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Asylum detention under the European Convention on Human Rights

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Introduction

1. **The problem of immigration and asylum detention**

The right to liberty of the person is one of the foundational pillars of human rights regimes around the world. Its origins can be traced back to the English *Magna Carta Libertatum* of 1215, and the emergence of the modern State is inconceivable without it. Indeed, the very first right to which the Declaration of the Rights of Man and Citizen[1] refers to is the right to liberty (Article 2), and the Virginia Declaration of Rights[2] puts "the enjoyment of life and liberty" at the very top of the list of rights to which "all men" are entitled (Section 1). The Universal Declaration of Human Rights,[3] which aimed to guide States´ action towards individuals after the Second World War, also granted the right to liberty a central spot. This milestone document in the history of International Human Rights Law provides in its Article 3 that "everyone has the right to life, liberty and security of person", and is complemented with Article 9: "No one shall be subjected to arbitrary arrest, detention or exile".

Nonetheless, despite its paramount importance for every human being, States seem to be more readily prepared to restrict the right to liberty of aliens than that of nationals. In effect, particularly since the

[1] Declaration of the Rights of Man and Citizen. Approved by the National Assembly of France, August 26, 1789.

[2] Virginia Declaration of Rights. Adopted by the Virginia Convention of Delegated, June 12, 1776.

[3] Universal Declaration of Human Rights, 10 December 1948 (UN General Assembly, 217 A III).

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turn of the century, detaining migrants has become a "routine rather than exceptional" practice[4] through which States seek to control irregular migration, respond to mounting political pressures and maintain and assert their territorial authority (Sampson and Mitchell, 2013). Though there are no overall global statistics on immigration detention, organizations such as the Global Detention Project and the International Detention Coalition[5] are continuously gathering data and raising awareness on the immigration detention policies in different countries, which show that the struggle to end arbitrary and unnecessary detention of aliens is far from over.

Detention of migrants without a punitive purpose —i.e. detention that falls outside the ambit of criminal law— is often referred to as "administrative detention" (Goodwin-Gill, 2003:232). As noted by Costello (2015:143), administrative detention of migrants is one of the singularly most disturbing contemporary practices from the point of view of the rule of law and human rights.

The international community has expressed the concerns of political and civil actors over this practice in the Global Compact for Migration,[6] which is the first international agreement to regulate human mobility at the global level (Guild, 2017; Fajardo del Castillo, 2019). In Objective 13 of the Compact, States commit to "use immigration detention only as a measure of last resort" and to "work towards alternatives". Although the agreement is *soft law,* the fact that 164 States approved it in Marrakesh on the 10th of December 2018 is an important step towards the recognition of the problem and the promotion of cooperation among States to find solutions. Moreover, the United Nations Committee on Migrant Workers has published a General Comment on Migrant´s Rights to Liberty and Freedom from Arbitrary Detention,[7] which again reinforces the inclusion of the issue of immigration detention in the international political agenda.

Among the migrants being detained, some of them are people who have been forced to flee their home countries for different reasons and

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[4] UNHCR, *Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees*, 2014

[5] Their findings are available at https://www.globaldetentionproject.org/category/sidebar-publications/publications/country-detention-reports and https://idcoalition.org/publications/.

[6] Global Compact for Safe, Orderly and Regular Migration, United Nations General Assembly, 19 December 2018 (Res. A/73/195).

[7] General Comment No. 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention, Committee on the Protection of the Rights of All Migrants Workers and Members of Their Families, 23 September 2021 (CMW/C/GC/5).

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are in search of international protection, i.e. asylum-seekers. This practice is particularly troublesome, because asylum-seekers already experienced a type of trauma in their countries of origin —in some cases, they fled precisely because they feared being arbitrarily detained. Moreover, detention is not the only post-migration stressor that asylum-seekers face, and deprivation of liberty causes them an "independent deterioration of the mental health of people who are already highly traumatised", as empirical studies have shown (Filges *et al.*, 2015:40). Any detention of asylum-seekers exposes them to a high risk of re-traumatisation and reduces the future prospect of successful adaptation and eventual integration in the host society (Ilareva, 2015).

2. **Asylum detention in Europe during and after the refugee crisis**

In the European context, the use of detention as part of migration policies is very much linked to European States' "improvised response" (Van Middelaar, 2019) to the unprecedented levels of migrants and asylum-seekers that the continent faced in 2015, which was named by the United Nations High Commissioner for Refugees (UNHCR) "the year of Europe´s Refugee Crisis" (Spindler, 2015). This refugee crisis contributed to intensify States' restrictive practice towards asylum-seekers, including containment (Costello, 2020) and asylum detention.

Although as far back as 2003 Goodwin-Gill warned of the need to maintain accurate records of all cases where refugees and asylum-seekers are detained (Goodwin-Gill, 2003:238), data collection and publication by States on this issue remains very scarce in the European continent (AIDA, 2015:7; Global Detention Project, 2015). Despite this lack of official statistics, non-governmental organizations show that the detention of asylum-seekers became a particularly visible problem in several European (EU and non-EU) countries in the years following the refugee crisis (2015-2019). A report by the Hungarian Helsinki Committee (HHC, 2019) proves that the use of detention of asylum-seekers increased after 2015 in Bulgaria, Hungary, Italy and Greece. Some findings of this report are used here to illustrate the scope of the problem of asylum detention in Europe during the years in which the large arrival of asylum-seekers became a politically controversial issue:

In Hungary, more than 70% of asylum-seekers in 2017 were detained *de facto* (i.e. without a detention order) in the "transit zones" (HHC, 2019:20). These transit zones were informal detention centres placed behind a fence at the border with Serbia (but still inside Hungary´s territory) where, between 2017 and 2020, all asylum ap-

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plicants were obliged to submit their claim and to remain during the whole asylum procedure.[8] Importantly, since no detention order was issued, no remedy was available to challenge both its lawfulness as well as its conditions (Gil-Bazo, 2017). Moreover, the detention conditions in these centres were appalling. In July 2018, Hungary introduced a new inadmissibility ground that resulted in the automatic rejection of all asylum application lodged in the transit zones, and many of these asylum-seekers with a rejected claim were deprived of food while awaiting deportation, which led to a strong reaction from different European bodies: the European Court of Human Rights issued eight interim measures ordering Hungary to stop these inhuman practices (HHC, 2019a) and the European Commission opened an infringement procedure for the non-compliance of the conditions of detention in the transit zones with the EU Charter of Fundamental Rights (European Commission, 2019).

In Bulgaria, access to the asylum procedure was not automatic upon submission of the asylum application —as required by EU law— and therefore asylum-seekers who entered the country irregularly were immediately issued a removal order and detained for the purpose of its execution (Ilareva, 2015). Some asylum seekers were left in immigration detention even after they had formally been admitted to the asylum procedure; and others were placed in so-called "temporary accommodation centres" which, despite their denomination, were in fact detention facilities where asylum-seekers did not know how long they would be detained (HHC, 2019:20).

In Italy, detention upon arrival after 2015 occurred in three ways: detention in hotspots, *de facto* detention on boats and administrative detention in pre-removal centres (HHC, 2019:22). Detention of asylum-seekers in the hotspots caught the greatest attention due to the fact that it was the EU who set up these facilities through the 2015 European Agenda on Migration. The Agenda defined hotspots as facilities where the European Asylum Support Office, Frontex and Europol worked on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants.[9] Although the main objec-

[8] These transit zones were eventually closed after the Court of Justice of the European Union (CJEU) declared that they violated several articles of the Reception Conditions Directive which regulate the guarantees for detained asylum-seekers (C-924/19 PPU and C-925/19 PPU). For an analysis of this judgment, see Nagy, 2020.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 240 Final, 13-5-2015

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tive of the Italian hotspots was to ensure proper identification and fingerprinting of newly arrived persons, for a long time Italian authorities detained asylum-seekers for a period of around two weeks without a legal basis, therefore amounting to *de facto* detention (Majcher, 2018). This changed in October 2018, when a new law was enacted to regulate detention in the hotspots, but which was nevertheless criticized for giving the authorities wide-ranging discretion over who to detain (HHC, 2019:23).

In Greece, after the entry into force of the EU-Turkey Statement[10] in March 2016, the hotpots in the Greek islands turned into detention centers where all asylum-seekers coming from Turkey were deprived of their liberty for up to 25 days as part of the implementation of the Statement. This led UNHCR to suspend some of its activities on the ground due to its policy of opposing mandatory detention (UNCHR, 2016). Although this systematic detention was eased in practice, the Greek law that allowed for such detention (which was labelled as "restriction of liberty" in the law) was not sufficiently clear so as to ensure legal certainty; and the hotspots were sometimes used for pre-removal detention of asylum-seekers who had received a decision of return to Turkey (Majcher, 2018). In other detention centres, unaccompanied minors were continuously detained under the pretext of "protective custody" for indeterminate periods of time, and asylum-seekers who reached Greece by plane and did not have a valid entry authorisation were detained at the airport without a detention order (HHC, 2019:17).

Finally, to illustrate asylum detention practices in two non-EU Member States who were at the centre of the 2015 refugee crisis, Turkey and North Macedonia are also a case in point. Turkey maintains a geographical limitation to the Refugee Convention,[11] which means that it only examines asylum applications of European asylum-seekers. For non-European asylum-seekers, Turkey provided a "temporary protection regime" for Syrians and a "conditional protection regime" for non-Syrians (Alpes *et al.*, 2017). Except for Syrians, asylum-seekers were often detained in removal centres in overcrowded conditions, as well as in improvised facilities such as sport halls without a detention order (AIDA, 2019). In the case of North Macedonia, Amnesty International also criticised the unlawful detention of asylum-seekers (Amnestey International, 2018).

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[10] EU-Turkey statement. European Council Press release, 18 March 2016.

[11] Convention Relating to the Status of Refugees, 28 July 1951 (U.N.T.S., vol. 189, p. 137) and Protocol relating to the Status of Refugees, 31 January 1967 (U.N.T.S. vol. 606, p. 267).

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The Council of Europe did not remain silent on this issue. Already in 2010, the Parliamentary Assembly issued a recommendation expressing its concern about the substantial increase in the detention of migrants and asylum-seekers in European States.[12] After the new wave of detention practices in the context of the 2015 refugee crisis, the Council of Europe adopted a "five step plan to abolish migrant detention" (Com-missioner for Human Rights, 2017) and published a first draft of a codifying instrument of European rules on the administrative detention of migrants (McGregor, 2017).[13] For the European Committee for the Prevention of Torture (CPT), immigration detention remained a primary focus of its work during these years (CPT, 2017). In 2019, the Council of Europe organised a Conference on Effective Alternatives to the Detention of Migrants together with the European Commission and the European Migration Network (Council of Europe, 2019). All these legal and political instruments also tackled the more specific problem of asylum detention.

3. **Purpose of the study, theoretical framework and research question**

It is in this context of tension between European States' attempts to control migration through asylum detention and the concern of the international community regarding this practice that the European Court of Human Rights (ECtHR) was called for action in the years following the refugee crisis in order to protect asylum-seekers' right to liberty and related procedural rights under Article 5 of the European Convention on Human Rights (ECHR),[14] as well as their right to freedom from inhuman or degrading treatment under Article 3 ECHR when asylum seekers faced appalling detention conditions. Although the traditional role of the ECtHR is to provide remedies in individual cases, in the past decades the Court has moved towards dealing with systematic violations of human rights in general terms, setting human rights standards and thus acquiring a constitutional function (Harmsen, 2007:51). This constitutional function is exercised both in the "Council of Europe legal

[12] Detention of asylum seekers and irregular migrants in Europe, Parliamentary Assembly of the Council of Europe Recommendation 1900 (2010), 28 January 2010.

[13] Codifying instrument of European rules on the administrative detention of migrants 1st Draft, European Committee on Legal Co-Operation (CDCJ), 18-05-2017.

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (CETS, No. 5) as amended by Protocol 14, 13 May 2004 (CETS, No. 194).

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space", which extends to all of its members, and in the "European legal space", which only extends to EU Member States and is structured through the intertwining of national, European Union and Council of Europe legal orders (Von Bogdandy, 2016).

Through the lens of this constitutional role of the ECtHR in the European continent, the first aim of this study is to *analyse and systematise the jurisprudence of the Court between 2015 and 2019* regarding asylum detention, in order to elucidate which are the common minimum human rights standards applicable in the Member States of the Council of Europe when people in need of protection are deprived of their liberty.

The second aim of this study, which contains our research question, is to evaluate the case law of the ECtHR concerning asylum detention from the perspective of the theory of practical consequences and the margin of appreciation doctrine.

The theory of practical consequences sets out that constitutional courts should take into account the practical (i.e. political) consequences of their judgments, due to the fact that its decisions affect not only the individual applicant but the political community as a whole (Larenz, 1979; Häberle, 1980; García de Enterría, 1981:180). Although the ECtHR has not always exercised a constitutional function in Europe, it has long taken into account the practical consequences of its judgments by applying the margin of appreciation doctrine. The origins of this doctrine go back to the 1960s and 1970s, when the European Commission of Human Rights[15] and the ECtHR[16] reasoned that the primary obligation to secure the Convention rights fell on State authorities themselves, and that, as such, the Court would give some *discretion* to States in applying the Convention and would only intervene when it is absolutely necessary to do so (Hutchinson, 1999; Tulkens and Donnay, 2006).

The deference granted to States by the margin of appreciation doctrine is justified by two types of considerations. On the one hand, the Court uses normative considerations of legitimacy: it believes that national authorities can make better policies than international courts because they are better informed and have more relevant expertise; and that national authorities are more legitimate decision-makers than international courts because they are making their decisions through elected and democratically accountable bodies (Dothan, 2018:147).

[15] *Lawless v. Ireland,* no. 332/57, Report of the European Commission of Human Rights, 19 December 1959.

[16] *Handyside v. Uk,* no. 5493/72, ECtHR 7 December 1976.

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On the other hand, the Court makes use of this doctrine as a reaction to political pressures by States who do not wish to see the Court intervene in sensitive political issues. Indeed, it has been shown that judicial actions of the ECtHR do not take place in a political vacuum but are reflective of socio-political transformations and political criticism (Madsen, 2018). Thus, one of the main justifications of the margin of appreciation doctrine (political considerations) is very similar to the theory of practical consequences applied by constitutional courts at the national level.

In the context of migration, which is undoubtedly a burning political issue, the Court has often applied the margin of appreciation doctrine or the theory of practical consequences by adopting a deferential stance towards migration policies so as to maintain its legitimacy in the eyes of State authorities and to avoid having its decisions dismissed as "judicial meddling" by States jealous of their sovereignty (Guiraudon, 2000). This fear of upsetting States at times translates into tightly circumscribed rulings on migration-related cases which fail to appreciate the position of discrimination that migrants face and exhibit a bias in favour of the State (Dembour, 2015). The first migration-related case in which the Court adopted such a State-protective approach was *Abdulaziz, Cabales and Balkandi*. In this judgment, the Court laid down what has now become its mantra in migration-related judgments: "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory".[17]

The self-restraint of the ECtHR in politically sensitive cases is very much in contrast to the approach taken by the Interamerican Court of Human Rights (IACtHR), which has played a proactive role in defending, among others, socio-economic and non-discrimination rights even with the reluctance of Latinamerican States, to the point that the term "constitucionalismo transformador" has been coined to describe the IACtHR´s way of handling sensitive political cases in its jurisprudence (Von Bogdandi *et al.*, 2019). With regard to migration, Dembour´s comparative study of the case law of both Courts concludes that, while in the Inter-American system the migrant is first of all conceived as a human being in need of protection; in the European system, by contrast, the migrant is first of all conceived as an alien subjected to the control of the sovereign State (Dembour, 2015:8).

