigration detention is purely administrative and preventive in nature. The classification of immigration detention as administrative benefits states because it allows them to avoid providing immigration detainees with costly and time-consuming procedural guarantees that people receive during criminal proceedings. Because of this selective application of processes that are normally associated with criminal law, immigration within EU law has the potential to render detainees more vulnerable while at the same time offering greater discretion to governments. The paper finds that one way to address this apparent excess in the EU detention regime would be to formally provide immigration detainees with standard fair trial guarantees to which persons incarcerated under criminal law are entitled. Because of the expenses this would involve, such a move could also encourage states to be more circumspect when making the decision to place a non-citizen in detention.¹¹

2 Immigration detention under EU law: formally administrative sanction

Traditionally, immigration detention has been defined as an administrative procedure. As Legomsky observes, this legal tag allows states to “explicitly reject ... the procedural ingredients of criminal adjudication.” This section details the differences between administrative detention and criminal detention in order to better scrutinize states' insistence on labelling immigration detention administrative. It contrasts the protections accorded to immigration and criminal detainees under the [European Convention on Human Rights](#) (ECHR). Against this background, it fleshes out the main procedural guarantees that are lacking from the EU immigration detention regime due to its formal administrative label.

2.1 Criminal vs. administrative detention under European human rights law

Deprivation of liberty most commonly occurs during the enforcement of criminal law. Because of the impact that detention has on fundamental rights, detainees are entitled several procedural guarantees. First, when a person is arrested on suspicion of having committed a criminal offence, by virtue of article 5(3) of the ECHR, he is to be brought promptly before a judge or other officer authorized by law to exercise judicial power. This means that judicial review is automatic; the detainee does not have to apply for it.¹² If the detainee is charged with a criminal offence, the same provision stipulates that he is entitled to trial within a reasonable period of time or must be released pending trial. In conjunction with the presumption of innocence enshrined in article 6(2) of the ECHR, this provision favours release and the

¹¹ For an exploration of this idea, see Dan Wilsher, "Detention of Immigrants: Enforcement, Non-compliance, and Punishment," Presentation for the Global Detention Project, Graduate Institute of International and Development Studies, March 8, 2012, <http://www.globaldetentionproject.org/de/publications/newsletter/public-event-8-march-2012.html>.

¹² European Court of Human Rights, *McKay v. the United Kingdom*, 543/03, GC, October 3, 2006, para. 34.

authorities are obliged to consider alternatives to detention on remand. Where the risk of absconding may be avoided by bail or other measures, the accused shall be released.¹³

Additionally, once a charge has been brought, pursuant to article 6(1) of the ECHR, the accused is entitled to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁴ The right to a fair trial—or due process of law—is based on the principles of the separation of powers and the independence of the judiciary from the executive. It is a broad concept whose content may vary depending of the proceedings at stake. However, at the very least it encompasses the intertwined requirements of equality of arms and adversarial proceedings. Equality of arms refers to a fair balance between the prosecution and defense, meaning that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.¹⁵ Proceedings are adversarial if both prosecution and defense have the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party.¹⁶ The notion of fair trial also includes minimum rights for accused in criminal proceedings, which according to article 6(3) of the ECHR include:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Unlike detention under criminal law, administrative detention typically refers to deprivation of liberty ordered by the executive branch of government—rather than the judiciary—without criminal charges or trial.¹⁷ The United Nations (UN) [Working Group on Arbitrary Detention](#) describes it as “arrest and detention of individuals by

¹³ Ibid., para. 41; European Court of Human Rights, *Jablonski v. Poland*, 33493/96, December 21, 2000, para. 83-84.

¹⁴ Article 6(1) sets out the right to fair trial in both civil litigation, including public law proceedings, and criminal process. In line with the Strasbourg case-law, the proceedings concerning admission or expulsion of non-citizens are excluded from either limb of the right to fair trial. See *Maaouia v. France*, 39652/98, October 5, 2000, para. 36; *Taheri Kandomabadi v. the Netherlands* (dec.), 6276/03 and 6122/04, June 29, 2004. This working paper develops arguments to challenge the court's position with respect to fair trial in criminal proceedings.

¹⁵ European Court of Human Rights, *Dombo Beheer B.V. v. the Netherlands*, 14448/88, October 27, 1993, para. 33.

¹⁶ European Court of Human Rights, *Ruiz-Mateos v. Spain*, 12952/87, June 23, 1993, para. 63.

