Freedom Security Justice
European Legal Studies

Collana diretta da Angela Di Stasi

MIGRATIONS RULE OF LAW AND EUROPEAN VALUES

edited by

Angela Di Stasi
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EDITORIALE SCIENTIFICA
2023

Collana
Freedom, Security & Justice: European Legal Studies

10

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Editoriale Scientifica
2023

This Volume has been financed by the funds of the Research Unit of the University of Salerno – PRIN 2017 MIUR Project – "International Migrations, State. Sovereignty and Human Rights: Open Legal Issues/Migrazioni internazionali, Stato, sovranità, diritti umani: questioni giuridiche aperte" (Principal Investigator: Prof. Angela Di Stasi) and by the funds of the Jean Monnet Module (2023-2025) "Democracy and the Rule of Law: A New Push for European Values (EU-DRAW)" – Jean Monnet Action Project no. 101085618 (Scientific Coordinator: Prof. Rossana Palladino).

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.

This Volume has undergone a double-blind peer reviewed procedure.

Via San Biagio dei Librai, 39
80138 Napoli

ISBN 979-12-5976-820-9

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Lorenzo Bernardini [*]

1. *Setting the scene*

The utilization of immigration detention as a mechanism for managing migration flows has been a topic of intense discourse and contention within the European Union (EU) in recent years[1]. Driven by the imperative to implement robust border control strategies, the EU Member States have progressively established an *ad hoc* framework of regulations explicitly targeting third-country nationals (TCNs), whether deemed irregular migrants or applicants for international protection. Among other legal tools, the administrative deprivation of personal liberty has emerged as a deemed flawless, and notably effective,

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[1] See, among others, R. PALLADINO, *Il trattenimento ai fini dell'allontanamento: evoluzioni giurisprudenziali e normative a confronto*, in http://www.aisdue.eu/, 25 January 2023, pp. 146-165 and C. COSTELLO, *Immigration Detention: The Grounds Beneath Our Feet*, in *Current Legal Problems*, 2015, no. 1, pp. 143-177.

measure in ensuring a streamlined control over migration flows[2]. This is particularly evident in the extensive physical oversight that national authorities are thereby authorized to exercise over against TCNs[3].

The context within which the forthcoming analysis will be conducted revolves around a juxtaposition – or, rather, a clash – of two traditional and old-fashioned paradigms. Firstly, the coercive authority of States to detain foreign nationals, that is, "non-citizens", whose presence within their territory is not in keeping with the domestic immigration law framework, a power directly derived from the State's customary prerogative to control its borders[4]. The latter authority epitomizes *per se* a prominent manifestation of a State's sovereign power[5]. Secondly, the paramount necessity of upholding universal fundamental rights, with a primary focus on the right to personal liberty, as enshrined in various European and international legal instruments[6], including (but not limited to) Article 5 of the European Convention on Human Rights (ECHR), Article 6 of the Charter of Fundamental Rights of the European Union (CFREU), Article 7 of the American Convention on Human Rights (ACHR), and Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

Central to this clash is the assertion by States of their inherent right to exercise control over their own territory. I have argued elsewhere that it is precisely this prerogative that provides the domestic justifica-

[2] L. BERNARDINI, *Detained, criminalised and then (perhaps) returned: the future of administrative detention in EU law*, in M.G. COPPETTA (ed.), *Immigration, personal liberty, fundamental rights*, Milano, 2023, pp. 59-73.

[3] See, among others, R. PALLADINO, *La detenzione dei migranti. Regime europeo, competenze statali, diritti umani*, Napoli, 2018, *passim*, and G. CORNELISSE, *Immigration Detention and Human Rights*, Leiden, 2010, *passim*.

[4] M. FLYNN, *Immigration Detention and Proportionality*, Global Detention Project Working Paper No. 4, 2011, p. 10 ff.

[5] See M. PICHOU, *«Crimmigration» and Human Rights: Immigration Detention at the European Court of Human Rights*, in V. FRANSENN, C. HARDING (eds.), *Criminal and Quasi-Criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future*, London, 2022, p. 251.

[6] For a broad analysis, see C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, 2015, pp. 279-314.

tion for taking criminal or administrative measures against foreign individuals[7].

Against this background, it is worth recalling that, typically, the deprivation of personal liberty serves as the traditional, albeit exceptional, means by which justice systems enforce criminal law. Notably, detention may serve as both a precautionary measure (e.g., pre-trial detention) and a punitive measure (i.e., imprisonment *stricto sensu*), depending on whether the individual is still a suspect/accused person or has already been served with a final conviction, respectively. When criminal detention is employed as a means of deterrence against migrants (e.g., criminalizing irregular entry or stay of TCNs), it can lead to an overlap between criminal law and immigration policies, commonly referred to as the «crimmigration» phenomenon[8].

In that context, the deprivation of liberty is applied within the established framework of criminal law to penalize the individual for a violation of specific provisions[9]. Importantly, this entails *inter alia* that the individual is entitled to various robust safeguards that are recognized at the European level, including fair trial rights as enshrined in

[7] L. BERNARDINI, *The protection of the fundamental rights of migrants within the ECHR legal framework. From universalism of guarantees to legal particularism*, in M.G. COPPETTA (ed.), *Immigration, Personal Liberty, Fundamental Rights*, cit., pp. 18-21.

[8] This is the well-known expression coined by J. STUMPF, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, in *American University Review*, 2006, no. 2, pp. 367-419. On the employment of criminal law as «a mere façade designed to cover with the criminal law's legitimating mantle a system of administrative measures aimed at reducing illegal immigrants to the dehumanized condition of non-persons at the mercy of the state», see A. SPENA, Iniuria Migrandi*: Criminalization of Immigrants and the Basic Principle of the Criminal Law*, in *Criminal Law and Philosophy*, 2014, no. 8, pp. 635-657, spec. p. 654.

[9] This includes, among other measures, the implementation of brand-new criminal offenses specifically targeted to TCNs. This approach aligns with the concept theorized by Günther Jakobs several years ago, known as the «criminal law of the enemy» (*Feindstrafrecht*). In the interpretation put forth by the German jurist, the "foreigner" may easily be embodied in the notion of "enemy" – displaced from their homeland, devoid of a precise identity, culturally identifiable as "other", and susceptible to various labels, predominantly that of a "criminal". For further references, see L. BERNARDINI, *La detenzione degli stranieri tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di Godot*, in *Dir. Imm. e Cittad.*, 2022, no. 1, pp. 75-95.

Article 6 ECHR and in the EU so-called "Stockholm Directives", addressing procedural safeguards in the context of criminal proceedings[10], such as the right to interpretation and translation[11], the right to be informed about the case[12], the right to silence, to be present at trial and to be presumed innocent until a final conviction[13], the right to access to a lawyer[14], the right to legal aid[15].

