Addressing Irregular Immigration Through Criminal Penalties: Reflections on the Contribution of the ECJ to Refining and Developing a Complex Balance

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1 Introductory Remarks

The significant increase in migration in recent decades has raised concerns regarding the management and control of flows, particularly those of irregular migrants. The tools and mechanisms for containment have thus been progressively placed at the center of the debate not only nationally, but also supranationally. In this context the European Union (EU), to which specific competence in this matter was attributed by the Treaty of Amsterdam,[1] although shared with Member States, has played an important role by adopting numerous provisions since 1999.[2]

Besides the issue of controlling illegal immigration as a whole, the debate is, however, being increasingly focused worldwide on the so-called criminalization of irregular migrants. In recent years, in fact, many states have gradually introduced criminal penalties applicable to people who enter, re-enter, or stay illegally on their

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[1] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997), entered into force on 1 May 1999.

[2] With regard to the immigration policy of the European Union, see, among the many contributions, De Bruycker and Urbano de Sousa 2004; Nascimbene 2009; Favilli 2010; Kaddous and Dony 2010; Adinolfi 2011.

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territory, instead of resorting to administrative measures. As for Italy, it is worth recalling the heated debate that followed the introduction of the crime of illegal immigration in 2009 in the Consolidated Act regulating Immigration and the Status of Foreigners (Legislative Decree no. 286/98, hereinafter Consolidated Act). Pursuant to the newly introduced Article 10*bis* of the Consolidated Act, unless the fact constitutes a more serious offence, the alien who enters or remains on the national territory in breach of immigration law requirements commits a criminal offence punishable with a fine of between 5,000 and 10,000 euros.[3]

The adoption in Italy of increasingly coercive measures for the purpose of preventing the phenomenon, semantically placed in so-called security packages, fits into an international context of the criminalization of irregular migrants. A trend which is observable particularly since the last decade, exacerbated by the impact of the political terrorist attacks in 2001 and then which spread in many countries: in the European Union, the United States, and also in South-East Asia and Australia.[4]

The following considerations dwell on an analysis of recent developments concerning this issue at the international level and within the European Union whereby, in 2011, the EU Court of Justice provided significant guidance on the scope of relevant EU legislation, precisely in relation to the application of criminal sanctions against third-country nationals on the ground of their illegal entry and/or stay.

2 The Evolution of the Treatment of Foreigners in the International Context

Leaving aside considerations of the effectiveness and appropriateness of criminal sanctions which are applicable to the entry and illegal stay of foreigners, related to both immigration and criminal policy,[5] from a legal point of view, the theme lends itself to some reflections concerning the relationship between the foreigner and the State which are also functional to an examination of the evolution of the treatment of aliens.

In "classic" international law, the control of persons entering the territory, and their ultimate expulsion, were in fact considered to be among the prerogatives of state sovereignty. At the end of the nineteenth century, in the Preamble to the International Rules on the Admission and Expulsion of Aliens it was asserted that "for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of

[3] On the most recent changes to Italian immigration legislation and in particular on the use of criminal tools, see Renoldi 2009; Caputo 2009; Masera 2009.

[4] See Fernandez et al. 2009; Di Pascale, forthcoming.

[5] On these aspects see in particular Viganò 2010.

its sovereignty and independence."[6] These principles have also found expression in the case law of the European Court of Human Rights (ECtHR), which on numerous occasions stated that each State has the right to control the entry, residence, and expulsion of foreigners.[7]

In respect of these statements, the definition of the standard treatment of the foreigner today appears, however, to be significantly influenced by the international law of human rights, which supplements or replaces, as necessary, the standard itself. This view is largely shared in the legal literature,[8] which emphasizes the contribution of international instruments on human rights, first and foremost the UN Charter and the Universal Declaration of Human Rights. A summary of this approach is United Nations General Assembly Resolution no. 40/144 (1985) which approved the "Declaration on human rights of individuals who are not citizens of the country in which they live".

