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People in Between

The criminalization of migration detention in Europe

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To my parents, who have always embraced the 'other'. Your love, your courage and your kindness never cease to inspire me, even in my darkest hours. For that, I will always be grateful.

SUMMARY

There is a heated debate going on concerning the use of migration detention in Europe. In the wake of the increased number of migrants trying to enter or having become irregular while residing in Europe, states seem to rely on the practice of migration detention in such a degree, that it has become an integral part of their national and European Union (hereinafter EU) policies. This happens, despite the fact that a number of European and national legal instruments describe it as a measure of last resort. The widespread use of this practice has led to the adoption of a number of controversial measures that have been heavily criticized. This paper explores a number of these measures implemented by a large number of EU states and takes a closer look at the case of Greece. It claims that despite its administrative nature, migration detention in its current form resembles to criminal detention. It proposes that this conflict between how migration detention is implemented and how it should be implemented exists because of the intersection of criminal and migration law. In particular, it examines how migration law has absorbed some features of the criminal law enforcement while at the same time it has left out features pertaining to the procedural aspect of criminal law¹. It explores different aspects of this phenomenon, also known as crimmigration², and sets the background in order to understand how the intersection between these bodies of law became possible. The main focus is allocated on how migration detention has been criminalized meaning how criminal law has affected this type of detention by changing its purposes thus leading to the adoption of a number of measures that belong to criminal detention. Finally, the paper examines the implications that criminalized detention has on the human rights of the migrants. It claims that crimmigration has created confusion as to which rules regulate detention and enhances the human rights violations of the migrant detainees thus leading to their discriminatory treatment. In the case of Greece, it further

¹ S. H. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', *Washington and Lee Law Review*, vol. 64, 2007, p.469.

² J. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', *American University Law Review*, vol. 56, no.2, 2006, p. 376.

argues that this discriminatory treatment has acquired an institutional character.

PREFACE

Writing this thesis has been an instructive and illuminating process for me. The examination of migration detention under the light of the crimmigration phenomenon provided me with a whole new perspective as far as it concerns detention in particular and migration in general. This thesis aims at providing a deeper understanding of this merge between criminal and migration law thus leading to new ways through which migration detention can be limited and migrants can be protected.

Before I start looking into the aforementioned issues, I want to thank certain people that helped me and supported me through the thesis writing process. First of all, I want to express my deepest gratitude to my supervisor Karol Nowak for his guidance and encouragement. I am also particularly grateful to Eleni Karageorgiou and Amin Parsa for supporting me and helping me structure my thoughts. They were always there when I needed their advice and their comments enabled me to delineate my topic and to think of new perspectives. I also want to thank Nina Mikelopoulou for the time she spent, polishing my English.

I am grateful to my family and friends for their patience and understanding throughout this stressful period. I am particularly indebted to Maria Valassa and Ares Cavus. Their support throughout the thesis writing and these past two years is of immeasurable value to me. I feel blessed to be their friend.

Key words

Migration detention, criminal law, crimmigration, intersection, procedural rights

ABBREVIATIONS

CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DPC	Displaced Person Camps
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDP	Global Detention Project
NGO	Non-Governmental Organization
SRHRM	Special Rapporteur on the Human Rights of the Migrants
WGAD	Working Group on Arbitrary Detention
UN	United Nations

1. INTRODUCTION

1.1 Contextual Background

It is undeniable that Europe has become one of the main destinations for a continuously growing number of migrants. People leaving their home countries because of war or in search for a job and a better life, see Europe as a refuge or a place where they can start a new, more dignified life. According to Eurostat in 2014, the number of asylum applications was 626 thousand, the highest number of applications since 1992³. However, reaching Europe is becoming more and more dangerous. This is because, to these increased migrations flows, Europe has chosen to respond with strict border controls thus forcing the migrants to resort to irregular means in order to get to Europe. The results of these border controls are dubious and in many cases dramatic. It is sadly remarkable that the deaths of thousands of migrants in the Mediterranean are increasing every year. It is estimated that more than 1,750 migrants have already died in 2015 trying to cross the Mediterranean, a number that is almost 30 times higher than during the same period in 2014⁴. In the wake of these tragedies, EU remains unwilling to change its border policies and continues to consider border controls as a priority and the primary way through which it deals with migration.

These border controls are accompanied by a certain anti-migration rhetoric that emphasizes the negative and destabilizing effects of migration thus justifying the implementation of harsh migration policies. It seems that the statement of Pim Fortyyn, a Dutch politician applying an anti-migration rhetoric, presenting the Netherlands as a ‘full country’ unable to accept more migrants, is more relevant than ever⁵. It is indeed true, that both at a state and at a European level a certain kind of argumentation is used that

³ Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (last visited on 25-May-2015)

⁴ R. Akkoc, J. Winch and N. Squires, The Telegraph, <http://www.telegraph.co.uk/news/worldnews/europe/italy/11548995/Mediterranean-migrant-crisis-hits-Italy-as-EU-ministers-meet-live.html> (last visited on 25-May-2015)

⁵ K.F. Aas and M. Boshworth, ‘The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State’, in K.F Aas and M. Boshworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford University Press, 2013, p.13. Available from: Lubsearch. (last visited on 25-May-2015).

points out the difference between Europeans and migrants mostly coming from countries of the global South. Their alleged inability to adjust to the European way of life and the danger they pose to the welfare system and society in general are also highlighted⁶. The rise of the far right wing parties in many European states such as Greece also contributes to this systematic, anti-migration rhetoric by placing the superiority of the citizens against the non-citizens in the center of the migration issue. The alleged imminent threat that migrants are posing to the cohesion of society has allowed the states to justify all the strict migration and border policies they implement. At the same time, in the face of the increased migration flows, governments have found a scapegoat for their failed economic policies and the economic and social crisis occurring in Europe⁷.

In this context of strict border controls and the enhanced anti-migration rhetoric, detention has a central role. Both the states and the EU are implementing this measure whether it is for pre-admission purposes or as a practice facilitating the expulsion of the migrants against whom a removal order has been issued. The laws regulating migration detention are characterized by vagueness and ambiguity thus leaving great discretion to the European states to interpret them at will. As a result, a number of dubious detention practices are applied, which seem to contravene the officially exceptional character of this practice as prescribed in a number of European and national legal instruments. Indeed, the lengthy detention periods as well as the prison-like detention facilities question the administrative nature of this practice. It is argued, that the way migration detention is currently implemented resembles more to punishment as used in criminal law⁸. At the same time, while migration detention looks and feels like a punishment, the protection afforded to migrant detainees remains poor and certainly less than the one provided to detainees in criminal detention. This practice has a grave impact on the lives of the detainees. Their

⁶ J. Huysmans, 'The European Union and the Securitization of Migration', *Journal of Common Market Studies*, vol.38, no.5, 2000, p. 767.

⁷ Huysmans, p. 769.

⁸ A. Leerkes and D. Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', *British Journal of Criminology*, vol.55, no.5, 2010, p.8.

mistreatment and the violation of their human rights occurring in the detention centers have become a widespread phenomenon and in some cases, they have led to riots, hunger strikes and suicides on behalf of the migrants⁹.

Despite the widespread criticism that detention policies have attracted, states continue to rely a great deal on this practice and to invest huge amounts of money in the construction or maintenance of detention centers. It is sadly remarkable that they choose to ignore the fact that the policies they are implementing concerning border controls in general and detention in particular, are translated in human rights violations, thus affecting the lives of thousands of migrants. In the light of these negative developments, it is no exaggeration to say that migration detention, as currently implemented, is testing the limits of democracy and human rights protection in Europe¹⁰.

1.2 Research goal and questions

The main question this paper aims to answer is how the phenomenon of crimmigration has affected pre-expulsion migration detention and the implications of this practice on the human rights of the migrant detainees. In particular, this paper examines a number of migration detention policies adopted by some EU states. It highlights the problematic implementation of this practice and it points out its resemblance with criminal detention. It argues that this resemblance is part of the broader phenomenon of crimmigration, a practice where migrants are treated like criminals but not protected like criminals. In addition, it seeks to describe the impact of this phenomenon in the human rights of the migrant detainees. Simply put, this thesis is based on the idea that the practice of migration detention has been highly misused by the states. In particular, a number of detention practices, as currently implemented, contravene the exceptional and last resort

⁹ RT <http://rt.com/uk/240205-detention-center-hunger-strike/> (last visited on 25-May-2015); P. Chrysopoulos, Greek Reporter <http://greece.greekreporter.com/2014/11/18/hunger-strike-after-death-of-immigrant-at-greek-detention-camp/>; (last visited on 25-May-2015)

¹⁰ M.C Caloz-Tschopp, 'On the Detention of Aliens: The impact on Democratic Rights', *Journal of Refugee Studies*, vol.10, no.2, 1997, p.165.

character, as enshrined in certain legal instruments and highlighted by several reports. In addition, by distinguishing between criminal and administrative-migration detention I argue that criminal law has altered the nature of migration detention i.e that it has affected its purposes. Furthermore, I seek to examine how crimmigration contributes to the already poor human rights protection afforded to the migrant detainees. In the case of Greece, I specifically point out the institutional discrimination of the migrant detainees as a result of the crimmigration occurring in this country.

With the analysis of the crimmigration phenomenon, this thesis aims at providing a better understanding of the current migration detention policies. In the general presentation of migrants as an imminent threat to society, criminal law is used as a means to manage them and as a justification for the implementation of extreme and abusive measures. What I wanted to point out is that crimmigration is a deliberate choice made by the states, in the name of security, and not an accidental incident. When it comes to detention, criminal law has become a useful tool for the states, in a sense that it affects this practice in an indirect way. While ostensibly and typically an exceptional measure, in reality through criminal law and the alleged criminal identity of the migrants, migration detention has become an integral part of migration policies. In the light of this analysis, this thesis also aims at presenting how crimmigration contributes in the already existing poor protection of the human rights of the migrant detainees. It also underlines the systematic and in the case of Greece the institutional discrimination of them compare to criminal detainees. The examination of the indirect, discriminatory and institutional way in which crimmigration functions is important, for those who want to understand the contemporary practice of migration detention and contribute to the elimination of the crimmigration phenomenon.

1.3 Theory, methodology and material

The theories, methodology and material of this thesis are interrelated. In order to present the problematic implementation of migration detention and how the crimmigration phenomenon has affected it, a number of legal instruments, reports, and national policies were analyzed. In the beginning, the definition of migration detention was presented as prescribed by certain international reports and legal scholars. In order to understand the character of this practice I compared it with criminal detention and highlighted their main differences. I particularly focused on the different purposes these two types of detention serve. Then, I presented the two main European legal instruments regulating migration detention upon which many national detention policies are based. These are the Returns Directive and the European Convention on Human Rights (hereinafter ECHR). Having highlighted the necessary legal framework, I proceeded in the presentation of the national detention policies that a number of EU states implement.

Based on national laws and international reports I explained why these practices appear problematic. In particular, I claimed that the way migration detention is currently implemented resembles more to criminal detention as presented in the beginning. In order to better illustrate this point, I provided a more detailed analysis of the case of Greece by referring to its detention policies and to a certain legal instrument, the advisory opinion 44/2014 on the extension of pre-expulsion detention.

After this policy analysis, I proceeded in the presentation of the criminalization of migration law. The definition of this practice was provided as well as some of its characteristics. In particular, I focused on the similarities and differences migration and criminal law have in order to illustrate how it is possible for them to merge. In order to understand how crimmigration affects detention, other ways through which this phenomenon is manifested were examined. Through the analysis of certain discursive methods such as political statements and of a number of laws, I presented how migrants are stigmatized as a deviant and criminal group.

In order to understand why crimmigration is taking place I attempted a brief analysis of the migration issue in Europe since the 1950's. I used the theory of securitization of migration in order to illustrate how migration has been constructed as a matter of security and border control¹¹. I brought a number of legal instruments and governmental arguments as examples in order to show how a number of states actors are presenting migrants as an imminent threat that needs to be eliminated even with means that exceed the limits of the law¹². Based on this analysis I claimed that criminal law is used by the states in order to enhance border controls and replace other failed border control policies¹³. In particular, I examined how the alleged criminality of the migrants is used as a justification for all the harsh measures states have adopted against them. When it comes to migration detention, I argued that criminal law has changed its nature by inserting certain elements of criminal detention into it. I combined the purposes of criminal detention with the problematic detention policies implemented, as presented above, in order to conclude that the character of migration detention has changed.

In order to examine the impact of criminalized detention in the human rights of the migrant detainees, I distinguished between the protection that detainees enjoy under criminal and migration law. I found that migrant detainees are afforded less protection than the criminal ones. I argued that crimmigration places migrants in a more vulnerable position because they are treated like criminals but they are not protected like them. In addition, I pointed out the crimmigration inserts an element of uncertainty as to the nature of migration detention and the rules regulating it¹⁴. I then combined these issues and argued that migrant detainees are systematically discriminated compare to the criminal detainees.

Greece was once more brought as an example of how migrant detainees are discriminated. However, in this case I argued that crimmigration has led to

¹¹ R. Taureck, 'Securitization theory and securitization studies', *Journal of International Relations and Development*, vol. 9, 2006, p. 54.

¹² Taureck, , 'Securitization theory and securitization studies', p. 54.

¹³ L. Weber and B. Bowling, 'Valiant beggars and global vagabonds: Select, eject, immobilize', *Theoretical Criminology*, vol.12, no.3, 2008, p.362.

¹⁴ M. Griffiths, 'Leaving with uncertainty: Indefinite Immigration Detention', *Journal of Legal Anthropology*, vol.1, no.3, 2013, p.266.

an institutional discrimination against the migrant detainees. I used the concept of institutional discrimination as defined by the Multiprofessional Faculty Development, which states that,

*“institutional discrimination is concerned with discrimination that has been incorporated into the structures, processes and procedures of organizations, either because of prejudice or because of failure to take into account the particular needs of different social identities.”*¹⁵

Based on that definition I examined certain Greek institutions and practices like political statements, laws concerning migration detention in Greece and the police authorities. I argued that crimmigration is embedded in all these institutions thus leading to the institutional discrimination of the migrant detainees. Finally, based on a report from the Special Rapporteur on the rights of non-citizens¹⁶, I highlighted that the legal status of the migrant is not a legitimate ground upon which he or she can be deprived of certain basic rights. Among these rights is the right to effective protection against his deprivation of liberty. Finally, based on certain international reports I presented that certain alternatives to detention ought to be implemented and the protection of the migrant detainees should be enhanced.

1.4 Scope and delimitations

Detention in the context of migration law serves certain purposes. More specifically, it is used for pre-admission purposes, where the authorities are detaining migrants while examining their cases and also in order to facilitate the expulsion of those migrants against whom a removal order is being issued¹⁷. This paper focuses on this later function of migration detention as a type of detention that has attracted much criticism. The long detention periods in the pre-expulsion detention centers, even when expulsion is not feasible, as well as the difficulties host states face in removing the migrants

¹⁵ Multiprofessional Faculty Development, <http://www.faculty.londondeanery.ac.uk/e-learning/diversity-equal-opportunities-and-human-rights/institutional-discrimination> (last visited on 25-May-2015)

¹⁶ UN Special Rapporteur, Report of the Special Rapporteur on the Human Rights on the Prevention of Discrimination and the rights of non-citizens, E/CN.4/Sub.2/2003/23, 26 May 2003.

¹⁷ Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, p.1.

from their territories are some of the reasons why I chose to examine this type of detention. When it comes to the European legal framework regulating this practice I chose the Returns Directive and the ECHR since these are the main legal instruments upon which states base their national pre-expulsion detention policies. In the case of international reports, I focused on those dealing with the issue of detention in general and migration detention in particular. I particularly focused on reports from the Special Rapporteur on the Human Rights of the Immigrants and the Working Group on Arbitrary Detention. As far as it concerns the policies examined, this thesis focuses more on those implemented from 2008 and onwards. While migration detention appears before this year it is in the recent years that Europe and the European states are focusing so much on their detention policies and at establishing common rules regulating this practice. While I tried to provide a general overview of those policies, I focused more on those implemented by Greece, Italy, the UK and the Netherlands. The limited space available, made it impossible for me to look at the detention policies of all European states. The reason why I chose those countries is because Italy and Greece are two of the main entry points of migration flows in Europe hence they are dealing with large numbers of migrant detainees. UK and the Netherlands are two traditional destination countries implementing detention. The difference between these two type of countries, entry points and destination countries, allows for a more holistic approach on the phenomenon of crimmigration and on the implementation of the measure of migration detention. Moreover, in these countries, especially in Greece, the UK and the Netherlands, there is a rise of far right wing parties and an increased anti-migration rhetoric. Greece has been examined closer because it is a country I am more familiar with and has accepted much criticism about its detention policies, which in many cases violate both the national and the European laws.