[17] *Abdulaziz, Cabales and Balkandi*, no. 9214/80; 9473/81; 9474/81, ECHR 28 May 1985, §67.

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Within this theoretical framework, this study, in addition to systematising the Court's case law on asylum detention, will seek to find out *whether the jurisprudence of the Court regarding detention of asylum-seekers is also characterized by the self-restraint that it generally shows in migration-related cases*. Particular attention will be paid to the question of *whether or not the intensified restrictive practices of States towards asylum-seekers after the 2015 refugee crisis have affected the Court´s judicial approach* and, if so, whether this crisis context has led the Court to be more deferential to States' migration control policies.

The latter research question is the reason for choosing judgments between 2015 and 2019 as the object of analysis. We have decided not to include judgments after 2019 because at the beginning of 2020, COVID-19 brought with it a new crisis in Europe, shifting the attention of States from the mass influx of 2015. Therefore, 2015-2019 is a reasonable time period to analyse in order to draw conclusions relating to the effects of States' restrictive responses to the refugee crisis on the Court's case law. This is not to say that COVID-19 did not lead to problematic State practices in the field of migration and asylum policy, including immigration and asylum detention (see for instance Volou 2021), but these are outside the scope of this study.

4. **Methodology, structure and choice of terms**

This study will closely analyse 34 judgments of the ECtHR issued between 2015 and 2019 in which the Court applied Article 5 and/or Article 3 ECHR when deciding on cases where detained asylum-seekers claimed to have been victims of a violation of their rights under these Convention provisions. There will only be one judgment that will be analysed despite it not concerning the detention of asylum-seekers but that of irregular migrants: *Khlaifia and Others v. Italy.*[18] However, we are including its analysis in this work due to the considerable impact that this judgment has had for the rights of both migrants and asylum-seekers in detention, as shown by the different authors that specifically commented this judgment (Zirulia and Peers, 2017; Venturi, 2017; Goldenziel, 2018). Where relevant, the analysis will also refer to leading cases issued prior to 2015 in order to compare them with the post-2015 case law of the Court.

[18] *Khlaifia and Others v. Italy*, no. 16483/12, ECtHR (Grand Chamber) 15 December 2016.

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These case law of the ECtHR on asylum detention has be drawn from the *European Database of Asylum Law* (EDAL), which is an online database managed by the European Council on Refugees and Exile (ECRE)[19] and created through funding from European Commission's European Refugee Fund.[20] Due to the large number of judgments compiled in this database, only those relating to EU Member States have been selected. This methodological choice is grounded on the fact that judgments against EU Member States allow us not only to identify the standards set by the ECtHR at the level of the Council of Europe, but also to look into how EU law plays a role in the Court's case law. It should nonetheless be kept in mind that the standards set by the ECtHR are particularly relevant in countries which are not part of the EU, since detained asylum-seekers in these countries lack the additional layer of protection offered by EU law. For an in-depth study of asylum detention under EU law, we recommend reading the special issue of the *Refugee Survey Quarterly* (De Bruycker and Tsourdi, 2016). For an analysis of how the proposed EU New Pact on Migration and Asylum deals with the issue of immigration and asylum detention, see Cornelisse (2021).

In order to insert the selected case law of the ECtHR in the framework of general international law, the Preliminary Chapter of this study will explain the standards set by the 1951 Convention relating to the Status of Refugees[21], its 1967 Protocol[22] (Refugee Convention) and the International Covenant on Civil and Political Rights (ICCPR)[23] relating to asylum detention. The first Chapter will analyse the construction of the right to liberty and the prohibition against arbitrary detention by the ECtHR in asylum detention cases, which includes considerations such as the grounds for detention and the lawfulness of detention. Chapter II will then systematise the case law of the Court regarding other rights to which detained asylum-seekers are entitled: the right to an effective

[19] ECRE is a renowned alliance of 102 NGOs across 41 European countries, established in 1974 to protect and advance the rights of refugees, asylum-seekers and other forcibly displaced persons in Europe and in Europe's external policies. More information can be found at https://www.ecre.org/our-work/

[20] The database and a more detailed explanation of its functioning can be found at https://www.asylumlawdatabase.eu/en/content/about-edal-european-database-asylum-law

[21] Convention Relating to the Status of Refugees, 28 July 1951 (U.N.T.S., vol. 189, p. 137).

[22] Protocol relating to the Status of Refugees, 31 January 1967 (U.N.T.S. vol. 606, p. 267).

[23] International Covenant on Civil and Political Rights, 16 December 1966 (U.N.T.S vol. 999, p. 171 and vol. 1057, p. 407).

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judicial review, the right to information, the right to compensation and the right not to be subjected to inhuman or degrading treatment in appalling detention conditions.

Regarding the method of citation of judgments, the complete reference to the judgment will be quoted in a footnote in two circumstances: 1) When it is quoted for the first time; and 2) When the judgment is referred to in the main text. Otherwise, only the name of the judgment and the relevant paragraph will be quoted in a footnote. In addition, the complete list of judgments analysed can be found at the beginning of this study.

As regards the terminology, the two central concepts of this study, namely the concepts "detention" and "asylum-seeker", will be used according to the following definitions:

> "Detention" will be understood as the "deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities"[24]. Detention of an asylum-seeker in this sense is a *non-punitive administrative measure* with the aim to fulfil a particular purpose (Dusková, 2017:25). Although we will sometimes refer to it as "administrative detention", it must be stressed that, under Article 31.2 of the Refugee Convention, non-punitive detention of asylum-seekers can either be ordered or applied by a State administration or by a court (Goodwin-Gill, 2003:232).

Detention of asylum-seekers does not only occur in police stations, immigration detention centres and border posts (including airports[25]), but can also take place in less-traditional premises such as reception and accommodation centres[26], refugee camps, hotspots[27] and the so-called "transit zones"[28]. In these areas, it is not always clear whether the measure at stake may be qualified as "detention" or as "restriction on the freedom of movement". From this qualification depends whether or not Article 5 ECHR may be deemed applicable: the right to liberty under Article 5 *only* applies when the measure amounts to detention —if that is not the case, the provision that enters the scene is

[24] Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR, 2012.

[25] *Aamur v. France,* no. 19776/92, ECtHR 25 June 1996.

[26] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §32.

[27] *J.R. and Others v. Greece,* no. 22696/16, ECtHR 25 January 2018.

[28] *Ilias and Ahmed v. Hungary,* no. 47287/15, ECtHR 14 March 2017.

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Article 2.1 of Protocol 4 ECHR, which protects the right to free movement. The criteria established by the ECtHR for deciding when Article 5 is applicable will not be inspected here, given that this study focuses on the *content* of Article 5. Nonetheless, it is important to note that one of the chosen judgments, namely the Chamber case *Ilias and Ahmed v. Hungary*,[29] was overturned by the Grand Chamber in November 2019 because it considered that the Hungarian transit zones (see Section 2) did not constitute detention, and as such, Article 5 was nor applicable in the particular case.[30] Despite this, the Chamber case will also be analysed in this study, given that its general findings on the guarantees offered by Article 5 remain relevant for deriving general conclusions on the content of this provision.

The term "asylum-seeker" will be used in a broad sense. It will refer to persons applying for refugee status pursuant to the definition of a "refugee" in the Refugee Convention, as well as other persons seeking subsidiary forms of protection (e.g. under Article 3 ECHR) whose claims are still being considered by the authorities. The asylum application may have been filed before detention or during detention, the latter case being the most common one in the selected judgments. The term will also be used to refer to those persons who have been denied refugee status and who are exercising their right to an effective remedy against the State's negative decision on their asylum claim (Article 13 ECHR in connection with Article 3). If a final decision rejecting the asylum claim has been adopted, the term "asylum-seeker" will still be used, but the circumstance of the rejection of his claim will be underlined.

Finally, it should be noted that many of the findings of this work are also applicable to migrants who have not applied for asylum in the country of destination. Therefore, this study also aims to contribute to the more general debate on immigration detention, which is, as shown in this introduction, an issue that concerns the international community as a whole.

[29] *Ibid.*

[30] *Ilias and Ahmed v. Hungary*, no. 47287/15, ECtHR (Grand Chamber) 21 November 2019

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Preliminary Chapter

The right to liberty of asylum-seekers under the Refugee Convention and the ICCPR

The European Convention on Human Rights does not apply in a vacuum, but in conjunction with other international instruments for the protection of human rights (Moreno-Lax, 2011:187). Article 31.3(c) of the Vienna Convention on the Law of Treaties lays down that a treaty shall be interpreted in their context, taking into account "any relevant rules of international law applicable in the relations between the parties". All States parties to the ECHR are also parties to the Refugee Convention and to the ICCPR. Therefore, we will devote this Preliminary Chapter to briefly outlining how the right to liberty is regulated by these two treaties, especially by the Refugee Convention, being, as it is, the *Magna Carta* for the rights of refugees and asylum-seekers (Jaeger, 2001:737).

The Refugee Convention arrived at a period when human rights did not yet have a conventional nature at the international level. This historical context, added to the fact that the Convention creates a very specific international law regime, has led some authors to affirm that the Convention "is not a human rights treaty in the orthodox sense" (Chetail, 2012:22), while others consider it to be an "early human rights treaty" (Clark and Crépeau, 1999:391). Be it as it may, it is clear that human rights are deeply embedded in the Convention, since its main purpose is "to assure refugees the widest possible exercise of the fundamental rights and freedoms".[31] Moreover, its universal nature derives from the fact that the Convention is grounded in Article 14 of the

[31] Convention Relating to the Status of Refugees, §2.

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Universal Declaration, according to which "*everyone* has the right to seek and enjoy in other countries asylum from prosecution"[32].

Without doubt, the right to liberty of the person is one of the core fundamental rights of the common constitutional traditions of all States and of the international human rights system. This means that, as a treaty that intended to confer a broad range of human rights to a particular group of people, the right to liberty had to be enshrined in the Refugee Convention.

However, the Convention does not grant the same rights to all refugees and asylum-seekers. The rights enshrined in the Convention may be classified according to: those conferred to refugees that are simply subject to a contracting State´s *jurisdiction*; those who are *physically present* within a State´s territory; those who are deemed to be *lawfully present* within the State; those who are *lawfully staying* in the country; and finally those who can demonstrate *durable residence* in the asylum state (Hathaway, 2021). The stronger the level of legal attachment to the contracting State, the more rights the refugee is entitled to.

Since the subject of this study *ratione materiae* is non-punitive detention and the subject *ratione personae* are persons who are seeking asylum in European States, two questions must be answered: First, does the Convention allow for the right to liberty of refugees to be restricted through non-punitive detention? And secondly, to which of the above-mentioned categories of refugees can non-punitive detention be applied?

The answer to the first question is straightforward. While the first paragraph of Article 31 forbids criminal detention of refugees who, having entered the territory of the State without authorization, comply with a certain set of requirements (such as presenting themselves without delay to the authorities); Article 31.2 of the Convention allows for the non-punitive detention of refugees:

> "The Contracting States shall not apply to the movements of such refugees *restrictions* other than those which are necessary and such restrictions shall only be applied until their status in the country is *regularized* or they obtain admission into another country".

While this provision uses the term "restrictions", the *travaux* préparatoires show that Article 31.2 also allows for detention (Noll, 2011:1268). Importantly however, it follows from the structure of the

[32] Universal Declaration of Human Rights, 10 December 1948 (UN General Assembly, 217 A III).

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sentence that the non-punitive detention of refugees is an exception to the rule. But exactly which refugees may the State detain? This is the most complex question. The drafters of the Convention titled Article 31 "refugees unlawfully in the country of refugee", and the wording of Article 31.2 tells us, *a contrario,* that only refugees whose status is *not regularized* can be detained. Following the five categories of legal attachment to the State, this means that States can only detain refugees who are under a State's jurisdiction or physically present in the territory of the State party. Turning to the subject of our study, it seems unclear whether, under the Refugee Convention, a person who has entered a European State without a visa or a residence permit (i.e. who has entered irregularly) but *has formally applied* for asylum can be considered as being "unlawfully in the country" and can thus be detained.

The problem of the Refugee Convention is that, unlike other human rights treaties, it did not create a treaty monitoring body with the power to issue general guidance to States to facilitate a consistent application of the Convention (Clark and Crépeaua, 1999:402). Therefore, when interpretation problems such as the present one arise, we have to look at the States parties' interpretation of the concepts enshrined in the treaty, following the general rule of international law that the right to give an authoritative interpretation of a legal norm belongs solely to the person or body who has the power to modify or suppress it.[33] Hathaway (2021) and Noll (2011:1273) thoroughly analyse the *travaux préparatoires* of the Refugee Convention and show that there was no common understanding among all States parties as to whether an asylum-seeker whose asylum claim has been registered can be deemed to be lawfully present in the territory.

The United Nations High Commissioner for Refugees (UNHCR) has expressed its opinion on the matter. The nature of UNHCR is that of an international diplomatic corps rather than that of an international legal body, having its own statute and primary responsibilities to protect refugees and to facilitate with States solutions for refugees (Clark and Crépeaua, 1999:402). However, it does play a key role in providing interpretative guidance on the Convention and in encouraging a harmonized application of its provisions by States parties (Chetail, 2012:64).

In its submission to the ECtHR in *Saadi v. United Kingdom* (a leading case with regard to our subject matter, as we will see later on), UNHCR stated that:

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[33] *Question of Jaworzina (Polish-Czechoslovakian Frontier),* Advisory Opinion of 6 December 1923, Permanent Court of International Justice Series B, No. 8, §37.

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> Where a State *admitted* an asylum-seeker *to procedures*, and the asylum-seeker complied with national law, his temporary entry into and presence on the territory could not be considered as "unauthorised"; the grant of temporary admission was precisely an authorisation by the State temporarily to allow the individual to enter its territory consistent with the law. In such a situation, the asylum-seeker was not seeking unauthorised entry, but rather, had been granted temporary but authorised entry for the purpose of having the asylum claim considered.[34]

Therefore, UNHCR makes a distinction between:

1. Irregularly arriving asylum-seekers who have filed an asylum application but have not yet been admitted to the asylum procedure (i.e. the claim has not yet been deemed admissible). These asylum-seekers are still unlawfully in the country and may be detained, for Article 31.2 of the Refugee Convention applies to them.
2. Irregularly arriving asylum-seekers whose claim has already been accepted for evaluation in the asylum procedure (*regularised* asylum-seekers in the sense of Article 31.2). These asylum-seekers cannot be detained, since they already enjoy a regular status in the country and are therefore holders of the right of freedom of movement enshrined in Article 26 —which can only be restricted "subject to any regulations applicable to aliens generally in the same circumstances".

Several authors also support this view (Hathaway, 2021; Field and Edwards, 2006; O'Nions, 2008; Noll, 2011; Costello, 2015). In any case, since States have not given UNHCR the authority to interpret the Refugee Convention, they do not have an obligation to follow its views; and may interpret Article 31.2 of the Refugee Convention in such a way that would allow them to also detain irregularly arriving asylum-seekers whose application has been deemed admissible. For an interpretation that differs from that of UNHCR, see Grahl-Madsen (1972), Slingenberg (2014), Battjes (2006) and Goodwin-Gil and McAdam (2021).