In recent decades the status of foreigners appears to have evolved, primarily thanks to the emphasis on the principle of nondiscrimination, that together with that of equality is one of the key principles of the international system of human rights. Affirmed in the Universal Declaration of Human Rights (Article 2) and the UN Charter (Article 1), the prohibition of discrimination has found an express recognition in all international instruments protecting human rights. It is used with increasing frequency to evaluate the possibility and legitimacy of limitations to the status of aliens. As was stated by the Special Rapporteur Weissbrodt (in his final report, summarizing the general principles and exceptions applicable to the rights of noncitizens), international human rights law requires the equal treatment of citizens and noncitizens.[9] Exceptions to this principle may only be made if they are to serve a legitimate State objective and are proportional to the achievement of that objective.

In light of the current trends, the issue of suitable tools to control illegal immigration, and especially the use of criminal sanctions, has given rise to different positions.

Worthy of particular mention are the reflections and the analysis which are taking place both within the United Nations, in particular through the work of the Special Rapporteur for the human rights of migrants, and in a regional context by the Council of Europe Commissioner for Human Rights. In recent years, they have both repeatedly dealt with this profile.

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[6] Preamble to the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 9 September 1892.

[7] Among the many decisions, see especially ECtHR: Abdulaziz, Cabales and Balkandali v. United Kingdom, 9214/80-9473/81-9474/81, Judgment (28 May 1985).

[8] For a recent analysis see Nascimbene 2013; see previously Villani 1987; Tiburcio 2001; Bogusz 2004; Weissbrodt 2008; Chetail 2007; Benvenuti 2008; Nascimbene and Di Pascale 2010; Aleinikoff and Chetail 2003; Pisillo Mazzeschi et al. 2010; Flauss 2011.

[9] Prevention of discrimination. The rights of noncitizens, drafted by the Special Rapporteur Weissbrodt, appointed by the Commission for Human Rights of the UN Subcommittee for the promotion and protection of human rights, who concluded his work in 2003, UN Doc. E/CN. 4/Sub. 2/2003/23 (26 May 2003).

In 2011, the EU Court of Justice upheld some important principles on the subject, ruling on the "Return Directive".[10] First, this took place with the judgment of April 28, 2011 *(El Dridi),* issued in relation to a provision of the Italian legislation and in a context of default in the transposition of the Directive, and subsequently in its judgment of 6 December 2011 *(Achughbabian*) that provided further interpretative guidance.[11] It is worth noting that the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of EU law (primary and secondary) under Article 267 of the Treaty on the Functioning of the European Union (TFUE),[12] the subject of its examination being the rules adopted by the EU institutions, which are the outcome of a decision process that sees the full involvement of the Member States within the Council. It is therefore an interpretation formulated in the light of the principles underlying the law of the European Union, also based on provisions that express the views of States (the Council), in a context (immigration) which is, furthermore, an especially sensitive issue.

Particularly interesting is therefore a comparison with other positions at the international level, expressing concerns oriented toward the development of absolute values and guided or determined, therefore, by the need to protect fundamental rights, rather than underlying concerns related to the protection of state prerogatives.

3 The "Return Directive" and the Judgment of the ECJ in the *El Dridi* Case: The Partial Fulfillment by the Italian Legislature

In EU migration policy, measures to tackle illegal immigration have aroused great interest since the establishment of the new competence. The regulatory action in this area (around 20 acts) has been mainly aimed at strengthening the control and surveillance of EU external borders, facilitating the return of undocumented migrants, and also at defining the penalties, whether administrative or criminal,

[10] 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 of 24 December 2008, p. 98.

[11] ECJ: Hassen El Dridi, alias Soufi Karim, C-61/11 PPU, Judgment (28 April 2011); see also the position of Advocate General Mazák. See the comments in Guida al diritto, 2011, 25, p. 9 ff.; Amalfitano 2011; Favilli 2011; Giliberto 2011; Viganò and Masera 2012; Raffaelli 2011; Liguori (2011) ECJ: Alexandre Achughbabian v. Préfet du Val-de-Marne, C-329/11, Judgment (6 December 2011).

