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Legitimacy and Rationalization in European Criminal Law: A Critical Analysis of the Criminalization of Migrant Smuggling

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ABSTRACT

The article critically examines the legitimacy of European criminal law through the perspective of migrant smuggling incrimination. By analyzing the complex intersection of legal principles and migration policies, the research investigates whether applying a principled criminalization approach can resolve existing systemic legitimacy challenges in European criminal law. The study systematically deconstructs migrant smuggling as a legal concept, evaluates its alignment with broader criminal law functions, and critically assesses the legal and ethical implications of current European Union incrimination strategies. Through a comprehensive methodology examining normative frameworks, interests, and legal principles, the research aims to provide a nuanced evaluation of criminal law rationalization in the European context. After defining the conduct and differentiating it from related concepts in the Introduction, Section 1 explores the relationship between migrant smuggling and the functions of European criminal law. Section 2 undertakes a step-by-step analysis of the criminalization process, examining all relevant interests and principles. Section 3 critically assesses the adequacy of this process's outcomes, followed by concluding observations on the broader implications for European criminal law legitimacy.

KEYWORDS

Migrant Smuggling; Function of the European Criminal Law; Material Legitimacy; Criminalisation Principles; Criminalisation Process

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INTRODUCTION: IDENTIFYING THE CONDUCT

Migration as a global phenomenon is not a recent one: people have always left their country looking for different opportunities in other parts of the world, regardless of the reason that motivated them to leave.[1] However, it is only with the creation of the nation-state – with fixed borders and the exercise of its sovereign power within them – that the phenomenon of migrant smuggling becomes relevant. With the policing of borders and the determination, by the internal law, of who could legitimately cross them, the parallel need to access the opportunities presented by that territory without respecting the requirements for entry is simultaneously created.

Migrant smuggling is therefore undeniably linked to the concept of "irregularity", stemming from the formalisation of the entry into a given territory;[2] the requirements for such a lawful entry and stay in a given territory are defined by the internal law of a given country. As a consequence, when an irregular situation is not identified and reported by the responsible bodies of each state, that irregularity will not exist; thus, a migrant's status can be fluid, depending on the fulfilment of the requirements established by law.[3]

This article aims to analyse the European legal definition of migrant smuggling, as it exists now in the legislation of the European Union [hereinafter EU], regarding its material legitimacy, to evaluate the need for a legislative revision. For that purpose, a proposed three-step criminalisation process will be followed, where the interests that can be subjacent to the criminalisation of migrant smuggling will be critically assessed to identify the ones (if any) that are capable of lending the necessary legitimacy to European criminal law. As migrant smuggling is a very plastic issue, in the sense that it can be used to simultaneously justify opposing views (depending on the adopted point of view), there are three dichotomies worthy of bearing in mind. First, migrant smuggling is not the same as human trafficking. Although the main elements to differentiate between the two, while fairly simple to identify in theory, can be quite difficult to extricate in practice. Secondly, with regard to protected interests, this subject can be

[1] On the "push and pull" factors of migration, see Marta Minetti, Human Trafficking and Migrant Smuggling: Analysis of the Distinction through the Lens of the "European Migration Crisis" and of the Italian Policy Response 11-12 (Sept. 2016) (LLM dissertation, University of Kent) (U.K.).

[2] "People smuggling has its roots in the border control measures of our countries, inasmuch as alcohol smuggling stemmed out of the prohibition policies." – François Crépeau, *The Fight Against Migrant Smuggling: Migration Containment over Refugee Protection*, *in* The Refugee Convention at Fifty: A View from Forced Migration Studies 173, 181 (Joanne Van Selm et al. eds., 2003).

[3] If a migrant in possession of a legal visa lets it expire for a few days and then renews it, their irregular situation will only acquire the negative consequences deriving from it if it is treated as such by the authorities responsible for the visa's renewal, as clearly exemplified by Sergio Carrera & Elspeth Guild, *Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach, in* Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU 1, 3 (Sergio Carrera & Elspeth Guild eds., 2016) (Belg.).

analysed from the state's or individual's point of view. Thirdly, concerning the answer to this phenomenon, one can advocate the criminalisation of the conduct as such or persist in a consistent approach through other vectors and practices. The aforementioned dichotomies will be addressed, even though the focus of this article will remain on the interests that are meant to be protected by criminalising migrant smuggling, allowing for a criminally relevant (and legitimate) definition of migrant smuggling to be reached.

There are a few concepts that must be differentiated beforehand in order to conceptualise and later define, such as migrant smuggling. First, *migration* itself: the act of migrating implies the movement of a person from one territory to another, be it a national or international movement, a temporary or permanent one, but without it being intrinsically regular or irregular. The *irregular migration* will, in turn, be the entry or stay in a state's territory without authorisation or in violation of the rules established by it.[4] It is important to differentiate between these two moments in time – the entry and stay – since they are not necessarily linked: one can enter a territory irregularly and then regulate their situation (e.g. because an asylum request is granted), or one can enter a territory lawfully, and then become irregular due to the operation of internal rules (e.g. if someone stays in the territory after the expiry date of a visa).

The last two concepts are the most similar: human trafficking and migrant smuggling. The Palermo Protocols, two Additional Protocols to the United Nations Convention against Transnational Organised Crime, are usually the source for distinguishing these two criminal behaviours. Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, establishes that trafficking in persons includes, among other conduct, "transportation . . . harbouring or receipt of persons, using the threat or use of force or other forms of coercion . . . for exploitation." This phenomenon differs from migrant smuggling in five aspects.[5]

First, the *consent* – a trafficking victim never expresses their consent, or if they do in an initial phase, it is then nullified by the use of coercion, fraud, abuse and exploitation; the migrant, in turn, consents to their smuggling. The second aspect is *intent*: the intent of the trafficker is always to exploit the victim in the final destination, whereas the smuggler's intervention ends when the migrant reaches the agreed destination. The *status* of the person is also different: the trafficked person is always a

[4] *See* Ilse van Liempt, *A Critical Insight into Europe's Criminalisation of Human Smuggling*, Sieps Eur. Pol'y Analysis, Jan. 2016, at 1, 2.

[5] *See* Human Rights First, *Human Trafficking and Migrant Smuggling: How They Differ, Fact Sheet*, Human Rights First (June 12, 2014) <https://www.humanrightsfirst.org/resource/human-trafficking-and-migrant-smuggling-how-they-differ> (last accessed Mar 3, 2023).

victim of the crime, whereas the migrant can also be seen as an object of the crime. As to the *transnationality* component, trafficking does not imply a transnational element, as it is sufficient for the victim to be transported or kept in a different location, regardless of being in the same region or country; migrant smuggling, by its very nature, has a transnational element. Lastly, regarding *profit*, the profit or advantage gained by the trafficker stems from the exploitation of the person. In contrast, the smuggler agrees to a fee paid for by the migrant for the services provided by the smuggler.

Even though the difference between these two practices is theoretically clear, it can be quite difficult to ascertain whether a given situation is trafficking or smuggling. The skewed perspective existing in these matters is worsened by the fact that the entities that usually intervene in such situations tend to consider the issue either at the point of departure of the migrant to determine whether the migrant consented or not (this is usually the stance adopted by states); or at the point of arrival of the migrant, to evaluate the elements of trafficking that exist at that point in time (this is usually the stance adopted by human rights advocates).[6] In reality, because of the typical lengthiness of the trip, the situation of a migrant may vary between trafficking and smuggling, depending on the choices they are confronted with.

[6] *See* Minetti, *supra* note 1, at 31.

1. CRIMINALISING MIGRANT SMUGGLING: THE RELATIONSHIP WITH THE FUNCTIONS OF EUROPEAN CRIMINAL LAW

When confronted with certain behaviour, criminal law must have clear guidance from criminal policy since it is simultaneously demanded that criminal law acts as a *limit* to the powers of the state (protecting the citizen from the state) and as the *foundation* of the powers of the state (protecting the citizen from others)[7] – in each incriminating norm, it must be weighed which dimension will prevail and to what extent, taking into consideration the interest behind criminalisation.