1.5 Outline

As already mentioned, this paper examines the detention policies of certain EU states, how criminal law has affected the practice of migration detention and the human rights implications of this phenomenon. In particular, **chapter 2** begins with a short historical overview of the migration detention centers. It then provides the definition of this type of detention and distinguishes it from the criminal one. Furthermore, it delineates the European legal framework regulating this practice. **Chapter 3**, proceeds with the examination of certain national migration detention policies, highlighting their problematic implementation and their resemblance to criminal detention. In addition, it focuses on the case of Greece and on one of the legal instrument regulating detention in this country. In **chapter 4**, the phenomenon of crimmigration is analyzed. The definition and the various manifestations of this practice are presented as well as a short historical overview of the migration issue in Europe. The main focus of this chapter is how criminal law is manifested through migration detention. In **chapter 5**, the human rights implications of the criminalized detention are described as well as the institutional discrimination against the migrant detainees occurring in Greece. Finally, some recommendations are presented, pointing out the need to protect migrant detainees, eliminate crimmigration and limit the use of migration detention.

1.6 Definitions

In the present paper, the terms migrant and third country national are used interchangeably and include individuals coming from non-European countries, who have entered or resided irregularly in a European country¹⁸. Apart from those who have irregularly entered a host country or have become irregular while residing in it, for example people whose residence permit or visa has expired, these terms also include asylum seekers whose asylum application has been rejected. Furthermore, apart from section 2.1 where the term detention has a general meaning i.e it is a practice

¹⁸ International Organization for Migration, 'Glossary on Migration', 2004, p. 34.

facilitating any migration purposes¹⁹, this term refers to pre-expulsion detention. For the purposes of this thesis, expulsion refers to “*an act by an authority of the State with the intention and with the effect of securing the removal of a person or persons (aliens or stateless persons) against their will from the territory of that State.*”²⁰ In some cases, the term pre-expulsion detention is explicitly used as an emphasis or to illustrate a certain point. In addition, this term is used interchangeably with the term pre-removal detention. As a result, the term migrant detainee refers to migrants confined in pre-expulsion or pre-removal detention centers.

¹⁹ G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Immigration and Asylum Law and Policy in Europe, Leiden, vol.19, 2010, p.4.

²⁰ International Organization for Migration, ‘Glossary on Migration’, 2004, p.22.

2. HISTORY AND LEGAL FRAMEWORK OF MIGRATION DETENTION

This chapter begins with a short historical overview of the practice of migration detention. It also introduces the definition of this practice and presents the main legal instruments regulating it. In section 2.1, a short reference to the history of detention centers is made. Section 2.2 introduces the definition of migration detention and presents the EU Returns Directive, the ECHR and the provision pertaining to the detention of migrants and the relevant case law of ECtHR in order to obtain a general idea of the European legal framework regulating this practice.

2.1 Short history of detention centers

Migration is a worldwide and complex phenomenon, dating back to antiquity. Through the centuries and based on a wide variety of motives and circumstances, people have moved around the globe. The systematic use of detention of migrants though, is considered a more contemporary practice. Although, traces of the history of this kind of detention can be found back in the history of imprisonment²¹, the first detention camps that resemble to the contemporary so called detention centers, are those set up after the end of World War II.

In the aftermath of this devastating war, a huge number of people, perhaps as many as 40 million, fled their homes in order to find shelter in foreign countries²². Some of them were lawfully admitted but for most of them, the basis for their residence in these countries was uncertain²³. These people with the uncertain status presented an international problem that the victorious powers had to settle. In order to re-locate these people detention camps were set up, the so-called ‘Displaced Person Camps’ (hereinafter DPS). In those camps, people were held until a decision was made, that would either sent them back to their homelands or to another country that

²¹ N. De Genova and N. Peutz, *The Deportation Regime: Sovereignty, Space and the Freedom of Movement*, Duke University Press, 2010, p. 116.

²² D. Wilsher, *Immigration Detention: Law, History and Politics*, Cambridge University Press, 2012, p.125.

²³ Wilsher, p.125.

would accept them²⁴. The proceedings leading to these decisions were slow and depended a great deal on the negotiations between the states. As a result of this delay, a lot of people spent years in detention camps, not being able to choose where they wanted to go²⁵. Furthermore, the living conditions in the camps were deplorable²⁶. Malnutrition and poor hygiene are some examples. Among these daily challenges that people faced in these camps is also the uncertainty concerning their residence²⁷. Since they could not be easily sent back to their countries but could not also choose where to go, they did not know when and where they were going to be sent. They were living in a legal limbo²⁸. This relocation issue of the refugees was a huge task and took many years to be fulfilled. It is noticeable that during 1945, ten million refugees were repatriated (sometimes by force) to their homelands at East²⁹. It is also important to mention that around one million refugees could not be repatriated as a result of fear of persecution³⁰.

With the beginning of the Cold War significant political pressure was placed on the Western states and forced them to accept a number of refugees instead of returning them to the Communist countries³¹. After many years of operation, the last camp for displaced persons closed down in 1957³². Despite the differences that the contemporary detention centers present compared to the DPC's, it is possible to say that they provide us with a first impression of the origins of detention of migrants.

Detaining migrants was not a popular practice in Europe, in the 1950's and 1960's³³. Although migration never stopped, states used other methods in order to control those entering their territories. Back then, states were more

²⁴ Wilsher, *Immigration Detention: Law, History and Politics*, p. 125.

²⁵ Wilsher, p. 125.

²⁶ Wilsher, p. 125.

²⁷ Wilsher, p. 125.

²⁸ Wilsher, p.125.

²⁹ The University of Nottingham, Briefing Paper 1, <http://www.nottingham.ac.uk/postwar-refugees/documents/briefing-paper-1-who-were-the-dps.pdf> (last visited on 25-May-2015)

³⁰ The University of Nottingham, Briefing Paper 1, <http://www.nottingham.ac.uk/postwar-refugees/documents/briefing-paper-1-who-were-the-dps.pdf> (last visited on 25-May-2015)

³¹ Wilsher, p.125.

³² ORT and the Displaced Person Camps, <http://dpcamps.ort.org/dp-stories/holocaust-survivors-in-post-war-europe/> (last visited on 25-May-2015)

³³ J. Huysmans, 'The European Union and the Securitization of Migration', *Journal of Common Market Studies*, vol.38, no.5, 2000, pp. 753-754.

willing to accept migrants who came to their territories and sometimes regardless of their legal status in the country³⁴. A number of reasons explain this practice but the most common was the need for labor force in various sectors like agriculture etc. Even when the first detention centers were built, their capacity was limited. One example is the Harmondsworth Immigration Detention Unit with 40 beds, adjacent to London's Heathrow airport, built in 1970³⁵.

It is not until the 1990's and the beginning of the twenty first century that detention of migrants became a widespread practice and an integral part of the EU national migration policies³⁶. The mass and systematic use of this kind of detention reflects some of the changes and developments that took place in the EU at that time.

2.2 Definition and legal framework

2.2.1 Definition of migration detention

Detention as such is a concept most known from criminal law and has always been used by the states in order to control individuals or groups of individuals. The incarceration of individuals convicted of a crime or pre-trial detention, is an integral part of the criminal law system. Post-conviction detention is a sanction serving specific purposes and is not an auxiliary measure but rather, depending on the policies, an end in itself. These purposes also define the various features of detention like the length of it and the facilities in which it takes place. The European Court of Human Rights (hereinafter ECtHR) in order to ascertain whether a sanction falls under criminal law or is a disciplinary measure has stated that, "*a sanction imposed as a punishment is a strong indication of the criminal character of the offence.*"³⁷ A number of legal scholars accept that the traditional purposes of criminal punishment include incapacitation, retribution,

³⁴ J. Huysmans, 'The European Union and the Securitization of Migration', p. 754.

³⁵ M. Bosworth and S. Turnbull, 'Immigration detention, punishment and criminalization', in Pickering S. and Ham J., *The Routledge Handbook on Crime and International Migration*, Routledge International Handbooks, 2014, p.8. Available from: Lubsearch (last visited on 25-May-2015).

³⁶ Bosworth and Turnbull, p.17.

³⁷ *Weber v Switzerland*, no. 11034/84, para 33, ECHR 1990.

deterrence.³⁸ Incapacitation aims in isolating the one who committed the crime thus protecting the society, retribution is focused on punishing or reprimanding him or her for his or her action and deterrence at discouraging the commission of similar acts in the future³⁹. Therefore, the mass incarceration of individuals in prisons, for lengthy periods, are features pertaining to criminal detention. It is important to underline that since the deprivation of liberty is one of the most severe sanctions that can be imposed on an individual, criminal legislations provide for a number of procedures and rights in order to secure the fair enforcement of this measure and provide the detainee with the opportunity to challenge his or her detention.

However, the detention of migrants in its systematic form appears, at least to some degree, to differentiate from criminal detention and has become a widespread practice the last twenty-five years. A number of human rights bodies and legal scholars, provide definitions of migration detention. The Working Group on Arbitrary Detention defines it as the practice of

*“arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants.”*⁴⁰

According to Cornelisse, migration detention is *“the deprivation of liberty under administrative law for reasons that are directly linked to the administration of immigration policies”*⁴¹. As these definitions illustrate, detention of migrants is an administrative practice serving migration related purposes, thus it is distinct from criminal detention. It is clear that migration detention is not punitive and does not aim to deter potential migrants from crossing the borders of a state⁴². Rather it is a bureaucratic practice

³⁸ I. Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention’, Global Detention Project, no.6, 2013, p. 10

³⁹ Majcher, p. 10.

⁴⁰ UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: Thematic Considerations: Administrative Detention and Habeas Corpus, A/HRC/13/30, 15 Jan 2010, para. 77.

⁴¹ Cornelisse, ‘Immigration Detention and Human Rights: Rethinking Territorial Sovereignty’, p. 4

⁴² Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, p. 1.

regulated by administrative law and can take place without the initiation of any criminal proceedings or a conviction for a crime⁴³. As a result, the proceedings leading to this type of detention are usually faster and simpler compared to the ones in criminal law, thus they cost less. Furthermore, migration detention is never an end in itself but always a means in order to enable or facilitate other migration procedures⁴⁴. The most common types of migration detention are i) the pre-admission detention where migrants are detained upon their arrival and before they get admitted to the state (like asylum seekers) and ii) pre-expulsion detention in order to secure the removal of migrants who are or have become unauthorized⁴⁵. In other words, it is a measure that facilitates border control⁴⁶.

2.2.2 The Returns Directive on the expulsion and detention of migrants

The definitions mentioned above provide a first glimpse of the nature of migration detention. In order to better understand the purpose of this practice and its particular features, it is important to refer to the European legal instruments regulating it. As mentioned earlier, the use of migration detention was not always widespread and systematic but became so in the beginning of the twentieth century. The entry into force of the Amsterdam treaty took migration detention from the exclusive regulation of national laws and placed it in the center of European migration policies⁴⁷. The main EU legal instrument regulating pre-expulsion detention, among other migration issues, is the Directive 2008/115 or as it is widely known the Returns Directive. This legal instrument establishes common standards and procedures for returning illegally staying third-country nationals⁴⁸. Member states of the EU have to transpose it in their national legislations. Although the Return Directive has been heavily criticized, especially for the

⁴³ Leerkes and Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', p.1.

⁴⁴ Leerkes and Broeders, p. 2.

⁴⁵ Leerkes and Broeders, p.1.

⁴⁶ Leerkes and Broeders, p.1.

⁴⁷ I. Majcher, 'The European Union Returns Directive: Does it prevent arbitrary detention?', *Oxford Monitor of Forced Migration*, vol.3, no.2, p.23.

⁴⁸ European Union: Council of the European Union, 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, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC.

provisions regulating detention, it sets the background on which most EU states base their national migration detention policies.

The preamble of the Returns Directive sets a number of principles that should permeate all the procedures enshrined in it. That includes pre-expulsion detention of migrants as well. More specifically, recital 6 mentions that, *“decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.”* Under this Directive, the fact that someone has entered or resided in a country without the necessary documents cannot automatically lead to his or her detention. Recital 21 complements this principle by dictating the implementation of the directive without any discrimination based on

“sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation”.

These two principles aim at preventing the stigmatization of the migrants and their automatic expulsion or detention based on the aforementioned grounds. In recital 16, the principle of proportionality is introduced as a principle that should permeate the enforcement of detention on migrants. According to this principle, detention must always be proportionate to the aim pursued, which in this case is to facilitate the expulsion of the migrant, and only when less coercive measures fail to apply.

The articles regulating detention should be interpreted in the light of the aforementioned principles. Article 15 paragraph 1 of the directive stipulates that, *“Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process”.* Here it becomes clear that detention is a practice facilitating the removal of a third-country national from the territory of an EU member state. This is why paragraph 4 of the same article stipulates that once there is no prospect of removal there is no reason justifying the detention and the migrant must be released. As a result, the grounds under which a migrant can be detained must be clearly defined and

exhaustively enumerated in legislation⁴⁹. Under article 15 paragraph 1, there are two grounds allowing for the detention of a third country national. First, when there is a risk of absconding meaning in order to secure the migrants physical presence in the day of his or her expulsion and second when he or she hampers the preparation processes of the removal.

Another feature of migration detention that can be extracted from article 15 is that it is a measure of last resort. Detention of migrants may apply “*unless other sufficient but less coercive measures can be applied effectively in a specific case*”. The directive requires from the state authorities to refrain from using migration detention when other less coercive measures can be applied. The Special Rapporteur on the Human Rights of Migrants reiterates this by stating that:

*“Governments have an obligation to establish a presumption in favor of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure.”*⁵⁰

The Working Group on Arbitrary Detention further stresses that this kind of detention should be the exception rather than the rule.⁵¹

Paragraph 5 of article 15 of the directive stipulates, that the detention of an migrant may not exceed the period of six months. However, under certain grounds this period can be extended for another 12 months. These grounds apply when there is a lack of co-operation on behalf of the third-country national concerned and when there are delays in obtaining the necessary documentation from third countries. In total, a migrant can be detained for a period of 18 months.

The directive also affords certain judicial guarantees to the migrant detainees in order to challenge their confinement. Paragraph 2 of article 15

⁴⁹ UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: Thematic Considerations: Detention of Immigrants in Irregular Situations, A/HRC/10/21, 16 February 2009, para. 82.

⁵⁰ UN Special Rapporteur on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Detention of Migrants in an Irregular Situation, A/HRC/20/24, 2 April 2012, para. 68.

⁵¹ UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: International Trends on Deprivation of Liberty of Concern to the Working Group: Detention of Non-citizens, A/HRC/7/4, 10 January 2008, para. 51.

provides to the detainee the possibility to challenge his or her detention when it is ordered by an administrative authority while paragraph 4 of the same article clearly mentions that in any case the detention of an migrant shall be reviewed “*at reasonable intervals either on application by the third-country national concerned or ex officio.*” Furthermore, article 16 paragraph two mentions that the detainees must be allowed to communicate, upon request, with legal representatives, family members etc.

The Returns Directive, although as shown in the next section, can be seen as a controversial legal instrument from which many human rights questions arise, demonstrates how the issue of expulsion and detention of migrants has become a matter of collective interest and concern. It is the first attempt of the EU member states to establish common standards and procedures for the detention of ‘illegal’ third-country nationals.

2.2.3 The European Convention on Human Rights and detention of migrants

The second instrument from which information can be drawn concerning the detention of migrants is the ECHR and the case law of ECtHR. Under article 5 of the ECHR, liberty and security of an individual are protected. The purpose of this article is to protect the individual from an arbitrary detention⁵². According to this article, “*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law*”. The article recognizes that states have a right to detain third-country nationals but it limits this right only to certain cases which are explicitly and exhaustively enumerated. When it comes to detention of migrants sub-paragraph (f) is relevant. More specifically this sub-paragraph permits “*the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition*”. Because the sub-paragraphs of this article constitute exceptions in the general prohibition of

⁵² F. Jacobs, R. White and C. Ovey, *The European Convention on Human Rights*, 6th edn, Oxford University Press, 2014, p. 213.

the deprivation of liberty they must be construed narrowly⁵³. Any deprivation of liberty must be compatible with the purpose of this article. This is why even if detention is in accordance with a procedure prescribed by a national law, it could still be considered unlawful under article 5, when it does not serve the purpose of this provision. The Grand Chamber of the ECtHR clarified in the *Saadi* case that the purpose of detention under article sub-paragraph f of article 5 is not punitive. It particularly stated that:

*“the measure is applicable not to those who have committed criminal offences but to aliens who often fearing for their lives, have fled from their own country...;and the length of the detention should not exceed that reasonably required for the purpose pursued.”*⁵⁴

When it comes to pre-expulsion detention, it is allowed as long as the detainee is the object of action “with a view to deportation or extradition”⁵⁵. It is noteworthy that, the decision ordering the expulsion of the detained migrant is irrelevant to the lawfulness of the detention. In the *Chahal* case, the Court stated that, “*It is therefore immaterial for the purposes of Article 5 para. 1(f), whether the underlying decision to expel can be justified under national or Convention law.*”⁵⁶ Furthermore, there is no need for the state to prove that detention was necessary in order to prevent the person from committing a criminal action or from absconding. According to Jacobs, “*unless there is an official arbitrariness the only way for detention to be unlawful is if the applicant can prove that at some point throughout his or her detention he or she was not the subject of deportation action*”⁵⁷. Therefore, the crucial factor in this case is that deportation proceedings are taking place ‘with due diligence’ and in ‘good faith’⁵⁸. This means that when deportation proceedings are not in progress or are conducted in ‘bad faith’, detention ceases to be justified and the detainee must be released.