¹⁷ A parallel can be drawn with internment under international humanitarian law, i.e. administrative detention ordered for security reasons, allowed both in international and non-international armed conflicts; see the Fourth Geneva Convention, art. 42, 43 and 78; Protocol I, art. 75(3); Protocol II, art. 5, see Jelena Pejic, “Procedural Principles and Safeguards for Internment/administrative Detention in Armed Conflict and Other Situations of Violence,” *International Review of the Red Cross* 87 (2005): 375–391.

state authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants.” It also highlights that “[t]he practice of administrative detention is informed by the belief that by detaining a person, a preventive action has been carried out thus securing society, community, and state.”¹⁸ Although not prohibited under international law, administrative detention should be nevertheless used as an exceptional measure. It is often inconsistent with the rule of law since it can involve deprivation of liberty without judicial guarantees, thus offering a broad discretion to the executive. Arguably, its widespread use poses a danger beyond the violation of rights in individual cases as it could, in the extreme, displace the normal criminal justice system.¹⁹

Defined under article 5(1)(f) as “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition,” immigration detention under the ECHR is of administrative character. This classification implies a different level of protection for immigration detainees when compared to persons charged with criminal offence. In particular, the right to challenge the lawfulness of detention encompasses less guarantees for persons detained under article 5(1)(f). In line with article 5(4) of the ECHR, it provides: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

There are several procedural safeguards accompanying criminal process that do not apply to administrative detention proceedings. Arguably some of them are crucial and their absence puts immigration detainees at a considerable disadvantage *vis-à-vis* their criminal counterparts. First, unlike pre-trial detention, the ECHR does not lay down the obligation on the authorities to consider non-custodial alternatives to immigration detention. Thus, the scope of the review proceedings may be limited to the lawfulness of immigration detention, rather than to extend to an assessment of its necessity. Another important difference relates to the character of the review. Contrary to the automatic judicial review of the pre-trial detention under article 5(3) of the ECHR, habeas corpus proceedings in case of administrative detention can be made dependent on an application by the detained person.²⁰

Nevertheless, the most relevant difference lies in the applicability of the guarantees set out in article 6(3) of the ECHR, which were listed above. The review proceedings of immigration detention do not need to ensure the same guarantees as criminal proceedings.²¹ For instance, the [European Court of Human Rights](#) found that an oral hearing in cases of detention for awaiting extradition was not necessary to ensure

¹⁸ Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Thematic Considerations: Administrative Detention and Habeas Corpus*, A/HRC/13/30, January 18, 2010, para. 77.

¹⁹ Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge: Cambridge University Press, 2012); David Cole, “In Aid of Removal: Due Process Limits on Immigration Detention,” *Emory Law Journal* 51, no. 3 (2002): 1003–1039, p. 1004–1006.

²⁰ European Court of Human Rights, *De Jong, Baljet and Van Den Brink v. the Netherlands*, 8805/79, 8806/79, 9242/81, May 22, 1984, para. 57.

²¹ European Court of Human Rights, *Megyeri v. Germany*, 13770/88, May 12, 1992, para. 22.

that the proceedings are adversarial.²² In its jurisprudence on immigration detention, the court does not require states to make available legal and linguistic assistance. Arguably such assistance would only be necessary under article 5(4) when its absence would clearly prevent detainees from appealing their detention.²³

2.2 Deficiencies in EU administrative detention procedures

The less protective features of administrative detention proceedings are also present in the EU immigration detention regime. In particular, relevant EU directives do not provide for the main procedural guarantees discussed above. First, pursuant to EU legislation, non-citizens in return and asylum procedures may be detained if other less coercive alternatives cannot be applied effectively (RD, article 15(1); RCD, article 8(2)). However, neither the Returns Directive nor the Receptions Conditions Directive effectively obligates states to assess the availability and feasibility of non-custodial measures in each individual case. Nor do the directives provide for an unequivocal presumption in favour of release.²⁴

Further, the review of asylum detention and pre-removal detention is not necessarily automatic. Both directives leave the choice to authorities to either provide ex officio for the review or grant the detainee the right to apply for it (RD, articles 15(2)-(3); RCD, articles 9(2) and 9(4)). Also, the compulsory hearing before a tribunal is not laid down in any of the directives.²⁵ Additionally, while access to free legal assistance to challenge detention is not provided in the Returns Directive, the Reception Conditions Directive is more generous. It sets forth that states shall ensure that detained asylum seekers have access to free legal assistance and representation in the initial review proceedings. However, subsequent reviews are not covered by this provision and states can introduce various restrictions, like monetary and time limits, or by explicitly designing legal advisers permitted to assist asylum seekers (RCD, article 9(6)-(7)). Finally, both directives fail to ensure access to free linguistic assistance in the course of review proceedings.