However, it is a prevailing practice that TCNs are routinely subjected to the deprivation of their personal liberty *outside criminal proceedings*. Administrative detention – a mechanism for migration control whose legitimacy has rarely been questioned at the international level – has conventionally been employed by Member States *vis-à-vis* both irregular third-country nationals (i.e., detention for the purpose of return, or pre-removal detention) and applicants for international protection while awaiting the outcome of their asylum applications (i.e., asylum detention)[16]. Hence, the primary aspect that demands our scrutiny pertains to the utilization of a conventional criminal law tool

[10] For a comprehensive analysis, see S. ALLEGREZZA, *Toward a European constitutional framework for defence rights*, in S. ALLEGREZZA, V. COVOLO (eds.), *Effective Defence Rights in Criminal Proceedings*, Milano, 2018, pp. 3-34.

[11] Directive 2010/64/EU of the European Parliament and of the Council *on the right to interpretation and translation in criminal proceedings*, 20 October 2010, OJ L 280, 26 October 2010.

[12] Directive 2012/13/EU of the European Parliament and of the Council *on the right to information in criminal proceedings*, 22 May 2012, OJ L 142, 1 June 2012.

[13] Directive (EU) 2016/343 of the European Parliament and of the Council *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, 9 March 2016, OJ L 65, 11 March 2016.

[14] Directive 2013/48/EU of the European Parliament and of the Council *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, 22 October 2013, OJ L 294, 6 November 2013.

[15] Directive (EU) 2016/1919 of the European Parliament and of the Council *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*, 26 October 2016, OJ L 297, 4 November 2016.

[16] See, among others, I. MAJCHER, M. FLYNN, M. GRANGE, *Immigration Detention in the European Union. In the Shadow of the "Crisis"*, Cham, 2020, p. 453.

(i.e., detention) for immigration purposes, which inherently fall within the administrative law realm[17].

As evidence of the complex nature of administrative detention, several definitions of the latter have been embraced over the years. These encompass the concept of «the deprivation of liberty of non-citizens because of their status»[18] or «the deprivation of an individual's liberty, usually of an administrative character, for an alleged breach of the conditions of entry, stay or residence in the receiving country»[19]. Furthermore, administrative detention has been characterized as «a tool employed to exercise state authority over immigration control»[20], and lastly, it has been described as «a substantial instrument, *almost punitive in nature*, explicitly targeting specific categories of individuals with the aim of safeguarding borders from "undesirable" immigration»[21].

Formally, the purpose of this measure can be traced back to the State's imperative to assert control over its territory and, should it be the case, to prevent abusive, ill-founded or unsubstantiated asylum applications. In the EU legal framework, detention for the purpose of return is expressly allowed by Articles 15-17 of the so-called "Return Directive"[22], whereas asylum detention is expressly allowed by Articles 8-11 of the so-called "Reception Directive"[23] and Article 18 of the Dublin III Regulation[24]. By analogy, Article 5(1)(f) ECHR permits

[17] See, with specific regard to asylum detention, C. BOITEUX-PICHERAL, *L'équation liberté, securité, justice au prisme de la rétention des demandeurs d'asile*, in V. BEAUGRAND, D. MAS, M. VIEUX (eds.), *Sa justice. L'Espace de Liberté, de Sécurité et de Justice*, Bruxelles, 2022, pp. 605-629.

[18] M. FLYNN, *Immigration Detention*, cit., p. 7.

[19] UNHCR, *Monitoring Immigration Detention: Practical Manual*, 2014, p. 20.

[20] R. PALLADINO, *La detenzione*, cit., p. 14.

[21] G. CORNELISSE, *Immigration Detention*, cit., p. 24, emphasis added.

[22] 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*, 16 December 2008, OJ L 348, 24 December 2008.

[23] Directive 2013/33/EU of the European Parliament and of the Council *laying down standards for the reception of applicants for international protection (recast)*, 26 June 2013, OJ L 180, 29 June 2016.

[24] Regulation (EU) No 604/2013 of the European Parliament and of the Council *establishing the criteria and mechanisms for determining the Member State responsible*

Member States to employ non-criminal detention measures for immigration purposes, namely, «the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition». The adoption of multiple pieces of legislation addressing this issue has facilitated – and, to some extent, fostered – a systematic trend in this regard[25], normalizing the employment of administrative detention across the EU[26].

It is difficult to ignore that such a trend has likely been embraced by national authorities, as it has allowed them, in the context of implementing immigration detention measures, to circumvent significant procedural and substantive safeguards inherent in criminal justice systems[27]. Indeed, in contrast to criminal law realm – evocatively referred to as «the privileged place of guarantees»[28] – the more administrative detention is framed and regulated under the framework of administrative law, the fewer protections are afforded to TCNs.

Nevertheless, the perception that this may entail the imposition of

for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 26 June 2013, OJ L 180, 29 June 2013.

[25] See, in this regard, L. ARBOGAST, *La détention des migrants dans l'Union européenne: un business florissant. Sous-traitance et privatisation de l'enfermement des étrangers*, Migreurope, 2016. Indeed, this trend has already been observed by O. CLOCHARD, S. LAACHER, *Vers une banalisation de l'enfermement des étrangers dans l'Union européenne*, in *Bulletin de l'association de géographes français*, 2006, no. 1, pp. 121-136.

[26] R. CHERCHI, *Il trattenimento dello straniero nei centri di identificazione e di espulsione*, in *Quest. giust.*, 2014, no. 3, pp. 50-51.

[27] See, in this critical vein, D. LOPRIENO, *"Trattenere e punire". La detenzione amministrativa dello straniero*, Napoli, 2018, p. 213; M. BONFIGLIOLI, *Non delitto e castigo. Il trattenimento degli stranieri irregolari nei CIE tra istanze di effettività dei rimpatri e negazione dell'*habeas corpus, in *Sicurezza e Scienze Sociali*, 2013, no. 1, pp. 190-191; A. CAPUTO, *La detenzione amministrativa degli stranieri e la Costituzione: interrogativi sul* diritto speciale *degli stranieri*, in *Dir. Imm. e Cittad.*, 2000, no. 1, p. 53 and further references cited therein.

[28] L. FERRAJOLI, *Principia iuris. Teoría del derecho y de la democracia*, vol. II, *Teoría de la democracia*, Madrid, 2013, p. 347: «el derecho penal, sustancial y procesal es, al menos en su modelo axiológico, el lugar privilegiado de las garantías, primarias y secundarias, de los derechos fundamentales individuales de inmunidad y de libertad».

a «detention without a crime»[29] or, more precisely, a «punishment without a definite crime»[30] which implies a concealed form of penalty against the individuals involved appears to be more than a mere unsupported stance. Instead, it has been aptly observed that administrative detention *de facto* aligns with the punitive rationale of criminal measures[31]. Besides, it is essential to point up that there are several procedural guarantees accompanying criminal proceedings do not extend to administrative detention procedures[32].