⁵³ Jacobs, White and Ovey, *The European Convention on Human Rights*, p. 213.

⁵⁴ *Saadi v. United Kingdom*, no.13229/03, para. 74, ECHR, 2008.

⁵⁵ Jacobs, White and Ovey, p. 238.

⁵⁶ *Chahal v United Kingdom*, no.22414/93, para.112, ECHR 1996.

⁵⁷ Jacobs, White and Ovey, p. 239.

⁵⁸ Jacobs, White and Ovey, p. 218

Determining when expulsion proceedings are in progress can be a difficult task for the Court. A number of reasons can stall the expulsion of an migrant. It can be because there are no travel documents and the detainee is not willing to co-operate with the authorities, because the country of origin does not accept the detainee etc. The Court has stated that a third-country national can be detained for a reasonable period in order to facilitate the preparation proceedings⁵⁹. However, in the case of *Louled Massoud* where the Algerian applicant refused to co-operate with the authorities the Court stated that the authorities did not negotiate the issue of expulsion vigorously thus they did not act in due diligence⁶⁰. It becomes apparent that the fact that the detainee is not willing to co-operate cannot lead to his or her excessive detention and that the factor of due diligence must be present in all cases in order for the detention to be lawful.

Paragraph 4 of article 5 enshrines the right for migrant detainees to challenge the lawfulness of their detention before a court. The term ‘court’ in this paragraph has a broad meaning. It does not need to be a ‘*court of law of the classic kind integrated with the standard judicial machinery of the country*’⁶¹. However, it must be of a judicial character thus providing for certain judicial guarantees and have the power to order the release of the detainee⁶². It is important to mention that, this paragraph offers protection for all of the categories of detainees but this protection, as the Court admitted in the *Chahal* case⁶³, is less compared to the one offered to criminal detainees under paragraph 3 of the same article. One example is that while paragraph 3 requires an automatic review of the detention paragraph 4 does not. Furthermore, the judicial guarantees offered to the migrant detainees are less compared to the ones enshrined in article 6(1) concerning criminal or civil proceedings⁶⁴.

⁵⁹ *Agnisson v Denmark*, no.39964, ECHR, 2001, The court held that the application was inadmissible.

⁶⁰ *Louled Massoud v Malta*, no.24340/08, para 54, ECHR 2010.

⁶¹ *Weeks v. United Kingdom*, no.9787/82, para.61, ECHR 1987.

⁶² *Weeks v. United Kingdom*, no.9787/82, para. 61, ECHR 1987.

⁶³ *Chahal v United Kingdom*, no.22414/93, para. 112, ECHR 1996.

⁶⁴ For more information see chapter 5 page 56.

The application and limits of paragraph 4 appear even more problematic, as shown later, in the case of migrant detainees since the scope of the review required for them is quite uncertain⁶⁵. As far as it concerns their detention, it seems that the only thing a court is expected to do is to determine whether the deportation proceedings are diligently pursued so that detention could be considered lawful.

In this chapter, I tried to set the necessary background for the main issues that will be analyzed in this paper. Both the historical overview and the legal framework are valuable tools in understanding the current issues and problems emanating from the use of migration detention. The ECtHR and the various international organizations have recognized the difference between migration and criminal detention by highlighting the non-punitive nature of the former type of detention. The next chapter will criticize the aforementioned legal instruments and the migration detention policies implemented by many EU states and claim that the massive and systematic use of the detention of migrants is particularly problematic and against the purpose of this practice as prescribed by the law.

3. NATIONAL POLICIES OF EUROPEAN UNION MEMBER STATES AND THE PROBLEM OF THE SYSTEMATIC USE OF MIGRATION DETENTION

This chapter deals with the problem of the systematic use of detention as a way to regulate and facilitate the expulsion of migrants. What this chapter proposes is that migration detention, as currently implemented by a number of EU states, does not comply with the specific and exceptional character described above. On the contrary, it appears that this practice shares some common elements with criminal detention. Section 3.1 provides a general overview of the detention policies that some of the EU states follow. It focuses on some elements these policies have, in order to prove that the excessive and systematic use of detention is a common practice in many EU states incorporated in the detention policies of these states. Section 3.2 takes

⁶⁵ Jacobs, White and Ovey, *The European Convention on Human Rights*, p. 242.

a closer look at the case of Greece, as one of the main entry points of immigrants in the EU, in order to better illustrate the issue at hand.

3.1 Overview of national detention policies of EU states

As stated previously, detention of migrants is an administrative practice with an exceptional character, serving certain purposes. It is different from criminal detention, which serves, punitive purposes. The practice of administrative detention of migrants varies among EU states. However, a number of common elements allow for the delineation of the general pattern that EU states follow when it comes to the implementation of this practice.

To begin with, as it was mentioned in the previous section, from the late 1990's and the beginning of the 21st century there was an increase in the number of migrants detained in order to be returned to their countries of origin. It is at that point that most of the detention centers designed for migration purposes were built. Because of their geographical position and the Schengen Convention, which provides for the abolition of the border controls among the EU member states and the strengthening of the control of the external borders, the countries of Southern Europe i.e Spain, Italy, Malta and Greece, are the ones dealing with the biggest numbers of migration flows. Countries that once were known as emigration countries, like Greece, became the destination of a significantly large number of migrants.

The rise of the number of migrant detainees though, is a general phenomenon. The UK, which is not a signatory in the Returns Directive, is a typical destination country, which saw its migration detention numbers increasing. In 1993, there were 250 places for migrant detainees while by 2009 this number has climbed up to 2,665 places⁶⁶. Today there are ten pre-expulsion centers and the total number of migrant detainees is 3,400⁶⁷. In the Netherlands, there is also an increased number of migration detention

⁶⁶ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom', 2014, p. 15.

⁶⁷ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, p. 10.

numbers going from 250 people in 1993 to 2,260 in 2003⁶⁸. In 2012 in his visit in Italy, the Special Rapporteur on the Human Rights of the Migrants estimated that the number of irregular immigrants residing in the country was between 440,000 and 540,000 while in 2011 the estimated number of immigrants detained in pre-expulsion centers was 7,735⁶⁹. All these increased numbers of detainees pose questions, concerning the grounds under which states detain immigrants and whether this is indeed an exceptional and purely administrative practice.

As shown in the previous section, the Returns Directive provides for two grounds under which an immigrant can be held in pre-expulsion detention. A number of scholars argue that the formulation of article 15(1) leads to the conclusion that this list of grounds is non-exhaustive⁷⁰. Furthermore, the Returns Directive has been criticized for the use of vague terms, thus leaving a wide margin of interpretation to the states⁷¹. Taking these two factors into consideration, it is not surprising that a number of national EU legislations also provide for vaguely formulated grounds for detention or even add other grounds to those established by the directive⁷².

Since the Returns Directive has been incorporated in national laws the most common grounds for the detention of migrants are, the risk of absconding and the avoidance or hamper of the preparation processes for the expulsion. Most states have adopted a broad definition as to who can be regarded as a person likely to abscond the preparation processes for his expulsion. Italy is such an example where the term 'risk of absconding' includes a number of circumstances. These are the absence of travel documents or documents proving accommodation, previously made false declarations with respect to

⁶⁸ J. Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research', CEPS Papers in Liberty and Security in Europe, no.61, 2013, p.13.

⁶⁹ UN Special Rapporteur on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Mission to Italy, A/HRC/23/46/Add. 3, 30 April 2013, para. 8.

⁷⁰ A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', European Journal of Migration and Law, vol.11, 2009, p.13.

⁷¹ Majcher, 'The European Union Returns Directive: Does it prevent arbitrary detention?', p. 24.

⁷² Under the Greek law 4075/2012 article 59, an immigrant can be detained when he is considered a threat to public health.

his or her identify; the breach of the obligation to report during the voluntary departure period or that the migrant has not left during the period of voluntary departure or re-entered despite the ban on re-entry⁷³. In many cases, states prefer to use the even more abstract term of public order in order to justify the pre-expulsion detention of migrants. In some national legislations, like the Dutch law, the risk of absconding falls under this category.

More specifically, the Dutch Aliens Decree defines as reasons of public interest to detain a migrant, the risk that the alien will evade surveillance or that the alien boycotts the preparation of departure or expulsion⁷⁴. It is important to mention though, that the list of circumstances under article 5.1.b of the Dutch Aliens Decree that may lead to the assumption that the migrant will evade surveillance, is non-exhaustive⁷⁵. This provides the state with an almost endless list of reasons under which an immigrant can be detained for the sake of public order. Moreover, when it comes to the migrants avoiding or hampering the preparation processes of their expulsion some national legal instruments do not even define what the terms avoids or hampers mean⁷⁶.

If the grounds for the detention of migrants can be interpreted in such a broad manner, it only seems reasonable to question the exceptional nature of detention. A number of United Nations bodies (hereinafter UN) and Non-Governmental Organizations (hereinafter NGO's) have criticized the systematic use of detention and the automatic way in which it is applied. It seems that the wording of the Returns Directive, although the preamble provides for the case-by-case decision on migration detention cases and prohibits any discriminatory treatment, fails to create strong obligations for states and to restrain the use of migration detention⁷⁷. Although in theory,

⁷³ Global Detention Project, 'Italy Detention profile', 2012, p. 3.

⁷⁴ A. Brand, 'Immigration Detention and the Rule of Law: National Report: Netherlands', Bingham Center for the Rule of Law, 2013, p.32.

⁷⁵ Brand, p.32.

⁷⁶ Majcher, 'The European Union Returns Directive: Does it prevent arbitrary detention?', p. 25.

⁷⁷ Majcher, 'The European Union Returns Directive: Does it prevent arbitrary detention?', p. 25.

states must review every case separately and impose the measure of detention in exceptional cases and under certain grounds, the vague terms allow them to confine large numbers of migrants usually based on criteria such as race, skin color etc. It is noteworthy, that Malta is a European applying the practice of mandatory detention to all persons who have been issued an expulsion order. According to article 14(2) of the Maltese law “[u]pon such order being made, such person against whom such [expulsion]order is made, shall be detained in custody until he is removed from Malta.”⁷⁸ This case is unique among the European states but illustrates the shift to the systematic and almost automatic use of immigration detention.

The length of the detention of migrants is a factor illustrating the excessive use of this practice. Article 15(6) of the Returns Directive provides for a six months period of detention, which can be extended to 18 months under certain conditions. All EU states have to comply with this limit. This provision had both positive and negative results. Positive results concern those countries, which before the Directive, did not have an upper limit to the pre-expulsion detention of migrants like Denmark, Lithuania and Sweden or for countries, which allowed longer duration like Romania and Latvia⁷⁹. Negative results had to do with these countries, which had to increase their upper limit in order to comply with the Directive. For example, Italy and Greece before transposing the Directive in their national legislations had an upper limit of three and six months respectively⁸⁰.

Furthermore, the vague formulation of the conditions under which detention can be prolonged for 18 months has led to its widespread use. Subparagraph (b) of article 15(6) especially allows for the continuation of the detention for reasons outside the sphere of influence of the detainee by permitting the extension of detention due to *‘delays in obtaining the necessary*

⁷⁸ J. Majcher and M. Flynn, ‘Immigration Detention in Malta’, Global Detention Project, 2014, p.4.

⁷⁹ Majcher, ‘The European Union Returns Directive: Does it prevent arbitrary detention?’, p. 27.

⁸⁰ I. Majcher, p.27

*documentation from third countries*⁸¹. Taking into consideration that states often face problems in co-operating with the immigrant's country of origin a large number of detainees falls under this category. As a result, there are many cases where the 18 months period is the rule and not the exception⁸². Such a long time of detention is a harsh measure, incompatible with the non-punitive purposes of this practice. It is noteworthy that the law incorporating the 18 months limit in Italy was deemed unconstitutional⁸³. Nevertheless, it still remains a law, implemented by the Italian authorities⁸⁴.

The UK is a typical example of long detention periods of migrants. Despite the fact that UK is not a signatory in the Returns Directive, it is bound by article 5 paragraph 1(f) of the ECHR thus its detention policies must comply with it. One of the most striking features of the British detention policies is that it has no upper limit. In some cases, this practice has resulted into controversial outcomes. Based on a national report on the use of detention in UK, there are two cases, in which a national court found that 41 months and three years and nine months of detention, are reasonable⁸⁵. The report does not clarify the type of detention that was at stake, but regardless of the type, such periods are extremely long and certainly against the purpose of migration detention as enshrined in article 5 paragraph 1(f) of the ECHR.

Greece, as shown in the next section⁸⁶, is also a country applying the measure of detention for a longer period than the 18 months prescribed by the Returns Directive. Long detention periods like the aforementioned, certainly do not promote the concept of migration detention as a last resort and ancillary practice. Prolonged detention is a common practice in criminal law where different purposes are served and a number of procedures have taken place before the imposition of such a severe sanction. But even in criminal law sentences are always defined and have an upper limit.

⁸¹ Majcher, 'The European Union Returns Directive: Does it prevent arbitrary detention?', p. 27.

⁸² Majcher, p. 28.

⁸³ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para. 17.

⁸⁴ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para. 17.

⁸⁵ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom', 2014, p. 18.

⁸⁶ See section 3.2, page 33.

Administrative detention must always be limited serving the purposes prescribed by the law. Unfortunately, as it seems, the Returns Directive is not able to restrict the excessive use of migration detention and states appear willing to use this method systematically, by interpreting the existing provisions as broadly as they can or by not complying with them.

The facilities in which migrants are held, also indicate how states perceive the practice of migration detention. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter CPT) in its report concerning the standards of prisons and detention centers highlights that, “*a prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence*” thus “*...care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment*”⁸⁷. Unfortunately, the majority of the detention centers in some European states do not seem to comply with these standards. The Special Rapporteur on the Human Rights of Migrants in many cases has highlighted the military design of removal centers in many EU countries such as Italy and Greece⁸⁸. The surveillance camera systems, armored doors and anti-escape gates are only some of the examples illustrating the prison-like design of the detention centers⁸⁹. In the UK, many of the detention centers were previously prisons or have been built according to category B prison standards, which means that are classified as a closed prison for “*those who do not require maximum security, but for whom escape still needs to be very difficult.*”⁹⁰ The comment of the Chief Inspector of Prison is of particular interest: “*their physical security (of the detainees) and the culture in the*

⁸⁷ CPT, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/E, Rev. 2015, paras 28-29.

⁸⁸ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para. 67; UN Special Rapporteur on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Mission to Greece, A/HRC/23/46/Add.4, 17 April 2013, para.48.

⁸⁹ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, paras 65-67.

⁹⁰ In Brief, <http://www.inbrief.co.uk/prison-law/male-prisoner-categories.htm> (last visited on 25-May-2015)

establishment is still very much that of a prison rather than immigration removal center”⁹¹.

The situation is similar in Greece. The existence of a barbed wire fence, the confinement of the migrants in their cells for the biggest part of the day as well as their inability to go outside at all because of the unwillingness of the police officers, do not comply with the standards set by the CPT⁹². Finally, the pre-removal detention centers in the Netherlands are regulated by a particular version of the Dutch prison rules⁹³, another fact illustrating the close connection between a detention center and a prison.

The data provided so far, illustrate the massive and systematic use of migration detention in some of the EU states. Among the other questions that the great reliance on this practice raises, is whether detention is indeed an effective way of facilitating the expulsion procedures. It would be only reasonable to assume that the increased numbers of migration detention are an indicator of their effectiveness. However, a look at the expulsion numbers of some of the EU states contradicts this assumption. In Spain for instance, according to Global Detention Project, in 2009 from the 16,590 people detained on expulsion orders only 8,935 were expelled⁹⁴. The same seems to apply in Greece, which is one of the countries with the highest expulsion order rates, (84,705 in 2012)⁹⁵. However, the number of the expulsions that were actually carried out is small compared to the number of the orders (16,650 in 2012)⁹⁶.

⁹¹ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, ‘The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’, 2014, p. 42.

⁹² UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para. 67; UN Special Rapporteur on the Human Rights of the Migrants, Mission to Greece, para. 48.

⁹³ Brand, ‘Immigration Detention and the Rule of Law: National Report: Netherlands’, p.32.