When it comes to migrant smuggling, that guidance seems to exist at the international level: Article 3 (a) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air defines migrant smuggling as "the procurement, to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."[8] The criminalisation of the migrant is also clearly denied in Article 5, as is the action of anyone acting within the humanitarian clause (Article 19). Though this Protocol presents some challenges,[9] the intention appears to be protecting irregular migrants[10] by punishing all who, acting in the context of organised crime (since it is a supplement to the United Nations Convention against Transnational Organised Crime), gain illicit profit by exploiting the migrants' situation of necessity. The conclusion will be forcefully different in the European sphere, given how the EU opted to criminalise the conduct, revealing a security-oriented and mainly preventive perspective,[11] with the clear intention to stop migration flows from reaching European territory. This perspective perceives migrant smuggling as a threat to the security of the EU, thus furthering the adoption of measures with an anticipatory character. This stance slowly transforms

[7] Put in a different way, see Jeroen H. Blomsma & Christina Peristeridou, *The Way Forward: A General Part of European Criminal Law*, *in* Approximation of Substantive Criminal Law in the EU: The Way Forward 117, 134 (Francesca Galli & Anne Weyembergh eds., 2013) (Belg.): "[M]ost debate on the content of the general principles of European criminal law is the result of a different focus on the *instrumental* or *protective* finality of criminal law" (emphasis added).

[8] Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against trasnational organised crime, 2000 [hereinafter Smuggling Protocol].

[9] For a more detailed account, see, e.g., Raquel Cardoso, As Funções do Direito Penal Europeu e a Legitimidade da Criminalização: Entre o Harm Principle e a Protecção de Bens Jurídicos [The Functions of European Criminal Law and the Legitimacy of Criminalization: Between the Harm Principle and the Protection of Legal Interests] 503-04 (2023) (Braz.).

[10] Emphasising the importance of that direction, see, e.g., Valsamis Mitsilegas, *The Normative Foundations of the Criminalization of Human Smuggling: Exploring the Fault Lines Between European and International Law*, 10 New J. Eur. Crim. L. 68, 72 (2019) (U.K.).

[11] *Id.* at 84; and expounding on this characteristic, most recently, see, e.g., Valsamis Mitsilegas, *The EU External Border as a Site of Preventive (In)justice*, 28 Eur. L.J. 263, 264-65 (2022) (U.K.).

criminal law into security law, dissociating criminalisation from both criminal action and from a concrete act on the part of the agent of the crime.

The existing law (known as the Facilitators Package) criminalises the conduct in the following manner:

> 1. Each Member State shall adopt appropriate sanctions on:
>
> a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
>
> b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.
>
> 2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the behaviour aims to provide humanitarian assistance to the person concerned.[12]

Unlike the United Nations Protocol, there is no mandatory need for financial gain when assisting a person to enter or transit across the territory of a Member State in order for the conduct to be a crime (unlike the assistance to the residence).[13] This immediately raises the possibility of criminally punishing people who act without any criminal intent, whether they act out of humanitarian concern or because they are legitimately pursuing their business.[14] This is aggravated by the fact that the European legislation does not possess a general safeguard clause, such as the one in Article 19 of the Protocol: it mentions only the *possibility* for Member States to choose not to criminalise

[12] Directive 2002/90, of the European Parliament and of the Council of 20 Novembre 2002 defininig the facilitation of unauthorised entry, transit and residence, 1.

[13] Even though Art. 1(1)(b) mentions the motivation to obtain financial gain when assisting a person to reside irregularly in a territory, some Member States have not transposed this requirement, making it possible for people who act with the intention to shelter friends or family (or motivated by humanitarian reasons) to be criminalised – for a list, see Sergio Carrera et al., Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update, Study requested by the PETI committee, at 11, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf (Dec. 2018).

[14] For example, taxi drivers or operators in the housing sector (be it a rental situation, hotels or AirBnB) can unconsciously commit migrant smuggling as defined in the Directive: the first ones, because they must not control documents when transporting people within the EU; the latter, because they profit (even unknowingly, and legally) from the migrant's stay in the country – *see* Sergio Carrera, *supra* note 12.

humanitarian aid regarding entry and transit (not residence), as defined in Article 1(2) of the Directive.[15]

Specialised literature underscores the fact that the definition provided by the Directive is in clear breach of the international obligations existing for the EU and Member States for the protection of human rights, as well as in contradiction to the fundamental values of the EU (Article 2 Treaty on European Union [hereinafter T.E.U.]) and the humanitarian aid it is committed to providing (Article 214 Treaty on the Functioning of the European Union [hereinafter T.F.E.U.]).[16]

The corresponding Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence establishes some circumstances that will increase the maximum sanction (in Article 1(3)):

> 3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:
>
> — the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA (1),
>
> — the offence was committed while endangering the lives of the persons who are the subject of the offence.[17]

Regarding the first exception, it must be noted that what is used in the Protocol as a requirement for criminalisation appears in the Framework Decision [hereinafter F.D.] as an aggravating factor, which means the European norm will be applied to a much

[15] France has already been tried by the European Court of Human Rights for convicting a regular resident of migrant smuggling, simply because he continued to house his son-in-law after his visa expired – *see* case of *Mallah c. France* App no 29681/08 (ECtHR, 10 November 2011). This case involved Art. 8 of the European Convention on Human Rights [hereinafter E.C.H.R.], so France was not found to have breached the Convention.

[16] It is not only the legislation of the EU that is found to be misaligned with its own values, but also its actions: "Engaging with regimes in source and transit countries in exchange for emigration control has been very costly, and I do not refer it to money but leverage and credibility. What is the cost of migration control when the [EU] legitimizes regimes in Libya and Sudan?" – *see* Virginie Guiraudon, *20 Years After Tampere's Agenda on 'Illegal Migration': Policy Continuity in Spite of Unintended Consequences*, *in* 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice 147, 155 (Sergio Carrera et al. eds., 2020) (It.). Recent examples include Turkey and Belarus, who leveraged their strategic geographical positioning (regarding transit routes) against unwanted actions by the EU Relating the migration to the democratic crises in Europe, see Francesco L. Gatta, *Migration and the Rule of (Human Rights) Law: Two 'Crises' Looking in the Same Mirror*, Croatian Y.B. Eur. L. & Pol'y, Dec. 2019, at 99 (Croat.).

[17] Council Decision 2002/946, 2002, O.J. (L 328) 1(3).

broader set of conducts. As for the second exception, only the endangerment of the migrant's life is mentioned (and not other relevant interests), which is also worthy of criticism.[18] Concerning the possible criminalisation of the migrant himself, there is no mention whatsoever in the Directive or F.D.[19]

There is no doubt that in the case of migration, the European policy has been defined throughout the EU's history with a specific perspective of "reaction to crisis"[20] and their potential effects, so it is no wonder that the ultimate goal of the European policies remains *avoiding* such crisis by stopping migration flows whenever possible. This narrative, as well as the generalised feeling of a lack of control at the borders, is usually aided by the stigmatisation to which migrant smugglers are subject: they are often portrayed as male, carrying out their activities as part of vast criminal organisations (therefore connected with other serious crimes, such as terrorism or drug trafficking), whose only intent is to profit, thereby jeopardising migrants' lives and in the process committing several other violent crimes against them.[21]

A certain idea of the problem is consequently formed, one that is not only hard to overcome but also favours an approach through punishment to appeal to public opinion,[22]

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[18] Alessandro Spena, *Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?*, *in* Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU, *supra* note 3, at 33, 36.

[19] The Court of Justice of the European Union [hereinafter C.J.E.U.] has, however, taken some steps to limit such a consequence: see *infra* note 86. There is now a Proposal (Proposal for a directive of the european parliament and of the council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM (2023) 755 final (Nov. 28, 2003) for a new Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, which is meant to replace the Facilitator's Package. Although this Proposal introduces profit as an element of the criminal conduct, as well as harm to migrants (Art 3 (a)(b)), it also lays down a new offence, which is the public instigation to third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State (Art 3(2)). The mandatory exemption of humanitarian assistance, as well as the non-criminalisation of the migrant, is still missing from the articles of the proposed Directive.

[20] Andrew Geddes, *Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards*, *in* 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice, *supra* note 16, at 8-9.

[21] Gabriella Sanchez, *Who Is a Smuggler?*, *in* 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice, *supra* note 16, at 183-84. Reality, however, tends to look differently, as the author notes:

> While many migrant journeys can indeed be characterized by abuse and violence, the practices articulated as smuggling by law enforcement and other state actors are quite often void of criminal intention, and aim instead at preserving and improving the lives and dignity of those whose only options to travel are irregular, unsafe and undignifying.

[22] Geddes, *supra* note 20, at 14. See also Sirlene N. Arêdes, *O conceito material de bem jurídico penal* [*The Material Concept of the Criminal Legal Interest*], 6 PHRONESIS - Revista do Curso de Direito da FEAD 101, 114 (2010) (Braz.) – where the author concludes (with Zaffaroni) that the use of criminal law only to assuage public opinion is illegitimate.

even though criminal law may be ineffective in this situation or even prove to worsen precisely that which is intended to prevent.