In this regard, it has additionally been argued that the "demarcation line" between administrative and criminal measures becomes extremely blurred when administrative deprivation of liberty is in question[33]. This standpoint is unsurprising, given that, at the international level, it has been consistently emphasized that «detention is a tool that characterizes criminal law as opposite to administrative law which, by nature, should resort to alternative interim measures to detention»[34].

The misalignment between the ostensibly non-punitive formal character of administrative detention and its effectively punitive implementation is the cornerstone of the proposed analysis. The content of this chapter will pivot around the proposition that even though administrative detention is presented as a non-punitive measure, it, in fact, shall trigger a spectrum of procedural safeguards for the individual involved, due to its inherently punitive characterization. These

[29] G. CAMPESI, G. FABINI, *La detenzione della «pericolosità migrante»*, in *Materiali per una storia della cultura giuridica*, 2017, n. 2, p. 516.

[30] D. WILSHER, *Immigration Detention: Law, History, Politics*, Cambridge, 2012, p. 153.

[31] See, among others, C. COSTELLO, *Immigration Detention*, cit., p. 146; G. CAMPESI, G. FABINI, *Immigration Detention as Social Defence: Policing 'Dangeours Mobility' in Italy*, in *Theoretical Criminology*, 2020, no. 1, p. 66; M. PIERDONATI, *La restrizione della libertà personale nel "carcere amministrativo" dei C.I.E.: tradimento e riaffermazione del principio di legalità*, in R. DEL COCO, E. PISTOIA (eds.), *Stranieri e giustizia penale*, Bari, 2014, p. 243.

[32] I. MAJCHER, *The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention*, in N. KOGOVŠEK ŠALAMON (ed.), *Causes and Consequences of Migrant Criminalization*, Cham, 2020, pp. 120-124.

[33] R. PALLADINO, *La detenzione dei migranti*, cit., p. 12.

[34] UN GENERAL ASSEMBLY, *Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante*, 65th Section, 3 August 2010, A/65/2022, para. 27.

safeguards – traditionally associated only with criminal proceedings – are presently not applicable in the context of administrative detention, preventing the ability of the individual in question from invoking and benefiting from these guarantees, despite the punitive nature of the measure at stake.

2. *Unveiling the tangible nature of administrative detention – a punishment in disguise?*

The premise of this Section is straightforward, namely, that «there is a dissonance between the administrative form of pre-removal detention and its punitive use in practice»[35]. By analogy, I would maintain that a similar dissonance exists concerning asylum detention. Essentially, all forms of administrative detention, due to their inherent features, tend to exhibit an underlying punitive nature.

I have illustrated elsewhere that this is not a novel approach to administrative detention. In the Inter-American Human Rights System (IAHRS), for instance, the punitive nature of administrative deprivation of liberty for immigration purposes has been plainly established in the well-settled case law of the Inter-American Court of Human Rights (IACtHR)[36]. Significantly, the IACtHR not only dubbed administrative detention as a «punitive custodial measure» or a «punitive penalty» but also categorized it as an «administrative measure with punitive characteristics»[37]. This label, suggesting that the measure may function as a criminal tool "in disguise", appears to be acknowledged within the IAHRS based solely on the occurrence of a deprivation of liberty in the material case, regardless of whether such a measure is connected to a criminal offence.

[35] I. MAJCHER, *The Effectiveness of the EU Return Policy at All Costs*, cit., p. 120.

[36] See L. BERNARDINI, *"Criminal or nay?" Migrants' administrative detention within the IAHRS: lessons (not) learned by Europe*, in *Revista Brasileira de Direito Processual Penal*, 2022, no. 3, pp. 1559-1564 for further references.

[37] See Inter-American Court of Human Rights, judgment of 23 November 2010, *Vélez Loor v. Panama. Excepciones Preliminares, Fondo, Reparaciones y Costas*, paras. 167, 163 and 172, and 170 respectively.

Is it possible to achieve a similar outcome within the European legal framework?

Despite the growing attention paid to this subject, not only in academic legal circles but also in political discussions, there remains a shortage of empirical evidence regarding the very nature of administrative detention measures in Europe. These tools display a complex and multifaceted character to the extent that it has been aptly noted that, alongside non-punitive administrative functions, immigration detention laid down in EU law may also fulfill the traditional objectives of the criminal justice system[38].

Against this background, this Section aims at exploring an alternative perspective on administrative detention, with the purpose of revealing the numerous *de facto* punitive elements embedded within its normative framework[39]. As a consequence, it will be finally argued that TCNs deprived of their liberty for immigration purposes should be entitled to enjoy the full range of procedural safeguards traditionally associated with criminal proceedings, as enshrined in Article 6 ECHR and Article 47 and 48 CFREU.

2.1. *Of (nuanced) boundaries of* matière pénale *in the European legal framework*

Both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have developed an extensive and well-established body of case law concerning the concept of «criminal charge» or «accusation en matière pénale», which forms the kernel of both Article 6 ECHR and Articles 47 and 48 CFREU. The substantial and procedural guarantees enshrined in the former provision – fundamentally applicable only when the existence of a criminal charge is established against a suspect and/or an accused person – set

[38] Specifically, detention «may also amount to a punitive instrument for crime control», according to I. MAJCHER, C. DE SENARCLENS, *Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe*, in *AmeriQuest*, 2014, no. 2, p. 11.

[39] See, for a broad analysis, A. CAVALIERE, *Le vite dei migranti e il diritto punitivo*, in *Sistema Penale*, 2022, no. 4, pp. 43-71.

the benchmark for minimum substantial and procedural guarantees safeguarded by the latter provisions, as per Article 52(3) CFREU.

The analysis will thus begin by delving into the florid ECtHR's case law, aiming to define the minimum boundaries of the concept of a «criminal charge» as per Article 6 ECHR. The Strasbourg Court has identified several principles to delineate these boundaries, which, for the purpose of the present study, will subsequently be employed to the essential characteristics of immigration detention outlined by both European frameworks. This assessment aims to unveil the punitive nature of immigration detention.

Since the seminal *Engel* judgment, the ECtHR has developed a tripartite test designed to meticulously depict the criminal nature of a legal instrument under scrutiny: (i) initially, due consideration is accorded to the formal definition provided by domestic law; (ii) subsequently, an in-depth analysis is undertaken regarding the intrinsic nature of the offense and the accompanying sanction; (iii) finally, the level of severity inherent in the measure in question takes center stage[40]. These criteria are, notably, alternative and not cumulative[41]. It is also worth noting that indications from domestic law have a relative value, as it is not sufficient to exclude the penal nature of a sanction merely because it is not defined as such by domestic law[42]. Furthermore, the purpose pursued by the measure in question should be examined – if it involves the general interests of society normally protected by criminal law, this aspect should be taken into consideration[43]. Finally, regarding

[40] European Court of Human Rights, Plenary, judgement of 8 June 1976, application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel and Others v. the Netherlands*, para. 82.