⁹⁴ Global Detention Project, Greece Detention Profile, <http://www.globaldetentionproject.org/countries/europe/spain/introduction.html> (last visited on 25-May-2015)

⁹⁵ Global Detention Project, Greece Detention Profile, <http://www.globaldetentionproject.org/countries/europe/greece/introduction.html> (last visited on 25-May-2015)

⁹⁶ Global Detention Project, Spain Country Profile, <http://www.globaldetentionproject.org/countries/europe/greece/introduction.html> (last visited on 25-May-2015)

In addition, information concerning to what extent migration detention actually facilitates expulsion is scarce. Where such data exist they also contest the efficacy of migration detention. One such example is Amygdaleza, the biggest detention center in Greece. A report on this particular detention center showed that the number of detainees returned (including both expulsion and voluntary return) in a two year period (2012-2014) is 27,9%⁹⁷. Despite these facts, states continue to rely a great deal on detention and spend huge amounts of money for the construction or maintenance of detention centers, a practice which puts into question the supplementary role that migration detention has to the expulsion of the migrants.

The aim of this chapter was to present an overview of some of the EU policies concerning the detention of migrants. Data were introduced, demonstrating how policies can deviate from what the law stipulates. Elements and practices resembling to criminal detention seem to penetrate the way migration detention is implemented in many EU states. Furthermore, the Returns Directive itself appears to fall short in limiting the use of migration detention. As a result, states interpret this instrument as widely as possible, which in many cases has led to controversial outcomes.

3.2 The case of Greece and the advisory opinion 44/2014 on the extension of pre-expulsion migration detention

This section takes a closer look at the case of Greece in order to better illustrate the misuse of the practice of migration detention and its resemblance to imprisonment. Greece is one of the main entry points of migrants to Europe. From the early 1990s though, it also became a destination country for a large number of them⁹⁸. Both at this time and in the recent years, Greece found itself with almost half a million undocumented

⁹⁷ D. Angeli and A. Triandafyllidou, 'Is the indiscriminate detention of irregular migrants a cost-effective policy tool? A case-study of the Amygdaleza Pre-Removal Center', Midas Policy Brief, 2014, p.8.

⁹⁸ A. Triandafyllidou, 'Greek Migration Policy in the 2010s:Europeanization Tensions at a Time of Crisis, Journal of European Integration, 2014, p.3.

migrants⁹⁹. Despite these numbers, the majority of migration policies implemented were re-active, which means that they always addressed situations after they happened with ad hoc laws and presidential decrees, instead of being pro-active through long-term plans to manage immigration¹⁰⁰. Since 2005, the irregular entrance, exit in Greece is a crime punishable with a minimum of a three-month imprisonment and a fine of no less than 1,500 euros¹⁰¹. However, the prosecutor can abstain from initiating criminal proceedings and order the administrative expulsion of a migrant, therefore his or her detention in the majority of cases is also administrative¹⁰².

The increased numbers of migrants in Greece in conjunction with the rise of the far-right wing party of Golden Dawn have created an atmosphere of fear and hostility against them. One indicative example is that only in the first quarter of 2011, the Pakistani Community has denounced 60 incidents of racist violence¹⁰³. In the light of these developments, the government appeared unwilling to implement policies that promote the human rights and the integration of the migrants. On the contrary, it launched a number of harsh measures that have been heavily criticized by the international and the European community. Among these policies are those concerning the detention of migrants. A number of reports from various UN bodies have condemned the systematic use of this kind of detention in Greece, the deplorable conditions in the detention centers, the impunity of police officers when it comes to abuses against the migrants and the lack of efficient safeguards afforded to the detainees in order to challenge their confinement¹⁰⁴.

⁹⁹ Triandafyllidou, 'Greek Migration Policy in the 2010s:Europeanization Tensions at a Time of Crisis', p.3

¹⁰⁰ Triandafyllidou, 'Greek Migration Policy in the 2010s:Europeanization Tensions at a Time of Crisis', p.3.

¹⁰¹ Greek Law 3386/2005, article 83(1).

¹⁰² Greek Law 3386/2005, article 83 (2).

¹⁰³ A. Triandafyllidou, 'Migration in Greece: Recent Developments in 2014', Hellenic Foundation for European and Foreign Policy, 2014, p.27.

¹⁰⁴ UN Special Rapporteur on the Human Rights of Migrants, Mission to Greece, para. 54; UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, para.93.

At this time, there are six pre-removal centers operating in Greece of which five were built after 2012 while the one remaining was built in 2007¹⁰⁵. The estimated number of detainees in 2013 was 6,000¹⁰⁶. The law regulating the pre-removal detention of migrants is law 3907/2011, which incorporates the Returns Directive into the Greek legislation. According to article 30(1), detention should be imposed only when other less coercive measures fail to apply effectively. However, both the Working Group on Arbitrary Detention and the Special Rapporteur on the Human Rights of Migrants have underlined, that this is not implemented in practice¹⁰⁷. Only the fact of the irregular presence in the country is usually enough reason for the detention of a migrant. The maximum period of detention in Greece is 18 months¹⁰⁸. According to article 30(4) of law 3907/2011 when the expulsion is not feasible the detainee must be released. The length of migration detention has become the center of a heated debate in this Greece and will be used as an example in order to illustrate the abuse of the practice of migration detention in this country.

In February 2014 the Greek Council of State (hereinafter the Council), one of the highest legal authorities in Greece, issued the advisory opinion 44/2014 concerning the length of pre-expulsion detention of migrants. The story behind this advisory opinion is that by the end of February 2014, 300 Syrian migrants were about to be released since the 18 months period of their detention was about to expire and their expulsion remained unfeasible. The Greek Police Headquarters asked the Council whether it was permissible to prolong the detention for those detainees who do not cooperate with the competent authorities in order to return to their countries of origin. The Council decided that the extension of migration detention is permissible when the expulsion is rendered unfeasible due to the

¹⁰⁵ J. Majcher and M. Flynn, Immigration Detention in Greece, Global Detention Project 2014, p.11.

¹⁰⁶ Parallahlografos, <https://parallahlografos.wordpress.com/2014/04/02/κέντρα-κράτησης-μεταναστών-τα-ελληνι/> (last visited on 25-May-2015).

¹⁰⁷ UN Working Group on Arbitrary Detention, Mission to Greece, para. 70; UN Special Rapporteur on the Human Rights of Migrants, Mission to Greece, para. 43.

¹⁰⁸ Greek Law 3907/2011, article 30(6).

unwillingness on behalf of the detainee to co-operate with the authorities in the preparation processes of the expulsion¹⁰⁹.

The reasoning of the Council, is particularly flawed and raises a number of issues. The first and more striking issue is the fact that the Council permitted the extension of migration although there is no law, Greek or European, allowing for such an extension. The Council itself acknowledged this fact but stated that the prolongation of detention will not be considered as detention but as a restrictive measure, forcing the migrant to remain in the detention center¹¹⁰. It is extremely worrying that such a highly esteemed and authoritative legal body decided against the existing legislation. The Council justified this statement by mentioning that

*“the release of those immigrants will lead to their indirect legalization and since they don’t have their means to sustain themselves it is certain that they will pose a threat to public order and security.”*¹¹¹

Furthermore, according to the Council, this measure is also at the detainees best interest since in the detention centers they are provided with all the necessary for their survival under decent conditions. In addition, the principle of proportionality is not violated according to the Council, because the detainees can always choose to leave Greece and return to their countries of origin¹¹². This advisory opinion is an extreme case of how a European state like Greece can go as far as to bend the rule of law in order to extend the use of migration detention. Indefinite migration detention, in its foundation is not proportionate with the aim pursued. On the contrary, it can be argued that it punishes the detainee and sends a strong message to other potential migrants not to attempt to come to the country without the necessary documents. However, as it was shown in the previous chapter, this is in no way compatible with detention as an administrative practice and a choice of last resort. The lines between detention and imprisonment,

¹⁰⁹ Greek Council of State, Advisory Opinion No 44/2014, published on 24 February 2014, p. 23.

¹¹⁰ Greek Council of State, Advisory Opinion No 44/2014, p. 21.

¹¹¹ Greek Council of State, Advisory Opinion No 44/2014, p. 22.

¹¹² Greek Council of State, Advisory Opinion No 44/2014, p. 22.

migrant and criminal are blurred thus making difficult to distinguish one from the other.

This chapter presented an overview of the European migration detention policies and the more concrete case of Greece. At the same time, it introduced the problem of how the practice of detention is being misused, or even worse abused, by the states. The mass incarceration of migrants, the prolonged periods of their detention and the prison-like facilities do not advocate for the administrative and exceptional character of this type of detention. On the contrary, elements of punishment, as described above, seem to have been crept into this administrative practice. At the same time, as mentioned earlier, the protection afforded to the detainees in order to challenge the legality of their confinement is limited and significantly less compared to the one provided to criminal detainees. It looks like the lines between detention and imprisonment, migrant and criminal are blurred thus making difficult to distinguish one from the other. The next chapter will address this issue by placing migration detention in the broader context of criminalization of migration law.

4. BETWEEN CRIMINAL AND MIGRATION LAW- CRIMMIGRATION

It is not until recently, that the intersection between criminal and migration law began to attract the attention of European legal scholars. However, the phenomenon of the criminalization of migration law is not new and has been the subject of extensive investigation in the U.S. The large number of migrants crossing the U.S borders, the systematic use of criminal law in migration law enforcement and the increased numbers of migrants detained has led many scholars in trying to delineate and explain the merge of these two concepts. The different levels of attention to this issue have to do with the different features of the European countries and the U.S and the various political and economic developments that took place in them. What this chapter wants to achieve is to present why migration detention in EU is used in the way presented in the previous chapter, by placing this practice into the general phenomenon of criminalization of migration law. Section 4.1

introduces the definition of crimmigration and some of the common and different elements of criminal and migration law. In section 4.2, the different ways through which crimmigration is manifested are examined, apart from detention, in order to obtain a deeper understanding of this phenomenon. Section 4.4 sets the necessary background against which the intersection between criminal and immigration law is taking place by going through some important developments of migration law in Europe since the 1950's. Finally, section 4.5 analyses how criminal law has affected migration detention by changing the purposes it serves.

4.1 The amalgam of criminal and migration law

Criminalization of migration law in general refers to the stigmatization of migrants as criminals¹¹³. Stephen Legomsky defines it as the phenomenon where migration law “*absorbs the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.*”¹¹⁴ Simply put, criminalizing migration law means that certain features of criminal law enforcement, like criminal detention, are used in order to implement migration law provisions or facilitate migration control, while characteristics pertaining to the procedural aspect of criminal law are left out of this process. It is important to clarify, that despite this intersection migrants are not considered criminals in the traditional understanding of the term. Their legal status is still regulated by migration law, which is administrative in nature. In addition, a criminal identity is conferred upon the migrants thus making them look like a group that is dangerous for the safety of society. The criminalization of migration law must be understood as a phenomenon where migrants are presented *as* criminals and treated *like* criminals.

At first sight, the intersection between these two bodies of laws appears strange since they serve different purposes and function in different

¹¹³ L. I. Estevez-Picon, ‘Criminalising Hope: Human Rights Implications of the Criminalization of Irregular Immigration in EU Member States and the EU’, Master Thesis, European Inter-University Centre for Human Rights and Democratization, 2012, p.6.

¹¹⁴ Legomsky, ‘The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms’, p.469.

contexts. However, there are some patterns that these two concepts share which reveal how it is possible for them to intersect. Criminal law aims at preventing or addressing harm to individuals while migration law determines who enters the borders of a state or who should be expelled or leave¹¹⁵. While ostensibly different it can be argued that “*both criminal and immigration law are systems of inclusion and exclusion*”¹¹⁶. The former separates the ‘guilty’ from the rest of the society while the latter determines who should be accepted into or expelled from the society. As Stumpf pointed out, the pattern appears common: “*both create insiders and outsiders*”¹¹⁷. Furthermore, in both cases the decision of who belongs where, lies with the state. This is because primarily, both criminal and migration law regulate relationships between the state and the individual¹¹⁸. This is not the case for other branches of law like family, property or business law, which primarily address the relationships between individuals¹¹⁹. Through criminal and migration law, the state exercises power and manages individuals by creating categories and deciding who should be included or excluded. In the light of these common features, the relationship between these two bodies of law does not appear so odd but becomes clearer.

The definition presented above pointed out two parts of the criminalization process. The first concerned the injection of criminal law enforcement elements into migration law while the second stressed that certain features related to procedural aspects of criminal law were left out of this process. This is one of the biggest differences between criminal and migration law¹²⁰. Procedures and procedural safeguards are an integral part of criminal law. For every action taken, whether it is an arrest, an interrogation, a conviction or a detention, certain procedures prescribed by law must take place. At the same time, the suspect or the detainee has a number of rights at

¹¹⁵ J. Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’, p. 379.

¹¹⁶ Stumpf, p. 380.

¹¹⁷ Stumpf, p. 380.

¹¹⁸ Stumpf, p. 380.

¹¹⁹ Stumpf, p. 380.

¹²⁰ Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’, p. 390.

his or her disposal enabling him or her to challenge all the decisions taken against him/her and protect him/herself from any arbitrary action on behalf of the authorities. As a result, under criminal law, procedures require time and monetary funds in order to ensure the fair treatment of the individual.

However, the same does not seem to apply to migration law. The procedures followed in this case are more simple compared to the ones in criminal law thus they cost less and require less time. Actions taken under immigration law are order from the executive branch of the government and not from the judiciary¹²¹. Furthermore, while criminal provisions also leave a certain margin of interpretation to the judiciary they are more precise and not so vaguely formulated. Migration law provisions though, use more broad terms thus allowing the states to interpret them at will. The Returns Directive presented in the previous chapter is an illustrative example. Moreover, the rights conferred to individuals under migration law vary significantly from the ones in criminal law. Since procedures are simpler and usually faster, migration law does not provide for an extensive protection net. As a result, migrants do not have the same protection against actions taken against them compared to the one provided under criminal law. The decreased level of protection prescribed in migration law in conjunction with the criminal law elements injected in it appears particularly problematic in the context of migration detention and will be further examined.

4.2 Manifestations of Crimmigration

Criminalization of migration law is a multi-dimensional and complicated phenomenon with a variety of manifestations. A number of practices, each with different elements, contributes to its construction. These practices are interrelated and assert great influence at each other. Therefore, in order to understand how migration detention fits in the construction of crimmigration, or else, how crimmigration is manifested through migration detention it is important to analyze other aspects of this phenomenon. Therefore, in this section a brief overview of two practices of crimmigration

¹²¹ Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention, p.6

will be presented while detention will be separately examined at a later stage. The first of these aspects includes a discursive element and concerns how migrants are presented through public discourse, which was already mentioned in the previous section. The second, has to do with the expansion of migration offences punishable with criminal sanctions. The analysis of these two aspects will provide a deeper and more holistic understanding of the crimmigration phenomenon and facilitate the examination of migration detention as a more specific and integral part of it¹²².

The first way through which criminalization of migration is manifested is of particular importance. This discursive aspect of crimmigration is related to how migrants are presented to the public and how they are connected with notions like criminality, deviance and security. This criminal identity of the migrant is constructed through various discursive actors like politicians and the media. A number of political statements emphasizing on the ‘illegality’ of the migrants crossing the state borders and their tendency towards the commission of crimes create a climate of fear and hostility against the migrants. Mr. Samaras, the former Greek prime minister, presented migrants as invaders who have occupied Greek cities and must be reconquered back¹²³. This alleged criminality of the migrants is also enhanced by the increased xenophobia and the rise of the far right wing parties throughout Europe. In this xenophobic context, migrants are additionally presented as a threat to the welfare state. A number of politicians emphasize the fact that migrants are sustained through the taxes citizens pay while at the same time they ‘steal’ the jobs from them or they take advantage of any social benefits available¹²⁴.

This discursive aspect of crimmigration is based a great deal on the categorization of immigrants. As Maneri stressed, these categories that

¹²² Parkin, ‘The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research’, p.1.

¹²³ Amnesty International, ‘Greece: Frontier of hope and fear-Migrants and Refugees Pushed Back at Europe’s Borders’, 2014, p. 24.

¹²⁴ Huysmans, ‘The European Union and the Securitization of Migration’, p.768.

“lack any descriptive coherence or precision, but are nevertheless replete with connotations and implicit associations (‘clandestine’, ‘gypsies’, ‘extracomunatari’, ‘Muslims,’ etc.) provide the raw material for the discourse on immigration.¹²⁵”

It is true that immigrants are always referred to as a group or a category with a number of vaguely formulated traits that are linked to their nationality, race, religion etc. Some of these traits are usually recognizable thus leading to an immediate stigmatization. In Greece for example there are cases where police officers are conducting documents checks by stopping public buses at central stations in Athens, and saying “All blacks out!” before marching the suspects to the nearest station¹²⁶. This incident illustrates how certain features of migrants like the color of their skin can lead to their automatic categorization.