Another open question is *for which reasons* can asylum-seekers be detained. Article 31.2 does not lay down the grounds on which States can base the detention —it only provides that authorities may detain asylum-seekers if "necessary". This leaves States a large margin of appreciation, which has led Chetail (2012:57) to argue that "the Convention addresses the issue in general and arguably vague terms".

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[34] *Saadi v. UK,* no. 13229/03, ECtHR 29 January 2008, § 56 [emphasis added].

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The UNHCR Executive Committee, a subsidiary organ of the UN General Assembly and governing body of UNHCR, has clarified this issue. In 1986, while stating that "detention should normally be avoided", the UNHCR Executive Committee (with the endorsement of the General Assembly) laid down an *exhaustive* list of grounds on which States can rely in order to detain asylum-seekers, which must be prescribed by law; these being:[35]

a) To verify identity
b) To determine the elements on which the claim to refugee status or asylum is based
c) To deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State
d) To protect national security or public order

In 1999, UNHCR adopted its "Guidelines on the Detention of Asylum-Seekers",[36] which were revised in 2012.[37]. In both guidelines the grounds for detention are further constrained: for instance, ground (b) can only be used when the information regarding the elements of the asylum claim could not be obtained in the absence of detention.[38] More importantly for the purposes of comparing the Refugee Convention with the jurisprudence of the ECtHR, the 2012 Guidelines stress that: (1) Illegal entry or stay of the asylum-seeker, in itself, does not give the State an automatic power to detain; and (2) As a general rule, asylum-seekers cannot be detained on grounds of expulsion, as they are not available for removal until a final decision on their claim has been made —with the only exception that there are grounds for believing that the asylum-seeker has introduced an asylum claim merely to frustrate an expulsion decision.[39]
Moreover, UNHCR stressed the importance that asylum-seekers may only be detained for the aforementioned *grounds* when it is *rea-*

[35] Conclusion relating to the detention of Refugees and Asylum-Seekers No. 44 (XXXVII), Executive Committee of the High Commissioner´s Programme, 13 October 1986. Document approved by the UN General Assembly in its resolution No. 12A(A/41/12/Add.1).

[36] Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, UNHCR, February 1999.

[37] Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR, 2012.

[38] UNCHR Guidelines, 2012, §28.

[39] UNHCR Guidelines, 2012, §32-33.

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sonable, *necessary* and *proportional*.[40]. As we will explain in more detail in Chapter 1 (Section 2.4), these are the four steps of the "proportionality test". Evaluating the necessity of the detention means that States have to choose —of all those means that may advance the purpose of the limiting law— that which would *least limit* the human right to liberty (Barak, 2012). In essence, it means that States have to look for alternatives to detention. Since the necessity requirement is the only explicit limitation to detention of asylum-seekers in Article 31.2 of the Convention, UNHCR has consistently warned States that they ought to look for alternatives to detention —and it did so not only in the Guidelines but also in its 2014-2019 Global Strategy "Beyond Detention", which aims to ensure that alternatives to detentions are available in law and implemented in practice.[41]

The Refugee Convention does not include provisions on judicial review of the detention, right to be informed of the reasons for detention or detention conditions. It does, however, enshrine an article which grants refugees *access to courts* (Article 16.1). Since there is no personal qualification in this article, it applies to all asylum-seekers, whether or not they are lawfully present in the territory of the State.

Regarding the ICCPR (the Covenant), as a first remark, it must be highlighted that the interrelationship between the Refugee Convention and international human rights law has grown so strong that, according to some authors, it is no longer possible to interpret or apply the Refugee Convention without drawing on the text and jurisprudence of other human rights treaties (Clark and Crépeau, 1999:389). Among these treaties, the ICCPR is, without doubt, the most relevant one, given that it has been almost universally ratified and that it is a central part of the International Bill of Human Rights, which defines the minimum standards of human rights that all States are required to protect.

The general rule as regards the applicability *ratione personae* of the Covenant is that each of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.[42] Therefore, asylum-seekers enjoy (most of) the rights of the Covenant. Among these rights, we find the right to liberty in Article 9.

Article 9.1 ICCPR enshrines *everyone's* right to liberty, and also lays down the circumstances under which States may detain a person: they

[40] UNHCR Guidelines, 2012, §34.

[41] UNHCR, Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019.

[42] Human Rights Committee, General Comment No. 15: The Position of Aliens Under the Covenant (CCPR/C/GC/15).

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can only do so "on grounds and in accordance with such procedure as are established by law" and as long as detention is not "arbitrary". This article covers many situations, since it allows for both criminal and administrative detention of all persons regardless of their legal status in the State —unlike Article 31(2) of the Refugee Convention, which only permits administrative detention to certain groups of refugees.

Unlike the Refugee Convention, the ICCPR instituted a treaty-monitoring body with the power to provide general comments to States parties (Article 40 ICCPR), which serve as an authoritative interpretation of the rights enshrined in the Covenant. The fact that the Committee receives periodic reports from States and other parties, along with its experience in applying the Covenant, has led some authors to argue that "from a moral point of view, the interpretation provided by the HRC overrides interpretations provided by States" (Citroni, 2015). Moreover, the Spanish Supreme Court in its judgment 1263/2018 set a precedent in international human rights law by recognising that the decisions of supervisory bodies of human rights treaties must be complied with by the Spanish State (Gutiérrez Espada, 2018).[43]

It should be noted, however, that the Covenant does not make clear that the Committee is to be the final interpreter of the treaty (Harrington, 2015), and therefore States are not obliged to fol-low the HRC's interpretation. In any case, it can be argued that the Committee´s interpretation of the Covenant has more *auctoritas* than UNHCR's interpretation of the Refugee Convention.

In its General Comment on the right to liberty[44] and in the case *A. v. Australia*, the HRC summarised its views on Article 9 regarding administrative detention of asylum-seekers. There are three important ideas in this Comment that will later be compared with the case law of the ECtHR:

a) First, the notion of "arbitrariness" includes elements of inappropriateness, reasonableness, necessity and proportionality.[45] Therefore, like the Refugee Convention, the ICCPR requires States to follow the four steps of the "proportionality test".
b) Second, asylum-seekers who *unlawfully* enter a State´s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it

[43] Sentencia del Tribunal Supremo (Sala 3.ª, Sección 4.ª) de 22 de marzo de 2018 (ES:TS:2018:1263).

[44] Human Rights Committee, General Comment No. 35, 16 December 2014 (CCPR/C/GC/35).

[45] General Comment No. 35, §12.

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is in doubt.[46] However, illegal entry alone cannot be a ground for detention.[47]

c) Third, the detention of asylum-seekers whose claim is being resolved is generally considered arbitrary by the HRC, *except* when there are particular reasons specific to the individual, such as individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.[48]

When taking a decision on detention of migrants, authorities have to take into account the effect of the detention on their physical or mental health.[49] The Committee's interpretation of Article 9 has been very liberty-protective, and the standards it elaborated have informed UNHCR's position that asylum-seekers should only be detained in very exceptional circumstances (Field and Edwards, 2006:10). However, we find that UNHCR has gone further in its protection of asylum-seekers than the HRC since, unlike the monitoring body of the ICCPR, it considers that asylum-seekers whose claim has been deemed admissible cannot be detained under any circumstances.

The ICCPR also grants detained individuals procedural safeguards and the right to dignified treatment, which will be briefly be examined here (for further analysis see Majcher, 2019).

Article 9.2. sets out that persons who are deprived of liberty shall be informed, at the time of arrest, of the reasons for their arrest. One major purpose of this article is to enable detained persons to seek release if they believe that the reasons given are invalid or unfounded. Therefore, as far as possible, that information must be given immediately upon arrest, and the reasons must include the general legal basis of the arrest and the factual specifics.[50]

For its part, Article 9.4 ICCPR entitles anyone who is deprived of his liberty to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". The HRC has emphasised that this procedural provision applies in the context of immigration detention.[51] Some of the requirements of this provision are: that there is a possibility to challenge the measure from the moment of arrest; that the detainee has the right to appear in person before the court; that

[46] General Comment No. 35, §18.
[47] *A. v. Australia,* Communication No. 560/1993, HRC 30 April 1997, §9.2.
[48] *Ibid.*
[49] General Comment No. 35, §18.
[50] General Comment No. 35, § 24-28.
[51] General Comment No. 35, § 40.

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the court reviews the compatibility of the measure with both domestic law and with Article 9.1; and that the person receives a decision by the court without delay.[52]

Article 9.5 moreover grants individuals who have been victims of unlawful detention an "enforceable right to compensation". This financial compensation relates to the pecuniary and non-pecuniary harm resulting from the unlawful detention; and States are required to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion.[53]

Finally, Article 10.1 ICCPR lays down that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". This provision adds to the protection afforded by Article 7, according to which no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. Importantly for cases of asylum detention, the application of this rule cannot be dependent on the material resources available in the State. The core of this provision is that respect for the dignity of detained persons is guaranteed under the same conditions as free persons, and that they are not subjected to any hardship other than that resulting from the deprivation of liberty.[54] Conditions of detention of migrants are also relevant for the HRC in the context of Article 9, since in its General Comment on this provision it forbids States from detaining migrants in prisons and obliges them to make sure that detention takes place in appropriate, sanitary, non-punitive facilities.[55]

Having explored the international standards that the Refugee Convention and the ICCPR lay down regarding deprivation of liberty of asylum-seekers, we now have a framework in which to insert the jurisprudence of the court around which this study revolves: the European Court of Human Rights.

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[52] General Comment No. 35, § 39-48.

[53] General Comment No. 35, § 49-52.

[54] Human Rights Committee, General Comment No. 21, 10 April 1992 (HRI/GEN/1/Rev. 9 (Vol. I), § 2-8. See also the HRC views on Article 7 ICCPR in General Comment No. 20, 10 March 1992 (HRI/GEN/1/Rev. 9 (Vol. I), p. 200).

[55] General Comment No. 35, §18.

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Chapter I

The right to liberty of asylum-seekers under the European Convention on Human Rights

Article 5.1. of the European Convention on Human Rights states that "everyone has the right to liberty and security of person". The protection that this article confers to detainees has long been a subject of interest for legal commentators (Liñán Nogueras, 1980). In its jurisprudence, the ECtHR has clearly stated that the purpose of this provision is to protect the individual against any *arbitrary* interference by the State with his or her liberty.[56] The concept of *arbitrariness* is thus paramount to understanding the right to liberty.

The general principle enshrined in this provision is non-detention ("no one shall be deprived of his liberty"); however, like most principles, it allows for exceptions, which are contained in an "*exhaustive* list of the grounds on which a person may be deprived of his or her liberty".[57] Therefore, no other *material* reasons can be alleged by the State when detaining a person than those listed in Article 5.1, and these reasons must be "narrowly interpreted", since they are an exception to the fundamental right to liberty.[58] Nonetheless, it should be noted that in the case *Hassan v. UK*,[59] the Court effectively read into

[56] *Thimothawes v. Belgium,* no. 39061/11, ECtHR 4 April 2017, §56.

[57] *Thimothawes v. Belgium,* §56; *Ilias and Ahmed v. Hungary*, §61; *Richmond Yaw and Others v. Italy,* nos. 3342/11, 3391/11, 3408/11, 3447/11, ECtHR 6 October 2016, §67; *O.M. v. Hungary,* no. 9912/15, ECtHR 5 July 2016, §40; *J.N. v. UK,* no. 37289/12, ECtHR 19 May 2016, §74; *Mahamed Jama v. Malta,* no. 10290/13, ECtHR 26 November 2015, §136; *Nabil and Others v. Hungary,* no. 62116/12, ECtHR 22 September 2015, §26.

[58] *Richmond Yaw and Others v. Italy,* §67; *Khlaifia and Others v. Italy* (Grand Chamber), §88; *S.C. v. Romania,* no. 9356/11, ECtHR 10 February 2015, §56.

[59] *Hassan v. UK,* no. 29750/09, ECtHR 16 September 2014.

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Article 5.1 an extra permissible ground for detention, i.e. detention in the context of an international armed conflict when that detention is consistent with the Third and Fourth Geneva Conventions (Hill-Cawthorne, 2014).

The right to liberty finds its connection to migration control and migrants' rights in Article 5.1(f), which allows for the detention of migrants in certain cases. As noted by Costello (2015:147), by putting immigration detention in a category of its own, the ECHR leaves this type of detention subject to looser standards of justification, as will be shown in this study. In any case, Article 5.1(f) is the provision towards which the jurisprudence of the ECtHR has gravitated when deciding on detention cases in the context of the European refugee crisis.

When assessing the position of the ECtHR towards the detention of migrants, it can be argued that the Court tries to strike a balance between the State's right to control its borders and the right to liberty of migrants, although, as will be shown throughout this study, it often gives preference to the former. On the one hand, in the leading case *Saadi v. UK*[60] of 2008 and in following judgments[61] the Court affirmed that the ability of States to detain would-be migrants who have applied —through an asylum application or otherwise— for permission to enter the country is an essential corollary to the "undeniable" right of States to exercise sovereign control over the entry and residence of aliens on their territory.

On the other hand, the Court has at times shown its discomfort with general detention practices of migrants. In 2013, in the case *Suso Musa v. Malta*[62]*,* the Court made a general critique to the "odd" detention practices of an EU Member State (Malta), expressing its reservations as to the Government's good faith in applying an across-the-board detention policy and the by-passing of the voluntary departure procedure. This assertion was reaffirmed after the 2015 crisis in *Mahamed Jama v. Malta, Abdi Mahamud v. Malta* and in *AbdullahiElmi v. Malta*[63]. Although the Court is only referring to one specific country, this sentence may well reflect a general concern of the ECtHR towards the practice of detaining migrants in EU Member States in the context of the refugee crisis.

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[60] *Saadi v. UK,* no. 13229/03, ECtHR 29 January 2008, §64.

[61] *Thimothawes v. Belgium,* §58; *J.R. and Others v. Greece,* §108.

[62] *Suso Musa v. Malta*, no. 42337/12, ECtHR 9 December 2013, §100.

[63] *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13, ECtHR 22 November 2016, §113; *Abdi Mahamud v. Malta,* no. 56796/13, ECtHR 3 May 2016, §131; *Mahamed Jama v. Malta*, no. 10290/13, ECtHR 26 November 2015, §146.

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This concern stands out in the cases of detention of asylum-seekers. In its famous judgment *M.S.S. v. Belgium and Greece* in 2011, the Court held that the detention of migrants is acceptable in the context of combating irregular migration, but only if the State complies with its international obligations, in particular with the 1951 Geneva Convention and the ECHR, and that a State's legitimate concern to foil migrants' attempts to circumvent immigration restrictions *must not deprive asylum-seekers* of the protection afforded by these conventions.[64] Moreover, when detaining asylum-seekers, the authorities have to bear in mind that they are not applying the measure to individuals who have committed criminal offences but "to aliens who, often fearing for their lives, have fled from their own country".[65]

It is precisely the delicate situation that asylum-seekers face which makes their detention a very sensitive issue that needs to be studied in depth. Therefore, we will now proceed to identify and analyse the legal problems that the ECtHR dealt with in cases in which EU States relied on Article 5.1(f) in order to detain asylum-seekers; keeping in mind that the judgments studied were delivered in the context of a general concern on the part of EU States for greater border control.

1. **The grounds for detention of asylum-seekers**

The law creates powers to detain migrants and asylum-seekers (Costello, 2015:145), which must pursue particular purposes for them to be legal under the ECHR. The Convention provides certain grounds on which authorities can base that power when implementing migration control policies. In this Section, we will analyse the scope and content of these grounds, which are, as we will see, not devoid of controversy.