[41] European Court of Human Rights, Grand Chamber, judgement of 21 November 2006, application no. 73053/01, *Jussila v. Finland*, paras. 30-31.

[42] European Court of Human Rights, judgment of 27 November 2011, application no. 43509/08, *A. Menarini Diagnostics s.r.l. v. Italy*, para. 39.

[43] This aspect has been emphasized since European Commission of Human Rights, Admissibility, decision of 10 July 1981, application no. 9208/80, *Saraiva De Carvalho v. Portugal*, para. 5 and European Commission of Human Rights, Admissibility, decision of 2 September 1993, application no. 17571/90, *Borrelli v. Switzerland*. See, more recently, European Court of Human Rights, *A. Menarini Diagnostics s.r.l.*, cit., para. 40.

the severity of the measure at stake, the ECtHR has considered in *Grande Stevens* that the additional consequences that the application of the sanction might produce could be relevant in this respect (e.g., the temporary loss of reputation of the representatives of companies affected by the measures issued by market regulation authorities)[44].

As has been rightly noted, the *Engel* criteria, subsequently developed in successive case-law, were first established to acknowledge the criminal law guarantees *vis-à-vis* individuals subjected to an (allegedly) administrative measure – i.e., a disciplinary measure –, for which the Court denied the predominant punitive purpose but which, as it affected personal liberty, was nevertheless considered within the scope of applicability of criminal law guarantees[45]. The consideration that a specific legal instrument may encroach upon the personal liberty of individuals – safeguarded by both Articles 5 ECHR and 6 CFREU – is, therefore, a crucial factor that, while not inherently decisive according to the ECtHR, holds paramount significance in determining whether a measure may be characterized as having a criminal nature. Certainly, when it comes to a legal tool that impinges upon the right to personal liberty, the level of severity of measure at stake, that is, the third of the *Engel* criteria, may be undeniably brought into question.

In light of Article 52(3) CFREU[46], the same *Engel*-oriented stance has been shared by the CJEU. For instance, in *DB*, the latter has maintained that the right to silence as per Article 6 ECHR is «intended to apply in the context of proceedings which may lead to the imposition of administrative sanctions of a criminal nature. Three criteria are relevant to assess whether penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur»[47]. Extending this argument, the examination of whether a par-

[44] See, in this regard, European Court of Human Rights, judgement of 4 March 2014, application no. 18640/10, *Grande Stevens and Others v. Italy*, para. 97.

[45] See L. MASERA, *La nozione costituzionale di materia penale*, Turin, 2018, p. 219.

[46] See the Opinion of AG Kokott delivered on 15 December 2011 in Court of Justice, *Bonda*, case C-489/10, para. 43, ECLI:EU:C:2011:845.

[47] See Court of Justice, judgment of 2 February 2021, *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, case C-481/19, para. 42, ECLI:EU:C:2021:84, which

ticular penalty possesses a criminal character should be conducted in accordance with the *Engel* criteria even within the EU legal framework. As a consequence, if such an evaluation establishes that such a tool holds a criminal nature, the fair trial safeguards outlined in Article 47 and 48 CFREU become applicable.

2.2. *Unveiling the punitive purpose of administrative detention*

Turning back to administrative detention, it is noteworthy that none of the European Courts has ever applied *Engel* criteria in this field. The ECtHR has consistently regarded administrative detention as distinct from the criminal sphere. This latter interpretation can arguably be attributed to the phrasing of Article 5(1)(f) ECHR, which outlines a specific type of deprivation of liberty that markedly differs from the other forms of detention applicable within criminal proceedings (e.g., Article 5(1)(c) ECHR with regard pre-trial detention measures). At present, the ECtHR has not rendered any judgments explicitly endorsing these conclusions[48].

On the contrary, the CJEU has recently found in *Landkreis Gifhorn* that «when ordered for the purpose of removal, the detention of an illegally staying third-country national is intended only to ensure the effectiveness of the return procedure and *does not pursue any punitive purpose*»[49]. In the eyes of the CJEU, it would probably be maintained *mutatis mutandis* that even asylum detention does not pursue any punitive purpose, being devoted to preventing the applicant from absconding or to assessing their right to enter to the territory while waiting for the outcome of the application.

To sum up, the CJEU has rejected categorizing administrative detention as criminal by relying on a *teleological argument*, asserting that such a measure does not serve punitive purposes.

recalls EU Court of Justice, judgment of 20 March 2018, *Garlsson Real Estate and Others*, case C-537/16, para. 28, ECLI:EU:C:2018:193.

[48] In simpler terms, there is no judgment rendered by the Strasbourg Court in which the applicability of Article 6 ECHR has been acknowledged in this context.

[49] Court of Justice, judgment of 10 March 2022, *Landkreis Gifhorn*, case C-519/20, para. 38, ECLI:EU:C:2022:178, emphasis added.

Nevertheless, if the trigger factor for the (allegedly non-criminal) deprivation of liberty is the hampering conduct exhibited by the TCN concerned – who hinders the relevant return or asylum proceedings –, I believe that it might be demanding to disclaim the punitive rationale behind the measure. In this regard, it is worth recalling that the second *Engel* criterion («the very nature of the offence, considered also in relation to the nature of the corresponding penalty»)[50] attaches paramount importance to the *punitive purpose of the measure under scrutiny*[51].

Against this background, it appears that administrative detention aims at punishing the TCN who did not behave "properly", thereby preventing the State from carrying out the relevant proceedings – it essentially acts as a *reaction* against the individual concerned.

This is clearly the case of pre-removal detention, as regulated by Article 15 of the Return Directive, which can be issued against the TCN at stake on the grounds that, in the material case, either «there is a risk of absconding» or «the third-country national concerned avoids or hampers the preparation of return or the removal process»[52]. According to some scholars, this unequivocally demonstrates that the primary objective of the measure is associated with compelling the migrant to collaborate with the authorities and punishing TCNs for their reluctance in cooperating with the State – these characteristics would make plain the tangible punitive nature of the deprivation of liberty imposed upon them[53]. To put it simpler, it is challenging to disregard the fact that «any detention imposed because of deliberate hampering looks like a sanction»[54]. Hence, if this reading is correct, pre-removal

[50] European Court of Human Rights, Plenary, judgement of 21 February 1984, application no. 8544/79, *Öztürk v. Germany*, para. 50.

[51] See, for further references, L. MASERA, *La nozione costituzionale*, cit., pp. 57-80. Interestingly, the ECtHR pointed out that «there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty» (European Court of Human Rights, Plenary, *Öztürk*, cit., para. 53).

[52] Article 15(1)(a) and (b) of the Directive 2008/115/EC.