As discussed in this section, European human rights law does not offer administrative detainees the same level of procedural protection as that afforded to persons detained under criminal law. Weaker guarantees attached to administrative procedures are also reflected in EU rules governing immigration detention. It is convenient for states to classify immigration detention as an administrative measure

²² European Court of Human Rights, *Sanchez-Reisse v. Switzerland*, 9862/82, October 21, 1986, para. 51.

²³ According to the court, the remedies shall be accessible, meaning that “the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy”, see *Conka v. Belgium*, 51564/99, February 5, 2002, para. 46 and 55.

²⁴ This is mirrored at the domestic level. Leaving aside the states’ practice with respect to alternatives to pre-removal detention, the wording of domestic provisions reveals great disparities across the EU. Pursuant to the Austrian Aliens Police Act (article 77) the authorities may refrain from imposing detention if there is a reason to assume that its purpose can be achieved by use of more lenient measures. The Danish Aliens Act No. 947 (section 36) provides that if the non-custodial measures are not sufficient to ensure removal, police may order deprivation of liberty. On the other hand, the Polish Aliens Act (article 90-91) merely mentions non-custodial measures, without requiring authorities to examine them in the light of particular circumstances in each individual case.

²⁵ However, some states provide for the hearing in person, like Hungarian Act II of 2007 on Third-Country Nationals (section 54) under which pre-removal detainees may request a personal hearing.

because it is easier and less costly to resort to detention under administrative law. As De Giorgi has noted, it is “exactly the partial subtraction of immigration from the sphere of penal law that allows the suspension of the traditional guarantees of criminal justice: the fact that the detention, expulsion, and deportation of immigrants are not considered as real ‘punishments’ permits a de facto criminalization which leaves aside the principles of the rule of law.”²⁶

3 Immigration detention under EU law: *De facto* punishment

The use of administrative procedures for confining non-citizens is justified by the assumption that immigration detention is a non-punitive, preventive, and merely bureaucratic measure aimed to enforce immigration and asylum policy. The objective of this section is to challenge this orthodox view. Arguably, despite its formal categorization as administrative, immigration detention may incorporate criminal justice techniques, priorities, and methodologies. This analysis draws on the criteria developed in the jurisprudence of the European Court to distinguish formally administrative proceedings from penal ones for the purpose of due process guarantees. The main elements of these criteria are then applied to immigration detention under EU law.²⁷ The paper demonstrates that in some circumstances the functions and effects of pre-removal and asylum detention are in fact punitive, which reveals the criminal nature of many detention proceedings.

3.1 The *Engel* criteria

By virtue of article 6 of the ECHR, fair trial guarantees apply in the “determination of criminal charge.” States could easily evade these guarantees by introducing legal norms and procedures outside the ambit of criminal law in their domestic legislations. Thus the Strasbourg Court recognized that there may be proceedings that are administrative in form but criminal in nature for the purposes of fair trial guarantees. In *Engel v. the Netherlands* the court established three criteria to distinguish criminal proceedings from administrative ones, which can assist in determining whether formally non-criminal procedures under domestic law constitute in fact a “determination of criminal charge.”²⁸ First, the court looked at the classification of the proceedings under domestic law. Where these are not defined as criminal the court applied two further criteria.²⁹ If the subsequent assessment shows that the proceedings are in fact criminal in nature, it does not however entail that the

²⁶ Alessandro De Giorgi, *Re-thinking the Political Economy of Punishment: Perspectives on Post-Fordism and Penal Politics* (Aldershot: Ashgate Publishing, 2006), p. 133.

²⁷ This analysis will be abstract since, as discussed above, under the ECHR immigration detention is explicitly laid down as administrative measure. Moreover, in the *Maaouia* case the court considered those criteria and ruled that due process guarantees do not apply to decisions regarding the entry, stay and deportation of non-citizens, see *Maaouia v. France*, para. 39-41. However, in their concurring opinion judges Costa, Hedigan and Pantiru stress that exclusion order shall be considered “ancillary penalty,” being both preventive and punitive in character. In any case, the court’s conclusion does not preclude our analysis as detention proceedings are not an integral element of removal process.

²⁸ European Court of Human Rights, *Engel and Others v. the Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, June 8, 1976, para. 81-82.

²⁹ European Court of Human Rights, *Weber v. Switzerland*, 11034/84, May 22, 1990, para. 31.

responding state must transfer them into its penal law. The court required only that such formally non-criminal proceedings ensure fair trial guarantees.