Let's take the idea that criminal law must be legitimate seriously (besides formal legitimacy). Its *content* must be able to respect the axiological and legal foundations of the community in which it is to be applied. The material legitimacy[23] of European criminal law should hinge upon the identification of interest behind criminalisation, which would then point the European legislator towards the most appropriate criminalisation principle in that particular situation: if the interest identified is a proper interest of the EU or a common interest already subject to preemption, the parameters of the principle of protection of legal goods (*Rechtsgüter*) should be followed; if the interest is common (to the EU and Member States), then the harm principle should be respected.[24] There is also the possibility that the interest belongs solely to a certain Member State, which would then deem any intervention on the part of the EU unnecessary (and even illegitimate due to the principle of subsidiarity).

With respect to migrant smuggling, it is fairly simple to exclude the possibility that there are exclusive national interests at stake since this is a conduct that affects more than just one Member State – it is *global* in its relevance.[25] Since an exclusive responsibility on the part of a Member State to regulate migrant smuggling is excluded, an analysis of which interest lies at the heart of this criminal prohibition must be performed in order to identify it either as a common interest (pre-empted or not), or a proper interest of the EU

Before following the criminalisation process to see if a criminal law norm is indeed needed and in what terms it would be materially legitimate, it is necessary to assess the understanding of the European institutions on this subject. What is meant to be protected by incriminating migrant smuggling?

[23] As defined in a previous study, Cardoso, *supra* note 9. Raquel Cardoso, *Navigating troubled waters: evaluating the function and material legitimacy of European criminal law*, XLIII Polish Yearbook of International Law (2023).

[24] The different categories of interests are divided according to the responsibility for their protection, a criterion that combines both the holdership of the interest and the attribution of competence to the Union – see Cardoso, *supra* note 23, building upon the multiple works of Pedro Caeiro, the most recent of which is Pedro Caeiro, *Constitution and Development of the European Union's Penal Jurisdiction: Responsibility, Self-reference and Attribution*, 27 Eur. L.J. 441 (2022) (U.K.).

[25] That migration is a global problem is also acknowledged in the European sphere – see Opinion of the European Economic and Social Committee on 'Implementation of the Global Compact for safe, orderly and regular migration based on EU values', 2020 O.J. (C 14/02) (Jan. 15, 2020). Even historically, it was quickly evident that concerns regarding migration could not be satisfactorily addressed by each State acting alone: agreements with third countries have been used since the abolition of internal borders and the existence of migratory crises in some Member States – analysing this, Geddes, *supra* note 20, at 8-10. The growing tendency to supranationalise immigration control has also become apparent with Tampere: as Guiraudon, *supra* note 16, at 149-50 writes, "The Tampere summit consecrated the particular vision of [Justice and Home Affairs] personnel in charge of immigration policy: shifting policy elaboration upwards to the supranational level and outwards to non-[EU] states".

In the Directive, there is a dual motivation – on the one hand, to combat illegal immigration, and on the other, *through that*, to combat the exploitation of human beings.[26] In the F.D., there is a much more evident concern with the security of the EU while also repeating the same considerations that are made in the Directive regarding immigration and human exploitation.[27]

This approach seems to have been adopted by the Commission as well: be it in the evaluation of both legislative instruments[28] or in the guidance it provided for their application,[29] the primary interest seems to be the irregular immigration itself (crossing the borders or residing in the EU illegally) and the state's interest in controlling their borders, and only in a secondary plane the risk such conduct may represent to migrants' lives.

The question that must be posed is: what is the real interest behind the criminalisation of migrant smuggling?[30] Is it to protect the territory of the EU, to ensure an effective execution of the Union's immigration policy, general security concerns, or is it to protect the migrants? This is what will be analysed in the following Subsections of this article.

[26] Council Directive 2002/90/EC, recitals 1 and 2, 2002 O.J. (L 328). This connection becomes even more apparent in other legislative instruments mentioned in recital 5. The order in which these objectives are mentioned must also be noted: there is a *first* concern, which is the fact that people are crossing the external border of the EU without authorisation; and *secondly,* there is also a concern that those people may be the object of exploitation.

[27] Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence 2002/946/JHA [2002] OJ L 328/1, recitals 1 and 2.

[28] Refit evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD(2017) 117 final, at 11 (Mar. 22, 2017): "[A]ffecting States' legitimate interest to control borders and regulate migration flows".

[29] Communication from the Commission Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01, 2020 O.J. 323/1, at 3 (Oct. 1, 2020): "The general objective of the Facilitators Package is to help fight against both irregular migration, by penalising facilitation in connection with unauthorised crossing of the border, and organised crime networks that endanger migrants' lives".

[30] The aim of the following Subsections is, more than analysing what *is* behind criminalisation in this instance, to conclude what *should* be behind the criminally relevant conduct of migrant smuggling, through the optics of the material legitimacy of European criminal law. It is moreover fairly evident that the existing European legislation seeks to regulate immigration through criminal law means.

2. THE CRIMINALISATION PROCESS

To assess the material legitimacy of any criminalising norm, a three-step process is proposed[31]: the first phase would be dedicated to identifying the interest that is meant to be protected through criminalisation (or the prevailing interest) in order to know if it is a proper interest of the EU or a common one, and the level of harmonisation it already presents or requires. The second phase would be devoted to analysing that interest through the lens of one of the principles of criminalisation connected with material legitimacy: the legal good (*Rechtsgut*) if the interest is proper or a preempted common interest; the harm principle for simply common interests, the ones whose protection cannot be solely ascribed to either the EU or the Member States. Finally, the third phase would focus on other criminalisation principles that must be respected in such a process: the legality principle, proportionality, subsidiarity, *ultima ratio*, effectiveness, and respect for fundamental rights.

2.1. THE FIRST PHASE: THE NATURE OF THE (REAL) INTEREST AT STAKE

In the first phase, all potential interests behind the criminal approach to migrant smuggling shall be analysed to determine their suitability to underpin the criminalisation of such behaviour. If it is concluded that multiple interests are susceptible to supporting that criminalisation, the preponderant one must be chosen to allow for a precise definition of the type of intervention needed and permitted.[32]

The potential interests that will be mentioned are the territory of the Union, the common market, immigration policy, security, and the protection of migrants' rights.

[31] Cardoso, *supra* note 9, at 450f and Cardoso, *supra* note 23.

[32] The preponderant interest would be determined through two vectors: either it is possible to establish a more thorough link between what is intended to be regulated and a given interest – much in the sense of what the C.J.E.U. evaluates when more than one legislative base is possible (see, illustratively, cases: Case 45/85, Commission of the European Communities v. Council of the European Communities, 1987 E.C.R. 01493, ¶ 11; Case C-200/89, Commission of the European Communities v. Council of the European Communities, 1991 E.C.R. I-2867, ¶¶ 11 and 18-25; Case C-209/97 Commission of the European Communities v. Council of the European Union, 1999 E.C.R. I-08067, ¶ 13; Case C-338/01, Commission of the European Communities v. Council of the European Communities, 2004 E.C.R. I-04829, ¶58; Case C-411/06, Commission of the European Communities v. European Parliament and Council of the European Union, 2009 E.C.R. I-07585, ¶ 47; and Case C-155/07, European Parliament v. Council of the European Union, 2008 E.C.R. I-8103, ¶¶ 35, 72, 75-79); or a more functional stance can be adopted by looking at the concrete harmonisation needs in that case, which could lead to the option that allows for the most harmonisation or, conversely, the one that leaves the most discretionary margin to the Member States.

2.1.1. THE TERRITORY OF THE EU

Even though the EU is not a state, it is still possible to conclude that it has a territory that is susceptible to delimitation.[33]

As an interest, the territory of the EU should be considered a common interest not subject to preemption: the EU indeed has an interest in its territory, one that is different from the interest each Member State has since it encompasses the totality of Member States. But it is equally true that those territories existed before the EU, and they belong primarily to the sphere of competence of each State, which is demonstrated by the ample powers that remain within it when it comes to their territories – such as the power to conform them (thus adding or subtracting parcels of territory from the EU without its interference); or the power to decide *who* they wish to keep in their respective territories as citizens, along with the requirements needed to become one, without the Union being able to supersede them in that.[34]

It would not be entirely correct, however, to conclude that the territory would hence correspond solely to a national interest, which should consequently feel no interference from the EU: given the existence of the Schengen Area and the multiple freedoms within it, European norms configure the applicable rules in that area in a relevant way, so that Member States effectively share the responsibility for its protection with the EU, at least in those dimensions that transcend the internal borders of each Member State. On the other hand, the EU shapes some aspects related to the territory that go beyond the simple delimitation of a space where its rules are applicable.[35] This prompts the conclusion that the territory must be considered a common interest, one

[33] In a more immediate reading, the territory of the E.U. is identified by reference to the territory of the multiple Member States (Art. 52 of the T.E.U. and Art. 349 and 355 of the T.F.U.E.). Given the specificities of the EU, however, the physical territory will not always overlap with the territory where EU law is applied: regarding criminal law, the space where it is applied results from the principle of mutual recognition, the harmonisation of criminal norms, judicial and police cooperation, but especially, from the intricate landscape generated by the opt-outs (and opt-ins) enabled by the Treaties. When it comes to the territory of the Union, the question will not be *whether* it possesses one, but rather *which one* is being referred to.