[53] I. MAJCHER, *«Crimmigration» in the European Union through the Lens of Immigration Detention*, Global Detention Project Working Paper No. 6, p. 14.

[54] D. WILSHER, *Immigration Detention*, cit., p. 153.

detention depicts a punitive character, rooted in its deterrent purposes[55]. Accordingly, it may be subsumed within the concept of a «criminal charge» as per Article 6 ECHR and Articles 47 and 48 CFREU.

Regarding asylum detention, the situation bears some similarities, although they are less overt[56].

Within the EU law legal framework, asylum detention measures can be imposed on an applicant for international protection for the purpose of establishing essential elements upon which the application for international protection relies, especially when obtaining such information is unfeasible in the absence of detention, particularly in cases where there is a risk of absconding of the applicant[57]. Besides, applicants may be detained «in order to decide, in the context of a pro-

[55] As was aptly observed by C. MAZZA, *La prigione degli stranieri*, Rome, 2013, pp. 128-131, «administrative detention centers serve a distinct deterrent function for individuals seeking to enter the national territory […] they act as a deterrent for new illegal arrivals and […] can also be instrumental in prompting migrants to disclose their identities […] The stated purpose of the centers – i.e., enforcing return proceedings against irregular TCNs – is consistently disregarded since there is no direct correlation between detention (which is a restrictive measure) and the ability to carry out the returns (which depends on specific procedures and prerequisites). So, what is the actual function of these centers? […] Their primary function is predominantly deterrent in nature».

[56] See *contra* C. BOITEUX-PICHERAL, *L'équation liberté, securité, justice*, cit., pp. 605-606, where the Author recalls the Opinion of AG Bot delivered on 30 April 2014 in EU Court of Justice, *Bero and Bouzalmate*, joined cases C-473/13 and C-514/13, para. 92, ECLI:EU:C:2014:336: «detention does not constitute a penalty imposed following the commission of a criminal offence and its objective is not to correct the behaviour of the person concerned so that he can, in due course, be reintegrated into society. Any idea of penalising behaviour is, moreover, missing from the rationale forming the legal basis of the detention measure».

[57] Article 8(3)(b) of Directive 2013/33/EU. See, by analogy, the ground laid down in Article 8(3)(f) of Directive 2013/33/EU concerning the detention of the applicant to be transferred to another Member States, as per Article 28 of Regulation (EU) 604/2013. According to the latter provision, an applicant may be detained for the purpose of transfer when «there is a significant risk of absconding». Hence, for the purpose of the present analysis, the grounds listed down in Article 8(3)(b) and (f) of the Directive are equivalent: in both cases, the TCN is detained on the basis of their hampering behavior, that is, their absconding.

cedure, on the applicant's right to enter the territory»[58] or «in order to determine or verify his or her identity or nationality»[59]. In all these instances, the issuance of a detention order against TCNs is, once again, prompted by their allegedly obstructive behavior[60]. Likewise, the punitive justification behind the measure is subtly apparent.

Still, applicants can be deprived of their liberty even in circumstances where their conduct is not *directly* impeding the asylum process. This is the case of deprivation of liberty ordered where «protection of national security or public order so requires»[61] or where the applicant was previously involved in return proceedings and is deemed to have lodged an application for international protection «merely in order to delay or frustrate the enforcement of the return decision»[62]. While the TCN's behavior in this context is not expressly aimed at obstructing the smooth progression of asylum procedures, the imposition of deprivation of liberty is nevertheless employed as a means to reprimand the individual for their dangerous or abusive (and, therefore, non-cooperative) conduct, thus unveiling its underlying objectives – discouraging individuals from seeking asylum or residing irregularly

[58] Article 8(3)(c) of Directive 2013/33/EU.

[59] Article 8(3)(a) of Directive 2013/33/EU.

[60] In the first scenario, detention serves a repressive purpose, as it is evident that its primary aim is to compel the TCN in question to provide the authorities with the pertinent information underpinning the asylum application. In the second scenario, detention is ordered when authorities harbor uncertainty regarding the applicant's admissibility to the territory. Thus, applicants face detention due to their irregular status (otherwise they would have been granted entry), and the encroachment upon their personal liberty serves as a punitive measure in response to undesirable behavior, thus demonstrating both repressive and deterrent aims. In the third scenario, the TCN is subjected to detention due to their reluctance to disclose or specify their nationality or identity. It is worth noting that detention can also be employed for the purpose of «determining» these elements, not solely for their «verification». In each of these scenarios, TCNs' personal freedom is curtailed by national authorities in response to their hampering conduct.

[61] Article 8(3)(e) of Directive 2013/33/EU.

[62] Article 8(3)(d) of Directive 2013/33/EU.

within the territory (deterrence), and if this fails to dissuade, penalizing them for their actions (retribution)[63].

Conclusively, the nature of administrative detention measures, as conceptualized by EU law, is inherently punitive[64]. Whether in the context of pre-removal or asylum-related deprivation of liberty, these measures are reactive responses to individuals perceived as «somewhat irresponsible and untrustworthy»[65], due to their irregular entry and/or stay. A parallel observation can be made regarding Article 5(1)(f) ECHR, which, as anticipated, permits the detention of a TCN «to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition». In my understanding, the foundation for this atypical deprivation of liberty remains *the blameworthy conduct of the migrant concerned*, who either attempted illegal entry into a specific country or is slated for return, thereby warranting detention due to their irregular status.

In light of the foregoing, administrative detention ought not to be characterized solely as an administrative instrument for immigration control. Instead, it should be viewed as a *de facto* punitive tool with «deterrent purposes that are traditionally restricted to (punitive) criminal sanctions» while, concurrently, it appears to be designed to «shape the conduct of a category of migrants in terms of both immigration and crime control objectives»[66].

[63] In this regard, see I. MAJCHER, *«Crimmigration» in the European Union*, cit., pp. 15-17.

[64] With regard to pre-removal detention (though the reasoning is applicable to asylum detention as well), it has been observed that, as evidence of the punitive nature of the measure, the deprivation of liberty inherently carries a «disvalue» (*disvalore*) even greater than the ultimate objective sought to be achieved (i.e., the return of the TCN). Moreover, the migrant, detained until deportation becomes feasible (or, respectively, until the asylum procedure has ended), effectively bears the inefficiency of the domestic expulsion system, being deprived of personal liberty for reasons beyond their responsibility. See, in this vein, R. BARTOLI, *Il diritto penale dell'immigrazione: strumento di tutela dei flussi immigratori o mezzo di esclusione e di indebolimento dello straniero?*, in *Quest. giust.*, 2011, no. 2, p. 26.

[65] G. CAMPESI, G. FABINI, *Immigration Detention as Social Defence*, cit., p. 66.

[66] I. MAJCHER, C. DE SENARCLENS, *Discipline and Punish?*, cit., p. 15.