The second and third *Engel* criteria are thus decisive. The second criterion relates to the nature of the offence and relies on two elements. First, the court looked at the personal scope of the provision defining the offence in question. Norms under criminal law are considered to be of a general character, applying to the whole or the majority of the population because legislation addressing a specific or narrowly defined group suggests a disciplinary or administrative procedure. Secondly, the Strasbourg judges assessed the purpose of the penalty attached to the offence. Sanction imposed as a punishment is a strong indication of criminal character of the offence.³⁰ It needs to be stressed that traditional objectives of criminal punishment include incapacitation, retribution, and deterrence. In particular, a penalty providing for isolation of the offender from the society serves an incapacitative function. Retributive sanctions aim to reprimand and punish the wrongdoer for his actions. Finally, deterrence theory assumes that by threat of punishment persons will abstain from committing impugned acts.³¹

The last *Engel* criterion focuses on the penalty itself, particularly its nature and degree of severity. Among various kinds of penalties, deprivation of liberty most easily reveals a criminal character of the sanction. In order for a detention to render fair trial guarantees applicable it must be imposed as a punishment and have effects on the person concerned of a certain severity. According to the court, "In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental."³² Thus, the function of the penalty is relevant also in terms of this criterion. Moreover, penalty imposed as punishment—incapacitation, deterrence, or retribution—creates a presumption of the criminal character of detention. The length of detention is particularly relevant. The court looked at the maximum duration of penalty under the law that may be imposed rather than the one actually imposed, even if the practice shows that the maximum is seldom imposed.³³ Thus, arguably not only the punitive purpose of a sanction but also its punitive effect may be relevant for concluding a criminal character of the proceedings. For instance, detention that is excessively prolonged in relation to its non-punitive purpose or that subjects detainees to prison-like conditions would have punitive effect.³⁴

Finally, the second and third criteria are not cumulative—each in their own way may reveal the criminal nature of the proceedings. However, where a separate analysis

³⁰ Ibid., para. 33; European Court of Human Rights, *Bendenoun v. France*, 12547/86, February 24, 1994, para. 47.

³¹ Nora V. Demleitner, "Immigration Threats and Rewards: Effective Law Enforcement Tools in the 'War' on Terrorism?," *Emory Law Journal* 51, no. 3 (2002): 1059–1094, p. 1068–1071; Daniel Kanstroom, "Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases," *Harvard Law Review* 113 (2000): 1890–1935, p. 1894; Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," p. 474.

³² European Court of Human Rights, *Engel and Others v. the Netherlands*, para. 82.

³³ European Court of Human Rights, *Ezeh and Connors v. the United Kingdom*, 39665/98 and 40086/98, GC, October 9, 2003, para. 120 and 126–129.

³⁴ Robert Pauw, "A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Apply," *Administrative Law Review* 52, no. 1 (2000): 305–345, p. 323.

would not yield such a result, they may also be taken into consideration together.³⁵ As the court underscored, “[h]aving weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the ‘charge’ in issue a ‘criminal’ one within the meaning of Article 6 para. 1.”³⁶ Thus, arguably, if a sanction cannot be said to pursue solely preventive purposes, but rather can be construed as also having punitive or deterrent character, it should be considered as punishment. If administrative proceedings appear at least partially criminal in nature, some procedural safeguards must be applied. Also, formally administrative legislation may be in fact criminal in nature if it lacks mechanisms to limit sanction to non-punitive functions.³⁷

3.2 The application of the *Engel* criteria to the EU immigration detention regime

The following section assesses the EU immigration detention regime against two main elements of the *Engel* criteria—the purpose and effect of penalty. The purpose of detention is evinced from the grounds on which states may detain non-citizens. In turn, the length of detention and the conditions of confinement have a bearing on the penalty’s effect. The assessment reveals that despite being formally administrative measures, both pre-removal and asylum detention may constitute punishment.

3.2.1 Pre-removal detention

The use of administrative detention in removal settings is circumscribed by international human rights law. In line with case law from the Human Rights Committee, which is mirrored in recommendations by the UN Working Group on Arbitrary Detention and [Special Rapporteur on the Human Rights of Migrants](#), pre-removal detention must be subject to the principles of necessity and proportionality. Precisely, detention must be necessary to execute a removal order taking into account all circumstances of the particular case. Detention must also be proportionate to the ends sought by the authorities.³⁸ It should thus be imposed when other, less coercive ways to carry out removal have been examined and discarded.³⁹

Likewise, because administrative detention is by definition a preventive measure, it may be imposed only where there is something to prevent. Arguably, the principles of necessity and proportionality coupled with the preventive character of

³⁵ European Court of Human Rights, *Bendenoun v. France*, para. 47; European Court of Human Rights, *Garyfallou AEBE v. Greece*, 18996/91, September 24, 1997, para. 33.