[34] See e.g., the recent case Case C-689/21, Udlændinge- og Integrationsministeriet, ECLI:EU:C:2023:626 (Sept. 5, 2023).

[35] E.g., it grants some visas; uniformises a set of common rules to be applied in the Schengen Area; celebrates agreements with third countries, which will be applied to people that are in European territory (such as extradition agreements); supports the Member States when it comes to their action at the external borders of the Union (the paradigmatic example here being FRONTEX). With regard to migrant smuggling specifically, Art. 27 of the Convention Implementing the Schengen Agreement establishes the need to "impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens". This provision does not impose the need to criminalise such behaviour, and it does restrict its relevance to conduct motivated by the obtainment of financial gain, which is much narrower than what is defined in the Facilitator's Package.

whose multiple dimensions of protection are attributed to the EU or the Member States, depending on which one is at stake (the national or the supranational one).

Regarding migrant smuggling, is it truly the territory that is meant to be protected? It is submitted that, even if linked with the territory, what would be at stake would rather be the *security* of it – in which case the interest will be security, and not the integrity of the territory – or the cohesion of the European territory and respective population, in which case the interest would be the *immigration policy*, through which not only this is ensured, but also the attempt to respond to some concerns of the population (such as the distribution of the existing resources – employment, social support, etc.) when confronted with a potentially exponential and uncontrolled increase of the number of people in a given territory.

2.1.2. COMMON MARKET

The criminalisation of migrant smuggling may also have the ultimate objective of protecting the common market of the EU, particularly concerning employment: the presence of a significant number of immigrants in an irregular situation in one or multiple Member States could lead to a distortion of the common market.[36]

In terms of responsibility for its protection (and even holdership), this interest is markedly European – European rules regulate the common market; it is a highly harmonised area that does not tolerate regulatory autonomy in the Member States. Therefore, the only possible conclusion is that the responsibility for its protection is primarily (if not exclusively) attributed to the EU

Even though the regulation of immigration (and hence of irregular immigration and its facilitation) affects the common market since it prevents some of its unwanted effects, it does not seem to be entirely accurate to argue that this is the most salient connection within the criminalisation of migrant smuggling: its impact is not only distant (with regard to the conduct that is criminalised), but its dimension is also uncertain.[37] The effect that the normative response in criminal matters may have on other sectors of the Union's intervention is also secondary. Therefore, the common market cannot be the real interest at stake when pondering the criminalisation of migrant smuggling.

2.1.3. IMMIGRATION POLICY

At present, European legislation emphasises the importance of criminal measures when it comes to controlling illegal immigration – it is expected that the penal threat will

[36] See e.g., André Klip, European Criminal Law: An Integrative Approach 197-98 (1st ed., 2009) (U.K.), noting the connection of the criminalisation of migrant smuggling with the (then only proposal) Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[37] Even though it appears as one of the legal goods protected *as a consequence* of the protection of regular migration: see the recent request for a preliminary ruling made by Italy (Tribunale di Bologna [Trib.] [Court of First Instance of Bologna] 17 luglio 2023, n. 10034/2019 (It.)) regarding the compatibility of the Facilitator's Package with the Charter of Fundamental Rights of the EU, particularly the cited position of Italy's Constitutional Court at page 9. This case is pending before the C.J.E.U., having had the first hearing on the 18th June 2024 (Case C-460/23, Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 – Criminal proceedings against OB (Aug. 25, 2023). Commenting the case, Lorenzo Bernardini, *Il* delit de solidarité *davanti alla corte di giustizia: il caso* Kinshasa *come* game changer *per le politiche migratorie europee* [*The Crime of Solidarity Before the Court of Justice: The Kinshasa Case as Game Changer for European Migration Policies*], Diritto, Immigrazione e Cittadinanza, Mar. 2024, at 1, 1-2. (It.).

discourage migrants from entering or staying in European territory without the respective authorisation.[38]

This policy is ultimately directed at protecting the sovereignty of States,[39] since migration is a purely social phenomenon that will only acquire some legally relevant quality once evaluated through the rules in the legal order at stake. When broken down into its elemental features, the act of migrating is neutral conduct (not in *itself* worthy or unworthy), and even when it can be classified as illegal, this negative aspect relates to the disrespect of rules that were put in place to regulate migration.[40]

As an interest, the immigration policy must inevitably be classified as a common interest: Member States retain a significant part of their sovereignty regarding immigration, with the EU being attributed only some aspects of it, such as granting some short-stay Schengen visas. States decide over the status of non-nationals, deportation and expulsion (with the exception of some limitations deriving from, for instance, the case law of the European Court of Human Rights) and, therefore, a large part of what is "illegal migration" will be dependent on the practices of the state.[41] The EU has some competencies attributed in this regard, such as those mentioned in Articles 77 and 79 T.F.U.E. (mainly Article 79(2)(c), which allows for the adoption of common rules regarding "illegal immigration and unauthorised residence").

The European approach is, in this case, proactive because it seeks to prevent the *potential* acts of illegal entry, stay or residence, thus pushing back unwanted migrants from its territory.[42] But this stance is also questionable from the point of view of the temporal sequence of events: how can migrants already be deemed "illegal" before they enter, stay or reside in the territory of a Member State in violation of its rules?

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[38] See the request for a preliminary ruling n. 10034/2019 ¶¶ 31-34. This becomes clear with the criminalisation of the migrant's conduct itself: even though it is not directly criminalised in European legislation, its criminalisation is also not limited by it – in this sense, Mitsilegas, *supra* note 10, at 81-82.

[39] The prerogative of deciding, regarding their non-nationals, their statute and requirements for entering, staying, or residing in the country – Guiraudon, *supra* note 16, at 150. The argument could be made that it was rather the sovereignty of the state itself that was at stake here – see, questioning it, Mitsilegas, *supra* note 10, at 83-84. Sovereignty, as an interest to be protected by criminal law, is however much more questionable and problematic than even the immigration policy, since any disrespect for any norm could trigger disrespect for that interest and, consequently, criminal liability – which is not at all considered legitimate in a state governed by the rule of law.

[40] This is a textbook description of behaviour that should fall under the remit of the administrative branch of the law – see e.g. Jorge de Figueiredo Dias, Direito Penal - Parte Geral - Tomo I [Criminal Law - General Part - Book I] 186-87 (3rd ed., 2019) (Port.).

[41] Guiraudon, *supra* note 16, at 150-51.

[42] The prevention of these acts will also involve the cooperation of third countries, who are responsible for stopping migrants from coming to the EU These *pushback* practices (see Mitsilegas, *supra* note 11, at 26 f.) seek to prevent the migrants from accessing a territory where the Member State/ EU would become responsible for them, even though it could be temporary. See also on the subject, Parliamentary Assembly, Pushback policies and practice in Council of Europe member States, Resolution 2299 (June 28, 2019).

It is legitimate for States to have an immigration policy aimed at preventing their territory from being suddenly confronted with an exponential increase in population coming from other countries, seeking employment or social benefits;[43] what is illegitimate is to pursue that objective at any cost, namely by disregarding fundamental principles of their legal order[44] and international obligations they assumed.[45] The legitimacy of this interest as the one to which protection is granted through the criminalisation of migrant smuggling will be evaluated in the next section.

2.1.4. SECURITY

Security may have multiple meanings, which makes it a malleable and easily influenced[46] ambiguous concept. It can have a *negative* meaning as a motive for adopting more restrictive measures. Within this meaning, security is an objective in itself, and it is necessary to preserve the state both as an institution and as a collective of subjects. It can also have a *positive* meaning, in which it configures a right to security, be it individual or collective – this right exists regarding the state and other individuals, acting as a counterweight to the first (negative) dimension.[47] The *internal* security of the EU comprises a *horizontal* dimension (the judicial and police cooperation, with the support of all relevant sectors) and a *vertical* dimension, which corresponds to international cooperation, the Union's policies regarding security, and the Member States' regional cooperation.[48] Lastly, there is correspondingly an *external* dimension of the EU's security, which regards cooperation with third countries (be it of the EU itself or Member States).[49]

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[43] Letizia Paoli, *How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm*, 22 Eur. J. Crime, Crim. L. & Crim. Just. 1, 8 (2014) (Neth.).