1.1. *The first limb: preventing asylum-seekers' "unauthorised entry"*

The first ground on which a State can detain a migrant under Article 5.1(f) is "to prevent his effecting an *unauthorised* entry into the country". The Court has interpreted that, until a State has explicitly au-

[64] *M.S.S. v. Belgium and Greece,* no. 30696/09, ECtHR 21 January 2011, §216-218. This was reiterated in *N.M. v. Romania,* no. 75325/11, ECtHR 10 May 2015, §55.

[65] *Ilias and Ahmed v. Hungary*, §64; *Abdi Mahamud v. Malta,* §87; *Mahamed Jama v. Malta,* §95.

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thorised entry of a person to the country, any entry is "unauthorised", and therefore the detention of a person wishing to enter the country but requiring an authorisation that is not yet available is permitted under Article 5.1(f).[66] As in the case of Article 31 of the Refugee Convention and the ICCPR, we are faced with the problem of determining whether or not a migrant who has entered a State in an irregular manner but who has applied for asylum can be considered to be "authorised".

The Court has solved this question in the following manner: "up to the decision on an asylum claim, such detention can be considered to fall under the first limb of Article 5.1(f), namely to *prevent effecting an unauthorised entry*".[67] This interpretation was first established in the 2008 case *Saadi v. UK*.[68] Thus, although lodging an asylum application prevents the asylum applicant from being expelled until his asylum claim has been processed (principle of *non-refoulement*, which will be explained in Section 1.2), it does not prevent him from being detained under the ECHR. Only *if national law forbids the detention of asylum-seekers*, will that detention also violate Article 5.1(f) ECHR.[69] The question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to stay, is also *largely dependant on national law*.[70]

As Battjes (2017:274) notes, under the ECHR, the asylum-seeker is both in *and* not in the territory: the State is required to regard the asylum-seeker as being present in its territory for the purposes of *non-refoulement* but, at the same time, it may regard the asylum-seeker as not being present for the purposes of detention. This, in turn, entitles the State to detain the asylum-seeker to "prevent" the entry. The Convention system thus creates a fiction of non-presence that invites us to imagine the asylum-seeker as being kept "outside" the State and awaiting approval for his entry (Costello, 2015:151).

But what if the asylum-seeker presents himself to the immigration authorities without delay? Following Article 31 of the Geneva Convention, this action exempts the asylum-seeker from being penalised on account of his illegal entry, so maybe it also exempts him from non-punitive detention under Article 5.1(f)? The Court has clearly answered this ques-

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[66] *Thimothawes v. Belgium,* §59; *Mahamed Jama,* §137.

[67] *Abdullahi Elmi v. Malta,* §141; *O.M. v. Hungary,* §47; *Abdi Mahamud v. Malta,* §128; *Mahamad Jama v. Malta,* §144; *Nabil and Others v. Hungary,* §27.

[68] *Saadi v. UK,* no. 13229/03, ECtHR 29 January 2008, §65.

[69] *R.T. v. Greece,* no. 5124/11, ECtHR 11 February 2016, §88; *A.Y. v. Greece,* no. 58399/11, ECtHR 5 November 2015 §87.

[70] *Mahamed Jama,* §138.

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tion in a negative manner: "to interpret the first limb of Article 5.1(f) as permitting detention only of a person who is trying to evade entry restrictions would undermine the power of the State to exercise its right of border control".[71] Therefore, even if the asylum-seeker presents himself at an official border post and asks for entry into the territory, the authorities could allow them entry but still detain him under Article 5.1(f) ECHR.

The Court's view that domestic law may regard asylum-seekers as being "unauthorised" up to the decision to grant them refugee status coincides with the view endorsed by the United Kingdom during the drafting of the Refugee Convention. For the UK, "lawfully in the country" (in the sense of Article 26 of the Refugee Convention) meant "the acceptance by a country of a refugee for permanent settlement, and not the mere issue of documents prior to a final decision as to the duration of his stay".[72]

The Court's interpretation, however, is hardly reconcilable with that of the Human Rights Committee. As explained in the Preliminary Chapter, although the HRC has declared that Article 9 ICCPR allows for the detention of asylum-seekers even when their claim has been admitted into the procedure, this is only possible for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. For the Committee, Article 9 ICCPR does not permit detention only on the grounds of illegal entry of the asylum-seeker.

The ECtHR has to interpret the European Convention of Human Rights in the light of the ICCPR, since the Convenant is also applicable in the relations between Council of Europe Member States (Article 31.3(c) of the Vienna Convention on the Law of Treaties). The relevance of other international treaties in its case law was recognized by the Court itself in *Al-Adsani v. the UK*[73] and in the leading judgment *Demir and Baykara v. Turkey,* where it clarified that it views the provisions of the Convention in the broader context of international law[74] (see Fahrat, 2015:319).

When taking the ICCPR into consideration, the Court can form its own interpretation of this treaty, which may differ from that of the HRC. However, it is objectionable that the Court has not explained why its views divert from that of the Committee. In its famous judgment *Ahmadou Sadio Diallo,* the International Court of Justice (ICJ) stated that "although the Court is in no way obliged (…) to model its own interpretation of the Cov-

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[71] *Suso Musa v. Malta,* §90.

[72] UN Doc. A/CONF.2/SR.14, 22 November 1951.

[73] *Al-Adsani v. the United Kingdom* [GC], no. 35763/07, ECtHR 21 November 2001, § 55.

[74] *Demir and Baykara v. Turkey,* no. 34503/97, ECtHR 12 November 2008, §37-52, 147-154.

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enant on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body (…)".[75] If the ICJ —which, although often dealing with human rights issues, is not a human rights court (Ghandhi, 2011:528)— "ascribes great weight" to the Committee's views, there is a strong case to be made that a human rights court like the ECtHR should at least discuss its position in relation to that of the HRC. This is even more the case if we take into account that, as a Court with the constitutional aspiration of developing general human rights standards within the area of the Council of Europe, the ECtHR needs to deploy external references to enhance the persuasiveness of its interpretation (Fahrat, 2015:320).

The Court's opinion on the "unauthorised" nature of asylum-seekers' status also contrasts with that of UNHCR, for whom asylum-seekers whose claim has been deemed admissible are already *lawfully* in the country, and may thus not be detained under Article 31.2 of the Refugee Convention. As noted in the Preliminary Chapter, UNHCR was not granted the authority to interpret the Refugee Convention, and therefore the argument advanced above with regard to the necessary dialogue between the ECtHR and the HRC is not as strong here. Nonetheless, it would be desirable that the Court positions itself in relation to UNHCR's views and explains why it takes a different approach, especially since this organisation submitted its opinion on the matter directly to the ECtHR in the *Saadi* case.[76] In fact, both in *Saadi*[77] and *Suso Musa*[78], the Court refers to the views of UNHCR to give greater legitimacy to its reasoning, but it does so in a selective manner: while it underlines that the UNHCR 1999 Guidelines allow for the detention of asylum-seekers, it does not refer to the view of UNHCR that asylum-seekers whose claim has been admitted to the asylum procedure may not be regarded as "unauthorised".

1.2. *The second limb: detaining asylum-seekers "with a view to deportation"*

The second exception to the principle of non-detention of migrants is the case that action is being taken against that person "with a view to deportation or extradition", as stated by the second limb of Article 5.1(f). As

[75] *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, §66

[76] *Saadi v. UK,* no. 13229/03, ECtHR 29 January 2008, § 54.

[77] *Saadi v. UK,* §34.

[78] *Suso Musa v. Malta,* no. 42337/12, ECtHR 9 December 2013, §90.

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in the first limb of this Article, the question that arises is whether or not this is a valid ground for detaining migrants who have applied for asylum. There is no doubt that asylum-seekers whose claim has been rejected can be detained "with a view to deportation", because legally speaking, they are not asylum-seekers anymore but irregular migrants. But what about asylum-seekers who are awaiting a fist-instance decision on their asylum application or the outcome of the review of a negative decision? Are States allowed to detain them "with a view to deportation"?

In its 1996 leading case regarding detention under the second limb of Article 5.1(f), *Chahal v. UK*, the Court considered that the period in which the asylum-seeker had been detained on pre-deportation grounds while his asylum claim was still pending "was not excessive".[79] Therefore, it implicitly authorised detention of asylum-seekers in the context of an expulsion procedure.

More than a decade later, the Court nuanced its position in *S.D. v. Greece* and in *R.U. v. Greece*.[80] In these judgments, the Court used the following logic to find that the asylum-seeker could not be detained "in view of his expulsion":

1. National law —as well as the Refugee Convention— does not allow for the expulsion of an asylum-seeker until his claim has been finally rejected.
2. National law only permits detention for expulsion purposes when that expulsion can be executed.
3. Therefore, detention of an asylum-seeker for expulsion purposes is in violation of national law because his expulsion cannot be executed while his asylum claim is still pending.

Costello (2016:292) asserts that these judgments are in tension with *Chahal.* Such tension is visible, however, they do not seem to be in direct contradiction with the Court's position in *Chahal,* because both judgments very much focus on whether or not detention is in accordance with *national law.* As we will explain in Section 2.1, conformity of the detention with national law is vital in order for it to conform to Article 5 ECHR. Nonetheless, the judgments do not actually conclude that Article 5.1(f) itself prohibits detention of asylum-seekers "in view of their expulsion".

During the climax of the refugee crisis, namely September 2015, the ECtHR offered clarification on this issue. In *Nabil and Others v. Hungary,* the Court explicitly stated that detention with a view to deporta-

[79] *Chahal v. UK,* no. 22414/93, ECtHR 15 November 1996, §116.

[80] *S.D. v. Greece,* no. 53541/07, ECtHR 11 September 2009, §62 and *R.U. v. Greece*, no. 2237/08, ECtHR 7 September 2011, §94-96.

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tion of an migrant with a pending asylum case is admissible under Article 5.1(f).[81] We will later discuss whether or not this conclusion can be regarded as being in line with international legal standards. But first, now that we know that asylum-seekers *can* be detained under this ground, we will analyse the requirements that the Court sets for this type of detention to be in full compliance with Article 5.

The Court sets out two important guarantees of the right to liberty of migrants and asylum-seekers awaiting execution of an expulsion: the expulsion or extradition procedure must be *in progress* (i.e. the authorities must actually carry out acts of preparation for deportation) and the authorities must conduct this procedure with *due diligence*; otherwise detention ceases to be justified.[82]

Regarding the meaning of the term "due diligence", even though it is not explicitly defined by the Court, we can infer it from its jurisprudence:

1. The State has to take *active* steps to remove the person from the territory *as quickly as possible*,[83] with "energy and impetus".[84]
2. When the detainee that is awaiting the expulsion procedure asks for asylum, the State has to *speedily* process and decide the claim, even if the detainee asks for more time to submit documents to support his asylum claim.[85] These first two requirements are related to the element of the duration of detention, which we will closer analyse in Section 3.
3. In case of a delay in the expulsion procedure, the State has to prove that it has met with difficulties in obtaining travel documents on behalf of the applicant or that it is facing the refusal of a certain country to receive the person.[86] The fact that the applicant refuses to cooperate with the authorities' attempts to effect a voluntary removal is not a "trump card" capable of justifying any period of detention.[87]
4. There must be a *realistic prospect* of removal.[88] For example, in the case *S.Z. v. Greece,* the Court found that there was no rea-

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[81] *Nabil and Others v. Hungary,* no. 62116/12, ECtHR 22 September 2015*,* §38.

[82] *S.Z. v. Greece,* §53; *Thimothawes v. Belgium,* §60; *Abdi Mahamud v. Malta,* §137; *R.T. v. Greece,* §86; *A.Y. v. Greece,* §85; *Nabil and Others v. Hungary,* §29; *A.E. v. Greece,* §49; *S.C. v. Romania,* §57.

[83] *S.C. v. Romania,* §64-65.

[84] *J.N. v. UK,* §107.

[85] *S.M.M. v. UK,* §84-85.

[86] *S.C. v. Romania,* §64-65.

[87] *J.N. v. UK,* §106.

[88] *S.Z. v. Greece,* no. 66702/13, ECtHR 21 June 2018*,* §54.

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> listic prospect of removal because the asylum-seeker was Syrian and the authorities should have been aware of the impossibility of deporting him in view of the worsening conflict in Syria.[89] From this case we learn that, in order to assess whether the prospect of removal is realistic, the State has to make use, at the very least, of the relevant public reports on the situation of the country were the person in question will be removed, since the Court itself draws on a report by UNHCR about deportations to Syria in order to carry out this assessment.[90]

It is also important to note that, when the ECtHR applies an interim measure under Rule 39 of the Rules of the Court in order to suspend the expulsion or extradition of an asylum-seeker whose claim has been finally rejected, this does not in itself render the detention of the person unlawful, provided that the authorities still envisage expulsion at a later stage, and on condition that the detention is not unreasonably prolonged.[91]

We will now make a normative assessment of the finding of the Court in the aforementioned case *Nabil v. Hungary*. In this judgment, the ECtHR reasoned that, as a general principle, asylum-seekers can be detained "in view of their expulsion" because "an eventual dismissal of the asylum application could open the way to the execution of the deportation orders".[92] Drawing on previous legal doctrine, it is here argued that this view is at odds with the guarantees that the Court itself provides to detained asylum-seekers when these are read in the light of the principle of *non-refoulement*.

The principle of *non-refoulement* is enshrined in Article 33 of the Refugee Convention, which has become part of customary international law (Coleman, 2003). It entails that States cannot, in any manner, expel refugees to a territory where they would face persecution. The prohibition of *refoulement* has also been developed in the case law of the ECtHR under Article 3 of the Convention (prohibition of torture, inhuman or degrading treatment).[93] It protects migrants (not just asylum-seekers) from being sent to countries where they would face a real risk of torture, inhuman or degrading treatment (Soler García, 2019).

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[89] *Ibid.,* §57.

[90] *Ibid.,* §30.

[91] *H.S. v. Cyprus,* §311.

[92] *Nabil and Others v. Hungary,* no. 62116/12, ECtHR 22 September 2015, §38.

[93] The leading cases in this respect are *Soering v. UK*, no. 14038/88, ECtHR 07 July 1989 and *Vilvarajah and Others v. UK,* no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, ECtHR 30 October 1991.

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In order to know whether or not the expulsion of the asylum-seeker would place him at risk of *refoulement*, the State has to analyse the merits of the asylum claim. Therefore, until the authorities have made a final decision that the asylum-seeker is *not a refugee* in the sense of Article 1 of the Refugee Convention, the State cannot promote repatriation or expulsion.[94] This was acknowledged by the Court in the aforementioned case *R.U. v. Greece,* when it stated that "it follows from Articles 31 to 33 of the Refugee Convention that the expulsion of a person who has filed an asylum claim is not permissible until there has been a final decision rejecting the asylum claim".[95]

The requirement that asylum-seekers are not expelled until there is a negative decision on their asylum claim also applies in cases of *non-refoulement* under Article 3 ECHR (Soler García, 2019). If the first-instance decision on their asylum claim is negative, asylum-seekers can challenge this decision before a second instance (right to an effective remedy, Article 13 ECHR). During this time, they are also entitled to stay in the territory until there is a decision from the higher instance on their asylum application, as laid down by the ECtHR in *Gebremedhin* (this is called the *automatic suspensive effect*).[96] Even in the case of shared protective responsibility arrangements such as the safe third country concept or the Dublin Regulation,[97] asylum-seekers cannot be expelled until the authorities have ascertained that the individual applicant does not face a risk of indirect *refoulement* (see *Hirsi v. Italy*)[98] or of exposure to inhuman or degrading treatment (see *Tarakhel v. Switzerland*).[99]

As shown above, in order for a detention to be justified under the second limb of Article 5.1(f), the ECtHR requires that there be a *realistic prospect of removal.* However, if the principle of *non-refoulement* forbids deportation until the asylum claim has been rejected, it seems unreasonable to affirm that there is a realistic prospect of removal in the

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[94] Non-Refoulement No. 6 (XXVIII), Executive Committee of the UNHCR Programme, 1977 (UNGA No. 12A, A/32/12/Add.1).