[12] As renamed and amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007), entered into force on 1st December 2009.

applicable against those (carriers, but also employers) who are involved in illegal immigration.[13]

Among these measures the "Return Directive" is of particular importance. Adopted after three years of negotiations, it has provoked strong reactions from various parties (associations, trade unions, and also many governments of Latin American and African countries), focusing in particular on compatibility with fundamental rights. In implementing the Hague Programme, which had called for the establishment of an effective policy on expulsion and return, the Directive introduced a uniform framework for all Member States, both in relation to the expulsion of illegal immigrants and detention for the purpose of their removal.[14]

As mentioned above, in recent times the ECJ has pronounced itself on two occasions in relation to the legitimacy of criminal sanctions imposed on irregular migrants, in one case referring to Italian rules, in the other to French legislation, thus contributing to better defining the limits within which national authorities can act.

(a) The judgment in *El Dridi* concerned the possible incompatibility, then being retained, of certain Italian standards: in particular Article 14.5*ter,* of the Consolidated Act in relation to Articles 15 and 16 of the Return Directive which regulate the detention of foreigners and defining the terms and conditions thereof. The Court of Justice criticized not only the specific provision which made noncompliance with the order of the police authority to leave the country within a given deadline punishable with imprisonment, but also "any [other] provision of Legislative Decree no. 286/1998 which is contrary to the result of the Directive".[15] The national rules in question were in fact held to be contrary to the spirit and the effectiveness of the Directive, because they pursued an aim which was opposite to that underlying the Directive itself: essentially, the imprisonment of illegal migrants instead of a voluntary return. Purposes that, obviously, must be kept in mind in assessing the correctness of the transposition.

The national legislation in question was therefore declared incompatible with the Directive, resulting in the obligation not to apply it by the courts and national authorities, in view of the direct effect of the relevant provisions (Articles 3 and 16). The Court had also stated on a previous occasion that Article 15 had immediate application.[16]

The Court emphasized and reminded the national court that in so doing it should take due account of the principle of retroactivity concerning the more lenient penalty *(lex mitior),* which forms part of the constitutional traditions common to the Member States and has the nature of a general principle of EU

[13] For a detailed analysis of the measures adopted by the EU in the field of irregular migration see Merlino and Parkin 2011. See also Di Pascale et al. 2011; Nascimbene and Di Pascale 2011.

[14] For a commentary on the Directive see Maiani 2008/2009; Baldaccini 2009.

[15] See El Dridi, supra n. 11, para 61.

[16] ECJ: Said Shamilovich Kadzoev (Huchbarov), C-375/09 PPU, Judgment (30 November 2009).

law.[17] The Italian courts (both criminal and administrative courts) have correctly followed this principle.

(b) The judgment has various profiles of interest, both with regard to EU law and national law, particularly in relation to the more recently adopted transposition legislation.

First, it represented the first application of the urgent preliminary ruling procedure (pursuant to Article 104*ter* of the Rules of Procedure of the Court) in a case concerning a person who is being detained. The procedure took place quickly (after just over two months), thereby fully responding to the need for urgency.[18]

Second, the judgment contains an extensive analysis of the Directive; in particular, it sets out specifically the procedure to be applied by each Member State for returning third-country nationals whose stay is irregular, as stated in Articles 6.1 and 6.6, and determines the order of the various successive stages of that procedure. The Directive—states cannot disregard this when transposing it—"does not allow those States to apply stricter standards in the area that it governs."[19] Priority is, first of all, to be given to voluntary compliance: this purpose should have been taken duly into account also by the Italian legislature, whereas with Law no. 129/2011, also adopted to transpose the Directive, the forced removal procedure seems to be privileged. A voluntary return is provided for (and it could not be otherwise), but is being presented as an alternative to coercive measures, and in contrast, therefore, with the objective pursued by the Directive. Only in two cases may Member States limit or deprive the alien of his or her liberty by resorting to detention: (a) when the state enforces the decision to return in the form of removal (because of the risk of absconding or the person concerned poses a risk to public policy, public security, or national security, he/she has not been granted the period for voluntary compliance, or if granted, such period has not been observed); (b) when, after assessing the individual condition of the person concerned, there is a risk that removal is impaired by his/her conduct. Exceptional circumstances, therefore, are intended in a restrictive sense.