2.3. *The harsh degree of severity of administrative detention – is deprivation of personal liberty serious enough?*

In addition to its punitive intent, administrative detention should be regarded as a tool *de facto* rooted in criminal law, due to its harsh degree of severity. Indeed, it significantly encroaches upon personal liberty, a fundamental right of paramount importance, according to the ECtHR which dubbed it as a prerogative which holds a position, together with Articles 2, 3 and 4 ECHR, «in the first rank of the fundamental rights that protect the physical security of the individual»[67].

As mentioned earlier, the degree of severity constitutes the third criterion within the *Engel* criteria. Although it is a crucial factor in evaluating the criminal nature of a legal instrument, *the ECtHR has never acknowledged that deprivation of liberty inherently renders certain tool criminal in nature*[68]. In the eyes of the Strasbourg Court, for a detention measure to be regarded as a criminal instrument, it must possess at least a certain level of punitive purpose[69].

I have already argued that, in my understanding, administrative detention pursues punitive purposes. Nevertheless, even if this assertion might be challenged on the grounds that such a measure is unrelated to any criminal offense, I would underscore that its level of severity imparts a criminal character to it. Consequently, I align with those who have stressed that the concept of *matière pénale*, as per Article 6 ECHR, should be contingent upon the *gravity of the measure in question*, to the extent that deprivation of liberty should never be categorized as an administrative measure – when applied, it thus inherently possesses a criminal nature[70].

[67] European Court of Human Rights, Grand Chamber, judgment of 1 June 2021, application nos. 62819/17 and 63921/17, *Denis and Irvine v. Belgium*, para. 123.

[68] See, for further references, see L. MASERA, *La nozione costituzionale di materia penale*, cit., pp. 86-89.

[69] This stems from the wording of European Court of Human Rights, Plenary, *Engel*, cit., para. 82, emphasis added: «[…] 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».

[70] A. CAVALIERE, *Osservazioni intorno al concetto di "matière pénale", tra Costituzione e CEDU*, in *Archivio Penale*, 2023, no. 2, pp. 53-56.

Accordingly, administrative detention – beyond its punitive objectives (which, in any case, I content do exist) –, by impinging upon the personal liberty of individuals, should always be regarded fundamentally as a criminal measure, irrespective of any further attempts to mislabel it as a merely bureaucratic tool.

Against this background, it can be easily demonstrated that both pre-removal and asylum detention, as conceived by the EU legislator and in the ECHR legal framework, hold a harsh degree of severity *vis-à-vis* the individual concerned. At least three indicators can be identified in this regard: (i) the measure encroaches upon personal liberty in a manner equivalent to penal detention; (ii) the TCN concerned may be detained even in penitentiary facilities under prison-like conditions; (iii) the periods of detention can extend for a considerable duration.

2.3.1. *Administrative detention amounts to a deprivation of personal liberty*

Across the EU, administrative detention stands as the sole protracted deprivation of liberty that can be imposed irrespective of any prior criminal law violations, and its legitimacy has been upheld on the grounds of its formal non-punitive character[71]. Yet, as detention is «something closer to punishment»[72], there exists no *practical* distinction in the deprivation of liberty imposed upon a suspect or accused person and a TCN, as both individuals undergo a comparable degree of deprivation of personal liberty[73].

In this context, it was noted that «administrative regimes are, with increasing prevalence, imposing sanctions akin to punishment but denying the protections of criminal process»[74]. Detention is, certainly, among these sanctions. As a result, detained migrants, despite the tan-

[71] E. RIGO, *Spazi di trattenimento e spazi di giurisdizione*, in *Materiali per una Storia della Cultura Giuridica*, 2017, no. 2, pp. 475-478.

[72] D. WILSHER, *Immigration Detention*, cit., p. 40.

[73] See, for an Italian perspective, L. PEPINO, *Centri di detenzione ed espulsioni (Irrazionalità del sistema e alternative possibili)*, in *Dir. Imm. e Cittad.*, 2000, no. 2, pp. 11-25.

[74] J. PARKIN, *The Criminalisation of Migration in Europe*, CEPS Papers in Liberty and Security in Europe, No. 61, October 2013, p. 17.

gible severity of the measure in question, are treated less favourably compared to suspects or accused individuals placed in pre-trial detention – a paradoxical situation[75].

Besides, the «increasing relevance of immigration detention may be read as an example of the expansion of penal logic and practices into migration control policies»[76], to the point that administrative detention ends in «a contrivance, strategically employed to circumvent the principles of criminal law by means of measures that inflict severe distress and have a profound impact on the individual's personal freedom and dignity»[77]. Challenging the viewpoint that administrative deprivation of liberty is nearly *interchangeable* with "penal" detention scenarios is very difficult. Although its administrative formal definition may give the perception of a more lenient *façade* to coercion, it conceals lower levels of protection, fostering a deceptive illusion of reduced severity[78].

Numerous rulings rendered by the two European courts have acknowledged that pre-removal or asylum detention measures inflicted upon TCNs constitute a deprivation of liberty under Article 5 ECHR and Article 6 CFREU, despite the efforts of the Member States to characterize administrative detention as merely a bureaucratic restriction on the freedom of movement[79]. It is therefore indisputable that the level of severity experienced by TCNs due to administrative detention measures is *materially equivalent* to that experienced by suspects and accused persons subjected to criminal detention measures.

[75] D. LOPRIENO, *"Trattenere e punire"*, cit., p. 217.

[76] G. CAMPESI, G. FABINI, *Immigration Detention as Social Defence*, cit., p. 66.

[77] A. CAVALIERE, *Le vite dei migranti*, cit., pp. 68-69.

[78] See, in this regard, L. PARLATO, *L'assistenza linguistica come presupposto delle garanzie dello straniero*, in V. MILITELLO, A. SPENA (eds.), *Il traffico di migranti. Diritti, tutele, criminalizzazione*, Torino, 2015, pp. 96-98.

[79] In this regard, see L. BERNARDINI, *La detenzione degli stranieri tra "restrizione" e "privazione" di libertà*, cit., pp. 75-95. With regard to detention occurring in transit zones at the borders of EU Member States, see Court of Justice, Grand Chamber, judgement of 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, paras. 215-231, ECLI:EU:C:2020:367.

2.3.2. *Administrative detention is enforced under prison-like conditions of detention*

The assumption that the deprivation of liberty experienced by TCNs in the context of pre-removal or asylum detention is comparable to that suffered by a suspect or an accused person in the context of criminal proceedings brings us to the second point – TCNs are detained in conditions akin to those in prison facilities. This stems from two considerations.