[95] *R.U. v. Greece*, no. 2237/08, ECtHR 7 September 2011, §94.

[96] *Gebremedhin v. France*, no. 25389/05, ECtHR 26 April 2007, §66.

[97] For the safe third country concept, see Articles 38 and 39 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180/60); for Dublin procedures, see Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 (recast) (OJ L 180/31).

[98] *Hirsi Jamaa and Others v. Italy*, no. 27765/09, ECtHR 23 February 2011.

[99] *Tarakhel v. Switzerland*, no. 29217/12, ECtHR 04 November 2014.

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case of an asylum seeker whose claim has not yet been assessed with a final negative decision. In *Nabil,* the Court appears to liken an "*eventual* dismissal of the asylum application" to a "realistic prospect of removal". But is that reading correct? In our view, the only way to affront this issue in line with the principle of legal certainty is to affirm that there is only a realistic prospect of removal when the claim of the asylum-seeker has been finally rejected. An "eventual dismissal" of the asylum claim seems too remote an event for the purposes of calling the prospect of removal "realistic".

Moreover, the Court has asserted that, for detention to be compatible with the second limb of Article 5.1(f), the expulsion procedure must be *in progress.* However, as noted by Matevzic (2016), actions for the preparation of the expulsion of asylum-seekers, such as contacting the authorities of their country of origin in order to obtain their documents, cannot be carried out while their claim is still under review; because that would put the asylum-seeker at risk of being identified by the persecuting actor (be it the State of origin or a private actor) and would thus contravene the very purpose of Geneva Convention, which is to offer protection to the refugee from these persecuting actors. Therefore, the expulsion procedure of an asylum-seeker cannot be *in progress,* which means that detention of asylum-seekers contravenes the standards set by the ECtHR.

For these grounds, we disagree with the Court's view in *Nabil* regarding this issue, and consider that its reasoning should be reversed: the general principle should be that asylum-seekers cannot be detained "in view of their expulsion" under Article 5.1(f). So as not to completely block States' removal policies, the Court could set out an exception to this rule in cases where the asylum-seeker was already detained for the purpose of removal before lodging the application and there are objective grounds for believing that the asylum-seeker has introduced an asylum claim merely to frustrate the expulsion. UNHCR Guidelines allow for this exception (see Preliminary Chapter). However, the broad discretion that *Nabil v. Hungary* grants States to detain asylum-seekers in order to effect an expulsion provides a lower protection to the right to liberty of asylum-seekers than the Refugee Convention (as interpreted by UNHCR).

2. **The lawfulness of the detention and the prohibition of arbitrariness**

A State might detain an asylum-seeker for one of the two purposes to which Article 5.1(f) refers whilst still acting in violation of the Convention. This is the case because the arrest or detention must be "law-

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ful". The ECtHR has paid special attention to this term, since the lawfulness of the detention is directly connected to the core principle of Article 5: the prohibition of arbitrariness.

Indeed, in order for a detention to be lawful, the Court has developed an extensive jurisprudence that sets forth the requirements that the arrest must comply with. Since these requirements apply to both limbs of Article 5.1(f), the distinction between them is often blurred (Cornelisse, 2010:283). For example, in *K.G. v. Belgium*, a case where the asylum-seeker had been irregularly staying in Belgium for many years, the Court found that he had been detained both in order to prevent his unauthorised entry and to prepare his expulsion.[100]

The conditions set out by the Court also relate to the obligation of the authorities to follow "a procedure prescribed by law" (Article 5.1 par. 1).[101] In this way, the Court connects this general obligation of Article 5.1 to the specific obligation of Article 5.1(f). The *burden of proof* of these conditions falls on the State, since through detention the authorities are restricting the human right to liberty and they thus have to demonstrate that they have the lawful authority to detain.[102]

These conditions are the following:

2.1. *Compliance with national law*

First, the deprivation of liberty must "essentially" *conform to the substantive and procedural rules of national law*.[103] This means that the ECtHR may satisfy itself that the State's actions are in compliance with national law,[104] and may not need to consider other legal sources so as to determine the lawfulness of a detention. As such, we find an interplay between national law and the ECHR, since the Court has to examine the requirements set out in national law in order to determine whether the detention is in conformity with the Convention. However, the scope of the Court´s task in this connection is subject to limits "inherent in the logic of the European system of protection".[105] In effect,

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[100] *K.G. v. Belgium,* no. 52548/15, ECtHR 6 November 2018.

[101] *Kahadawa v. Cyprus,* §59.

[102] *S.M.M. v. UK,* §85.

[103] *S.Z. v. Greece,* §53; *Kahadawa v. Cyprus,* §59; *S.M.M. v. UK,* §63; *Richmond Yaw and Others v. Italy,* §69; *O.M. v. Hungary,* §41; *J.N. v. UK,* §75; *Mahamed Jama,* §139; *Khlaifia and Others v. Italy* (Grand Chamber)*,* §91.

[104] *Nabil and Others v. Hungary,* §31.

[105] *Nabil and Others v. Hungary,* no. 62116/12, ECtHR 22 September 2015*,* §31.

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the scope of the ECtHR's review of national law is restricted, for it is *in the first place* for the national authorities, most notably the courts, to interpret and apply the domestic law, even in those fields where the Convention incorporates the rule of that law.[106]

The ECtHR thus limits its examination to whether the interpretation that national authorities make of national legislation when issuing or reviewing a detention order is "arbitrary or patently unreasonable";[107] and to whether the *effects* of that interpretation are in conformity with the ECHR.[108] As an example, in *Nabil and Others v. Hungary,* the Court noted that, *under Hungarian law*, in order to detain a migrant for the purpose of expulsion, the authorities had to prove that detention was necessary to prevent the individual from frustrating the enforcement of the expulsion, something that the authorities did not do in the case at hand.[109] Although this "proof of necessity" is not required under the ECHR (as will be explained below), the fact that national law prescribed this entailed that the detention became unlawful under Article 5.1(f). Conversely, in *Mahammad and Others v. Greece,*[110] the Court declared that, under Greek law, asylum-seekers can be detained when the applicant does not have travel documents and the detention is necessary in order to verify his identity, which was the case at hand, and therefore the detention had been lawful under Article 5.1(f).

When the decision to detain shows a "serious and manifest irregularity" with respect to the requirements set out in national law, the Court has exceptionally declared that the decision is *ex facie* unlawful. To determine this irregularity, the ECtHR takes into account whether national jurisprudence is clear about the requirement at hand and whether, in spite of this, national authorities have failed to comply with that requirement (for example, with the principle of adversarial proceedings).[111]

2.2. *Compliance with international law… and EU law?*

Where does this leave compliance of the detention with international standards? As already emphasised, the Court uses the term "essentially" [conform to national law], which implies that national law

[106] *S.M.M. v. UK,* §64.
[107] *Thimothawes v. Belgium,* §71.
[108] *Ilias and Ahmed v. Hungary,* §63.
[109] *Nabil and Others v. Hungary,* §39-43.
[110] *Mahammad and Others v. Greece,* no. 48352/12, ECtHR 15 April 2015, §6.
[111] *Richmond Yaw and Others v. Italy,* §73.

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is the first source[112] that the Court refers to, but not the only one. In different judgments, the Court further expands on this idea, asserting that "Article 5.1 refers not only to standards of domestic law but also, where appropriate, to other standards applicable to the persons concerned, including those found in international law".[113] *Compliance with international law* (most notably with the ECHR) is thus the second condition for a detention to be "lawful".

On the other hand, compliance with EU law is not directly a requisite for detention to be "lawful" under Article 5.1(f). It is however an indirect requisite, provided that the Directives are clearly transposed in national law —in which case, the Court will again apply the principle of limiting itself to examine whether the interpretation of national law is arbitrary or patently unreasonable. This interaction between EU law and the ECHR results in increased protection for asylum-seekers, contributing to the *constitutionalisation* of asylum detention in the EU (Cornelisse, 2017:232; see also De Bruycker and Tsourdi, 2016).

Firstly, EU Member States that are part of the Common European Asylum System are required to establish in their national legislation that asylum-seekers have a right to remain in the territory until a first-instance decision has been made (Article 9 of the recast Asylum Procedures Directive or APD).[114] Although Member States may refrain from authorising entry of asylum-seekers in case that they apply "border procedures" (Article 8.3(c) Reception Conditions Directive;[115] see Cornelisse, 2017a), it appears that once the State has allowed the asylum-seeker to remain in the territory pursuant to Article 9 APD, the ECtHR does not permit detention "to prevent an unauthorised entry". Indeed, in the case *O.M. v. Hungary*, the Court examined a provision under Hungarian law that transposed the right to remain of asylum-seekers in Article 9 APD into national legislation. The Court observed that "where a State (…) enacts legislation (of its own mo-tion or pursuant to European Union law) *explicitly authorising* the entry or stay of immigrants pending an asylum application, an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of the detention under Article 5(1)(f)".[116]

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[112] *Nabil and Others v. Hungary,* §30

[113] *Thimothawes,* §71, *Ilias and Ahmed v. Hungary,* §63

[114] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180/60).

[115] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

[116] *O.M. v. Hungary,* §47.

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Secondly, the EU asylum *acquis* requires Member States to lay down in national law that the detention of an asylum-seeker can only be effected when it is strictly necessary, that is, when no alternatives to detention are viable.[117] If a State does not do this, it is not only violating national and EU law, but also Article 5 ECHR, because of the requirement of this article that national law has to be complied with.

Another example of interaction between the two orders can be found in the Chamber judgment *Ilias and Ahmed v. Hungary,* where, after reiterating the elements of an arbitrary detention under Article 5 ECHR, the Court further "noted" that, in accordance with the Asylum Procedures Directive, EU Member States should not hold a person in detention for the sole reason that he or she is an asylum applicant.[118] It thus seems that the ECtHR was taking EU law into account not only to determine whether the detention was lawful under national law, but also in order to establish whether or not it was arbitrary. This could be seen as a positive advancement of the jurisprudence of the Court since, as Costello (2016:287) criticised, in a previous judgment against Hungary (*Lokpo and Touré v. Hungary*), [119] the ECtHR failed to take into account the violation of this same provision of the APD in its assessment of the lawfulness of detention.

In any case, the Court clearly separates its role from the EU *aquis.* For example, in *J.N. v. UK.,* it asserted that "the Returns Directive is not to be taken as the only system conceivable in Europe as being compatible with sub-paragraph (f)".[120] Where a Directive is not well transposed into the national legal system, the Court has declared that assessing whether national law complies with the Directives is beyond the limits of its competence. In the words of the Court, "it is primarily for national authorities to interpret and apply domestic legislation, *if necessary in conformity with the law of the European Union*".[121] In the case *Timothawes v. Belgium,* for instance, the applicants alleged that the ineffective transposition of Article 7.3 of the former Reception Con-ditions Directive[122] (requiring authorities to assess the need for detention of asylum-seekers) in Belgian law resulted in his detention

[117] This is established in both primary law (Article 52(1) of the EU Charter of Fundamental Rights) and in secondary law (Article 8(2) Reception Conditions Directive, Article 28(2) Dublin Regulation).

[118] *Ilias and Ahmed v. Hungary,* no. 47287/15, ECtHR 14 March 2017*,* §64.

[119] *Lokpo and Touré v. Hungary,* no. 10816/10, ECtHR 20 September 2011.

[120] *J.N. v. UK,* no. 37289/12, ECtHR 19 May 2016*,* §91.

[121] *Thimothawes,* §71, *Ilias and Ahmed v. Hungary,* §63.

[122] Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31/19).

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being unlawful. In answering this argument, the Court recalled that the implementation of the Reception Conditions Directive in national law is not for the ECtHR to ascertain, but for national courts.[123] This follows from the principle of primacy of EU law —established by the Court of Justice of the European Union in, *inter alia, Costa v. ENEL*[124] and *Simmen-thal*[125]— according to which national courts have to interpret domestic legislation in conformity with EU law and exclude the application of national legislation that contradicts it.

2.3. *Compliance of national law with the ECHR*

The third requirement for a detention to be lawful is that *domestic law itself complies with the ECHR*, including the general principles contained therein, particularly those that refer to the rule of law and to legal certainty.[126] The latter implies that, where a national law authorises deprivation of liberty, it must be sufficiently *accessible* and *precise* so that the detainee can *foresee* to a reasonable degree the consequences to be derived from a particular act.[127] The importance of adopting laws which clearly govern the substantive requirements and procedural guarantees of the detention of migrants, with particular reference to the right to *habeas corpus,* was stressed by the Grand Chamber in *Khlaifia and Others v. Italy*.[128] This aspect of the judgment was positively acclaimed by scholars (Zirulia and Peers, 2017).

In order to assess whether domestic law complies with the ECHR, the Court carries out an evaluation of the "quality of the law". In doing this, the Court takes into account factors such as the existence of clear legal provisions for ordering detention, for extending detention and for setting time-limits for detention.[129] However, a general control of the ECtHR over national legislation cannot be invoked by an individual who has not been affected by the incompatibility of national law with the Convention in a particular case; since "the Court has not a task of controlling legislation or practice in the abstract but it must be limited, without forgetting

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[123] *Thimothawes v. Belgium,* §71.

[124] Judgment of 9 March 1978, *Simmenthal,* C-106/77, EU:C:1978:49.

[125] Judgment of 15 July 1964, *Costa v. E.N.E.L.,* C-6/64, EU:C:1964:66.

[126] *Thimothawes v. Belgium,* §62; *Richmond Yaw and Others v. Italy,* §69; *J.N. v. UK,* §76; *Khlaifia and Others v. Italy* (Grand Chamber)*,* §91.

[127] *Richmond Yaw and Others v. Italy,* §70; *J.N. v. UK,* §77.

[128] *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR (Grand Chamber) 15 December 2016, §97-108.

[129] *J.N. v. UK,* §77.

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the general context, to address whether the manner in which that law affected the applicant was in breach of the Convention".[130]

The reluctance of the Court to control in the abstract the compatibility between national law and the ECHR can be observed in *Ilias and Ahmed v. Hungary*, a case in which the Court casted doubts on the "clarity and foreseeability" of the domestic provisions on which the authorities had grounded the detention,[131] but did not make any statement on whether these provisions were compatible with the ECHR. Similarly, in *Suso Musa v. Malta,* in *Abdi Mahamud v. Malta* and in *Mahamed Jama v. Malta,* the Court "expressed reservations" about the quality of all the applicable laws, but nevertheless accepted that these laws provided a sufficiently clear legal basis for the detention of asylum-seekers.[132]

This third requirement also implies that national authorities have to interpret national law *in conformity with the ECHR* and, in turn, *in conformity with the jurisprudence of the ECtHR.* This is not expressly stated by the Court, however, it is a direct consequence from this third requirement: if there has to be a consistency at the normative level (between national law and the ECHR) then this consistency must also be present at the implementation level (between the national jurisprudence and the jurisprudence of the ECtHR, which is the highest interpreter of the Convention). This is again exemplified in the Chamber case *Ilias and Ahmed v. Hungary,* where the Court stated that the national authorities had "elastically interpreted" a general provision of national law in order to detain an asylum-seeker without any formal decision, a procedure which "falls short of the requirements enounced in the Court´s case law".[133]

2.4. *The prohibition of arbitrariness*

Finally, the fourth requirement set out by the Court in order to determine the "lawfulness" of a detention is that any deprivation of liberty must be in accordance with the purpose of *protecting the individual from arbitrariness.* This, according to the Court, is a "fundamental principle",[134] for it is the core value that Article 5 seeks to protect.