Television and printed media also play an important role to the construction of the identity of migrants. The dissemination of news, including photographs and videos, pertaining to the criminality of the migrants enhance the stigmatization of the migrants as a dangerous category and amplify the hostility against them¹²⁷. An advertisement in London is such an example where a host of buses touring the city displayed the message: *“In the UK illegally? Go home or face arrest.”*¹²⁸

The systematic representation of migrants as a category that threatens society and breaks the law provides the governments with the justification they need for the implementation of harsh measures against migrants and for the use of criminal law in migration law enforcement.

Criminalization of migration is also manifested through the expansion of migration offences punishable with criminal sanctions. There are two categories of migration offences, the first concerns ‘crimes’ which can be committed only by the migrants and the second by individuals assisting

¹²⁵ Parkin, ‘The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research’, p.4.

¹²⁶ RT, <http://rt.com/news/greece-immigrants-abuse-police-585/> (last visited on 25-May-2015)

¹²⁷ Parkin, p. 5.

¹²⁸ Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention’, p.13.

migrants¹²⁹. The most illustrative example of the first category concerns the irregular entrance, exit and stay of an immigrant at a state's territory. By 2010, 17 from the then 27 members of the EU considered irregular border crossing and stay a criminal offence¹³⁰. The sanction imposed is usually detention and fines¹³¹. The second category concerns offences committed by people assisting irregular migration. This includes service providers like schools and hospitals but also private actors like employers¹³². In UK for instance, the maximum limit for assisting people to breach migration law stretches up to 14 years of imprisonment¹³³. These kinds of offences usually include a 'duty to report' i.e the obligation to refer any case of irregular migration to the authorities¹³⁴. The breach of this obligation is also punished under a number of national EU legislations. In the Netherlands the breach of the obligation to report a case of irregular migration is punishable with a fine of 3,350 euros or six months imprisonment¹³⁵. However, it seems that despite the expansion of migration offences punishable with criminal sanction, it looks like in practice they are rarely implemented¹³⁶.

In the case of Greece examined above although irregular border crossing is a criminal offence, the majority of the migrants and expelled and detained under the provisions of migration law¹³⁷. Criminal proceedings are rarely initiated for these kinds of offences and the way of administrative law is preferred. Aliverti has reached the same conclusion for the UK. She claims that although from 1997 to 2009, 84 new migration offences have been introduced, in practice only a few of them are enforced¹³⁸. She highlighted that authorities consider criminal prosecution as a last resort when the

¹²⁹ Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research', p.7.

¹³⁰ Parkin, p.7.

¹³¹ Parkin, p. 7.

¹³² Parkin, p.8.

¹³³ Parkin, p.8.

¹³⁴ Parkin, p.8.

¹³⁵ Parkin, p.8.

¹³⁶ A. Aliverti, 'Making people criminal: The role of the criminal law in immigration enforcement', *Theoretical Criminology*, vol.16, no.4, 2012, p.418.

¹³⁷ PRO ASYL Foundation and Friends of PRO ASYL in co-operation with the Greek Council for Refugees and Infomobile, 'Walls of shame-Accounts from the inside: The Detention Centers of Evros', 2012, p. 14.

¹³⁸ Aliverti, 'Making people criminal: The role of the criminal law in immigration enforcement', p. 420.

option of administrative expulsion or detention is not feasible¹³⁹. Based on the aforementioned facts it could be argued that in this case criminal law is used more as a threat or as a solution when the other options have failed¹⁴⁰. States rely on the deterring role of criminal law. Only the threat and the possibility of enactment of criminal law will be enough in order to discourage future migrants from crossing the borders, seems to be the logic behind this way of intersection between migration and criminal law.

Understanding the crimmigration phenomenon requires a holistic approach. In this section two of the three main ways of how criminal and migration law interact, were presented. Both of them are important and provide a different aspect of how migration law is being criminalized. The next section will attempt to outline why crimmigration is taking place by referring to the general political and economic context of the EU.

4.3 Migration as a security issue

Migrants were not always presented or considered as criminals by the European states. The increasing intersection of criminal and immigration law reflects some of the economic and political developments that took place in Europe. In order to understand the role of criminal law in migration control and why detention of migrants resembles to criminal detention, it is important to examine the general context in which immigration law was developed. Referring to migration in terms of criminality and deviance reflects a general shift that took place in Europe in the 1980's towards security and increased border controls. This section, will attempt to briefly examine these developments in order to better understand the role that criminal law plays in migration control in general and in migration detention in particular.

Through the ages, states responded to human mobility with a number of different ways. In the Europe of the 1950's and 1960's, the increased mobility of people in search of a job, was welcomed by the states. For most

¹³⁹ Aliverti, 'Making people criminal: The role of the criminal law in immigration enforcement', p. 424.

¹⁴⁰ Aliverti, p. 424.

European countries that were trying to re-build themselves in the aftermath of the WWII, migrants constituted a cheap labor force usually employed in sectors like agriculture and construction¹⁴¹. At that time, the legal status of these migrants was not a central issue. Some countries, like France, even recruited foreign workers directly from their countries of origin and although their legal status would eventually be settled, it was not a priority issue¹⁴².

By the 1970's, migrants working at European states started to settle in a permanent way. From temporary workers who would return to their homelands after a number of years, they became permanent residents¹⁴³. This is why family reunification was a central issue at that time since a large number of migrants brought their families from their countries of origin in order to live with them in Europe. Although, at that time the free movement of people remained a marginal issue, the political rhetoric of that period had started to emphasize the destabilizing effect of migration¹⁴⁴. One of the most significant developments reflecting this change is the Council Regulation 1612/68, which made a distinction between the freedom of movement for workers of the EU member states and for workers from third-country nationals¹⁴⁵. As Huysmans pointed out "*the Council resolution made clear that the free movement of persons in the internal market will be a prerogative of nationals of Member States*"¹⁴⁶". At the Paris summit in 1973, the same idea of member states nationals benefiting from special rights was confirmed¹⁴⁷.

In modern times, and especially since the mid 1980's, migration started to become a political issue. This era is marked by high unemployment rates and periods of economic recession. The decrease of the welfare state and the attempt of the states to protect their domestic labor market also characterize

¹⁴¹ Huysmans, 'The European Union and the Securitization of Migration', p.753

¹⁴² Huysmans, p.754.

¹⁴³ Huysmans, p.754.

¹⁴⁴ Huysmans, p.754.

¹⁴⁵ Huysmans, p. 754.

¹⁴⁶ Huysmans, p.754.

¹⁴⁷ Huysmans, p.754.

this period¹⁴⁸. By that time, asylum and economic migration were confused and the former was seen as a route to achieve the latter.¹⁴⁹ Asylum seekers are usually accepted in a country or afforded more protection compared to the economic migrants who are seen as a threat and destabilizing factor of the economy of the state. However, since migration is a complex phenomenon, it is usually based on a wide combination of factors and millions of decisions, therefore it remains very difficult to distinguish one kind from another. In the phenomenon of migration politicians of that time started to find a scapegoat for all the failed economic policies the governments implemented. In doing so migrants were presented as a destabilizing factor for the economy, a group that takes advantage of the welfare system sustained by the taxes citizens pay¹⁵⁰.

It is by that time, that the regulation of migration became a central issue in the political agenda of EU and common efforts in regulating and restricting it took place. One of the most significant developments was the adoption of the Schengen Agreement in 1985, which provided for the abolition of the internal borders between the signatory states. Initially, the agreement did not take place under the auspices of the EU. Only a number of states had signed it. In 1990, the Schengen Convention was adopted, implementing the Schengen Agreement. As time passed, more states became members of this agreement and in 1997, through the adoption of the Amsterdam Treaty, it was incorporated in the EU legislation. The majority of the EU member states are part of the Schengen area. The abolition of internal borders between the signatories of the Schengen Convention has led to the creation of a single external border. A number of EU states and signatories to the Schengen Convention have pointed out that since internal controls were significantly decreased, the controls in this single external border should be enhanced¹⁵¹. This is because states believed that the abolition of internal border controls although it will facilitate the free movement of nationals coming from EU states and enhance the internal market it will also attract

¹⁴⁸ Huysmans, 'The European Union and the Securitization of Migration', p.754.

¹⁴⁹ Huysmans, p.755.

¹⁵⁰ Huysmans, p.767.

¹⁵¹ Huysmans, p. 759.

people from outside of the EU thus making states more vulnerable to future threats¹⁵². It seems that the abolition of borders created a feeling of insecurity to the EU states. This is why the maintenance of security inside the Schengen Area and the strengthening of the external border controls are some of the main issues the Schengen Convention regulates. More specifically, through the Schengen Convention states aim in tackling, preventing or regulating transnational crime, terrorism and migration. It is indeed remarkable, that in the Schengen Convention migration is placed among terms like terrorism and is considered as an issue of security and border control¹⁵³. This observation provides a first glance as to how migration was securitized i.e how it was constructed as an issue pertaining to notions like threat and security¹⁵⁴.

The emphasis given to the strengthening of border control and the enjoyment of special rights on behalf of the nationals of EU states that are signatories to the Schengen Convention, has led to the distinction between the ones who are inside the borders and those coming from outside of them. This is particularly important in the case of migration law since, as it was mentioned before, it is a body of law regulating who enters a state and who not. It is true that even before the Schengen Convention, migrants were presented in a negative way. However, it is with the creation of the Schengen Area that the phenomenon of migration became an integral part of the EU policies, in other words it became institutionalized, and it is because of its emphasis on external borders that migration is so tightly connected to border control¹⁵⁵. Following the incorporation of the Schengen Convention in the EU legislation, a number of EU directives and regulations have been drafted in order to establish common migration policies throughout Europe. One of the most important legal instruments is the Dublin Regulation. The aim of that regulation is to establish criteria for identifying the EU member

¹⁵² D. Bigo, 'Criminalisation of "migrants": the side effect of the will to control the frontiers and the sovereign illusion', https://www.academia.edu/3102850/Criminalisation_of_migrants_the_side_effect_of_the_will_to_control_the_frontiers_and_the_sovereign_illusion, 2004, p. 11, (last visited 25-May-2015).

¹⁵³ Huysmans, 'The European Union and the Securitization of Migration', p. 756.

¹⁵⁴ Huysmans, p. 754.

¹⁵⁵ Huysmans, p. 757.

state responsible for examining an asylum application. The purpose of the regulation is to prevent migrants from filing asylum applications in many EU countries and make examination of asylum applications faster. However, since migrants were now able to file only one asylum application the chances of getting accepted into to an EU country were significantly reduced¹⁵⁶.

The period since the beginning of the twenty-first century is marked by an economic recession, where many countries like Greece, Italy and Spain, were facing and continue to face serious problems both at an economic and at a social level. In this context and using migration as a scapegoat for the failed policies they implemented, politicians cultivated a climate of hostility and fear against migrants¹⁵⁷. The rise of far right-wing parties placed anti-migration argumentation at the heart of almost every political debate. Migration became an issue through which politicians gained popularity and votes. Migrants are now more than ever presented as a dangerous group threatening society. In addition, their cultural differences are being used as a way to stress their inability to adjust to the European way of life, to integrate¹⁵⁸. The distinction is evident. They are different from us and from our way of life. Their presence in EU poses an imminent threat to societies that are allegedly coherent and nationally homogenous¹⁵⁹.

According, to this perception of migration as a dangerous group, the adoption of measures that will help control migration flows and deter future migrants from crossing the EU borders appears of paramount importance. Since the threat to society is presented as imminent these measures also need to be harsh and need to be taken as fast as possible¹⁶⁰. Based on this discourse governments have adopted a number of highly contested migration policies and measures. However, the element of a threat that is

¹⁵⁶ Huysmans, 'The European Union and the Securitization of Migration', p.756.

¹⁵⁷ Huysmans, p. 769.

¹⁵⁸ Huysmans, p. 763.

¹⁵⁹ D. Bigo, Criminalisation of "migrants": the side effect of the will to control the frontiers and the sovereign illusion, https://www.academia.edu/3102850/Criminalisation_of_migrants_the_side_effect_of_the_will_to_control_the_frontiers_and_the_sovereign_illusion, 2004, p.11. (last visited on 25-May-2015).

¹⁶⁰ Taureck, 'Securitization theory and securitization studies', p. 54

imminent has led the public in accepting a large number of these practices. In the name of emergency states have successfully introduced migration control practices that otherwise would not be accepted.

The political dimension that the immigration law has acquired becomes evident from a number of data from various countries that show that despite the enhanced border controls and the anti-migration policies adopted, migration numbers have not been reduced and probably will not be reduced¹⁶¹. This gap between the anti-migration rhetoric and its practical results does not stop politicians from keep stressing the negative and destructive consequences of migration in order to raise their popularity and gain more votes.

The statements of Mr. Samaras, during the pre-election period are illustrative. The former Greek prime minister chose to speak to the Greek people from the fence that was built in Evros in order to discourage migration from the land borders of Greece. He stressed the important role the fence plays in restricting thousands of migrants from entering the Greek soil terrorism and accused the opposition for wanting to take down the fence.¹⁶² Some days later, in the aftermath of the attacks to Charlie Hebdo and still during the pre-election period, he directly connected 'illegal' migration with terrorism¹⁶³. The Dutch politician Pim Fortuyn gained much popularity through his harsh stance against migration. He openly criticized multicultural policies implemented in the Netherlands by pointing out the dangers they entailed and accused previous coalitions by claiming that '*they had intentionally neglected important issues such as collective safety.*'¹⁶⁴ The aforementioned statements illustrate how politicians use migration as means to achieve their political goals whether these are to scare the electorate, to gain more votes or to show that through strict migration

¹⁶¹ D. Broeders, 'Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands', *Punishment & Society*, vol.12, no.2, 2010, p. 169.

¹⁶² Attikanet, http://attikanet.blogspot.se/2015/01/blog-post_7.html (last visited on 25-May-2015)

¹⁶³ Times of France, <http://www.thetoc.gr/eng/politics/article/samars-seeks-to-use-charlie-hebdo-massacre-for-electoral-gain> (last visited 25-May-2015)

¹⁶⁴ M.A.H. van der Woude and J.P van der Leun and J.A.A Nijland, 'Crimmigration in the Netherlands', *Law and Social Inquiry*, vol39, no.3, 2014, p. 565.

controls action is being taken against one of the most ‘serious’ threats EU faces.

The construction of migration as a security issue is based on arguments concerning membership and belonging and is directly connected with the different developments that took place concerning the borders of the EU¹⁶⁵. The enhanced migration and border controls define who should enter the EU and who not. Who is able to stay and integrate in the EU society and who is dangerous for it and should be excluded. This type of argumentation, sets the background against which crimmigration is taking place. Furthermore, it is also the logic behind the increased detention numbers presented in the previous chapter. In the next section, the relationship between criminal law and detention will be analyzed.

4.4 Crimmigration and migration detention

Criminal law has affected migration control in a number of different ways. In this body of law, states found a useful instrument in order to enhance migration control and justify the strict measures implemented against the migrants. In the general attempt to present migration as a threat to society and public order, criminal law seems to provide more concrete solutions. This is because now migrants are not only a threat in the abstract meaning of the word, but criminals, people who should be punished, who should be treated in a harsh way. Practices and methods of criminal law are more concrete than those prescribed under migration law. However, it is important to notice that migrants are not criminals with the traditional meaning of the term. The purpose in this case is not to bring the migrants in front of the society and hold them accountable for their actions¹⁶⁶. It is exactly the opposite, to expel them from it. This logic explains why although new migration offences punishable with criminal law are increased, they are rarely implemented in practice. One illustrative example is the case of irregular entrance, exit or stay. Although in most countries they are considered as criminal offences, the authorities choose the path of

¹⁶⁵ Huysmans, ‘The European Union and the Securitization of Migration’, p.757.

¹⁶⁶ A. Spina, ‘Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law’, *Criminal Law and Philos*, vol.8, 2013, p.653.

administrative expulsion or detention¹⁶⁷. Only a few of them are prosecuted under criminal law. It looks like criminal law is used as a façade¹⁶⁸. It provides the means to enforce migration law, however the measures implemented in practice remain administrative. Based on the aforementioned I argue that criminal law in the context of migration control plays a dual role. One that is symbolic and one that is real. As I will show in this section, these two aspects of crimmigration are interrelated.

The symbolic aspect of crimmigration implies, that even though criminal law is not applied in practice, it can be used as a threat¹⁶⁹. The fact that there is a possibility for the migrant to be prosecuted under criminal law, is a threat in order to deter future migrants from crossing the borders of an EU state. Criminal law has become a way to discourage migration. At the same time, it is a justification for the implementation of strict measures against migrants that are of administrative nature. This is why in the beginning of this chapter I pointed out that crimmigration is all about treating migrants *like* criminals. If every immigrant was charged under criminal law then the whole body of this law would have to be implemented. The authorities would be obliged to follow the criminal procedures and provide to the migrants all the procedural rights that a suspect or a convicted person has under criminal law. However, as showed, in the case of migration the aim is not to punish the migrants. It is to expel them.