[44] Criminal law must not be used to sanction disrespect for what are essentially administrative norms, nor should it be used to dissuade individuals or organisations from providing humanitarian aid – in this sense, Mitsilegas, *supra* note 10, at 78.

[45] E. g., the duty to grant asylum to migrants who might need it (since many times they have no option but to enter the territory irregularly) – in reference to the *right to receive asylum* (as a right of the individual, and not a prerogative of the state), Koen Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, 59 Int'l & Compar. L. Q. 255, 289 (2010) (U.K.).

[46] Alessandro Bernardi, *Seguridad y Derecho Penal en Italia y en la Unión Europea* [*Security and Criminal Law in Italy and in the European Union*], 5 Politica Criminal 68, 81 (2010) (Chile).

[47] *Id.* at 76 f. Some examples can be found in the E.c.h.r., namely Art. 8, right to respect for private life, Art. 9, freedom of thought, conscience and religion, Art. 10, freedom of expression, Art. 11, freedom of assembly and association (number 2 of each Art.) for the negative dimension, and Art. 5, right to liberty and security, and Art. 6, right to a fair trial, for the positive dimension.

[48] Justice and Home Affairs Council, Internal security strategy for the European Union - Towards a European security model, at 21 (Mar. 2010).

[49] *Id.* at 29.

The dimension that is usually relevant for criminal law is the *negative* one, furthering the adoption of restrictive measures with the ultimate goal of protecting security as a state and collective interest.[50] When evaluated about the EU, this interest cannot be considered a proper interest of the EU: European security (from a supranational point of view) encompasses the security of every Member State, and it is therefore a true "common security".[51] On the other hand, there are multiple dimensions of security that coexist within the European space: the internal security of each Member State and the internal and external security of the EU; these dimensions are not always easy to distinguish.[52]

This interest being common, it seems safe to conclude that it is not harmonised in a way that determines its preemption yet, thus precluding an autonomous action on the part of Member States (especially because a great part of the responsibility for the protection of a community belongs to the state, not the EU). For that reason, security would also lead to its analysis through the lens of the harm principle, just as the immigration policy.

2.1.5. MIGRANTS' RIGHTS

Finally, there is the possibility that what motivates the criminalisation of migrant smuggling is the violation of the rights of the people involved in it (the migrants).[53] In this case, the conduct of facilitating the irregular entry, stay or residence in the territory

[50] The security focus comes across quite clearly in several legal instruments regarding migrants: e.g., the Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM (2020) 610 final, p. 7 (Sept. 23, 2020). Also the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM (2020) 612 final (Sept. 23, 2020) and the Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM (2016) 272 final (May 4, 2016).

[51] The common nature of some of the identified risks to European security is also obvious: some of those are terrorism, organised crime, drug, human and gun trafficking, etc. – Justice and Home affairs Council, *supra* note 48, at 7.

[52] *See* Ester Herlin-Karnell, *Waiting for Lisbon ... Constitutional Reflections on the Embryonic General Part of EU Criminal Law*, 17 Eur. J. Crime, Crim. L. & Crim. Just. 227, 239 (2009) (Neth.).

[53] The evaluation of the harms migrants can suffer through smuggling was already performed by Europol, who mentions the severe physical, psychological and social harms that can result, whether from some type of violence they suffer throughout their voyage, or even because they lose their lives trying to reach the European territory through dangerous means – Paoli, *supra* note 43, at 7-8.

of a Member State would only be a crime when its perpetrator exploits the migrant's situation, or violates their rights in any other way. The option for this perspective would allow consideration of the person "simultaneously as recipient and fundament of the criminal norm", preventing them from being "considered as object of the norm or the public policy of the State"[54] – which is particularly important in this case, due to the ambiguity of the current legal status of the migrant (as author, object and/ or victim of the smuggling).

Evidently, the protection of the people involved in a crime is not a proper or exclusive interest of the Union; it is also not highly harmonised, so as to subtract it from the sphere of responsibility of the state – it is, once again, a common interest.

2.1.6. INTERIM CONCLUSION

After considering the potential interests behind the criminalisation of migrant smuggling, it becomes necessary to choose the legitimacy criterion to be applied. The only interest susceptible to lead to an analysis according to the principle of protection of legal goods would be the common market, as the only one that is not just a common interest; however, this does not seem to be the violated interest (or at least the predominant one).

The rest of the interests mentioned cannot be qualified as proper interests of the EU, nor highly harmonised interests, so as to preclude an autonomous state action; therefore, this analysis will proceed with the application of the harm principle[55] to the conduct, in order to limit the European criminal competence to behaviours that do, in fact and in an actual way, harm its citizens (thus excluding a criminalisation that greatly anticipates the actual harm). The harm principle will allow for a more flexible approach in the Member States (because they can, within their margin of discretion, define a legal good internally and frame the incrimination accordingly, as long as it does not run counter the Directive), also with regard to sanctions, since they will be able to determine a sanction that harmonises with other crimes that jeopardise the same legal interest. It finally prevents a paternalistic approach to the subject.[56]

[54] Ana E. Liberatore Silva Bechara, Bem Jurídico-Penal [Legal-Criminal Interest] 67 (2014) (Braz.). The migrant (and respective rights) emerges as the object of protection by the criminal norm only in certain circumstances: see the position of the Italian Constitutional Court cited at the request for a preliminary ruling (n 34), 10.

[55] *See generally* John S. Mill, On Liberty (Batoche Books, 2001) (1859); Joel Feinberg, The Moral Limits of the Criminal Law. Volume 1: Harm to Others (1984) (U.K.); Nina Peršak, Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts (2007).

[56] With regard to the specific advantages, see Cardoso, *supra* note 9, at 413.

2.2. THE SECOND PHASE: EVALUATING MIGRANT SMUGGLING THROUGH THE OPTICS OF THE HARM PRINCIPLE

The EU's current measures regarding migrant smuggling are centred around immigration control, focusing on prevention, expulsion, and criminalisation. In order to increase the legitimacy of its approach, at least the criminal one, and since all potential interests involved are deemed to be common, the four elements of the harm principle[57] will be evaluated: (1) a conduct (2) that causes or is likely to cause harm (3) to others, (4) demanding an adequate intervention from the State in its prevention and repression.

The conduct at stake – namely, the introduction into the territory of a Member State of a foreigner without respecting the legal preconditions for their entry – allows for two opposite points of view, if criminally defined: either it is seen as a crime against the state (e.g., its sovereignty); or as a crime that jeopardises the migrants and their interests. Both points of view will be examined so as to conclude which (if any, or both) is susceptible to legitimate criminalisation and in what terms.

2.2.1. CONDUCT THAT CAUSES OR IS LIKELY TO CAUSE HARM

The causation (or probability) of harm will not be too problematic: if harm exists, whether towards the state or migrants, it should be actual, or at least prospective, in the sense of posing an immediate risk to the interests meant to be protected. From the perspective of the state, this conduct either violates or endangers (when the introduction of the migrant into the territory is unsuccessful) the security of its borders and sovereignty, as well as disrespecting its rules on regular immigration. In the case of migrants, this conduct endangers or harms their life, health, and human rights. Both perspectives allow for some form of harm to be found.

As for harm itself, the first analysis will focus on the state's interests, in order to determine if they are legitimate according to the harm principle. This perspective will evaluate sovereignty and security, which entails the decision over who should be granted or denied entry into the country (immigration policy).