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[130] *Thimothawes v. Belgium,* §71; *J.N. v. UK,* §100; *N.M. v. Romania,* §81.

[131] *Ilias and Ahmed v. Hungary,* no. 47287/15, ECtHR 14 March 2017, §66.

[132] *Abdu Mahamud v. Malta,* no. 56796/13, ECtHR 3 May 2016, §129; *Mahamed Jama v. Malta,* no. 10290/13, ECtHR 26 November 2015, §144; *Suso Musa v. Malta,* no. 42337/12, ECtHR 9 December 2013, §99.

[133] *Ilias and Ahmed v. Hungary,* §68.

[134] *Kahadawa v. Cyprus,* §59; *J.N. v. UK,* §78; *Mahamed Jama v. Malta,* §139.

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The prohibition of arbitrariness must apply to detention based on the first limb of Article 5.1(f) in the same way as to detention grounded on the second limb.[135] Furthermore, this prohibition demands that both the *order* to detain and the *execution* of the detention genuinely conform with the purpose of the restrictions permitted by Arti-cle 5.1(f).[136] Nonetheless, Article 5.1(f) does not require *automatic* judicial review of immigration detention, although the Court may take the effectiveness of any existing remedy into consideration in its overall assessment of the "arbitrariness test".[137]

The notion of "arbitrariness" in Article 5.1 extends beyond lack of conformity with national law. This means that the deprivation of liberty may be lawful in terms of domestic law but still arbitrary, and therefore contrary to the Convention.

But what exactly is arbitrariness? The Court has settled a clear jurisprudence in this respect. To avoid being branded as arbitrary, detention under Article 5.1 (f): 1) must be carried out in *good faith*; 2) must be closely *connected to the grounds* of detention relied on by the Government; 3) there must be some relationship between the grounds relied on and the *place and conditions* of detention, and 4) the *length of the detention* must not exceed that reasonably required for the purpose pursued.[138] Interestingly, this "arbitrariness test" is almost identical to the one applied by the British domestic courts, namely the so-called *Hardial Singh* principles.[139]

The requirement of good faith played an important role in *Abdullahi Elmi v. Malta* and *Aarabi v. Greece*. In both cases —which concerned the detention of minors—, assessing whether the authorities had acted in good faith entailed an evaluation of the behaviour of the asylum-seeker (e.g. the information he had provided the authorities regarding his age) and of the authorities (e.g. how long it had taken for them to determine the applicant's age). In *Abdullahi Elmi v. Malta*, although Maltese legislation laid down constraints for the detention of minors, the Court doubted that there had been *good faith* by the authorities, given that the determination procedure of the applicant's

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[135] *Thimothawes v. Belgium,* §65; *Ilias and Ahmed v. Hungary,* §62.

[136] *S.M.M. v. UK,* §66; *J.N. v. UK,* §80.

[137] *J.N. v. UK,* §94.

[138] *S.Z. v. Greece,* §53; *Kahadawa v Cyprus,* §60; *Thimothawes v. Belgium,* §64; *J.R. and Others v. Greece,* §110; *S.M.M. v. UK,* §66; *Abdullahi Elmi v. Malta,* §142; *O.M. v. Hungary,* §41; *J.N. v. UK,* §80; *Mahamed Jama v. Malta,* §140; *Nabil and Others v. Hungary,* §34; *S.C. v. Romania,* §58.

[139] *S.M.M. v. UK,* §57; *J.N. v. UK,* §97.

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age lasted more than seven months.[140] Conversely, in *Aarabi v. Greece* the Court found that the detention had not been arbitrary because the authorities had acted in *good faith* when failing to register a 17-year-old asylum-seeker as a minor, given that the applicant had signed the report of his arrest, which stated that he was of age, and given that the authorities had transferred the applicant to an accommodation for minors as soon as they learned that he was in fact a minor.[141]

This is, in our view, the correct manner to analyse the good faith requirement. However, in another case, *E.A. v. Greece,* the Court found that "the good faith of the authorities cannot be put into question"[142] merely because the State had justified the detention of the asylum-seeker on the grounds provided for in Article 5(1)(f). Thus, in this case the Court set an *iuris tantum* presumption of good faith when the authorities rely on such a ground. This results in an inconsistency of the Court's case law, as it confuses the requirement that there are *grounds* for detention with the requirement of good faith, the latter of which forms part of the arbitrariness test and demands a scrutiny of the authorities' factual behaviour.

As for condition number (2) (connection between the detention and the grounds), the State will only comply with it if the grounds relied on to detain the asylum-seeker are provided for in national law, for otherwise there would be a *de facto* detention, that is, a detention "not incarnated by a formal decision of legal relevance",[143] which automatically violates the principles of protection from arbitrariness. With regard to requirement number (3) (place and conditions of detention), it is here where the jurisprudence of the Court regarding Article 5.1(f) and Article 3 (prohibition of degrading treatment) find its connection: on occasion, the requirement of legality encompasses concerns relating to detention conditions, especially when detention of vulnerable individuals is at issue (Costello, 2016:286). For this reason, in cases where the Court had already found a violation of Article 3 due to the existence of degrading conditions of detention, it did not consider it necessary to pronounce itself on this matter in the assessment of the arbitrariness of the detention under Article 5.[144]

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[140] *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13, ECtHR 22 November 2016, §144-146.

[141] *Aarabi v. Greece,* no. 39766/09, ECtHR 2 April 2015, §43-44.

[142] *E.A. v. Greece,* no. 74308/10, 30 July 2015, §85.

[143] *Ilias and Ahmed v. Hungary,* §68.

[144] *A.Y. v. Greece,* §88.

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The prohibition of arbitrariness is directly linked with the *principle of proportionality*, which is applied by the Court in a very limited way, "only to the extent that the detention should not continue for an unreasonable length of time".[145] Therefore, the "proportionality test" is included in the arbitrariness test, but only regarding the length of the detention (requirement number 4). This interpretation follows the 1996 *Chahal* judgment.[146] We may question, however, whether the Court´s interpretation encapsulates the true meaning of "proportionality".

2.5. *The lack of a full proportionality test*

In his detailed book on the subject, Barak (2012) analyses the elements of the principle of *proportionality,* drawing from the common constitutional traditions of States around the world, and shows that it is made up of four components:

1. Proper purpose: the authorisation to limit a constitutional right does not only have to be legal, but also *legitimate.* In a constitutional democracy, a proper purpose is one that suits the values of a democratic society.
2. Rational connection: the use of the means to limit the right would rationally lead to the realisation of the law's purpose. That is to say, the limiting law increases the likelihood of realising the legitimate purpose.
3. Necessary means: The legislator has to choose –of all those means that may advance the purpose of the limiting law– that which would *least limit* the human right in question. The means which restrict the right can only be used if the purpose cannot be achieved through the use of other means that would equally satisfy the proper purpose.
4. Balancing or proportionality *stricto sensu*: A proper relation ("proportional" in the narrow sense) should exist between the benefits gained by the public when the purpose is fulfilled and the harm caused to the constitutional right of the individual.

If we apply these four requirements to the Court's jurisprudence, we find that:

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145 *J.N. v. UK,* §82.

146 *Chahal v. UK,* no. 22414/93, ECtHR 15 November 1996.

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1. Migration control, which is a practice generally accepted in democratic societies, is the legitimate purpose for restricting the human right to liberty of migrants. This purpose is reflected in Article 5.1(f). It is however debatable that migration control *per se* (i.e. preventing irregular entry and ensuring expulsion), without additional reasons, can be a legitimate purpose for detaining asylum-seekers, as we have discussed in Section 1.
2. In its "arbitrariness test", the ECtHR takes into account whether the detention of the asylum-seeker is closely connected to the grounds of detention relied on by the Government. The Court therefore fulfils this element of the principle of proportionality.
3. As repeatedly stated by the Court both in the cases analysed that relate to the first limb of Article 5(1)(f) —following *Saadi*— and to the second limb —following *Chahal*—, the State does *not* have to justify the *necessity* of the detention.[147] For example, they do not have to justify that the detention is necessary to prevent the individual from committing an offence or fleeing. Therefore, it does not require the State to look for alternatives to detention before issuing a detention order.
4. As noted by Moreno-Lax (2011:184), the search for a "fair balance" between the requirements of the public interest and the protection of the individual´s rights inheres in the entire ECHR. Undoubtedly, the balancing act entails taking into account the *individual circumstances* of the person who is to be detained. However, when it comes to the detention of migrants and asylum-seekers, the Court only requires States to take into account the individual circumstances of the person when a vulnerability is detected, as will be explained in Section 4.1. Therefore, the Court very much limits the scope of the balancing test. This is proven by the fact that, in the case law that we have reviewed, the only mention of the balancing act is made in a case regarding detention of children (which are viewed by the Court as vulnerable individuals).[148]

From this analysis regarding the principle of proportionality we come to the following conclusions: on the one hand, the understand-

[147] *S.Z. v. Greece*, §53; *Kahadawa v. Cyprus*, §58; *Thimothawes v. Belgium,* §60; *S.M.M. v. UK.*, §67; *J.N. v. UK,* §81; *R.T. v. Greece,* §84; *A.Y. v. Greece,* §84; *Nabil and Others v. Hungary,* §28; *H.S. v. Cyprus,* no. 41753/10, ECtHR 21 July 2015, §306; *A.E. v. Greece*, §49.

[148] *Bistieva and Others v. Poland*, no. 75157/14, ECtHR 10 April 2018, §78.

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ing of the Court of what "proportionality" means in the context of asylum detention is unusual, for it refers to the duration of detention, which is only an element to be taken into account when carrying out the balancing act. On the other hand, the ECtHR falls short of compelling States to effect a true "proportionality test" when detaining migrants and asylum-seekers, since, in its case law, the element of *necessity* is not present and the element of *proportionality stricto sensu* is incomplete.

The Court seems to justify the lack of a "necessity test" by implying that Article 5(1)(f) is less protective than Article 5(1)(c),[149] according to which the authorities have to give reasonable motives on why the [criminal] detention is "necessary" in order to prevent a person from committing an offence or from fleeing after having done so. Thus, the Court uses a literal interpretation of Article 5(1)(f), which indeed does not require a necessity test. The use of the literal method of interpre-tation in this case may, however, be deemed unacceptable for several reasons.

Firstly, both the Refugee Convention and the ICCPR establish that the authorities have to carry out a necessity test prior to detaining asylum-seekers. While the former instrument explicitly states in Article 31(2) that restrictions on movement may only be applied if they are *necessary*, Article 9(1) ICCPR sets out that detention may not be "arbitrary", a concept which, according to the HRC, includes elements of inappropriateness, reasonableness, necessity and proportionality. Once again, we find that the Court fails to carry out a systematic interpretation of the ECHR pursuant to the Vienna Convention on the Law of Treaties, as it does not give an explanation on why it has decided to deviate from the standards under universal human rights law.

Secondly, the Court generally leaves a wide margin of appreciation to State Parties for justifying interferences of human rights only when no consensus in the law and practice of the State Parties on a particular issue can be found (Fahrat, 2015:317). However, the existence of a consensus that detention must be a last resort is visible throughout the European continent: in EU law (see De Bruycker *et al.*, 2014), in resolutions of the Council of Europe[150] and in national law of European States. As Dembour (2015:383) explains:

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[149] *Kahadawa v. Cyprus*, §58; *Mahammad and Others v. Greece*, §54.

[150] Committee of Ministers Recommendation R (2003) to member states on measures of detention of asylum seekers, adopted on 16 April 2003; Detention of asylum seekers and irregular migrants in Europe, Parliamentary Assembly of the Council of Europe Recommendation 1900 (2010), 28 January 2010.

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> This consensus has been expressed not only by NGOs and independent experts but also from within the ranks of political institutions; not only in distant lands but also from within Europe; not just by close majorities but also through processes which reflect a broad consensus; not in the distant past but very recently.

Thirdly, in cases related to other types of detention measures which do not explicitly require States to carry out a necessity test —paragraphs (b), (d) and (e) of Article 5— the Court systematically demands an individual motivation of the necessity with respect to each detention decision. This was underlined by Judges Karakas and Turkovic in their dissenting opinions to the judgment *Thimothawes v. Belgium*.[151] Therefore, the Court gives more leeway to States when detaining migrants and asylum-seekers in the context of migration control than when detaining other individuals, including those who have not complied with the lawful order of a court (Article 5(1)(b)).

Finally, as noted by Cornelisse (2017:227), the very nature of human rights requires that interferences with these rights be kept to a minimum. To accept that the right to liberty of migrants can be restricted —even when these restrictions are not necessary— fails to recognise that this right counts as a human right. A possible reason why the Court affords such a substandard level of protection for detained migrants and asylum-seekers is the Court's perception of territorialised sovereignty as a natural and innocent concept and its portrayal of detention as a "necessary adjunct" to the sovereign State's "undeniable right of control" over its territory (Cornelisse, 2010:310).

Only taking into account the length of detention and not compelling States to carry out a necessity and balancing test can have very negative effects on the right to liberty of asylum-seekers. O'Nions (2008:181) gives the example of an asylum-seeker who has been a victim of torture and trauma, and who is detained for "only" 7-10 days. This would probably satisfy the "proportionality test" for the ECtHR (as it did in *Saadi v. UK*). However, since no alternatives to detention are sought and his particular circumstances are not taken into account, there is a significant possibility that this short-term detention will have a severe detrimental effect on his welfare.

We have started this Chapter by referring to the Court's statement that protecting the individual from arbitrary detention is the core purpose of Article 5 ECHR. Nonetheless, it is clear that this protection is

[151] Dissenting Opinions of Judges Karakas and Turkovic, *Thimothawes v. Belgium,* no. 39061/11, ECtHR 4 April 2017, §14-15.

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not equally applied by the Court to all individuals. Immigrants and asylum-seekers seem to have less of a right to liberty than others, since the proportionality test (which is in inherent to the prohibition of arbitrariness) that States are required to perform in cases of the detention of aliens is much less substantive than in other cases. It is true that the deficiencies in the proportionality test are partially covered by the use of the concept of "vulnerability", as we will explore below. However, the vulnerability concept in the Court's case law is still constructed on shaky grounds and, in any case, should not act as a replacement for a full four-step proportionality test.

3. **The duration of detention**

The length of detention is the main issue that preoccupies every detainee. "How long will I stay here?" is the first question that they ask at the detention centre. Lack of an exact time limit to detention leads to deep insecurity and anxiety (Ilareva, 2015). In its report on immigration detention in the United Kingdom, Amnesty International (2017) concludes that indefinite detention —whether or not the detainee suffers from pre-existing conditions or trauma— regularly results in serious and lasting harm, both to the detainee and the people close to them. One of the migrants interviewed by this organisation described her experience of indefinite detention as "emotional torture". It is reasonable to assume that for traumatised asylum-seekers, who, as mentioned above, suffer from an independent deterioration of their mental health caused by detention (Filges *et al.*, 2015:40), the uncertainty of not knowing when that situation will end only exacerbates that trauma.