³⁶ European Court of Human Rights, *Bendenoun v. France*, para. 47.

³⁷ Kanstroom, “Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,” p. 1924; Pauw, “A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Apply,” p. 317-324.

³⁸ Michael Flynn, “[Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy](#),” *Refugee Survey Quarterly* 31, no. 3 (2012): 40-68.

³⁹ Human Rights Committee, *A. v. Australia*, 560/1993, April 30, 1997, para. 9(2); Human Rights Committee, *Danyal Shafiq v. Australia*, 1324/2004, November 13, 2006, para. 7(2); Special Rapporteur on the Human Rights of Migrants, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Detention of Migrants in an Irregular Situation*, A/HRC/20/24, April 2, 2012, para. 68; Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Thematic Considerations: Detention of Immigrants in Irregular Situation*, A/HRC/13/30, January 18, 2010, para. 59. 62 and 65.

administrative detention lead to the conclusion that the risk of absconding and threat to public order constitute the only grounds for justifying pre-removal detention.⁴⁰ In terms of the former, if an individual represents a risk of absconding during return proceedings, administrative detention aims to prevent his flight and is thus necessary to ensure the person's presence at the removal.

The risk of absconding is one of two explicitly listed grounds in the Returns Directive providing states the ability to impose detention for up to six months (RD, article 15(1)(a)). The directive, however, lacks clear safeguards to prevent authorities from relying on the alleged risk of absconding to regularly detain persons in return proceedings. First, the term is only vaguely defined in the directive. It merely describes it as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a person under return procedures may abscond" (RD, article 3(7)). In particular, the underlying concept—"objective criteria"—is left to domestic legislators. As a result, in some domestic systems the "objective criteria" may not be defined at all or not enumerated in an exhaustive manner.⁴¹ This affords discretion to immigration authorities to find the risk of absconding according to their liking. It needs to be stressed, where the risk of absconding does not exist, removal may be carried out without detaining the person concerned. In such cases detention is unnecessary to prepare or carry out removal and cannot be said to pursue preventive aims. Rather, it may easily assume a punitive character.⁴²

To prevent automatic detention there should be a safeguard against presumption of risk of absconding on the sole basis of irregular status. The preamble enshrines vaguely such presumption, as it reminds that "decisions taken under [the] Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of irregular stay." However, the non-binding nature of the preamble suggests recommendation rather than a requirement on the authorities. It is regrettable thus that the directive fails to proscribe detention for the sole reason of irregular entry or stay. Immigration authorities may rely on the broad terms used in the directive to systematically detain migrants on account of alleged risk of absconding. Indeed, in the legislation of several Member States the "objective criteria" include irregular entry and/or irregular stay.⁴³ Automatic immigration detention imposed on account of solely irregular status thus can be seen as deterrent in nature. It aims at deterring non-citizens from staying irregularly.⁴⁴ A recent UK government-sponsored campaign targeting irregular

⁴⁰ Galina Cornelisse, "Detention of Foreigners," in *The First Decade of EU Migration and Asylum Law*, ed. Elspeth Guild and Paul Minderhoud, Immigration and Asylum Law and Policy in Europe 24 (Leiden: Martinus Nijhoff Publishers, 2012), 207–228, p. 223; Cole, "In Aid of Removal: Due Process Limits on Immigration Detention," p. 1007.

⁴¹ E.g. Greek Law No. 3907/2011 on the Establishment of Asylum Service and First Reception Service, article 18; Hungarian Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, section 54; Slovak Act No. 404/2011 on Stay of Aliens, article 88. Not defined at all: e.g. Estonian Act on the Obligation to Leave and Prohibition on Entry, section 7(2)(2)(8); Finnish Aliens Act No. 301/2004, section 121.

⁴² Wilsher, *Immigration Detention*, p. 110; Cole, "In Aid of Removal: Due Process Limits on Immigration Detention," p. 1007.

⁴³ E.g. Luxembourg Law on free movement of persons and immigration, article 111; Dutch Aliens Decree 2000, article 5(1)(b).

⁴⁴ For the discussion about deterrence functions of immigration detention in the Dutch context, see Arjen Leerkes and Dennis Broeders, "Deportable and Not so Deportable: Formal and Informal

migrants reveals that rationale. London saw a host of buses touring the city which displayed the message: “In the UK illegally? Go home or face arrest.”⁴⁵

The directive also allows states to resort to pre-removal detention where the person concerned avoids or hampers the preparation of return or the removal process (RD, article 15(1)(b)). However, the directive does not detail what actions may amount to “avoidance” and “hampering.” Again, by using vague terms, the directive affords immigration authorities broad discretion to impose detention. This can be reflected at the domestic level. In fact, legislations of some Member States explicitly sanction detention on this ground, without defining its terms.⁴⁶ However, above all, detention justified on account of avoiding or hampering of return process resembles retribution.⁴⁷ If detention aims not only to prevent absconding but is additionally used for retributive reasons, should it not be considered punishment?