"Security" as a criminally relevant interest is susceptible to many criticisms: first of all, it is not possible to narrow down the conduct that would harm such an interest, since it has an all-encompassing nature that eventually leads to the option to criminally sanction unlawful acts of an administrative nature, as well as the preventive

[57] These four elements can be gleaned from the general literature on the harm principle. For a theoretical approach, *supra* note 55.

protection of legal goods, which is not easily compatible with the *ultima ratio* principle of criminal law.[58] Secondly, "security" as a feeling must not be accepted, as it is extremely difficult to demonstrate its empirical existence and it encourages the adoption of increasingly harsher measures in order to appease general feelings of insecurity.[59] Furthermore, there is the risk of an authoritarian evolution of the state every time it invokes national security as a reason to criminalise certain behaviour,[60] in addition to the erosion of the symbolic function of criminal law.[61]

Consequently, if security is itself an interest to be protected through criminal law, the evaluation of the legislator will never duly consider the freedom of the citizens, since the pursuit of ways to diminish the feeling of insecurity will always outweigh freedom. This leads to the conclusion that security cannot be considered a legitimate, autonomous interest to be protected by criminal law,[62] at least when not in conjunction with another, legitimate interest.[63]

With regard to the immigration policy, in the case of migrant smuggling it seems fairly evident that the illegal character of the conduct stems from the crossing of a state's border without the authorisation to do so (hence, the migrants being part of the problem). Thus, the *unlawfulness* of migrant smuggling relies not on the author's *own* conduct, but rather on the help they provide to others to commit an illegal act, namely the irregular entry or stay of the migrant. In fact, the "crime" would be more properly committed by the migrant, who affects the state's interests with their conduct, since the facilitation of such behaviour has an ancillary nature in relation to the real conduct that bears the criminal unworthiness: that of the migrant.[64]

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[58] *See* Antonio Cavaliere, *Può la 'sicurezza' costituire un bene giuridico o una funzione del diritto penale?* [*Can 'Security' Constitute a Legal Interest or a Function of Criminal Law?*], *in* In dubio pro libertate. Festschrift für Klaus Volk zum 65. Geburtstag [In doubt, in Favor of Freedom. Commemorative Document for Klaus Volk on his 65th Birthday] 111, 116-17 (Winfried Hassemer et al. eds., 2009) (Ger.). As the author points out, security as a criminally relevant interest has already been used to reintroduce problematic incriminations, such as the criminalisation of irregular immigration.

[59] *Id.* at 124.

[60] Bernardi, *supra* note 46, at 75.

[61] Gerhard Fiolka, Das Rechtsgut. Strafgesetz versus Kriminalpolitik, dargestellt am Beispiel des allgemeinen Teil des schweizerischen Strafgesetzbuches, des Strassenverkehrsgesetzes (SVG) und des Betäubungsmittelgesetzes (BetmG) [The Legal Interest. Criminal Law Versus Criminal Policy, Illustrated with the Example of the General Part of the Swiss Criminal Code, the Road Traffic Act (SVG) and the Narcotics Act (BetmG)] 125 (2006) (Switz.).

[62] Expressively, Ester Herlin-Karnell, The Constitutional Dimension of European Criminal Law 85 (2012) (U.K.): "[A] blind focus on security risks not only rendering the Union's proclamation of humanist values meaningless, but also risks undermining the legitimacy of any action taken.".

[63] Persak, *supra* note 55, at 115 – besides the fact that there is not enough criminological data to determine what is susceptible to causing fear, it is also highly doubtful that criminalising a conduct should be based on the fear of another, subsequent crime occurring.

[64] That is, according to Spena, *supra* note 18, at 34, the adopted stance of the European legislation, given the use of the wording of the Directive ("facilitation of unauthorised entry, transit and residence"), which implies that there is a previous action that is already illicit (even though the migrant is not directly criminalised).

Still on the subject of the illicit nature of the conduct, it must be pointed out that, regarding the state's perspective, it would be sufficient for the migrant to regulate their situation for there to be no crime,[65] which means that there is no existential harm[66] in the conduct under analysis[67]: it is purely the non-compliance with norms that is at stake.[68] In the context of a state governed by the rule of law, this is not sufficient motivation for criminalising a certain behaviour; there must be a relevant interest worthy of protection for the use of criminal law to be legitimate.

Since the conduct itself has no specific unworthiness that corresponds to the specific sanctions of criminal law, is the right to determine how and who enters the territory such a fundamental interest of the state that it justifies the use of criminal law for its regulation? It is rather thought that it is not: in this case, the interest at stake lacks penal dignity, aside from the fact that the use of criminal law in this situation is also ineffective.[69]

If, however, we adopt the point of view of the migrant, their smuggling can in fact endanger or extinguish some undeniably relevant interests of the person concerned, namely physical and/or moral integrity, the interest not to be exploited (by any means), their welfare in general, and even their life. All of these interests are sociologically recognised and have unquestionable constitutional support.[70] The illicit nature of the conduct now stems from the act of smuggling itself, and not in an ancillary form: the author (smuggler) behaves in an inappropriate way towards those interests, and it is this

[65] If the right of the migrant to be in that territory is established, their conduct will not be unlawful; consequently, the behaviour of anyone who facilitates their conduct will not be unlawful either. In the repressive logic of some states, however, that second behaviour will still be reprehensible, although it may sometimes not be effectively punished for some other reason (see, for instance, the case of *Mallah c. France* App no 29681/08 (ECtHR, Nov. 10, 2011), ¶¶ 13-15.

[66] "[I]rregularity of entry and residence is exclusively co-constituted by individuals and border and immigration authorities entering into very specific kinds of exchanges which result into the application of the designations." – Carrera & Guild, *supra* note 3, at 3.

[67] That conduct being the movement of a person from one territory to another, where their irregularity results from norms designed to keep them out of said territory – David S. FitzGerald, *Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence*, 46 J. Ethnic & Migration Stud. 4, 4 (2020) (U.K.).

[68] See the request for a preliminary ruling Tribunale di Bologna [Trib.] [Court of First Instance of Bologna] 17 luglio 2023, n. 10034/2019 ¶ 38 (It.): "La generalizzata minaccia della sanzione penale per chi favorisca i contravventori alla normativa in materia di permessi all'ingresso, infatti, può dirsi funzionale al rafforzamento dei relativi precetti amministrativi". ["The widespread threat of criminal sanctions for those who encourage offenders to the legislation on entry permits, in fact, can be said to be functional to the strengthening of its administrative precepts"].

[69] It is ineffective in two ways: first, migrant smuggling is not responsive to risk fluctuations (which includes the risk of being criminally prosecuted) – European Commission, DG Migration and Home Affairs, A study on smuggling of migrants, Characteristics, responses and cooperation with third countries (Sept., 2015), at 111. On the other hand, it is also ineffective because, if the intention of states is to keep migrants *out* of their territory, that is hardly compatible with keeping them *in* the territory (however limited it may be) for the purpose of being subject to criminal prosecution.

[70] Which includes the constitutional support of the EU – see, in general, Charter of Fundamental Rights of the European Union, artt. 1-6.

behaviour that causes the violation or endangerment of a given right of the migrant, which will be criminally relevant if that act is indefensible (e.g., if the smuggler intends to profit from the exploitation of the migrant's fragile situation).

Hence, contrary to what happens in the perspective of the state, if the unworthiness and illegal nature of migrant smuggling stems from risking the migrant's interests through the exploitation of their situation, it cannot be affirmed that there is some ulterior action that is capable of erasing that unworthiness: all exploitation is, by definition, unfair.[71]

By changing the perspective, it can be concluded that any humanitarian action would be excluded from the criminalisation norm, since the intention is not to put the migrants at risk, but rather to act in order to protect their interests.[72] The same can be said with regard to people who act on behalf of friends or family. Likewise, people who work in the transports and housing sectors would not be at risk of prosecution if the incriminating norm had the migrants' interests as its focal point: as long as they obtained their normal profit, they would not be exploiting the migrant.[73] Finally, the migrants themselves would also be excluded from being potential perpetrators of such a crime, thereby clarifying their situation.

Concerning this first aspect of the harm principle, it is now possible to conclude that there is no sufficient harm vis-à-vis the state to justify a legitimate criminalisation; the regulation of such an unwanted conduct should be redirected towards branches of the law other than the criminal law.

When it comes to the migrant, there are still some important harms that must be avoided, therefore this analysis will proceed to the other aspects of the harm principle.

[71] Eamon Aloyo & Eugenio Cusumano, *Morally Evaluating Human Smuggling: The Case of Migration to Europe*, 24 Critical Rev. Int'l Soc. & Pol. Phil. 133, 140 (2021) (U.K.).

[72] This would be especially relevant for the pending *Kinsa* case (Case C-460/23, Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 – Criminal proceedings against OB (Aug. 25, 2023)).

[73] The same can be said regarding the acquisition of illicit profit, as long as such conduct does not put the migrant at risk, or exploits him/ her – for instance, charging a cost for providing illegal documents, without it being an "abnormal" or exploitative fee; or charging the normal cost of a comparable legal transport, without endangering the migrant's fundamental interests. The real problem here would be the definition of the threshold of a (still) fair profit, and the "abnormal" profit that could already constitute exploitation of the situation of the migrant, given the illegal nature of such profit. This is not an issue when it comes to regulated professionals, since it is possible to compare what they profited with the migrant and with a regular citizen. It must also be underlined that the eventual responsibility of these agents – be it criminal or administrative – could be established regarding these people (e.g., for counterfeiting documents), just not under migrant smuggling as it results from a legitimate criminalisation of it.