As discussed above, the ECtHR gives particular importance to the duration of detention when assessing States' compliance with Article 5.1(f), as this element is intrinsic to the "due diligence" obligation and to the prohibition of arbitrariness. The Court has stressed that Article 5 *does not provide for a maximum duration* of the detention of foreigners, and thus the lawfulness of the deprivation of liberty under this provision depends on the *particular circumstances* of each case.[152] Consequently, even where domestic law does lay down time limits, compliance with those time limits cannot be regarded as automatically bringing the asylum-seeker's detention into line with Article 5.1(f).[153]

[152] *J.N. v. UK,* §83; *A.E. v. Greece*, §50; *S.C. v. Romania,* §57.
[153] *J.N. v. UK,* §83.

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The opposite is also true: the fact that domestic law does not lay down time limits does not mean that there is a violation of Article 5.1(f), although the Court might take this into consideration in its overall assessment of the "quality of the [national] law".[154]

This last statement needs to be put into context: it concerns the cases *J.N. and Others v. UK* and *S.M.M. v. UK*[155], in which the asylum-seekers (whose claims had been rejected) complained that the fact that the UK did not specify maximum time limits of detention in national law was in violation of Article 5.1. The UK is indeed one of the few Council of Europe Member States which has no statutory time limit on immigration detention.

Although the UN Human Rights Committee[156] and other organisations (Liberty, 2017) have called for the UK to adopt time limits for immigration detention, the ECtHR does not consider that such limits are required by Article 5. In these two cases against the UK, the Court stated that, even in the absence of fixed time limits, UK domestic law does not give rise to any increased risk of arbitrariness because it permits the detainee to challenge the lawfulness of his detention at any time, and the national courts are required to apply an "arbitrariness test" identical to the one applied by the ECtHR.[157] Thus, the UK passed the Court´s examination of the "quality of the law". This was restated in a later case against Belgium.[158]

Due to the absence of time limits under Article 5(1)(f), the element of duration needs a case-by-case analysis so as to be able to foresee the possible outcome of a judgment in future cases. Following the Court's interpretation of proportionality as a principle linked to the duration of detention, it has in some cases considered the duration "reasonable" or "not excessive" and, in others, "unreasonable".

The Court has found the following length of detention not to be "excessive"[159]:

a) In what the Court considered to be a "short period of time": 5 to 7 days in an immigration detention centre.[160]

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[154] *J.N. v. UK,* §91.

[155] *S.M.M. v. UK,* no. 77450/12, EctHR 22 June 2017.

[156] Human Rights Committee. Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland. CCPR/C/CO/7. 17 August 2015.

[157] *J.N. v. UK,* §97-98.

[158] *K.G. v. Belgium,* no. 52548/15, ECtHR 6 November 2018.

[159] *S.C. v. Romania,* §63.

[160] *Kahadawa v. Cyprus,* §63.

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b) When an ordinary expulsion procedure was in progress, for the completion of administrative formalities: 3 months.[161]
c) In complex expulsion procedures that, in addition, required the processing of various asylum applications: 5 months.[162]
d) Following the application of an interim measure by the Court which suspended the expulsion procedure: 1 year.[163]
e) In the processing of the asylum claim filed by a detained migrant:
    a) When national law obliged authorities to process the asylum claim of a detainee "with absolute priority": 1 and a half months.[164]
    b) When there is a risk that the detainee absconds, misusing the asylum procedure, and the conditions of detention are adapted for asylum-seekers: 5 months.[165]
    c) When the detainee had been considered as an undesirable person by a national Court, which complicated the asylum application: 8 months[166] and 1 year.[167]
f) After a decision to grant subsidiary protection had been issued and before the asylum-seeker had been notified of it: 3 days, which the Court considered reasonable due to the "practical implications arising from the need to notify the decision".[168]
g) In the age assessment procedure of an asylum-seeker who turned out not to be a minor: 8 months (although the Court expressed reservations about the duration of the procedure but still found the duration not to be unreasonable).[169]

On the contrary, the Court has found the following duration of detention to be "unreasonable"[170]:

1. After it was clear that there was no realistic prospect of removal of the applicant but the detention continued: 21 days.[171]
2. In expulsion procedures:

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[161] *R.T. v. Greece,* §87; *A.Y. v. Greece,* §86.
[162] *Thimothawes v. Belgium,* §81.
[163] *H.S. v. Cyprus,* §314.
[164] *E.A. v. Greece,* §88.
[165] *Nassr Allah v. Latvia,* no. 66166/13, ECtHR 21 July 2015, §60.
[166] *S.C. v. Romania,* §63.
[167] *N.M. v. Romania,* §96.
[168] *Nassr Allah v. Latvia,* §58.
[169] *Mahamed Jama v. Malta,* §150.
[170] *Thimothawes v. Belgium,* §55.
[171] *S.Z. v. Greece,* §58.

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a) Where the applicant did not obstruct his deportation: 4 months.[172]
b) Where the applicant did not cooperate with his deportation but, at the same time, the authorities did not act with due diligence in the expulsion procedure: 1 year.[173]
c) After the Court lifted the interim measure which suspended the expulsion procedure but the applicants were kept in detention without an explanation from the Government: 23 days.[174]

3. In the assessment of an asylum application:

a) 4 months, since this period breached national law, according to which the asylum application of a detained person should be considered an "absolute priority".[175]
b) 7 months and 12 days, in a case where, although complex due to the risk of absconding and the fact that the applicant was asking for more time to submit documents for his asylum claim, the authorities did not act with due diligence in processing the asylum application.[176]

4. After subsidiary protection was granted to the asylum-seeker and no justification was given by the Government for continuing the detention: 5 days.[177]
5. After the Government finally rejected the asylum application but did not start the expulsion procedure and gave no explanation for the extension of the detention period: 9 months[178] and 3 months.[179]
6. In the age assessment procedure of two asylum-seekers who turned out to be minors: 8 months (compare with letter g, above).[180]

From this analysis we may conclude that the Court takes into account both the behaviour of the State *and* of the asylum applicant in order to determine whether or not the duration of detention is in breach of Article 5(1)(f). Nonetheless, the variety of situations and the

[172] *A.E. v. Greece,* §54.
[173] *J.N. v. UK,* §108.
[174] *H.S. v. Cyprus,* §320.
[175] *A.E. v. Greece,* §52.
[176] *S.M.M. v. UK,* §77-88.
[177] *Mahamed Jama v. Malta,* §157.
[178] *Abdi Mahamud v. Malta,* §137-138.
[179] *S.C. v. Romania,* §64.
[180] *Abdullahi Elmi v. Malta,* §145-148.

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difference in the assessment of the "reasonableness" of the duration of detention in each case by the Court —which, in some instances, even considers 1 year of detention to be reasonable— makes it difficult to draw a general trend from the case law. The approach in this sense therefore adds to the highly casuistic methodology of the Court in immigration cases, which Judge Martens referred to as "a lottery"[181] (see Dembour, 2015:182).

It can be argued that refraining from setting a fixed time limit, despite the wide consensus among European States and international institutions, is another way of granting States a wide margin of appreciation. This deference is all the more striking when considering that in *Sh.D. and Others v. Greece,* the Court itself recognised that not setting a maximum time limit in national law can lead to a "quite long" period of detention.[182] Yet this risk does not seem sufficient for the Court to read the requirement of a fixed time limit into its interpretation of Article 5(1)(f).

4. **Detention of vulnerable asylum-seekers**

When judges or legislators use the notion of vulnerability, they aim to provide a higher level of protection for a particular group or individual (Pétin, 2016:92). In the context of the right to liberty under the ECHR, understanding the concept of vulnerability and its legal implications proves to be difficult, because there is no systematic interpretation of the concept by the Court. Consequently, when reading different judgments that relate to vulnerability, one might come to different conclusions. As noted by Heri (2016), the Court often slips considerations of vulnerability without further discussion. Given that the impact of detention for vulnerable people may be proportionally higher than for others, and especially since there is no explicit prohibition of the detention of vulnerable individuals in any human rights regime (Pétin, 2016), searching for clarification has become an important issue in different works (Brandl and Czech, 2015). In the framework of this study, the concept of vulnerability also needs to be analysed, for it might give an answer to the question that has already been hinted at in Section 2.4.: Does the application of this concept by the ECtHR compensate for the gaps that we have found in its jurisprudence regarding the detention of asylum-seekers?

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[181] Dissenting opinion of Judge Martens in *Boughanemi v. France,* no. 22070/93, 24 April 1996.

[182] *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia,* no. 14165/16, ECtHR 13 June 2019*,* §69.

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The concurring opinion of judge Lemmens[183] in the *Thimothawes* judgment may be of help as a starting point for answering this difficult question. In this opinion, Lemmens interprets the jurisprudence of the Court regarding vulnerability and states that, when detaining migrants and asylum-seekers, authorities are required to implement a "vulnerability test". This test (which we understand forms part of the "arbitrariness test") is composed of three steps:

1. *Detect* whether the immigrant presents a *particular vulnerability* that opposes detention. If that is the case, steps 2 and 3 must be implemented.
2. Assess the *individual needs* of the vulnerable person.
3. Search for the possibility of applying a *less radical measure.*

If these steps are not followed, then the detention of the vulnerable person *could* raise an issue under Article 5.1(f). When reading this, one might think that the Court is recognising that, when detaining migrants and asylum-seekers, States have to carry out a *necessity test,* that is to say, that States have to look for alternatives to detention.

However, this is not actually the case: looking for an alternative measure to detention only becomes a requirement when a *particular vulnerability* of the asylum-seeker is detected, not in all instances of detention. The meaning of this concept will be explained below.

Nevertheless, even a necessity test in cases when a particular vulnerability is detected is a move forward from the absolute "no-necessity test" approach. As pointed out by Ventury (2016), vulnerability can serve to reinforce asylum-seekers' procedural and substantial rights, in particular by limiting States' *arbitrariness*. Moreover, according to Heri (2016), the concept has the potential to raise the standard of protection afforded to applicants because it imposes a *positive obligation* on the State to conduct an individualised assessment once vulnerability is detected.

An example of this positive obligation can be found in *Abdi Mahamud v. Malta,* a case about the detention of an asylum-seeker with health problems. The Court declared that his detention was lawful because national law did not completely exempt vulnerable individuals from detention. However, it then found the detention to be *arbitrary* because of the lack of good faith from the Government. The Court's reasoning was that, on the one hand, the Government policy allowed

[183] Concurring Opinion of Judge Lemmens, *Thimothawes v. Belgium,* no. 39061/11, ECtHR 4 April 2017, §7.

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vulnerable individuals to apply for release, but on the other hand it did not *take any active steps* to detect such vulnerable detainees and excessively delayed the applicant's vulnerability assessment procedure.[184]

Nonetheless, even if there is an obligation under the ECHR to carry out an individual "vunerability assessment", the positive impact of this obligation on asylum-seekers rights seems to be undermined by the fact that the Court requires *them* to prove their particular vulnera-bility when challenging the lawfulness of a detention before the ECtHR. Indeed, in *Thimothawes v. Belgium,* the Court stated that the asylum-seeker "has to establish that he was in a situation which could *prima facie* lead to the conclusion that his detention is not justified".[185] This conclusion is rather unfortunate, and we agree with Wissing (2017) in his argument that it should be for the State to reason why a less coercive measure could not be effective in an individual case and not for the asylum-seeker himself to prove why an alternative measure would be more adapted to his situation.

In the 2016 case *O.M. v. Hungary* the Court seemed to be lowering that threshold of proof, since it required States to especially protect asylum-seekers who "*claim* to be a part of a vulnerable group"[186] (Heri, 2016). However, the later judgment *Thimothawes,* from 2017, shows that the Court has not moved from its position requiring asylum-seekers to prove their vulnerability. Taking these two judgments together, we may draw the following hypothesis: when the asylum-seeker fled his country of origin *because of* his vulnerability (as was the case in *O.M.,* where the person had fled his country because of his sexual orientation), he doesn't have to prove that he belongs to that vulnerable group; but if that is not the case (like in *Thimothawes*), then the burden of proof falls on the asylum-seeker.

Examples of cases where the Court has asked the asylum-seeker to prove his vulnerability can be found in *Thimothawes* itself, in which the Court established that the asylum-seeker had not proved why his mental health led to the conclusion that he could not be detained, especially since he had benefited from medical attention in the detention centre.[187] Similarly, in *S.M.M. v. UK* the Court found that the national courts had already assessed that the mental illness of the asylum-seeker could be satisfactorily managed within detention, and that the applicant had not established any reasons why a divergence of this assess-

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[184] *Abdi Mahamud v. Malta,* no. 56796/13, ECtHR 3 May 2016, §130-136
[185] *Thimothawes,* no. 39061/11, ECtHR 4 April 2017, §79.
[186] *O.M. v. Hungary,* no. 9912/15, ECtHR 5 July 2016, §53.
[187] *Thimothawes v. Belgium,* §79.

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ment would be required.[188] A final example of this burden of proof is the case of underage asylum-seekers, who have to prove their vulnerability as minors by letting the State determine their age through an age-assessment procedure, which may also involve detention, as will be discussed below.

Turning now to the central question of when does a migrant or asylum-seeker present a "particular vulnerability that opposes detention" for the purposes of the vulnerability test, once again the answer is not straightforward. In its widely acclaimed 2011 judgment *M.S.S. v. Belgium and Greece* (Peroni, 2011; Dembour, 2015:422), the Court held that all asylum-seekers are a "particularly underprivileged and vulnerable population group in need of special protection (…) because of everything they have been through during their migration and the traumatic experiences they are likely to have endured previously".[189] Despite this reference to past experiences, it must be underlined that, for the ECtHR, vulnerability is not derived from an applicant's individual personal circumstances, but from his or her affiliation to a group with special needs (Brandl and Czech, 2015:249).

This group-centred approach to vulnerability is made clear by the Grand Chamber in the case *Khlaifia and Others v. Italy.* While the Chamber of the ECtHR considered irregular migrants to be particularly vulnerable because they had undergone a "dangerous journey on the high seas";[190] this argument was later dismissed by the Grand Chamber, which observed that the applicants were not asylum-seekers and, therefore, they "did not have the specific vulnerability inherent in that status".[191] This move has been described as a "step back" from the Chamber´s protection of irregular migrants (Venturi, 2017).

Therefore, following *M.S.S. and Khlaifia*, it seems clear that the mere fact of applying for asylum triggers the obligation of the authorities to implement steps (2) and 3) of the "vulnerability assessment" before placing the asylum-seeker under arrest. However, the analysis becomes more complicated when adding *Abdullahi Elmi v. Malta*[192] and *O.M. v. Hungary*[193] into the picture. In these judgements, the Court

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[188] *S.M.M. v. UK,* no. 77450/12, EctHR 22 June 2017, §69.

[189] *M.S.S. v. Belgium and Greece,* no. 30696/09, ECtHR 21 January 2011, §232.

[190] *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR 1 September 2015, §135.

[191] *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR (Grand Chamber) 15 December 2016, §194.

[192] *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13, ECtHR 22 November 2016, §113.

[193] *O.M. v. Hungary,* §53.

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found that, in addition to their status as asylum-seekers, the applicants were *even more vulnerable* than other asylum-seekers because they were minors (in *Abdullahi*) and because they were LGBT people (in *O.M.*). Although this distinction between a more general and a more specific vulnerability might seem confusing, Venturi (2016) argued that this is a positive step, because by taking a nuanced, flexible and layered approach to the concept, the Court acknowledges specifically the risks of a double vulnerability: as an asylum-seeker and as a member of another extremely vulnerable group.