Ultimately, not only the goal of detention but also its effect may render the sanction criminal in nature. Arguably, the effect of pre-removal detention under the directive may be seen as punitive. Detention may last up to six months, which is a long sanction for formally non-punitive goals (RD, article 15(5)). True, the directive prioritizes dedicated immigration detention facilities (RD, article 16(1)), a fact that contrasts sharply with many non-EU countries, like the [United States](#) and [Canada](#), which make broad use of criminal prisons for immigration-related detention. However, the directive is silent about the conditions of confinement that pre-removal detainees are guaranteed. In practice, it is not uncommon for EU states to subject persons to prison-like conditions. Some centres look like jails and the detainees are often held in their cells much of the time.⁴⁸ Moreover, the directive does not forbid holding migrants in jails. It merely states that when immigration detainees are in such facilities, they should be separated from criminal detainees. States are also allowed to derogate from this requirement during migration-related emergencies (RD, articles 16(1) and 18(1)).

The directive lays down two additional grounds on which states may extend the initial six-month detention up to eighteen months. States are allowed to do so when, regardless of all their reasonable efforts, the removal operation is likely to last a long time because of lack of cooperation from the detainee or there are delays in obtaining the necessary documentation from third countries (RD, article 15(6)). Extending detention by a year because of the detainee’s refusal to cooperate could amount to punishment, in terms of both the effect and purpose of the sanction.⁴⁹

Functions of Administrative Immigration Detention,” in *The Social, Political and Historical Contours of Deportation*, ed. Bridget Anderson, Matthew J. Gibney, and Emanuela Paoletti, *Immigrants and Minorities, Politics and Policy* (New York: Springer, 2013), 79–104, p. 87-92.

⁴⁵ Matthew Taylor, “‘Go home’ campaign creating climate of fear, say rights groups,” *The Guardian*, September 8, 2013, <http://www.theguardian.com/uk-news/2013/aug/08/go-home-climate-of-fear-rights-groups> (accessed August 25, 2013).

⁴⁶ Greek Law No. 3907/2011, article 30; Czech Act No. 326/1999 on the Residence of Aliens in the Territory of the Czech Republic, article 124.

⁴⁷ Wilsher, *Immigration Detention*, p. 153 and 193.

⁴⁸ See the “Detention Infrastructure” section of the country profiles on the [Global Detention Project](#) website.

⁴⁹ Also the latter ground is not less problematic, since it is beyond the control of immigrant. Both the Working Group on Arbitrary Detention and Special Rapporteur on the Human Rights of Migrants explicitly stressed that detention is likely to be unlawful if the obstacle for carrying out removal does not lie within detainees’ sphere of influence, see Working Group on Arbitrary Detention, *Detention of*

Similarly, the rationale for such detention fulfils traditional purposes pursued by the criminal justice system, in particular retribution. The authorities may rely on this ground to reprimand the non-national concerned for his allegedly non-cooperative behaviour and to compel him to cooperate. Moreover, the directive does not establish what constitutes non-cooperation, leaving it to the discretion of executive officers to assess it. As Wilsher argues, the non-compliance by the detainee with the obligation to cooperate should be defined as criminal offence subject to due process guarantees rather than be considered within the ambit of administrative detention. This would require clearer standards so that detainees would have certainty as to what is required. Courts could then determine whether a detainee has complied with the obligation and decide on the length of a sentence.⁵⁰

Besides the function and the length of the prolonged detention under the directive, the extension itself bears punitive elements. If a detainee cannot be removed, the non-punitive goal of his detention to ensure his removal drops out.⁵¹ Continued detention resembles incapacitation. As Wilsher argues, “keeping aliens within a state by means of detention cannot be viewed as a measure of immigration regulation. Put simply, the control of immigrants does not necessarily amount to immigration control. Only measures that secure the physical expulsion of aliens (as opposed to their seclusion from the community) are truly immigration measures.”⁵²