2.2.2. HARM TO OTHERS

Since it has already been established that no interest of the state has the necessary legitimacy to permit criminalisation of migrant smuggling, an analysis of this element from the perspective of the state would not be needed. However, even if it were concluded that some interest would be capable of triggering the use of criminal law (whether it be sovereignty, security, or immigration policy), there would be a new obstacle at this point, in the form of the subject to which those interests belong. Because the state cannot be considered a victim from the point of view of the harm principle,[74] only "security" would potentially lead to the criminalisation of migrant smuggling, given that it is also an interest of the citizens (they benefit from the protection of the territory where they are, mainly against external threats). However, security has been deemed to be an illegitimate interest when autonomously considered in an incriminating norm.

It could be argued that the *community*, and not the state, is the holder of the interests at stake, *via* the determination of the immigration policy: the right of association entails the right to exclude those we do not want to be a part of that community.[75] But here too, the legitimacy of this criminalisation must be denied, be it because the migrants would not be able to sufficiently influence the community if they were denied political rights; or because a conflict between the right to exclude and the right to migrate in search of a better life would then ensue.[76] Either way, the community cannot be considered a victim *per se*, thus a relevant interest of the individuals would be needed to anchor a legitimate criminalisation of migrant smuggling.

With regard to the victim, all that remains is the migrants themselves. As already mentioned, the biggest obstacle to considering the migrant as a victim is the initial consent to be smuggled into another territory. By consenting to the risky behaviour, one cannot be considered as a victim, otherwise criminal law would be used in a paternalistic way, which is also problematic. The consideration of the victim in light of the harm principle would lead to the exclusion of a wide range of conduct currently encompassed by the criminalisation of migrant smuggling, as long as[77]: there would be an agreement between both parties, whereby the smuggler would be under a duty of explaining the real risks that would follow, since any informed consent would

[74] Regarding the possibility of a state being considered the victim (therefore sustaining a harm), see e.g. Persak, *supra* note 55, at 55.
[75] Aloyo & Cusumano, *supra* note 71, at 148.
[76] *Id.* at 148-49. It seems clear that the right to migrate should prevail in such a conflict, since it has the objective of immediately improving someone's life; the right to exclude someone from a community is based on a hypothetical benefit regarding its non-alteration, or security.
[77] *Id.* at 134.

presuppose the knowledge of the situation; there was no violation of human rights; and the smuggler did not unnecessarily endanger the migrant's interests.

In this case, the migrants would only be considered victims – indeed, there would only *exist* victims – if any of these factors were disregarded,[78] or if they were exploited by the perpetrator of the crime (the smuggler) in order to obtain an illicit profit due to their fragile situation. According to this perspective, migrants who are victims of smuggling would have access to every right that would normally be attributed in such a situation.[79]

Lastly, the legitimate intervention of the state in the regulation of these matters will be assessed, bearing in mind the previous conclusions.

[78] Among these factors, consent is of particular importance, since it is normally the element that prevents migrants from being considered victims of this crime, as they act practically as accomplices – International Organisation for Migration [IOM], *Whatever Happened to the Migrant Smuggling Protocol?*, at 4 (2017), https://publications.iom.int/system/files/pdf/migrant_smuggling_protocol.pdf.

[79] Such as the right to residence in Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, 2004 O.J. L (261/19) (notwithstanding the express mention to their cooperation).

2.2.3. THE INTERVENTION OF THE STATE

Since the only legitimate interests to consider in this case would be those of the migrants, a crime would be committed when: their consent is defective, in the sense that it was not informed (deliberately, by the author of the crime); there is a violation of human rights in the process of migrant smuggling; the author unnecessarily risks the migrants' interests (for instance, by providing a boat that they know will not be able to withstand the journey instead of a better one just so the profit could be bigger);[80] or if the migrant is exploited by the smuggler.

Subjacent to all of these situations is an intrinsic wrongfulness of the conduct, which stems precisely from the fact that the author of the crime is taking advantage of the fragility of the migrant's situation in order to gain profit or an advantage of any kind.

According to the harm principle, the simple fact of introducing someone into a given territory (thus violating immigration laws) should not be considered a crime. Similarly, the conduct of someone that aids the migrant that intentionally takes the risks inherent to the decision they *freely* opt for should not be criminalised. At best, these behaviours should be subject to an administrative sanction,[81] given the disrespect for the immigration laws of the state. The acquisition of illicit (unfair) profit with the introduction of migrants on said territory, on the other hand, should be criminally punished, as well as cases that involve violation of human rights.

The only conduct that should be criminally censured is the introduction, facilitation of transit or residence of a foreign person in a Member State's territory of which he is not a national, nor of which he possesses an authorisation to do so, in order to obtain a financial or material illicit advantage, or violating the migrant's human rights in the process. Any other variation of this behaviour should be decriminalised (at least at the European level).[82]

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[80] Example in Aloyo & Cusumano, *supra* note 71, at 141.

[81] Thus justifying the non-existence of an irregularity once the migrant acquires the right to stay in that territory. A crime cannot be dependent on the regularisation of an administrative situation: this is both dogmatically and factually problematic; but it seems to be exactly the field of action of the administrative sanctions ("misdemeanours"), that allow the state to sanction someone for disrespecting any legal norms, without having the inherent censure and gravity of criminal sanctions. A very practical example may help clarify this: at the present moment, helping a Ukrainian national enter the territory of a Member State is not considered migrant smuggling because the Ukrainian people have a special authorisation to enter and reside in the EU; if the smuggled person bears any other nationality, the agent of this conduct is committing a crime. How can it be, for instance in a situation where the agent helps two people (one Ukrainian, one non-Ukrainian), that they are simultaneously doing something valuable *and* committing a crime? But it would make sense in terms of administrative sanctions, as explained.

[82] See also the interesting formulation of migrant smuggling by Arroyo, *Wirtschaftsstrafrecht in der Europäischen Union. Rechtsdogmatik, Rechtsvergleich, Rechtspolitik: Freiburg-Symposium* [*Economic Criminal Law in the European Union. Legal Doctrine, Comparative Law, Legal Policy: Freiburg Symposium*] 465 (Klaus Tiedemann ed., 2002).

2.3. THE THIRD PHASE: CONSIDERING OTHER RELEVANT PRINCIPLES

When it is concluded that there is a conduct that could legitimately be criminalised (axiologically speaking), it is then necessary to assess, in light of other fundamental principles of EU and criminal law, whether that criminalisation should in fact occur.

The principle of legality would be reinforced, also in the European sphere[83]: since directives, by their own nature, cannot abide by all of the subprinciples of legality, it is only the national law that must fulfil all of its requirements. Still, a more limited and clear definition of migrant smuggling in the EU would likewise lead to a more restricted and clear understanding of the phenomenon at the national level.

The principle of subsidiarity is respected as well, given the transnational potential of the conduct: it is indeed more effectively regulated on the supranational level than through multiple legislative solutions that are dependent on the individual will of each State. It would also restrict certain illegitimate actions of States that use criminal law against the migrants themselves (given the criteria of the harm principle), thus reinforcing the constitutional dimension of the EU and realigning Member States with their obligations under the smuggling Protocol.[84]

The proportionality of the criminal law would also be ensured, since the only relevant conduct would now be that which entails the exploitation of the migrant or which jeopardises their interests. This would be paramount in order to restrict the criminal responsibility of legitimate operators in the housing and transport sectors, given the fact that the normal exercise of their profession would not correspond to a crime (even if the person was in that territory irregularly). With regard to the migrants, they would only be liable to commit an administrative offence, and not a criminal one.

When it comes to evaluating the effectiveness of such a norm, criminalisation alone does not diminish the demand and supply of such services, so its effectiveness in

[83] Critically on the existing legislation with regard to the principle of legality, *see* Valsamis Mitsilegas, *Reforming the EU 'Facilitators' Package': The new Commission proposal in the light of the Kinshasa litigation*, EU Migration Law Blog, (Feb. 13, 2024), https://eumigrationlawblog.eu/reforming-the-eu-facilitators-package-the-new-commission-proposal-in-the-light-of-the-kinshasa-litigation/.