Being a deprivation of liberty, detention is moreover subject to stringent limits: it must have a duration for as short a period as possible and be only maintained as long as removal arrangements are in progress and executed with due diligence, should be reviewed at reasonable intervals and must in any case cease as soon as it appears that there is no longer a reasonable prospect of removal. The deprivation of personal liberty, then, is only instrumental to the objective pursued by the Directive, i.e., voluntary return.

Third, the judgment emphasized the importance of the protection of human rights and recalled, in this regard, European Court of Human Rights case law,

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[17] In these terms, see among others, ECJ: Criminal proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell'Utri and Others, Joined Cases C-387/02, C-391/02 and C-403/02, Judgment (3 May 2005), paras 67–69; Jager v. Amt fur Landwirtschaft Butzow, C-420/06, Judgment (11 March 2008), para 59.

[18] On this procedure see: Condinanzi and Mastroianni 2009; Tizzano and Gencarelli 2009.

[19] See El Dridi, supra n. 11, para 33.

according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued.[20]

All these concerns appear, however, to have been disregarded by the Italian legislature that should have expressly referred to them in particular in transposing the Directive through Law n. 129/2011.

4 The Successive Position Taken by the ECJ: The Judgment in *Achughbabian*

The principles expressed in the judgment in *El Dridi* were further confirmed and clarified in the judgment in *Achughbabian*.[21] The preliminary ruling had been referred by a French Court in relation to a provision contained in the Code on the entry and residence of foreigners and the right to asylum (CESEDA), Article 621.1, which provides for the punishment of imprisonment being imposed on a third-country national by reason of his illegal entry or presence in the country.

In this respect, the ECJ has reaffirmed its guidance that neither Directive 2008/115/EC, which concerns, as stated above, the return of irregular migrants, nor the relevant rules contained in the Treaty on the functioning of the European Union preclude, in principle, Member States from having competence in criminal matters in the area of illegal immigration and stay. Therefore, states may legitimately classify the irregular residence of third country nationals as an offence and lay down criminal sanctions, including imprisonment.

Confirming the *El Dridi* judgment, the Court reiterated, however, that Member States cannot apply criminal legislation capable of imperiling the realization of the aims pursued by the said directive, thus depriving it of its effectiveness. It is therefore in light of this parameter that the examination of the legality of the procedure must be conducted. If the aim of the Directive is the return of third-country nationals, "clearly, the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by Directive [….] does not contribute to the realisation of the removal which that procedure pursues" and consequently national legislation such as that at issue is "likely to thwart the application of the common standards and procedures established by the Directive and delay the return."[22]

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[20] ECtHR: Saadi v. United Kingdom [GC], 13229/03, Judgment (28 January 2008). For some remarks on the subject, the limits of deprivation of liberty and the conditions or standards to be met, see Nascimbene 2011.

[21] For a commentary see Raffaelli 2012.

[22] See in particular paras 37 and 39.

If it is true that the detention of a person against whom a return decision has been issued falls within the scope of the Directive and can be intended as a "measure" provided under Article 8 of the Directive, i.e., coercive measures that may be adopted by the State to enforce a return decision, the penalty of imprisonment in the course or during the return procedure is not an appropriate coercive measure, however. It is, in fact, such as to impede the application of the rules and procedures established by the Directive. This leads to the conclusion that detention during the return procedure impairs or hinders the enforcement of the return decision and is inconsistent with the Directive.

Member States may not provide for the imprisonment of third-country nationals illegally staying in cases where these persons (under the rules and procedures established by the Directive) must be removed and may, at most, subject them to detention in view of the preparation and implementation of such removal. The directive does not prevent, and therefore allows, the imposition of criminal sanctions against third-country citizens who are subject to a return procedure and who reside illegally on the territory of a Member State where there is no justifiable reason that precludes the return, under the limitation mentioned above: i.e., sanctions cannot be applied in the course or during the procedure.[23]

5 The Limits to the Adoption of Criminal Sanctions Against Irregular Migrants: The Principle Stated by the ECJ

Where a foreign national staying illegally has not left the country voluntarily, either because (in very exceptional cases) he/she could not benefit from this procedure in the absence of certain conditions, or because he/she did not comply with the deadline for removal, he/she can be expelled, taking all necessary measures, including coercive measures.