Furthermore, criminal law is not used in practice as a body of law for one more reason. It was mentioned earlier that criminal law is a set of rules that aims at excluding people from society. It was also mentioned that migrants are referred as a group with vaguely formulated traits. Despite the exclusionary feature, criminal law also has an inclusionary aspect. To bring someone under criminal law means to provide him or her with personality¹⁷⁰. It means that his or her case is examined individually and a decision about him or her is rendered. However, states try to manage

¹⁶⁷ Aliverti, 'Making people criminal: The role of the criminal law in immigration enforcement', p. 424.

¹⁶⁸ Spina, 'Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law', p. 650.

¹⁶⁹ Aliverti, p. 424.

¹⁷⁰ Spina, p.653.

migrants as a group. To fully use criminal law means to give to the migrants a personal standing, to include him or her even temporarily to society¹⁷¹. Once more, this is against the main function of migration and border control. In crimmigration only certain practices and methods of criminal law are actually implemented. The ones that lead to the creation of a climate or situations where immigrants are presented and treated like criminals. The ‘criminal’ identity is used as a justification by the states to justify the use harsh migration control practices, the mistreatment and the less protection afforded to the migrants. However, the actual practices that take place remain administrative.

The function of criminal law as a threat is one aspect of the crimmigration phenomenon. I claim that there is also a quite real function in which methods of criminal law are actually implemented. Migration detention is the most illustrative example of this aspect of crimmigration.

The importance of detention in migration control has been stressed in many instances throughout this thesis. States depend a lot on this practice in order to control migration flows and a big number of funds is invested in the construction and maintenance of detention centers. It has already been mentioned, that the role of detention in migration control is ancillary. It aims at facilitating the expulsion of migrants. As a result, it is distinctive from detention in criminal law, which is an integral part of it and not a supplementary practice. The function of detention as a criminal sanction, according to the traditional theories of criminal law is manifold¹⁷². First, it aims at deterring the commission of similar acts in the future. Second, it aims at reprimanding and punishing the individual for the commission of the criminal offence and lastly it incapacitates the one who committed the crime and isolates him or her in order to protect society¹⁷³. It is important to reiterate that detention is the harshest sanction that can be imposed on a criminal offender thus a number of procedures and rights are provided in

¹⁷¹ Spena, ‘Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law’, p.653.

¹⁷² Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention’, p.10.

¹⁷³ Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention’, p.10.

order to secure the fair enforcement of it. Migration detention has been greatly affected by the phenomenon of crimmigration. What criminal law has done in this case is that it has affected the purposes of the detention of migrants and introduced to it some of the practices that are typically part of criminal detention. In particular, I claim that detention of migrants has come to resemble more to a criminal punishment meaning that it has acquired deterrent, retributive and incapacitation features¹⁷⁴. A number of criminal law practices and characteristics that this kind of detention has adopted illustrate this point. However, despite the adoption of these criminal law features, this kind of detention remains administrative.

At this point, it is important to underline that structure in one of the basic elements of crimmigration. This is why before the examination of migration detention, as an aspect of crimmigration, other manifestations of this phenomenon were presented, in order to illustrate its organized form. Each one of these manifestations of crimmigration also follows a certain inner structure. This applies also to migration detention. A number of practices and theories need to be combined in order for criminal law to affect migration detention and alter its purposes. This is why deterrence, as an element inserted to migration detention, is evident from a number of practices concerning this practice. From the way detainees are treated till its length, migration detention functions in such a way as to discourage migrants from coming to the EU. A number of politicians and UN bodies have stressed this function of detention. One example, is a comment made by the former Greek minister of public order who stated that,

*“If it is known that Greece is a country that is not at all easy to enter, where if at any rate you enter, the most likely outcome is that they will arrest you and put you in a center, and you will stay there until you go back, then there will be no clientele for Greece.”*¹⁷⁵

¹⁷⁴ Weber and Bowling, ‘Valiant beggars and global vagabonds: Select, eject, immobilize’, p. 368

¹⁷⁵ L. Cheliotis, ‘Behind the veil of philoxenia: The politics of immigration detention in Greece’, *European Journal of Criminology*, vol.10, no.6, 2013, p. 735.

A statement attributed to Nikos Papagiannopoulos, the former Chief of Police in Greece, backs up this opinion: “*We must make their [migrants] lives unbearable*”¹⁷⁶. These statements clearly function in a deterrent way. If migrants are treated severely inside and outside of the detention centers and it is known that they are going to end up at a detention center then this will discourage potential migrants from crossing the Greek borders. I believe that this attempt to deter migrants is one of the reasons why Greece does not seem willing to improve the conditions in the detention centers and respect the human rights of the migrants. The same pattern is followed by other countries like Italy where the Special Rapporteur on the Human Rights of Migrants underlined the use of detention as a way to deter immigration¹⁷⁷. As it was mentioned previously, politicians continue to advocate in favor of migration detention even when there is evidence showing that detention does not actually prevent migrants from crossing a state’s borders. In this sense, the deterrent function of detention is symbolic¹⁷⁸. It sends a strong message to future migrants not to come to the EU. It is remarkable that politicians continue to openly advocate in favor of the deterrent function of migration detention despite the fact that a number of UN bodies like the Special Rapporteur on the Human Rights of Migrants regrets the use of this type of detention as a means to discourage migration.

An element of punishment, in the sense of retribution, has also been injected in the detention of migrants. As I explained previously, in this kind of detention migrants are not held accountable before the society for the ‘bad’ things they have committed. They are not detained in order to be corrected or reprimanded. The purpose is not to punish them but to remove them from the state’s territory. As a result, any notion of re-integration is rendered futile since from the beginning the aim is to permanently exclude them from the society and not to help them integrate or re-integrate, as the case is with the conventional detainees¹⁷⁹. In a more symbolic way it can be argued that,

¹⁷⁶ Amnesty International, ‘Greece: Frontier of Hope and Fear: Migrants and Refugees Pushed Back at Europe’s Borders’, 2014, p.12.

¹⁷⁷ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para.73

¹⁷⁸ Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, p.17.

¹⁷⁹ Leerkes and Broeders, p.10.

migration detention is meant to look or even worse to be felt like a punishment¹⁸⁰. The deplorable detention conditions, the prison-like detention centers and the decreased protection afforded to migrant detainees are only some examples illustrating how detention can be perceived as a criminal punishment. Furthermore, the practice of lengthy detention that UK or Greece apply, adds a punitive element to the detention of migrants. It is noticeable that lengthy detention is a sanction imposed only to the most serious crimes under criminal law. It seems that, the use of such a severe measure under migration law creates a direct connection between ‘irregular’ migration and the commission of severe crimes. In a more practical sense, this punitive element of migration detention can function as a means to exert pressure to the migrant detainee in order to cooperate with the authorities and agree to return to his or her country of origin.

The last feature of criminal law sanction infused in migration detention concerns incapacitation. Part of detention under criminal law is to physically exclude individuals convicted for crimes from society. This is a way of keeping society safe. From this point of view, incapacitation is one of the main purposes of criminal detention. Migration detention though, it is never an end in itself¹⁸¹. This kind of detention aims at facilitating the expulsion of the migrant and is permitted only under certain grounds. The fact that a migrant resides irregularly in a country is not enough of a reason to detain him or her. These grounds, as presented in the third chapter, are related to how cooperative the migrant is with the authorities and whether there is a risk of absconding. Even if some states provide for public order as a ground of detention, typically migration detention does not aim at incapacitating migrants and keeping them away from the society because they are dangerous. However, in practice I argue that migration detention has adopted some of the incapacitation features that criminal detention has.

In the second chapter, I pointed out, that in some cases and especially in Greece, only the fact that an migrant enters or resides irregularly in a

¹⁸⁰ Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, p.8.

¹⁸¹ Leerkes and Broeders, p. 2.

country is enough reason to detain him or her. The alleged criminality of this group of individuals seems to be the logic behind this practice. In fact, the presentation of migrants as a criminal group, with vague and non-defined traits provides a justification to the states for the massive incarceration of migrants¹⁸². Their ‘illegal’ residence and their irregular status are constantly emphasized by the governments. Migrants are presented as a group of people that breaks the law and particularly criminal law (since in most countries irregular entrance and residence is a criminal offence). However, the vast majority is never prosecuted under criminal law but rather managed under immigration-administrative law¹⁸³. Their alleged criminality is useful for justifying their excessive and in some cases automatic detention. If migrants are dangerous criminals then they must be detained until a decision on their status is rendered. This reasoning, explains up to a point why the 18 months of detention enshrined in the Returns Directive, has become the rule instead of being the exception as the law stipulates. Even if in most of these cases, the authorities know that the expulsion of a migrant is unfeasible they try to keep this ‘dangerous’ migrants detained for as long as possible¹⁸⁴.

The Greek advisory opinion presented above is an example of this reasoning. The Greek Council of State tried to justify the indefinite extension of migration detention by arguing that, the release of the three hundred Syrians would jeopardize public order and drive these migrants into a path of criminality¹⁸⁵. The alleged deviance has turned migrants into a group where whoever falls into it, should be detained. Detention serves as a way of keeping the ‘criminals’ out of the streets while states are trying to figure out what to do with them¹⁸⁶. As a result, new detention centers are built and thousands of migrants are detained in order to keep society ‘safe’

¹⁸² Parkin, ‘The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research’, p.4.

¹⁸³ Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, p.6.

¹⁸⁴ Majcher, ‘The European Union Returns Directive: Does it prevent arbitrary detention?’, p. 28.

¹⁸⁵ Greek Council of State, Advisory Opinion No 44/2014, p. 22.

¹⁸⁶ Leerkes and Broeders, p. 15.

for as long as possible even if that means that the law regulating detention is ignored or abused.

This element of incapacitation of migration detention for the sake of public safety and order serves political purposes. In an era where migration is considered an integral part of the general problems that states face at a social and economic level, detaining migrants makes the public feel that the government is actually taking measures in order to solve the migration issue¹⁸⁷. This is because detention as such it is an exclusionary practice. It presupposes separation from the society. As Bosworth mentions,

*[t]he point is that prisons and detention centers ... are singularly useful in the management of non-citizens because they provide both a physical and a symbolic exclusion zone*¹⁸⁸.

Detention shows that states are in control of migration flows. It is a demonstration that states are capable of controlling their borders by saying who stays and who leaves¹⁸⁹. Somehow, to reduce detention will mean that the state is losing control over its borders thus jeopardizing the coherence and safety of society. This is why the party of New Democracy opposed the initiative of the current Greek government to close the detention centers in Greece. Mr. Samaras, the former Greek prime minister and leader of New Democracy, stated that,

*“The government is trying to turn Greece into a magnet for all the illegal migrants. This shut down will have devastating effects on the coherence of the society, on its safety and on the economy as well as on tourism.”*¹⁹⁰

In times of crisis, governments are looking for ways to show to the public that they have everything under control. When it comes to migrants, detention is a means to manage the anxiety of the public concerning migration¹⁹¹. This explains up to a point why countries like Greece are so eager in detaining migrants even when expulsion is not feasible and even

¹⁸⁷ Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’, p. 17.

¹⁸⁸ Leerkes and Broeders, p.17.

¹⁸⁹ Leerkes and Broeders, p.17

¹⁹⁰ In.gr, <http://news.in.gr/greece/article/?aid=1231389848> (last visited on 25-May-2015)

¹⁹¹ A. Leerkes and D. Broeders, p.17.

when the way through which detention is implemented, contravenes with both European and national legislation.

Criminal law has significantly altered the way migration detention functions. Although, expulsion remains its first purpose this kind of detention now seems to serve other objectives. In the context of crimmigration, detention is used by the states as means to discourage migration flows, to ostensibly punish the irregular migrant and to keep him or her away from the streets while trying to determine his or her status or to figure out what to do with him or her. Despite, the fact that there is evidence illustrating that in practice detention does not prevent migrants from trying to enter to an EU state, this deterrent function remains an integral part of the migration rhetoric and policies. The punitive character injected in migration detention, is also evident in the way this kind of detention is implemented. It is not a punishment in the traditional way but it is meant to be felt like it is¹⁹². Finally, detention is used as a way of keeping society safe. Even when the expulsion of a migrant is unfeasible, the maximum period of detention will be implemented until states find out what to do with him or her.

States like Greece have taken that thought a step further by allowing the indefinite detention of a migrant under certain circumstances. These facts explain why in some countries detention numbers are increasing while expulsion rates are decreasing¹⁹³. It seems that migration detention has partly being detached from only serving expulsion purposes. Furthermore, in this case, certain features of criminal law detention like the duration and the prison-like facilities are implemented in practice thus affecting the lives of thousands of migrants. This makes clear that detention is a powerful tool, used by states in both a symbolic but more importantly in a real way. This is because detention is an inherently exclusionary practice, separating the individuals both in a symbolic and in a physical way from society. The results of the criminalization of this practice on the lives of the migrants are devastating. The use of criminal law in this particular practice has led to a

¹⁹² Leerkes and Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', p.8.

¹⁹³ D. Broeders, 'Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands', p.182.

systematic violation of the migrants' rights. In the next chapter I will, present the human rights implications of the criminalization of migration detention, both in Europe but also more specifically in Greece, and I will argue that this practice has led to a kind of discrimination against migrants that penetrates the Greek state apparatus.

5. HUMAN RIGHTS IMPLICATIONS OF CRIMINALIZED MIGRATION DETENTION

Having presented the national detention policies of some EU states and how crimmigration has affected them, this chapter will attempt to examine the human rights implications of the criminalized migration detention. I argue that this practice has led to a systematic violation of the human rights of the migrants and to their discriminatory treatment. Furthermore, I claim that, in the case of Greece, this discrimination of migrants seems to function in an institutional way. Section 5.1 presents the ineffective protection afforded to migrant detainees as well as the uncertainty that crimmigration inserts into their lives while held in the detention centers. It concludes by combining these two factors and claims that they have led to the systematic discrimination of the migrant detainees. In section 5.2, the case of Greece is analyzed as a way to illustrate that in this country discrimination against migrant detainees has been institutionalized. Finally, section 5.3 shortly provides for recommendations in order to limit the use of detention and increase the protection of migrant detainees.

In the beginning of the previous chapter, I stressed the selective nature of the crimmigration phenomenon. Migration law has absorbed some features of the criminal law enforcement but has left out any procedural aspects of criminal adjudication¹⁹⁴. This asymmetric incorporation of criminal law features from migration law is what makes crimmigration a highly problematic practice. Furthermore, I presented that in the case of migration detention, criminal law has affected its purposes thus allowing the states to

¹⁹⁴ Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', p.469.

detain migrants in a systematic and automatic way, based only on their alleged criminality.

The procedures regulating criminal and migration detention vary significantly. The same applies to the procedural rights afforded to the detainees under those two types of detention. In the case of criminal detention, a number of definite and specific procedures are taking place before this harsh sanction is imposed on an individual. A criminal detainee is afforded with certain rights that enable him or her to challenge his or her detention and protect him/herself from any arbitrary action committed by a state agent. In addition, the state has an obligation to ensure that this protection is effective meaning to adequately protect the detainee. In other words, under criminal law, a procedural mechanism is set up ensuring that detention, whether it is a pre-trial or a post-conviction one, it is imposed in a fair manner and that the detainee is treated respectfully.

However, in the case of migration detention things work in a different way. Since the detention of migrants is not a punishment but only a practice facilitating expulsion, the procedures are less and the protection afforded significantly weaker. Typically, this kind of detention should be a last resort, applied for a limited period. Therefore, it is considered reasonable that under migration law detainees are not in need of such level of protection as the one granted under criminal law. The ostensibly exceptional character of this type of detention is not accompanied by a strong security net. The laws regulating this practice, like the Returns Directive, are vaguely formulated and states enjoy great discretion in the way they treat migrant detainees. This differential treatment between these two types of detainees is also part of the general debate concerning the human rights that migrants should enjoy. States are constantly ignoring the fact that although not a punishment, at least not officially, detention is a practice that places migrants in an extremely vulnerable position. Rather, they have adopted a managerial perspective where detention is a means to regulate this particular group. Migrants are people in need of protection, of procedures that will allow them to deal with their issues and their detention in an effective way. However, in practice a number of reports have highlighted, the ineffective

and inadequate protection afforded to them. This practice, as will be shown later, seems to be a common pattern for a number of policies implemented by EU states.

In this general context of differential treatment, crimmigration affects the human rights of the migrant detainees in two ways. The first concerns the fact that in the case of migration detention, as mentioned above, although migrant detainees are treated like criminals, through the implementation of a number of criminal law practices, the procedures regulating their confinement remains administrative and more importantly, the rights afforded to them are not the ones that conventional detainees enjoy. If states decide to insert certain methods of criminal detention to the migration one, it only seems reasonable to also adopt the procedures and procedural rights that criminal law offers. However, because of crimmigration there are too many to cases where lengthy detention periods are imposed under migration law without the procedures followed under criminal law and even worse without the protection and rights afforded to criminal detainees. This selective adoption of criminal detention features decreases the protection afforded to migrant detainees. It has led to the systematic violation of the rights of the migrant detainees and to their discriminatory treatment, since they are treated like criminals but they are not protected like criminal detainees.