This conclusion stems also from Strasbourg case law. Under the ECHR, pre-removal detention is justified only for as long as deportation proceedings are being conducted. In cases where expulsion is not feasible due to detainee’s lack of cooperation or the failure to issue travel documents by the countries of destination, continued detention cannot be said to be effected with a view of deportation. According to the European court, such situation lacks a “realistic prospect of expulsion” and continued detention does not achieve immigration objectives, which makes it unlawful under the ECHR.⁵³ Similarly, the directive provides the concept of a “reasonable prospect of removal.” It sets forth that detention is no longer justified if a reasonable prospect of removal no longer exists (RD, article 15(4)). However, under EU law this concept is read together with the maximum permissible length of detention. As interpreted by the Court of Justice of the EU, the reasonable prospect of removal means that removal can be carried out successfully within the eighteen-month period and such prospect does not exist where it appears unlikely that the

Immigrants in Irregular Situation, para. 63 and 91; Special Rapporteur on the Human Rights of Migrants, *The Annual Report to Human Rights Council: Addendum: Communications Sent to Governments and Replies Received*, A/HRC/11/7/Add.1, May 20, 2009, para. 90. The length of ongoing detention depends thus on actions or lack thereof on the part of authorities of the third countries. As Wilsher noted, “[d]etention would appear to serve only as a bargaining counter to try and encourage diplomats to act.” Wilsher, *Immigration Detention*, p. 194.

⁵⁰ Wilsher, *Immigration Detention*, p. 67, 154-155 and 196.

⁵¹ Cole, “In Aid of Removal: Due Process Limits on Immigration Detention,” p. 1017-1018.

⁵² Wilsher, *Immigration Detention*, p. 72 and 255; see also Leerkes and Broeders for discussion about incapacitative function of immigration detention in the Netherlands, Leerkes and Broeders, “Deportable and Not so Deportable: Formal and Informal Functions of Administrative Immigration Detention,” p. 92-95.

⁵³ European Court of Human Rights, *Mikolenko v. Estonia*, 10664/05, October 8, 2009, para. 64-65 and 68; European Court of Human Rights, *Louled Massoud v. Malta*, 24340/08, July 27, 2010, para. 67, 69 and 73-74.

person concerned will be admitted to a third country within that period.⁵⁴ Such blanket permission to continue detention as long as it does not exceed eighteen months is inconsistent with the Strasbourg case law. Detention in such case has incapacitative effect.

3.2.2 Asylum detention

International refugee law enshrines specific safeguards limiting detention of asylum seekers. In line with article 31 of the [Convention relating to the Status of Refugees](#) (Refugee Convention),

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

These provisions address both punitive and administrative detention. The terms “penalties” in article 31(1) has been interpreted to refer to punitive detention aimed at deterrence. Thus, by virtue of this provision states shall not detain asylum-seekers for the sole purpose of discouraging further arrivals.⁵⁵ While non-punitive detention is permissible, such measure shall meet the requirements of article 31(2)—it must be necessary and may be maintained only until the person’s status is regularized. The regularization of status does not relate to final recognition of refugee status, what would allow detention during whole refugee status determination procedures. Rather, this term refers to any measure ending irregular presence, in particular the admission to the asylum procedure.⁵⁶

With respect to the necessity test, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) elaborated a list of grounds which may justify detention. Accordingly, the detention of asylum-seekers may only be resorted to if necessary to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to administer cases in which asylum-seekers have destroyed their travel or identity documents or have used fraudulent documents to mislead the authorities; or to protect national security of public order.⁵⁷ Therefore, administrative detention permissible under article 31(2) must be necessary on the

⁵⁴ Court of Justice of the European Union, *Saïd Shamilovich Kadzoev (Huchbarov)*, Case C-357/09 PPU, November 30, 2009, para. 67.

⁵⁵ Gregor Noll, “Article 31 (Refugees Unlawfully in the Country of Refuge/ Réfugiés En Situation Irrégulière Dans Le Pays d’Accueil),” in *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: a Commentary*, ed. Andreas Zimmermann, *Oxford Commentaries on International Law* (Oxford: Oxford University Press, 2011), 1243–1269, para. 77-78; United Nations High Commissioner for Refugees, Executive Committee, *Note on International Protection*, A/AC.96/643, August 9, 1984, para. 29.

⁵⁶ Noll, “Article 31 (Refugees Unlawfully in the Country of Refuge/ Réfugiés En Situation Irrégulière Dans Le Pays d’Accueil),” para. 115.