If immediate removal is not possible, and if other less coercive measures cannot be applied, Member States may resort to detention that (as mentioned) is instrumental and is still a *last resort* measure, serving only to prepare for the return, in compliance with the principle of proportionality and the fundamental rights of the person. The Court's warning is clear: states cannot "remedy the failure of coercive measures" (such as detention) adopted in order to carry out a forced removal.[24] The principle established in *El Dridi*, then reiterated in *Achughbabian*, is a general principle.

The consequences of this rule are important in immigration matters. Pursuant to Italian law, after the end of detention, the alien is again expelled, but the same reasons that previously allowed for a forced removal do not allow a voluntary

[23] Paras 46 and 48.

[24] See El Dridi, supra n. 11, para 58.

return after the issuance of the (new) measure of removal; thus, the behavior of the alien integrates the offence examined by the Court. This "perverse" national system was in fact criticized, and the national courts (not only the referring judge), due to the effect *erga omnes* of the ECJ preliminary rulings, have taken this into account, marking the fate of completely incompatible standards with EU law.[25]

Despite a critical reading proposed by some members of the government, the ruling has called into question the *rationale* of the criminalization of irregular entry and stay of foreigners. This implied a change to the Italian legislation in force, as in fact happened (though Law no. 129/2011),[26] although as mentioned above, many of the principles expressed by the ECJ were not adequately addressed; but overall, the impact is even broader and would require a "rethinking" of a general nature that has not yet taken place in Italy, despite the doubts and questions that arise for those who must interpret and apply the relevant legislation.

6 The Criminalization of Irregular Migrants and the Positions of the Council of Europe Commissioner for Human Rights and the Special Rapporteur on the Human Rights of Migrants

Compared to the position taken by the ECJ in relation to the interpretation of EU law, different approaches have been affirmed in other contexts at the international and European level.

(a) The appointment by the United Nations Commission on Human Rights of a Special Rapporteur "for the human rights of migrants", with the task, variously articulated, to verify and control the conduct of States regarding the protection of human rights, to provide communications to governments, visits, and conduct thematic studies,[27] confirms the interest in the issue of the rights of foreigners.

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[25] On *erga omnes* effectiveness and, in particular, the obligations of the State following a judgment on an "order for reference from which it is apparent that the legislation is incompatible with Community law", the national authorities having "to take the general or particular measures necessary to ensure that Community law is complied with in their territory", see ECJ: Office national des pensions v. Emilienne Jonkman and Hélène Vercheval and Noëlle Permesaen v. Office national des pensions, Joined Cases C-231 to C-233/06, Judgment (21 June 2007), paras 36–41 (with reference to the case law).

[26] With the Law Decree no. 89 of 23 June 2011, converted with amendments by the Law no. 129 of 2 August 2011, the Consolidated Act was amended to transpose Directive 2008/115/EC, in light of the statements upheld by the EU Court of Justice.

[27] The first appointment occurred in 1999; the mandate has been extended and renewed over the years and in June 2011, during the 17th session of the UN Human Rights Council, the new Special Rapporteur, Mr. François Crépeau, was appointed to remain in office until 2014. See Morrone 2005.

In this context some significant statements in relation to the treatment of irregular migrants can be discerned. In particular, the report prepared in 2010 by the Special Rapporteur on the human rights of migrants, Bustamante, was specifically dedicated to the impact of the criminalization of migrants, on their protection and their enjoyment of fundamental rights. The Special Rapporteur stated clearly that migration policies that take into account only the aspects related to security and border control are absolutely lacking in humanitarian terms, and have a negative impact on migrants' enjoyment of fundamental rights, without actually discouraging illegal immigration. The (negative) consequences of the criminalization of migration in relation to the enjoyment of fundamental rights have been well underlined and States were reminded of their responsibility concerning the disproportionate use of criminal justice as an instrument to repress irregular flows.[28]

His successor, appointed in 2011, has continued in the same direction and has taken an even clearer position, stating before the UN General Assembly in October 2011 that "illegal immigration is not an offense."[29] He therefore emphasized the requirement that, where measures of an administrative nature are taken as is often the case with detention in view of the expulsion of irregular migrants, adequate procedural safeguards and access to an effective remedy must be ensured.