The second way in which crimmigration affects the human rights of the migrants is through the uncertainty it creates¹⁹⁵. This merge of criminal and migration law creates confusion as far as it concerns the nature and characteristics of migration detention, which seems to resemble to the criminal one but it is not. As mentioned in the previous chapter, this uncertainty is the very essence of crimmigration. The aim is not for criminal law to substitute migration law at some point in the future but to blur the lines between these two bodies of laws thus making it easier to regulate migration and serve certain political purposes. This sense of instability and

¹⁹⁵ M. Griffiths, 'Leaving with uncertainty: Indefinite Immigration Detention', p.263.

confusion affects a great deal the effectiveness of the human rights provided to migrant detainees.

These two ways in which crimmigration affects the human rights of the migrants are interrelated. Crimmigration takes advantage of the poor quality of protection provided to the migrants and enhances the already existing ineffectiveness. It contributes to the continuation and systematization of the violation of migrants' human rights and leads to their systematic discrimination.

5.1 Ineffective remedies for migrant detainees and uncertainty in the detention centers

The ostensibly exceptional and administrative character of migration detention has led both the ECHR and the states to afford less protection to migrants detainees than the one provided to conventional detainees. As examined earlier, migration detention is allowed under certain grounds stipulated in article 5 of the ECHR and the protection afforded to the migrant detainees under paragraph 4 is significantly weaker from the one provided to detainees under paragraph 3 of the same article. More importantly, migrants under administrative detention do not enjoy the right to a fair trial enshrined in article 6 ECHR. This means that in the case of migrant detainees a number of fundamental principles of criminal law, like the presumption of innocence, do not apply.

Under national legislations of the EU states, migrant detainees are also treated differently compared to the conventional detainees. The Returns Directive has introduced a number of protective measures that states have to comply with. However, in most cases, as shown later, they have been proved insufficient. This is particularly evident in the case of crimmigration. While states constantly rely more on detention and make use of certain methods and aspects of criminal detention, the protection and the procedural rights of the migrants remain disproportionately less. Furthermore, in a

number of cases the existed protection was also ineffective¹⁹⁶. It is important to understand that even when procedures and rights exist they must also be effective meaning to adequately protect the detainee. Through article 13 of the ECHR this concept of adequate protection or effective remedies under national authorities is introduced. This particular article underlines the ancillary character of the ECHR to the national protection of the rights enshrined in it. States should be able to provide adequate protection and an effective national mechanism through which the individual can reach that protection. According to the ECtHR *“the effectiveness of a remedy within the meaning of article 13 does not depend on the certainty of a favorable outcome”*¹⁹⁷. It rather means that, *“the remedy must be one which enables the applicants to raise their Convention rights in a timely manner, and to have them considered in the national proceedings.”*¹⁹⁸ As already mentioned though in many cases states fail to adequately protect the migrant detainees.

In this section, the insufficiency of this protection will be pointed out through the examination of a number of procedural rights afforded to the migrants in certain EU states. Furthermore, the insecurity that crimmigration inserts in the detention centers will be examined. These two parts will be combined in order to demonstrate the discretionary nature of the crimmigration phenomenon.

One of the most important rights enabling every detainee to take action against his detention is the right to get informed about his or her situation and the rights he or she has while in detention. In the case of the migrant detainees, this right is enshrined under article 5 paragraph 2 of the ECHR, which stipulates that *‘Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.’* The significance of this right has been stressed in a

¹⁹⁶ UN Special Rapporteur on the Human Rights of Migrants, Mission to Greece, paras.54-61; UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, paras. 75-78.

¹⁹⁷ *Conka v. Belgium*, no.51564/99, para.75, ECHR 1996.

¹⁹⁸ Jacobs, White and Ovey, *The European Convention on Human Rights*, p.135.

number of cases before the ECtHR. Judge Evrigenis in his dissenting opinion in the case of *X v United Kingdom* stated that this right,

*“is the embodiment of a kind of legitimate confidence in the relations between the individual and the public powers.[...] and what is guaranteed is a right that is autonomous and not auxiliary to the one provided for under paragraph 4 of Article 5 (5-4).”*¹⁹⁹

The right to obtain information is of particular importance since it is one of the rights that enables a detainee to initiate any proceedings against his or her detention. However, in the case of migrant detainees the implementation of this right has been proven problematic. A number of reports point out that in many cases migrants do not have access to information²⁰⁰. In some cases, the detainees do not even know when they will be released or expelled. In Greece particularly, the Working Group on Arbitrary Detention mentioned that *‘the detainees had little or no information in a language they could understand about the reasons for detention, its duration or the rights to challenge their detention and deportation’*.²⁰¹ This happens despite the fact that article 76 paragraph 3 of law 3386/2005 provides for the information of the detainees in a language they understand. I believe that the limited access to information is directly linked to the absence of a right to an interpreter²⁰². Since migrants are coming from a third country, it is very likely that they do not know the language of the state in which they are detained. This places them in an even more vulnerable position and increases the feeling of uncertainty they already have in detention. Although, they might have the chance to obtain information in a language they understand, a lack of interpretation deprives them of the opportunity to communicate with the authorities, ask questions, make complaints etc. Neither the ECHR nor the Returns Directive provide for a right to an interpreter.

¹⁹⁹ *X v United Kingdom*, dissenting opinion of Judge Evrigenis, no. 7215/75, p.27, ECHR 1981.

²⁰⁰ UN Working Group on Arbitrary Detention, Mission to Greece, para.77; UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para.75.

²⁰¹ UN Working Group on Arbitrary Detention, Mission to Greece, para.77.

²⁰² UN Working Group on Arbitrary Detention, Mission to Greece, para.56; UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para. 107.

The aforementioned rights are an important presupposition for the right to legal assistance. This particular right is significant in order for the detainee to take any proceedings before a court and challenge his detention as stipulated in paragraph 4 article 5 of the ECHR. It is noticeable that the Returns Directive in article 12 paragraph 4, provides free of charge legal representation to the detainee in order to challenge his expulsion order but fails to enshrine such a right in the case of detention. Article 16 paragraph 2 only states that in the case of detention, the migrant should be able to contact a legal representative, upon his or her request. There is no automatic appointment of a solicitor in the case of detention. In practice, there are many cases where migrant detainees do not have a chance to be legally represented or when this happens, it is inadequate and problematic. In the UK, there are cases where the detainees were prevented from having a solicitor²⁰³. In his reports for both Italy and Greece, the Special Rapporteur on the Human Rights of Migrants pointed out a number of instances where the detainees were deceived by solicitors who took their money but did not follow up their cases²⁰⁴. It seems that despite the legal framework that exists, states fail to effectively secure a right to legal assistance and protect the detainees. However, the quality of legal representation is crucial for the initiation of any kind of proceedings.

The Returns Directive in article 15 paragraph 3 provides for the automatic review of the detention of a migrant at reasonable intervals. The ECHR also enshrines the right of a detainee to challenge the legality of his or her detention before a court and its obligation to speedily render a decision on the matter. The majority of the EU states provide for a review of migration detention, however its application appears problematic. The Special Rapporteur on the Human Rights of Migrants in the case of Italy notice that the appeal system of expulsion and detention is unnecessarily complicated since it requires two parallel appeal procedures²⁰⁵. The review takes place

²⁰³ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom', 2014, p. 44.

²⁰⁴ UN Special Rapporteur on the Human Rights of Migrants, Mission to Greece, para.58 ; UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para.77.

²⁰⁵ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para.75.

before a judge who is the Justice of the Peace²⁰⁶. The Working Group on Arbitrary Detention underlined the unsuitability of this authority since the judge has no specific knowledge on migration issues²⁰⁷. It is indeed remarkable how under criminal law a number of professional judges decide upon the same case while in the case of migration only one unspecialized judge is in charge²⁰⁸.

Furthermore, in Greece while law 3907/2011 provides for the automatic review of both the initial and the extension of the detention by the authority that ordered it, only the extension of the detention is automatically reviewed by an administrative court and not the detention *per se*²⁰⁹. It is the detainee, who has to initiate proceedings against his or her initial detention. What is particularly problematic in the case of Greece is that the review is taking place in an automatic way and without any reference to the specificities of the case²¹⁰. This confirms the fact that only the irregular status of a migrant or his/her alleged criminality, is enough reason for his or her detention thus allowing the authorities to review detention cases in an automatic way.

In the UK, which is not a signatory in the Returns Directive, the review of migration detention is not automatic but always depends upon the detainee to challenge the legality of his or her detention²¹¹. Considering the fact that in the UK there is no upper limit in this kind of detention, the non-automatic character of the review increases the vulnerability of the migrant detainees. It is remarkable, that according to the British criminal law in pre-charge detention, if an individual is going to be held more than 36 hours, it has to be brought before a court but in migration detention, it is the detainee who has to initiate the proceedings²¹². The presentation of the aforementioned

²⁰⁶ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para.75.

²⁰⁷ UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: Mission to Italy, A/HRC/10/21/Add.5, 26 January 2009, para.83.

²⁰⁸ UN Working Group on Arbitrary Detention, Mission to Italy, para.83.

²⁰⁹ UN Working Group on Arbitrary Detention, Mission to Greece, para.98.

²¹⁰ UN Working Group on Arbitrary Detention, Mission to Greece, para.96.

²¹¹ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom', 2014, p.48.

²¹² The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom', 2014, p.49.

rights aimed at providing an idea of the quality of the protection immigrant detainees enjoy. Despite the different policies, the EU states implement, it seems that there is a pattern of insufficient or ineffective protection of the migrants in detention.

Crimmigration inserts a sense of instability in the aforementioned inadequate protection of migrant detainees. In particular, I claim that it has led to practices that are contrary to the principle of legal certainty, one of the fundamental rules upon which democratic societies are based. In the case of *Korchuganova v. Russia* the ECtHR stated that legal certainty

*“requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”*²¹³

According to this rule, laws and decisions must be definite and clear and the legitimate expectations of the individual must be protected²¹⁴. The importance of this rule lies in the fact that it protects the individual from arbitrary state power²¹⁵. Migrants in detention though, seem to be regulated through uncertainty²¹⁶. Instability seems to penetrate the structure of migration detention, from the vaguely formulated laws regulating their detention until the lack of specific information concerning their confinement.

Crimmigration enhances this instability by selectively inserting features of criminal law detention into migration detention. As a result, in many cases migrants experience their confinement as a punishment although officially it is not. The prison-like facilities is one such feature. The structure and function of the detention center creates a prison-like environment, which often leaves the migrants to wonder what have they done wrong and why are they punished. This punitive aspect is enhanced by the poor protection provided to the detainees. The lack of information is such an example. The

²¹³ *Korchuganova v. Russia*, no. 75039/01, para.47, ECHR 2006.

²¹⁴ J. R. Maxeiner, “Some Realism about legal certainty in the globalization of the rule of law”, *Houston Journal of International Law*, vol. 31, no.1, 2008, p. 32.

²¹⁵ Maxeiner, p. 30.

²¹⁶ Griffiths, ‘Leaving with uncertainty: Indefinite Immigration Detention’, p.279.

confinement in a detention center that resembles to prison, in conjunction with the lack of information concerning the detention and the procedures regulating, increases their vulnerability. Indeed, there are cases where the immigrants and their legal representatives, do not know when they will be released or expelled²¹⁷. In other cases, they are moved from one center to the other without notice or even worse, they are expelled without any expulsion directions.²¹⁸ Migrants are left in a state of confusion unable to react to the complicated situation they are placed in. As Bosworth noticed, their inability to define what exactly the detention center is and what are they doing in there have led many of them “*to compare their experiences in detention, to prison*”²¹⁹. It seems that, this comparison helps the detention center to make sense²²⁰ since it looks like a prison and it is felt like a prison. However, it is not a prison.

On the contrary detention under criminal law is regulated by clear and definite laws. Based on the principle of legal certainty the criminal detainee is aware of his or her situation, of the rules and rights related to his or her case. The certainty upon which his or her detention is based enables him or her to take action against his or her detention and to deal with the new environment. Prison is, to some extent, a more stable environment since the detention is based upon a certain sentence. The difference between the uncertainty of the detention center and the stability of the prison is highlighted by a migrant held in a British detention center who stated that, “*in prison, you count your days down, but in detention you count your days up.*”²²¹

²¹⁷ PRO ASYL Foundation and Friends of PRO ASYL in co-operation with the Greek Council for Refugees and Infomobile, ‘Walls of shame-Accounts from the inside: The Detention Centers of Evros’, 2012, p. 28.

²¹⁸ Griffiths, ‘Leaving with uncertainty: Indefinite Immigration Detention’, p. 274.

²¹⁹ Ass. K.F Bosworth. M., ‘Can Immigration Detention Centers be Legitimate? Understanding Confinement in a Global World’, in K.F Ass and M. Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford University Press, 2013, p.6. Available from: Lubsearch (last visited on 25-May-2015).

²²⁰ Ass. and Bosworth, ‘Can Immigration Detention Centers be Legitimate? Understanding Confinement in a Global World’, p.7.

²²¹ The All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, ‘The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’, 2014, p.18.

The aforementioned analysis focused on the protection that migrant detainees are afforded against their detention. It pointed out that the procedural rights available to them are inadequate and ineffective. The most striking fact is that this poor quality of protection appears to be a common practice in many EU states. Crimmigration contributes in this situation by allowing the massive and automatic use of detention while at the same time refuses to increase the protection of the migrants at an adequate level. Increased detention should entail increased protection. However, this merge of criminal with migration law has led to an increased use of detention but without enhanced protection. At the same time, the uncertainty penetrating the detention centers confuses the detainees in a way that leaves them incapable of taking action against their detention. Even if certain procedural rights are available, this sense of instability renders them ineffective since detainees are not capable of evoking them.

The policies presented in chapter two as well as the human rights violations analyzed in this chapter prove that detention is not a measure of last resort anymore. The officially exceptional character of detention and the decreased protection it entails does not comply with reality. The criminal identity bestowed on the migrant has altered the character of detention by allowing its widespread use. The lack of effective protection though has led to a practice where migrants are treated like criminals but without the protection criminals enjoy in detention. This lack of protection in conjunction with the instability that occurs in the detention centers has led to the systematic discrimination of the migrant detainees. This conclusion appears reasonable considering the fact that crimmigration is a selective or a discriminatory practice. In the area of enforcement it treats criminal and migrant detainees the same while in the procedural level of protection and human rights it does not, thus leaving the later exposed and disadvantaged. It is also important to remember that, the uncertainty it entails is not accidental but a fundamental technique for the management of the migrants²²² that deteriorates the already unprivileged position in which immigrant detainees are placed. In the next section, I will examine Greece more closely. I claim that in this

²²² Griffiths, 'Leaving with uncertainty: Indefinite Immigration Detention', p.279.

country, crimmigration has led to an institutional discrimination against migrants detainees.

5.2 The case of Greece and institutional discrimination

Crimmigration is a phenomenon with a certain structure. In order to function it requires a number of different institutions and practices through which it can be manifested. In this section, I will again focus on the case of Greece. In particular, I claim that crimmigration penetrates the institutions of the Greek society thus leading to an institutional discrimination of the migrant detainees in this country. What I want to show is that in order for migrant detainees to be treated like criminals a number of different practices have to take place, involving different institutions such as the government, judicial authorities and the police. These institutions contribute in the creation and continuation of crimmigration thus leading to the institutional discrimination²²³ of the migrants in general and the migrant detainees in particular. Since information has already been provided concerning Greece and the role of crimmigration in it, I will not introduce so many new facts but I will proceed to a synthesis of what I already have said in order to point out the institutional element of this phenomenon. Although this part focuses on this particular country, because of the examination of crimmigration occurring in other EU countries, as presented in the previous chapters, it could be argued that Greece is not the only example where institutional discrimination occurs.

In the previous chapters, a number of public statements made by Greek politicians was presented. Terms like ‘invaders’ or ‘criminals’ were frequently used in order to describe and categorize migrants. A number of Eurobarometers conducted since 2000 showed that Greeks were more worried or feared of migration than most Europeans²²⁴. At that time, the xenophobia presented in Greek society was not a central issue in the

²²³ Multiprofessional Faculty Development, <http://www.faculty.londondeanery.ac.uk/e-learning/diversity-equal-opportunities-and-human-rights/institutional-discrimination> (last visited on 25-May-2015).