[84] In spite of Art. 83 T.F.U.E. allowing Member States to legislate more severely than the *minimums* established in EU law. The material legitimacy criteria intend to rationalise European criminal law and restrict the freedom of the European legislator, and thereby avoid the pernicious effects of European legislation in the multiple Member States: if the Directive is not drafted erroneously, we can avoid, in a first instance, a defective piece of national legislation as well. In this case, there would be an added benefit: if the Directive mentioned "profit" as one of the elements of migrant smuggling, it would be impossible for Member States to consider humanitarian help a criminal offence, because the obtainment of profit would already constitute one of the elements of the "minimums" established in European law, therefore it would have to be transposed, otherwise the Member State would be in breach of EU law. In conclusion, the criteria for evaluating the material legitimacy of European criminal law will not always have the side effect of rationalising the national transposition as well, but there are situations where such an effect will occur.

eliminating this phenomenon would remain practically unchanged.[85] On the one hand, the precarious situation of many irregular migrants[86] stems from the lack of legal means to reach the territory – and protection – of another country;[87] on the other hand, the hostile immigration policy seems to bear no impact upon the decision to try to reach that territory.[88] However, these new legislative measures would be more adequate and would be properly directed at conduct that is essentially an administrative offence – in this regard, such a norm would indeed be more effective, in the sense that it would not preclude the application of a sanction (a fine) to the irregular migrant.[89]

A criminalisation delimited in these terms would no doubt comply with the principle of respect for fundamental rights (the present one being in flagrant opposition to it) and also the *ultima ratio* principle, since the behaviour that is criminalised is not manageable through other, less grievous means.

It would seem, therefore, that such a norm would be feasible in the European sphere and would be more in line with fundamental principles of criminal law.

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[85] This can be easily concluded when one observes the statistical data regarding criminal proceedings for the crime of "facilitation of illegal immigration" – in Portugal, there has been an exponential increase of proceedings opened (in 2023), which amount to an increase of 298% (statistical data available at Gabinete do Secretário-Geral [Office of the Secretary General], Relatório Anual de Segurança Interna 2023 [Annual Internal Security Report 2023], at 53, https://www.portugal.gov.pt/pt/gc24/comunicacao/documento?i=relatorio-anual-de-seguranca-interna-2023 (Port.). If one takes into account the fact that the law criminalising this conduct dates from 2007, and the data regarding the increasing numbers of criminal proceedings for this crime, it becomes simple to infer that the criminalisation alone has not been effective in preventing illegal immigration (and the facilitation thereof).

[86] The methods for counting the irregular migrants that reach the territory of the EU are also subject to harsh criticism – see Carrera & Guild, *supra* note 3, at 2-3.

[87] Gabriella Sanchez, *Five Misconceptions About Migrant Smuggling*, RSCAS Policy Briefs, May 2018, at 1, 3 (It.).

[88] Michael Collyer, *Cross-Border Cottage Industries and Fragmented Migration*, *in* Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU, *supra* note 3, at 17, 21.

[89] The criminalisation of the migrant is not explicitly prohibited by the Directive, but the jurisprudence of the European Court of Justice has made some progress in that regard, stating that there are some penalties that are incompatible with the objectives of Directive 2008/115/CE on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 – for instance, any penalty that delays the return of the migrant in question (Case C-61/11 PPU, Criminal proceedings against Hassen El Dridi alias Karim Soufi (June 26, 2011); Case C-329/11, Alexandre Achughbabian v. Préfet du Val-de-Marne (Feb. 4, 2012); Case C-47/15 Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai, ECLI:EU:C:2016:408 (June 7, 2016); Case C-430/11 Criminal proceedings against Md Sagor, ECLI:EU:C:2012:777 (Dec. 6 2012). On the other hand, in case of a reentry, the imposition of a penalty that entails deprivation of liberty for a period of time was not deemed incompatible with the directive, even though there is still not a relevant interest worthy of criminal protection that can be envisaged in such situations – see case Case. C-290/14, Criminal proceedings against Skerdjan Celaj, ECLI:EU:C:2015:640, ¶¶ 26-30 (Oct. 1, 2015) and the criticism that followed it, namely by Mitsilegas, *supra* note 10, at 83-84: "[T]he distinctiveness in the interests protected by national law criminalising re-entry or the harm in re-entry are difficult to pin down unless re-entry is viewed as an additional affront to state sovereignty as translated in its capacity to guard the border effectively." On the limits of EU to the criminalisation in the Member States, Valsamis Mitsilegas, The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law 57-58 (2014) (Switz.).

3. IS SUCH A CRIMINALISATION ADEQUATE?

With migrant smuggling thus delimited, would the criticism now voiced against the European rules persist, or would it finally be "fit for purpose"?

The criticism regarding the lack of mention of profit in the conduct of migrant smuggling would automatically be resolved, since it would now be one of the essential elements of criminalisation.[90]

Likewise, the obtaining of profit through the assistance provided to migrants, or the violation of their human rights in the process (whether for entry, transit or residence in a territory) would automatically exclude acts displaying a humanitarian motivation from criminalisation, as well as assistance between friends or family, or even the criminalisation of the migrants themselves.

Commercial operatives in the sectors of transport or housing would similarly be excluded from this incrimination, as long as the profit they obtained was not considered "unfair" or "illicit" – in other words, that profit could not be different or disproportionate when compared with other clients just because of the fragility of the migrant's situation.

Lastly, the permitted discretion with regard to each legal order would not be so ample as it now is, thus curbing that particular criticism and, at the same time, making it possible to know exactly what constitutes migrant smuggling across the EU[91]

In any case, even though it results from the incriminating norm thus defined, there should be no doubt in the legislative instrument that the migrant, humanitarian assistance, and commercial operators were not to be criminalised. Humanitarian assistance, as well as the help one provides family or friends should also be excluded from a possible administrative sanction if the irregular migrant is given the right to legally reside in that territory (e.g., because they are granted asylum, or because of family reunification rules): it must be taken into consideration that the initial irregularity may well have been the only possibility of that person ever reaching the

[90] *See e.g.*, Stefano Zirulia, *Non c'è smuggling senza ingiusto profitto: Profili di illegittimità della normativa penale italiana ed europea in materia di favoreggiamento dell'immigrazione irregolare* [*There is No Smuggling Without Unjust Profit: Challenging the Legitimacy of the Italian and European Rules on Facilitating Irregular Migration*], Diritto Penale Contemporaneo Rivista Trimestrale, 2020, at 143, 143-44 (It.). It is also one of the envisioned changes in the new Proposal for a directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, *supra* note 19.

[91] At present, the flexibility allowed in Member States concerns only the possibility of criminalising more conduct than those already predicted in the Directive, not the adjustment of the European norms to the national legal order – that is because, even if the Member State in question wanted to include the obtaining of profit as a necessary element of the incrimination, that would likely not be in accordance with the Directive, since in practice that Member State would punish a narrower scope of conduct than intended by the EU.

territory which now grants them protection, given the lack of legal alternatives of obtaining it.

CONCLUSION

The aim of this article was to demonstrate that the application of a dogmatic criterion to assess the material legitimacy of European criminal law would go a long way towards rationalising it, as well as reinforcing its constitutional dimension and respect for fundamental principles that are the true common ground upon which to build a harmonised criminal law for all Member States.

As any legitimate power, the European criminal legislator must have an axiologically-driven approach to criminalisation and respect limits that are deemed essential in modern societies: there is no absolute legislative freedom, and the need for an incriminating norm must be substantiated.

Despite the stark criticism migrant smuggling is under, there is a legitimate version of the crime that would comply with the fundamental principles of criminal law – just not the one that has been adopted. Migrant smuggling should be considered a European criminal offence when directed at the protection of the migrants; other possibilities would be open for the Member States, as long as they would not run counter to the established norm at the European level. This would not only rationalise European criminal law, it would also lessen its impact on national legal orders, avoid unnecessary criticism of the EU and align its norms with its own values and international standards.

Whether this is a norm that is necessary, given the existence of other legal instruments that already criminally punish the relevant behaviours (namely those pertaining to human trafficking), is a whole new question. Indeed, it appears that it may not be needed at all. However, given that there is no possibility to remove it entirely from the legal orders of the Member States or of the European Union – due to the lack of an actual power to decriminalise on the part of the EU, and the consequent lack of power of the Member States to remove a criminal law provision that originated in the EU from their respective legal orders without disrespecting European constitutional principles – this would at least be a way to make migrant smuggling as legitimate as can be, while there is no decriminalisation competence in the EU.

It is also true that this phenomenon – in truth, both irregular migration and migrant smuggling – will not be significantly reduced if the only answer given is by

criminal law. This is a social fact that requires an interdisciplinary approach and solutions given by immigration policy. Nonetheless, it would be extremely important for the EU to stand true to its values and provide a better example when it comes to the exercise of its criminal power.