On the one hand, both Article 16 of the Return Directive and Article 10 of the Reception Directive foresee the possibility for migrants to be detained within penitentiary premises if a Member State is unable to furnish accommodation in a specialized detention facility. This can happen only where such Member State can ensure that, in the context of pre-removal detention, «the third-country nationals in detention [are] kept separated from ordinary prisoners»[80], whereas, in case of «detained applicants», they shall *additionally* be kept «separately from other third-country nationals who have not lodged an application for international protection»[81].

The CJEU has stressed that this requirement «is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and *constitutes a substantive condition for that detention*, without observance of which the latter would, in principle, not be consistent with the directive»[82]. Hence, detention within *ad hoc* centers is the norm, confinement within penitentiary facilities is the exception. Nevertheless, this latter possibility is deemed legitimate and is precluded neither by the EU legislator[83], neither, indeed, within the ECHR legal framework. Hence, it is common that Member States employ their penitentiary facilities for the purpose of

[80] Article 16(1) of Directive 2008/115/EC.

[81] Article 10(1), second subparagraph, Directive 2013/33/EU.

[82] EU Court of Justice, judgment of 17 July 2014, *Thi Ly Pham*, case C-474/13, para. 21, ECLI:EU:C:2014:2096.

[83] K. PARROT, C. SANTULLI, *La «Directive Retour», l'Union européenne contre les étrangers*, in *Revue critique de droit international privé*, 2009, n. 2, pp. 229-231. The Authors cited the case of Germany and Ireland as countries where TCNs are «couramment retenus dans le locaux pénitentiaires».

detaining TCNs[84]. In turn, if migrants are detained in the same facilities as suspects or accused persons, this implies, from a practical standpoint, that both administrative and criminal detention exhibit the same level of severity.

On the other hand, even *ad hoc* facilities bear a fundamental resemblance to prisons. It has been emphasized that, across European countries, TCNs are, in practice, subjected to a deprivation of liberty for immigration purposes within these aforementioned *ad hoc* facilities[85]. Besides, Ferrajoli rightly pointed out that immigration detention centers function as places of detention and segregation where *conditions are even worse than those provided within prison facilities*[86] – this is because, as detained TCNs fall outside the criminal law framework, all the safeguards afforded to suspects or accused persons do not apply to them. In this regard, since 2010, the Parliamentary Assembly of the Council of Europe (PACE) has worryingly emphasized that[87]: «conditions can be appalling (dirty, unsanitary, lack of beds, clothing and food, lack of sufficient health care, etc.) and the detention regime is often inappropriate or almost entirely absent (activities, education, access to the outside and fresh air). Furthermore, provision for the needs of vulnerable persons is often insufficient and allegations of ill-treatment, violence and abuse by officials persist. This all has a negative impact on the mental and physical well-being of persons detained both during and after detention».

In conclusion, the blending of administrative and criminal law

[84] See, with regard to the German legal framework, Court of Justice, judgment of 2 July 2020, *WM*, case C-18/19, ECLI:EU:C:2020:511, and Court of Justice, *Landkreis Gifhorn*, cit.

[85] See, among others, M. PICHOU, *Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights*, in *Critical Quarterly for Legislation and Law*, 2016, n. 2, pp. 114-131, and J.N. STEFANELLI, *Detention as a Tool of Immigration and Asylum Enforcement in the EU*, in G.L. GATTA, V. MITSILEGAS, S. ZIRULIA (eds.), *Controlling Immigration Through Criminal Law*, Oxford-New York, 2020, pp. 211-231.

[86] L. FERRAJOLI, *La criminalizzazione degli immigrati*, in *Quest. giust.*, 2009, n. 5, pp. 16-17.

[87] PACE, Resolution 1707 (2010), *Detention of asylum seekers and irregular migrants in Europe*, Text adopted by the Assembly on 28 January 2010 (7th Sitting), para. 4.

arises once more. Since the TCNs in question have not committed a criminal offense, nor are they under suspicion in this regard, why should they be detained within facilities typically designated for suspects or convicted individuals or, in any case, in detrimental conditions of detention? This circumstance reinforces the perspective that the methods and functions of criminal law have gradually become integrated into immigration law and that the severity of administrative detention measures is equivalent to that of criminal detention measures.

2.3.3. *Towards endless administrative detention measures?*

There is at least a last factor to be briefly considered, that is, the duration of detention. Under the ECHR legal framework, there is no indication of a time-limit for the deprivation of liberty to be carried out as per Article 5(1)(f) ECHR. From the case-law of the Strasbourg Court it can be inferred that, on a case-by-case basis, detention should not be excessive, and the duration of the deprivation of liberty must be reasonably justified in relation to the objective pursued by such detention measures. Still, there is no fixed numerical threshold beyond which detention becomes inherently arbitrary[88]. The ECtHR has indeed specified that «the question of whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features […] and that the arguments for and against release must not be "general and abstract" […], but contain references to the specific facts and the applicant's personal circumstances justifying his detention»[89]. This has led the ECtHR to conclude, for instance, that a six-month period of detention during the assessment of an applicant's international protection request was not arbitrary *per se*[90].

[88] A. GÜNDOĞDU, *Rightlessness in an Age of Rights. Hannah Arendt and the Contemporary Struggles of Migrants*, Oxford, 2015, p. 121.

[89] European Court of Human Rights, judgment of 24 September 2019, application no. 45852/17, *Ismailov v. Russia*, para. 21.

[90] European Court of Human Rights, judgement of 14 January 2021, application no. 73700/13, *E.K. v. Greece*, para. 96.

In contrast, within the EU legal framework, there are two distinct regimes. Regarding pre-removal detention, in accordance with Article 15 of the Return Directive, irregular TCNs may be detained for a maximum period of eighteen months, a time limit that is evidently not of negligible significance[91]. Differently, in the context of asylum detention, Article 8 of the Reception Directive does not stipulate any specific time limit concerning applicants for international protection. This aspect has rightly been deemed «indefensible», as the lack of a time limit clearly disregard the importance of the right to personal liberty of the individuals concerned[92], that is, «persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country»[93]. To sum up, it is apparent that deprivation of liberty for immigration purposes, in the context of both pre-removal or asylum detention, is typically enforced for *exceedingly protracted periods*.

This assumption can also be substantiated by examining the relevant ECtHR case-law – the Court analysed several cases where periods of detention were defined as «unusually long»[94], «excessive»[95], «par-

[91] Specifically, irregular TCNs may be detained, as a rule, for a maximum of six months (Article 15(5) of the Return Directive). However, pre-removal detention may be extended for a further period no exceeding twelve months where «regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries». Hence, either the non-cooperative behavior of the migrant in question or procedural deficiencies (which cannot, of course, be attributed to the TCN) may provide national authorities with grounds to extend the deprivation of liberty experienced by the TCN concerned.

[92] S. PEERS, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, Oxford, 2016, p. 313. It is notable that, while irregular TCNs may be subject to a defined, albeit extended, time limit, the same does not surprisingly apply to the applicant.