To confirm the change of perspective in framing the treatment of foreigners and the evolution of the theme, it is worth noting some of the statements made by the new Special Rapporteur on the same occasion. He affirmed that migrants are entitled to equal rights with citizens on the basis of the *International Bill of Human Rights.* Only two exceptions are allowed: the right to vote and stand for elections and the right to enter and stay in another country. All other rights then belong to everyone, regardless of their legal *status.* Any distinctions based on the status of foreigners can be made, provided, however, that they are not discriminatory and that they are justified in light of the system for the protection of fundamental rights.

This is an important statement which attaches primary importance to the protection of individual rights, without further reference to the sovereignty of the State. The latter still retains the right to regulate the access and residence of foreigners, but the framework of fundamental rights marks the limits of its action in this area.

(b) In the European regional context, the position taken by the Council of Europe Commissioner for Human Rights should be mentioned. Established in 1999, the Commissioner's mandate is generally related to the protection of human rights, whose situation in the Member Countries must be assessed (playing field missions and publishing ad *hoc* reports*).* The protection of the fundamental rights of various categories of foreigners, especially the most vulnerable of these

[28] Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, of 3 August 2010, A/65/222.

[29] Statement by Mr. François Crépeau, Special Rapporteur on the Human Rights of Migrants to the 66th session of the General Assembly, Third Committee—Item 69 (b), (c), 21 October 2011, para 3. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11523&LangID=E. Accessed 10 June 2012.

(women, children, minorities), is a key area of its action. The Commissioner has therefore devoted increasing attention to the issue of the criminalization of migrants. Thus, in an opinion adopted in 2008, the Commissioner stated that criminalization is a disproportionate measure which exceeds the legitimate interest of a State to control its borders. The application of criminal sanctions against illegal immigrants would lead to their assimilation with the carriers or employers who, in many cases, exploit, thereby contributing to their (unfortunate) exclusion. The statement that irregular immigration should be considered only an administrative offence is therefore clear.[30]

Other positions have been expressed in recent times, confirming the view that the criminalization of irregular migration is the wrong answer to a complex social phenomenon.[31]

7 Concluding Remarks

The treatment of undocumented migrants, and the tools that can be legitimately used to discourage and curb irregular migration, are now an issue of central importance.

The debate, increasingly lively and interesting, not only in legal terms, highlights in particular the search for a new balance between conflicting interests. It also represents an opportunity to assess the evolution of the theme of the treatment of aliens, where the focus seems to shift from state sovereignty to the protection of fundamental rights.

The ECJ in its recent case law has provided important guidance on the matter. While recognizing the legitimacy of criminal sanctions against anyone who has violated the rules on entry and stay, the Court in fact seems to be trying to limit their application as much as possible, especially in relation to the most relevant of coercive measures, i.e., detention, stressing the value of fundamental rights and reminding States of their obligations pursuant to EU law principles.

A ruling that represents a significant attempt in finding a balance in an increasingly interrelated field such as immigration and human rights.

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[30] Commissioner for Human Rights, It is wrong to criminalize migration, Viewpoint (29 September 2008). www.commissioner.coe.int. Accessed 10 June 2012.

[31] Criminalisation of Migration in Europe: Human Rights Implications, Issue Paper commissioned and published by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2010, CommDH/IssuePaper(2010)1. https://wcd.coe.int/ViewDoc.jsp?id=1579605&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679. Accessed 10 June 2012. See in the past the views of the Working Group on Arbitrary Detention (WGAD), that already in 1998 noted that "criminalizing irregular entry into a country exceeds the legitimate interest of a State to Regulate and control irregular immigration, and can lead to unnecessary detention", Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63 (18 December 1998).

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