⁵⁷ United Nations High Commissioner for Refugees, Executive Committee, *Detention of Refugees and Asylum-Seekers*, Conclusion No. 44(XXXVII), October 13, 1986, para. b.

above grounds and maintained only during preliminary proceedings prior to the admission to in-merit asylum procedures. Most importantly, there is a relation between both paragraphs of article 31 of the Refugee Convention. Where administrative detention of an asylum seeker is not lawful and necessary it may amount to punitive detention, proscribed under article 31(1).⁵⁸

The Receptions Conditions Directive provides six grounds on which detention of asylum seekers may be justified (RCD, article 8(3)), three of which arguably exceed the permissible grounds elaborated by the UNHCR Executive Committee and may allow systematic detention for deterrence purposes. The potential punitive function of asylum detention is underscored by the failure of the directive to set a maximum permissible period of confinement. This gives states broad discretion to impose longer periods of detention, which would strengthen the deterrent effect. Nor does the directive clarify that detention must not extend to the entire asylum determination proceedings, in line with article 31(2) of the Refugee Convention. Finally, the provisions addressing the conditions of detention largely mirror those of the Returns Directive, thus states are generally not prevented from subjecting asylum seekers to punitive conditions (RCD, article 10(1)).⁵⁹

The Receptions Conditions Directive allows states to detain an asylum seeker in order to determine or verify his identity or nationality (RCD, article 8(3)(a)), which is a broader justification than that elaborated by the Executive Committee. For instance, whereas the Executive Committee makes clear that initial identity checks may warrant detention only when a person's identity is undetermined or in dispute, the directive does not elaborate such a qualification. Additionally, the directive's failure to provide a limit on the length of detention contrasts with the Executive Committee's insistence on limits in order to prevent indefinite or prolonged detention.⁶⁰ Moreover, the directive sanctions detention for the purpose of determining the nationality of an asylum seeker, a ground that is not enumerated by the Executive Committee. In practice, such an assessment often requires a lengthy period of time.

The directive also provides for detention to determine the elements on which the application for international protection is based when these are presumably not attainable in the absence of detention, in particular when there is a risk of absconding (RCD, article 8(3)(b)). The crucial difference between this justification and that provided under refugee law lies in the fact that the latter allows detention only during preliminary interview. The UNHCR 2012 *Detention Guidelines* are straightforward in this respect: "It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary

⁵⁸ Noll, "Article 31 (Refugees Unlawfully in the Country of Refuge/ Réfugiés En Situation Irrégulière Dans Le Pays d'Accueil)," para. 76; Guy S. Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed. Erika Feller, Volker Türk, and Frances Nicholson (Cambridge: CUP, 2003), 185–252, p. 196; Wilsher, *Immigration Detention*, p. 136.

⁵⁹ The changes beneficial for detained asylum seekers include the requirement that asylum detainees shall have access to open-air spaces and the absence of the option to derogate from the requirement of separation of categories when detention is carried out in prisons, RCD, article 10(1)-(2).

⁶⁰ United Nations High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 24 and 26.

interview, the elements of their claim to international protection. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle—that detention of asylum-seekers is a measure of last resort—cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.”⁶¹ Without restricting this ground to a preliminary interview, the directive sanctions detention during the entire length of the asylum procedures, which may dissuade asylum seekers from pursuing the asylum determination procedures.

Finally, states are also allowed to detain asylum seekers in the context of a procedure to decide on the right to enter the territory (RCD, article 8(3)(c)). This ground is not offered by the Executive Committee. Detention at borders is already covered in the two preceding grounds, so inclusion of this specific ground suggests a broader scope of entry procedures that would justify detention. States may thus rely on this ground to systematically detain asylum seekers trying to enter irregularly. Obviously, such a measure can serve as a deterrent to discourage future arrivals.

4 Conclusion

The Global Detention Project working paper has attempted to demonstrate that the set of EU rules governing immigration detention can be seen as supporting scholars’ arguments about creeping crimmigration with respect to the treatment of non-citizens. In particular, the EU immigration detention regime displays features of the second facet of the crimmigration phenomenon identified in the introduction of this paper—that is, that we are observing a “greater criminal punitiveness within a formally administrative system of immigration regulation.”

EU directives selectively incorporate criminal justice methods, imposing the trappings of criminal punishment while failing to provide necessary safeguards. Although they are formally labelled as administrative detainees, persons deprived of their liberty for status-related reasons may in fact be subject to punitive penalties that in some respects exceed those imposed on convicted criminals.

The paper argues that when administrative immigration detention amounts to punishment, due to its goals or effects in a given case, immigration detainees must be granted fair trial guarantees to which persons incarcerated under criminal law are entitled. Arguably, the most relevant guarantees that should be afforded to them include presumption in favour of liberty, automatic review of detention, personal hearing, and legal and linguistic assistance granted free of charge as needed. Because such measures entail increased costs for national detention regimes, they would also help ensure that decisions to confine people in administration detention are made more judiciously.

⁶¹ Ibid., para. 28.

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