[93] European Court of Human Rights, judgment of 23 July 2013, application no. 42337/12, *Suso Musa v. Malta*, para. 101.

[94] It was the case, *inter alia*, of European Court of Human Rights, judgment of 24 September 1992, application no. 11613/85, *Kolompar v. Belgium*, para. 40, and European Court of Human Rights, judgment of 22 March 1995, application no. 18580/91, *Quinn v. France*, para. 48. The applicants were detained, respectively, for over two years and eight months and for almost two years.

ticularly long»[96], «extraordinarily long»[97], «considerable»[98] or «extremely long»[99] as per Article 5(1)(f) ECHR.

It seems not speculative to contemplate that, within this context, TCNs may undergo detention periods that surpass even the time limits observed in pre-trial detention within the realm of domestic criminal proceedings[100].

As Majcher aptly observed, «detention that is exclusively prolonged in relation to its non-punitive purpose or that subjects detainees to prison-like conditions would have punitive effect»[101]. Thus, the longer the TCN is detained, the more extensive the infringement upon their personal freedom becomes, thereby intensifying the punitive characterization of detention itself.

Taken together, the interplay of these three factors – the prejudice against personal liberty, the prison-like conditions of detention and the broad time-limits of the measure – may lead to the conclusion that the administrative deprivation of liberty of TCNs functions as a severly detrimental measure against the individual who is subjected to it, thus depicting its *de facto* criminal nature.

[95] See, very recently, European Court of Human Rights, judgment of 13 June 2023, application no. 53114/20, *Khokhlov v. Cyprus*, para. 98. The applicant was detained for a period of two years, one month and fifteen days (ibid., para. 96).

[96] European Court of Human Rights, judgement of 13 December 2011, application no. 15297/09, *Kanagaratnam and Others v. Belgium*, para. 94. The applicants, a family of Sri Lanka nationals, were detained for almost four months.

[97] European Court of Human Rights, judgment of 8 October 2009, application of 10664/05, *Mikolenko v. Estonia*, para. 64. The applicant was deprived of his liberty for more than three years and eleven months.

[98] European Court of Human Rights, Grand Chamber, judgment of 21 November 2019, application nos. 61411/15, 61420/15, 61427/15, 3028/16, *Z.A. and Others v. Russia*, para. 169. The applicants were detained for a period ranging from five months to over a year and nine months.

[99] European Court of Human Rights, Grand Chamber, judgment of 15 November 1996, application no. 22414/93, *Chahal v. the United Kingdom*, para. 119. The applicant was detained for almost six years.

[100] For instance, this may happen in Italy (cfr. the time limits foreseen in Article 303 of the Italian Code of Criminal Procedure which, as a rule, are considerably less than eighteen months).

[101] I. MAJCHER, *«Crimmigration» in the European Union*, cit., p. 10.

3. *A punitive measure shall deserve adequate guarantees – some concluding remarks*

In this contribution, I have contended that both pre-removal and asylum detention – despite being categorized as administrative and merely bureaucratic measures –, effectively serve punitive objectives. Besides, it has been asserted that, due to their inherent level of severity, administrative detention measures, regardless of their stated purposes (which I argue to be punitive, in any event), possess a punitive characterization *per se*. In this vein, I have shared the view that administrative detention measures «must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections»[102].

This aligns with what was acknowledged by the Inter-American Court of Human Rights in a seminal judgment, which is worth quoting at some length[103]: «administrative sanctions, as well as penal sanctions, constitute an expression of the State's punitive power and, […] on occasions, the nature of the former is similar to that of the latter. Both, the former and the latter, imply reduction, deprivation or alteration of the rights of individuals, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals, and subject to a careful verification of whether or not there was unlawful conduct».

Following this line of reasoning, there could be several implications. The most significant is that a set of additional, robust guarantees should be provided to those TCNs deprived of their liberty for immigration purposes. As previously noted, the comprehensive set of fair trial guarantees enshrined in Article 6 ECHR come to the fore. Among these, I will briefly delve into the right to remain silent and not to incriminate oneself, whose implications on the issue under investigation could be of particular interest.

[102] HRC, *General Comment No. 35*, *Article 9 (Liberty and Security in person)*, CCPR/C/GC/35, 16 December 2014, para. 14.

[103] Inter-American Court of Human Rights, judgment of 2 February 2001, *Baena-Ricardo et al. v. Panama (Merits, Reparations and Costs)*, para. 106.

In fact, it has been showed that the detained TCN's non-cooperative behavior may allow national authorities to extend their detention period. Once the punitive nature of such a legal tool is acknowledged, there seems to be no more room for imposing deprivation of liberty based on such a hampering conduct. Arguably, TCNs can still be obligated to provide certain information to domestic authorities, such as their identity papers. However, a request to act (even against their self-interest) to expedite return or asylum procedures may conflict with the right to remain silent and not to incriminate oneself eventually recognized for the migrant concerned.

Whereas Article 6 ECHR does not explicitly mention the right to silence or the privilege against self-incrimination, it is a widely recognized international standard that forms a fundamental part of the concept of a fair trial. By providing the suspect or the accused person with protection against improper coercion by authorities, the ECtHR has famously held that this prerogative contributes to preventing miscarriages of justice and achieving the objectives of Article 6 ECHR[104]. Besides, it has been acknowledged that both the right to silence and the privilege against self-incrimination cannot reasonably be confined to statements admitting wrongdoing or remarks directly incriminating the person questioned; rather, it also encompasses information on matters of fact that may subsequently be used in support of the prosecution and may thus influence the conviction, or the penalty imposed on that person[105].

What is more, a range of guarantees, not currently acknowledged *vis-à-vis* the detained TCN, would come into play, including the rights of the defence as per Article 6(3) ECHR.

In this context, I am aware that recognizing and accepting the punitive nature of administrative detention may be detrimental to the interests of States. Asylum or pre-removal detention could no longer be primarily, or even solely, grounded in the undesired behavior of the TCN concerned, as such conduct would eventually be deemed legiti-

[104] European Court of Human Rights, Grand Chamber, judgment of 8 February 1996, application no. 18371/91, *John Murray v. the United Kingdom*, para. 45.

[105] European Court of Human Rights, judgment of 17 December 1996, application no. 19187/91, *Saunders v. the United Kingdom*, para. 71.

mate in light of the right to remain silent and the privilege against self-incrimination, as enshrined in Article 6 ECHR. Moreover, the implementation of pre-removal or asylum detention measures would become more challenging for Member States if the additional guarantees enshrined in Article 6 ECHR are acknowledged *vis-à-vis* the detainees.

Nevertheless, this approach may indeed be the sole means of comprehending administrative detention in its *inherently punitive essence*, thereby strengthening the guarantees for TCNs and, ultimately, averting Member States from instituting a broad detention regime instead of one aligned with the principle of *extrema ratio*.