²²⁴ A.A Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’, *South European Society and Politics*, vol.18, no.4, p.557.

political agendas of the political parties²²⁵. It is only in the later years that migration became a crucial issue discussed by almost every political actor²²⁶. The failed migration policies, the economic crisis as well as the rise of far right wing party of Golden Dawn created a hostile environment for the migrants and led to their stigmatization as criminals. At the same time, the Greek government of New Democracy seemed to deny the existence of racism in Greek society by stressing the inherent hospitality embedded in the Greek genes²²⁷. It rather chose to blame the migrants who invaded Greece demanding to be sustained by the taxes the Greeks pay²²⁸. The existence and operation of Golden Dawn familiarized the Greek society even more with an anti-migration rhetoric, which now became part of the daily political discourse. At a time of an economic crisis the emphasis on the national identity and the exclusion of outsiders as a means to protect and 'save' the society, became an integral part of both the governmental and the opposition's argumentation.

These anti-migration sentiments were also reflected in a number of legal instruments regulating migration. The most noticeable of these legal instruments is the advisory opinion 44/2014 issued by the Greek Council of the State, which prolonged the detention of immigrants indefinitely. The advisory opinion was analyzed in the third chapter and it is used in this section as a means to illustrate how crimmigration has even affected highly esteemed authorities. The fact that the Council decided against the existed national and European legislation is particularly striking. The criminal path the 300 Syrians would potentially follow if released, was enough reason for the Council in order to extend detention beyond the limit permissible by the law. By labeling the extension of detention as a restrictive measure, the Council granted to the police officers the opportunity to decide at will on the confinement of migrant detainees. Despite the fact that a number of national

²²⁵ Ellinas, p.557.

²²⁶ Ellinas, p. 557.

²²⁷ Cheliotis, 'Behind the veil of philoxenia: The politics of immigration detention in Greece', p. 728.

²²⁸ Amnesty International, 'Greece: Frontier of hope and fear-Migrants and Refugees Pushed Back at Europe's Borders', 2014, p.24 ; See http://attikanet.blogspot.se/2015/01/blog-post_7.html

courts condemned this advisory opinion and the fact that it is not legally binding, the Greek government continued to implement this measure on the migrant detainees²²⁹. This incident is only a part of the general discrimination of the migrant detainees. The automatic detention of the migrants based only on their legal status and their alleged criminality, the lack of adequate protection of the migrant detainees as well as the unwillingness of the Greek state to effectively secure the human rights of the migrants illustrate how crimmigration has led to a general pattern of discrimination in this country.

The unwillingness of the state is particularly evident in the number of police abuses against migrants that remained unpunished. Police brutality against the migrants occurs frequently in Greece. A number of reports are stressing the fact that in many cases the police or the judicial authorities do not promptly investigate accusations of police brutality against migrants, whether they are in detention or not²³⁰. In addition, the police is frequently accused of not being able or willing to ensure the protection of the migrants²³¹. There are even cases where immigrants were discouraged by the police officers from filing complaints²³². The number of convictions from the ECtHR for the violation of article 3 of ECHR prohibiting the use of torture or other degrading treatment reflects the widespread mistreatment of the migrants, both in and out of the detention centers, and the inability of the national legal authorities to protect the human rights of the migrants. It can be argue that in the case of migrant detainees, police brutality is also used as a means to force them to leave the country and discourage the entrance of future migrants, a practice that complies with the criminalized character of migration detention described in the previous chapter. As a result, I strongly believe that the unwillingness of the state to tackle the

²²⁹ KIFA, <http://www.kifadramas.gr/tag/%CE%B4%CE%B9%CE%BA%CE%B1%CE%B9%CE%BF%CF%83%CF%8D%CE%BD%CE%B7/> (last visited on 25-May-2015).

²³⁰ Amnesty International, 'A Law unto Themselves: A Culture of Abuse and Impunity in the Greek Police, 2014, p. 44.

²³¹ Amnesty International, 'A Law unto Themselves: A Culture of Abuse and Impunity in the Greek Police, 2014, p. 44.

²³² Amnesty International, 'A Law unto Themselves: A Culture of Abuse and Impunity in the Greek Police, 2014, p. 32.

issue of impunity, tacitly permits and encourages its continuation. A culture of impunity has been established which leads to the systematic violation of the human rights of the migrants and implies a tacit collusion between the police and the government against them²³³. It now becomes clear that in Greece, crimmigration penetrates a number of institutions, laws and behaviors. I claim that this structural element has led to the institutional discrimination against the migrants in Greece.

Based on the UN report against discrimination the distinction between citizens and non-citizens is a legitimate ground upon which states can treat individuals differently. This means that states can choose to confer certain rights to their citizens while denying access to non-citizens, but only when this distinction “serves a legitimate State objective and is proportional to the achievement of that objective.”²³⁴Based on this, migrants do not enjoy certain rights that the state affords only to its citizens, like the right to vote. However, the right to liberty, to humane treatment and to protection against arbitrary state actions is not among those rights²³⁵. In particular the same report points out that,

“the principle of non-discrimination must be observed in all matters, in particular in those concerning liberty, security and dignity of the person, equality before the courts and due process of law, as well as international cooperation in judicial and police matters.”²³⁶

In addition, it emphasizes that “Immigrants and asylum-seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals”²³⁷. These statements illustrate that no matter his or her legal status, a migrant is entitled to effective protection and security and to the right not be treated as a criminal.

²³³ Amnesty International, ‘A Law unto Themselves: A Culture of Abuse and Impunity in the Greek Police’, 2014, p.39.

²³⁴ UN Special Rapporteur, Report of the Special Rapporteur on the Prevention of Discrimination and the rights of non-citizens, p.2.

²³⁵ UN Special Rapporteur, Report of the Special Rapporteur on the Prevention of Discrimination and the rights of non-citizens, para.6.

²³⁶ UN Special Rapporteur, Report of the Special Rapporteur on the Prevention of Discrimination and the rights of non-citizens, para.28.

²³⁷ UN Special Rapporteur, Report of the Special Rapporteur on the Prevention of Discrimination and the rights of non-citizens, para.29.

By stigmatizing migrants as ‘dangerous’ or ‘illegal’, crimmigration has achieved to present them as a group not worthy of full or adequate protection. The ostensibly administrative character of detention might lead to the simplistic conclusion that migrants do not deserve much protection. However, it is these vulnerable people that are in need of the utmost protection especially against state actors. Their legal status should not affect the level of their security. In times of increased migration flows, these statements become even more relevant. After all, criminal law does not distinguish between individuals. On the contrary, it is there to ensure the fair treatment of all individuals, including those who have committed the most hideous crimes. An effective procedural mechanism is one of the basic elements of every democratic society.

However, in the case of Greece, migrants are systematically treated like criminals but are not protected like criminals. Crimmigration occurs in a number of levels of the Greek society from public discourse and the political parties, to the laws and the authorities implementing them. Especially, in the case of the police it seems that some unwritten rules and guidance apply, which deprives the migrants from their effective protection. The most striking fact, as illustrated above through the presentation of governmental and political statements, is that the Greek government presents all these measures leading to their discretionary treatment as the only solution to the migration issue and has convinced a part of the electorate for their necessity. As a result, measures that would be considered unacceptable to be applied on citizens and under criminal law, are now excused and accepted in the name of national safety and the combat against ‘illegal’ migration.

Although this section focused specifically on Greece, it is possible to argue that institutional discrimination is a reality in a number of EU countries. While this assumption might seem arbitrary, I believe that the occurrence of crimmigration in many EU states and the systematic violation of the human rights of the migrants, as presented in this paper, is at least an indicator of the existence of institutional discrimination against migrant detainees in these countries. Of course, in order to reach more concrete conclusions, a

separate analysis of each country's institutions is necessary. The particular examination of Greece, aimed at presenting how one of the main stakeholders on migration issues deals with issues of crimmigration, detention and human rights protection of the migrant detainees. Greece is one of the most heavily criticized countries on their migration policies and has been many times convicted by the ECtHR and condemned by UN bodies and NGOs for the way it treats immigrants. The policies implemented by this country affect the lives of thousands of migrants therefore, it is important that they are scrutinized and criticized.

5.3 Recommendations

The merge of criminal and migration law has altered the character of migration detention. From a last resort measure, it has now become a widespread practice and an integral part of the national policies of the EU states. The legal instruments regulating it like the Returns Directive and the ECHR fail to limit the use of this practice and to ensure its exceptional character. States are willing to adopt detention policies that take advantage of the vagueness and inadequacy of the aforementioned instruments or even worse, measures that are not compatible with them. The result of these measures is the systematic violation of the human rights of the migrants and their systematic discrimination, which in some cases has become institutional.

A number of reports have made suggestions as to how detention should be applied²³⁸. I believe that one solution should be the dominant one and that is to reduce the use of migration detention. Detention, whether criminal or administrative, is a harsh measure depriving the individual of his or her liberty, one of the most fundamental rights a person has. This is why under criminal law a procedural mechanism has been set up, ensuring the fair imposition of this penalty. In the case of the migrants, detention appears even harsher since it is imposed to people who have not committed or

²³⁸ UN Special Rapporteur on the Human Rights of Migrants, Mission to Italy, para.84. ; UN Working Group on Arbitrary Detention, Mission to Greece, para.103.

accused of a criminal offence²³⁹. The significantly less protection afforded to them places them at an even more vulnerable position. Because of this limited procedural mechanism and decreased protection that administrative detention entails, its use must be limited. The Global Detention Center underlines that administrative detention should be implemented in exceptional cases since “*it can involve deprivation of liberty without judicial guarantees, thus offering a broad discretion to the executive*²⁴⁰”. This wide discretion of the executive is one of the features upon which crimmigration is based. For that reason, I believe that migration detention should be strictly regulated. States as well as the EU should stop using vague and undefined terms when drafting their detention laws and policies. Furthermore, the distinction between administrative and criminal detention should be made clear and the former should retain its exceptional character. At the same time, the protection under administrative detention should be enhanced thus recognizing the right of every individual to protection against arbitrary detention regardless of his or her legal status. Crimmigration particularly aims at keeping the protection of migrant detainees low.

In addition, when it comes to migration detention as such, it has been proven to be an insufficient measure in facilitating the expulsion of the migrants while at the same time is a measure requiring a huge amount of money. Instead of building new detention centers or implementing harsher border controls, states should focus more on the reception facilities and on alternative measures to detention.

In case detention numbers remain the same or continue to increase then I suggest that migrant detainees are provided with the same protection as the criminal ones. An adequate protection mechanism should be established and provisions like article 6 of the ECHR should apply on migration detention. If migrant detainees are treated like criminals then the increased protection of criminal law should also apply to them. The uncertainty introduced by

²³⁹ Baldaccini, ‘The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive’, p.14.

²⁴⁰ Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention’, p.7.

crimmigration does not have a place in democratic societies, regulated by the principles of non-discrimination and legal certainty.

While the abovementioned proposals concern migration detention and its implementation it is important to always keep in mind that crimmigration is a complicated phenomenon and detention is a part of it. As a result, in order to stop the implementation of criminalized detention, a holistic approach to crimmigration and the migration issue should be adopted. Crimmigration is now part of the rhetoric applied by many EU governments of the laws concerning migration and detention. It is thus important to remember that criminalized detention does not take place in a vacuum, but it is part of a general practice that stigmatizes and treats migrants as criminals. A practice which above all seems to serve certain political purposes.

6. CONCLUDING REMARKS

Throughout history detention has served, and continues to serve, a number of different purposes. The most common use of this practice is under criminal law. However, the aforementioned analysis proved that, in contemporary Europe, it is almost impossible to find national or EU migration policies that do not provide for the administrative detention as a means to facilitate the expulsion of migrants. The widespread use of this administrative practice seems to contravene the exceptional and last resort character as described by certain legal instruments like the Returns Directive and the ECHR. Despite the fact that these instruments introduce certain principles and practices concerning migration detention, they seem to fall short when it comes to actually regulating and limiting its application only to exceptional cases. The increased use of migration detention and the implementation of certain dubious detention practices confirm this observation.

These contested measures are not only part of the policies the southern EU states like Italy, Greece and Malta are implementing, but also of the policies northern states apply like UK and the Netherlands. Through the presentation of a number of these policies this paper claimed that migration detention, as

currently implemented, resembles to criminal detention. In particular, it claimed that migration detention is part of the crimmigration phenomenon, meaning of the selective intersection between criminal and migration law. The common elements that these two bodies of laws share, especially that of excluding individuals, has led to this selective adoption of certain elements of criminal law enforcement by migration law. At the same time, the procedural protection provided to criminal detainees is not afforded to the migrants. Apart from detention, this kind of treatment of the migrants is made clear through a number of ways including public discourse and legislation. The stigmatization of migrants as criminals or as a danger to the safety of society has allowed the states to categorize them and treat them in a collective way, which facilitates their management.

In this general attempt to understand the crimmigration phenomenon, this paper presented a number of facts explaining why criminal law is used in migration enforcement. The adoption of the Schengen Convention, which provided for the abolition of the internal borders and the creation of one external EU border, is one of the major developments which allowed states to frame and deal with migration as a security issue. The need to control this external border in conjunction with the economic crisis, the failure of certain economic policies and xenophobia has turned migration into a highly political issue. Governments used migration as a scapegoat and as a means to gain votes²⁴¹. By constructing migration as a security problem posing an imminent threat to society, states were able to implement a number of dubious ‘exceptional’ practices in order to combat ‘illegal’ migration. However, these ‘exceptional’ practices have been proved more permanent than states claimed they would be.

In this historical context, crimmigration has affected migration detention both in a symbolic and in a real way. It has changed the purposes that this administrative practice serves. Instead of being a last resort and exceptional measure facilitating expulsion, it has come to resemble more to criminal

²⁴¹ Huysmans, ‘The European Union and the Securitization of Migration in Europe’, p. 769.

detention thus serving deterrent, punitive and incarceration purposes²⁴². In order to discourage potential migrants from crossing their borders, states detain migrants based only on their legal status, even if this is not compatible with the Returns Directive. At the same time, the lengthy detention periods, the prison-like detention centers and the poor detention conditions provide this practice with a punitive element, which in many cases is used as a way to convince migrant detainees to leave the country. In addition, migration detention is used as a way keep migrants out of the streets. This explains why states are keeping migrants in detention as long as they can even when their expulsion is unfeasible. In countries like Greece, the authorities can prolong the duration of detention even beyond the permissible limit prescribed in both national and European laws. By stigmatizing migrant detainees as criminals, a group of people that is threatening public order, states are able to manage them at will, even if that means bending or broadly interpreting the law.

The problematic nature of the criminalized detention becomes evident on the impact it has on the human rights of the migrant detainees. Crimmigration takes advantage of the already weak protection of migrants by treating them as criminal detainees but not protecting them as such. What this paper stressed concerning the impact that crimmigration has on the human rights of the migrant detainees, is the uncertainty it introduces. The instability characterizing the detention centers renders the migrant detainees incapable of protecting themselves. This systematic violation of their human rights and unequal treatment of the migrant detainees compared to the criminal ones has led to their systematic discrimination.

While data from different countries were presented, this paper focused more on the case of Greece since it is one of the main entry points of migration flows in Europe. Certain measures and legal instruments were examined in order to prove how detention has been criminalized in this country. In addition, I attempted to illustrate that in this country, the discrimination against the migrant detainees has acquired an institutional character. From

²⁴² Majcher, Working Paper on “Crimmigration” in the European Union through the Lens of Immigration Detention’, p.10.

the political discourse until the legislation and the police authorities migrants are discriminated and treated like criminals but without the relevant protection. This pattern appears to be both paradoxical but also logical. The paradox element concerns the fact that a democratic society based on the principle of non-discrimination chooses to discriminate migrants based on their legal status thus depriving them of certain basic rights. At the same time, it is important to remember that once states have chosen to rely on crimmigration as a way to manage migration, it only seems reasonable that discrimination is going to be its main result. Crimmigration is an inherently discriminatory practice. It uses criminal law in a perverted way, taking only its harshest elements and leaving out the enhanced protection it offers²⁴³. In addition, since crimmigration occurs in different levels and institutions of society it only appears reasonable that its outcomes will be the institutional discrimination of the migrants.

The analysis conducted in this paper illustrates that crimmigration is embedded in EU and national policies and rhetoric. The systematic stigmatization of the migrants as criminals and their systematic mistreatment shows that crimmigration, unfortunately, is a deliberate choice. States are presenting the issue of ‘illegal’ migration in a way that allows them wide discretion as to how they are going to combat it. The imminent threat migrants pose to national security and cohesion has led to practices that do not comply with certain democratic principles. Detention is among these practices, through which crimmigration shows its most harsh face. Although crimmigration is rooted in issues concerning the structure of EU, the international market and the changing nature of the borders, states should consider certain alternatives to detention and increase the protection of the migrants in order to alleviate the discriminatory results of this selective intersection between criminal and migration law. In democratic societies, every individual should be treated with respect and should be able to enjoy certain basic rights, regardless of its legal status.

²⁴³ Spina, ‘Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law’, p.654.

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