We would also endorse this view, if it wasn't for the fact that, in other judgments like *Mahamed Jama*,[194] *S.M.M. v. UK.* and *Thimothawes,* the circumstance that the asylum-seeker lacked (or could not prove) a double vulnerability meant that the "vulnerability test" was no longer required by the Court. Therefore, the general vulnerability of asylum-seekers was emptied of meaning: only the vulnerability of certain asylum-seekers triggers the obligation of authorities to carry out a "vulnerability test" when restricting their right to liberty. As warned by Brandl and Czech (2015:251), the concept of vulnerability of asylum-seekers allows one to distinguish various grades of vulnerability derived from the personal circumstances of the individual concerned, *so long as the general state of vulnerability is sufficiently respected* [emphasis added]. However, in view of the developments presented above, it can hardly be maintained that the Court respected the general state of vulnerability of asylum-seekers in the years after the refugee crisis.

And so, which groups of asylum-seekers does the Court now find vulner-able in the sense of triggering the "vulnerability test"? In the Court's judgments after 2015, one group stands out: unaccompanied and accompanied minors. The second most common group are those with a deteriorated psychological and/or physical state of health, although in the cases analysed, the state of health had a greater impact on the Court's assessment of the conditions of detention under Article 3 than on that of Article 5.1(f). Thirdly, in *O.M. v. Hungary*, LGBT asylum-seekers were also considered exceptionally vulnerable.

Special reference will now be made to the first group. The obligation to consider alternatives to detention for children in an immigration context was first laid down in *Rahimi v. Greece* in 2011.[195] To come to this conclusion, the Court especially drew on Article 3 of the United Nations Convention on the Rights of the Child, which requires States to

[194] *Mahamed Jama v. Malta,* no. 10290/13, ECtHR 26 November 2015*,* §100.

[195] *Rahimi v. Greece,* no. 8687/08, ECtHR 05 July 2011. See also *Popov v. France,* nos. 39472/07, 39474/07, ECtHR 19 January 2012.

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take into account the *best interests of the child* when taking decisions that concern minors.[196]

The strong liberty-protective approach that the Court took when assessing cases of detained minors in search for asylum can be observed in different post-2015 judgments. For instance, in *Sh.D. and Others v. Greece,* the Court noted that a Decree providing for "protective custody" of minors (which was, in practice, detention) that does not set a time limit for this custody cannot be a legal ground for the detention of unaccompanied minors.[197]

Moreover, in what was termed an "uncharacteristically damning language" (Rooney, 2017), the Court stated in *Abdullahi Elmi v. Malta* that if the authorities delay the release of children after having established that they are in fact underage, this raises "serious doubts as to the authorities' good faith".[198] Similarly, in *Mahamed Jama v. Malta* the Court did not accept the Government´s argument that an extremely long detention period (8 months) could be justified purely because the age assessment procedure in cases of persons close to adulthood is lengthier.[199]

The fact that, in both judgments, the Court appeared to tacitly endorse the idea that States can detain asylum-seekers pending the result of an age determination process was criticized by Rooney (2017). She finds that this kind of detention is difficult to reconcile with the established principle of international law (recognized by the UN Committee on the Rights of the Child)[200] that children should be given the benefit of the doubt in administrative proceedings.

As a final example, in *Bistieva and Others v. Poland* —which was the first judgment on immigration detention in Poland (Helsinki Foundation for Human Rights, 2018)— the Court pointed out that the protection of the child's best interests involves not only considering alternatives to detention of minors, but also *keeping the family together*.[201] This takes us to a collateral issue to the right to liberty of minors: the right to family life (Article 8 ECHR). A core element of this right is the mutual enjoyment by parent and child of each other´s company; never-

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[196] *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia,* no. 14165/16, ECtHR 13 June 2019*,* §69; *Bistieva and Others v. Poland*, §78.

[197] *Sh.D. and Others,* §69.

[198] *Abdullahi Elmi v. Malta,* §146.

[199] *Mahamed Jama v. Malta,* §148.

[200] UN Committee on the Rights of the Child, General Comment No. 6, 1 September 2005.

[201] *Bistieva and Others v. Poland*, no. 75157/14, ECtHR 10 April 2018*,* §78.

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theless, if detention is prolonged —thereby subjecting the family to living conditions typical of a custodial institution— the Court has found a violation of Article 8 even when the family unity was maintained.[202] In any case, the detention of families accompanied by children has to be limited as far as possible with all the necessary means.[203]

With regard to asylum-seekers with a deteriorated state of health, the Court first recognized them as vulnerable (and thus required authorities to carry out the "vulnerability test") in the 2011 judgment *Yoh-Ekale Mwanje v. Belgium*[204], and kept doing so after 2015.[205] Some authors (Lavrysen, 2012; Costello, 2015:155) hoped that this judgment would mean a move away from *Saadi* and *Chahal* and that, in the future, the Court would require authorities to implement a necessity test in all asylum and migration detention cases. However, as we have seen, this has not been the case.

Finally, regarding LGBT asylum-seekers, the Court grounded their vulnerability on the fact that they may be unsafe in custody among other detained persons who come from countries with widespread cultural or religious prejudice against such persons.[206]

[202] *Ibid.,* §85.
[203] *Ibid.*
[204] *Yoh-Ekale Mwanje v. Belgium,* no. 10486/10, ECHR 20 December 2011, §44.
[205] *S.M.M. v. UK,* §76; *Abdi Mahamud v. Malta,* §88.
[206] *O.M. v. Hungary,* §53.

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Chapter II

Liberty-related rights under the European Convention on Human Rights

1. **The right to a judicial review of the detention: Article 5.4**

Article 5.4. ECHR is paramount to safeguarding at the national level the prohibition of arbitrary administrative detention of asylum-seekers. According to this article, "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the *lawfulness* of his detention shall be decided *speedily* by a court and his release ordered if the detention is not lawful". It thus lays down the right to seek a judicial review in the context of a detention, acting as the *lex specialis* in relation to the more general requirements of Article 13 ECHR.[207] The most noticeable difference between these two articles is that Article 13 establishes the right to an effective remedy before a "national authority", while Article 5.4 prescribes that this remedy be provided "by a court". This shows the importance that the ECHR gives to the right to liberty, as it specifically bestows on the national judiciary the power to control any restriction of this right.

Regarding the nature of the national "court", the ECtHR has reiterated that it cannot merely have advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful.[208] Although the procedure must have judicial character, it is not always necessary that an Article 5.4 procedure be attended by the same guarantees as under Article 6 (right to a

[207] *Kahadawa v. Cyprus,* §66; *Ilias and Ahmed v. Hungary,* §71; *A.Y. v. Greece,* §97.
[208] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §128.

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fair trial in cases of criminal or civil litigation).[209] On the other hand, Article 5.4 does not compel States to set up a second level of jurisdiction for the examination of the lawfulness of detention; but where domestic law provides for such an appeal, the appellate body must also comply with the requirements of Article 5.4.[210]

As a precondition for the detained asylum-seeker to be able to challenge the lawfulness of the detention, there needs to be a formal decision specifically addressing the issue of his or her deprivation of liberty,[211] because otherwise there is no decision that the national court can review. Therefore, *de facto* detentions, without a formal decision, are not only in breach of Article 5.1 but also of Article 5.4.

How exactly must this judicial review function? The Court has repeatedly stated that Article 5.4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances.[212] Nevertheless, from the ECtHR's jurisprudence we can infer that, for a domestic judicial review to be *effective*, there are certain requirements it must fulfil:

1. It must be available during a person's detention, it must provide guarantees appropriate to the type of deprivation of liberty in question and it should be capable of leading, where appropriate, to release.[213] It must also be accessible and its existence must be certain.[214]
2. It cannot simply be a decision granting bail, because bail is granted or refused pending a court hearing, irrespective of the lawfulness of the detention.[215]
3. It must be a *speedy* review. Once again we are faced with the requirement of time, which can only be assessed case-by-case, particularly in the light of the complexity of the case, the specificities of the domestic procedure, the conduct by the authorities and by the applicant during the proceedings[216] and what is at stake for the applicant.[217] Thus, if a review procedure deals

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[209] *Nasst Allah v. Latvia,* §80.
[210] *Nassr Allah v. Latvia,* §69.
[211] *Ilias and Ahmed v. Hungary,* §73.
[212] *J.N. v. UK,* §88; *Nassr Allah v. Latvia,* §80.
[213] *J.N. v. UK,* §88.
[214] *Khlaifia and Others v. Italy* (Grand Chamber), §130.
[215] *Abdi Mahamud v. Malta,* §106; *Mahamed Jama v. Malta,* §117. See also the pre-2015 judgement *Suso Musa v. Malta,* §57.
[216] *Khlaifia and Others v. Italy* (Grand Chamber), §131.
[217] *Nassr Allah v. Latvia,* §76.

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with straightforward matters, a relatively short period of review (e.g. less than a month) can breach Article 5.4 for lack of speediness.[218] But even in complex cases, the duration of the review violates Article 5.4 when it is "far too long" (e.g. eight months).[219].

4. It must review the "lawfulness" of the detention in the light not only of the requirements of domestic law but also of the Convention, since the term "lawfulness" in Article 5.4 has the same meaning as in Article 5.1.[220] Moreover, if domestic law bestows the national court with wider powers than the Convention, allowing it to review not only the lawfulness of the detention in the strict sense but also the conditions of detention, then the asylum-seeker also has the right to an effective remedy regarding the conditions of detention under Article 5.4.[221]
5. The subsequent judicial decision must be "sufficiently detailed",[222] although the national court does not need to address every argument contained in the aplicant's submissions.[223] For example, a decision is not sufficiently detailed if it simply relies on the "willingness of the authorities to improve the detention conditions" without actually examining the conditions of detention, or if it does not examine the consequences under domestic law of the fact that the detainee has filed an asylum claim.[224]
6. In line with the above, Article 5.4 does not guarantee a right to judicial review of such a scope as to empower the national court, on all aspects of the case, including questions of pure expediency, to substitute its own discretion for that of the decision-making authority.[225] However, the judicial decision cannot disregard concrete facts invoked by the detainee which are capable of putting into doubt the existence of the conditions which are essential for the "lawfulness" of the detention according to Article 5(1).[226]

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[218] *Nassr Allah v. Latvia,* §77.
[219] *Kahadawa v Cyprus,* §72.
[220] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §128.
[221] *Mahammad and Others v. Greece,* §67.
[222] *S.C. v. Romania,* §76.
[223] *S.Z. v. Greece,* §68.
[224] *E.A. v. Greece,* §97.
[225] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §128.
[226] *S.Z. v. Greece,* §68.

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If the remedy at issue does not comply with the previous requirements, the possibility that interim measures may be issued by a constitutional court pending proceedings does not make up for these deficiencies, since the ECtHR has considered that "it is unlikely that constitutional jurisdictions would be willing on a regular basis to release immigrant detainees pending a decision on their claims of unlawful detention".[227]

Not all obligations fall on the national court: if the detained person acts with a *lack of diligence* when taking proceedings against the authorities (e.g. failing to attend court summons, delaying the contact with the lawyer, not seeking assistance in order to understand the content of the judicial summons…) then the Court might not find a violation of Article 5.4, taking into account all the other relevant circumstances.[228] Moreover, Article 5.4 can only be applied to detained persons and cannot be invoked by a released person with the intention to challenge the lawfulness of a prior detention.[229]

In a similar vein, the ECtHR has accepted that the national court can exercise some elements of the judicial review in an *implicit* manner. For example, in *A.Y. v. Greece,* it stated that the national administrative court had confirmed that the detention of the applicant at the border post could deteriorate his state of health and, in this way, it had implicitly examined the conditions of detention in order to determine whether or not the detention was arbitrary.[230]

Regarding *legal aid*, there is no obligation on the part of States under Article 5.4 to provide for such aid in national detention proceedings. However, the lack thereof, particularly where legal representation is required under domestic law, may raise an issue as to the *accessibility* of the remedy and could lead to a violation of the Convention. For instance, in *O.S.A. and Others v. Greece*, the Court noted that the Government had not provided free legal assistance to the applicants and that the legal assistance provided by NGOs was limited. This, together with other factors, led the Court to declare that "even assuming that the [national] remedies had been effective, the Court fails to see how they could have been exercised. It considers that, in the circumstances of the present case, the applicants did not have *access* to the remedies in question".[231]

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[227] *Abdi Mahamud v. Malta,* §109, *Mahamed Jama,* §119.
[228] *N.M. v. Romania,* §82; *S.C. v. Romania,* §75-77.
[229] *Richmond Yaw and Others v. Italy*.
[230] *A.Y. v. Greece,* no. 58399/11, ECtHR 5 November 2015, §97
[231] *O.S.A. and Others v. Greece*, no. 39065/16, ECtHR 21 March 2019.

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As noted in the Chapter I section "the lawfulness of the detention", in cases where the incompatibility of national law with the ECHR has directly affected the right to liberty of an asylum-seeker, the ECtHR assesses the compliance of national law with the Convention so as to determine whether the detention was "lawful" in the sense of Article 5.1(f). This assessment is also applied by the Court in its jurisprudence on Article 5.4.

For example, in *Amadou v. Greece,* in *E.A. v. Greece* and in *A.E.v. Greece,* the Court reviewed a Greek law (Law n. 3386/2005) according to which an alien may only raise an objection against the decision ordering his detention on the basis of the risk of absconding or danger to public order. Since this law did not grant the national judge the power to review the legality of a detention in the context of an expulsion procedure (which was the case at hand), the Court considered that this law did not provide the asylum-seeker with the possibility of an effective judicial review.[232] In subsequent judgements, the ECtHR recognized that, at the time of detention, the new Greek law n. 3900/2010 law now allowed the administrative judge to examine any issue arising from the detention of a person with a view to being expelled, and therefore there was not an incompatibility between Greek national law and Article 5.4 anymore.[233]

Similarly, in *Abdi Mahamud v. Malta* and *Mahamed Jama v. Malta* the Court observed that the national law that enshrined the right of detainees to have access to an effective judicial remedy explicitly excluded from its application individuals apprehended or intercepted in connection with irregular crossing by sea; and thus did not provide an effective remedy to the applicant, who had arrived to Malta by sea in an irregular manner.[234]

Both in the latter case and in the cases *Kahadawa v. Cyprus*[235] and *H.S. v. Cyprus*[236], the ECtHR even reviewed the compatibility of the Maltese and the Cypriote Constitution, respectively, with Article 5.4, and found that the constitutional redress proceedings provided for in these Constitutions did not comply with the requirement of *speediness.*

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[232] *Amadou v. Greece,* no. 37991/11, ECtHR 4 February 2016, §72; *E.A. v. Greece,* no. 74308/10, 30 July 2015, §96; *A.E. v. Greece,* no. 46673/10, ECtHR 27 February 2015, §58-59.

[233] *A.Y. v. Greece,* §94; *R.T. v. Greece,* §95; *S.Z. v. Greece,* §69; *O.S.A. and Others v. Greece*, no. 39065/16, ECtHR 21 March 2019.

[234] *Abdi Mahamud v. Malta,* no. 56796/13, ECtHR 3 May 2016*,* §106; *Mahamed Jama v. Malta,* no. 10290/13, ECtHR 26 November 2015*,* §117.

[235] *Kahadawa Arachchige and Others v. Cyprus,* nos. 16870/11, 16874/11, 16879/11, ECtHR 19 June 2018, §71.

[236] *H.S. v. Cyprus,* no. 41753/10, ECtHR 21 July 2015, §28.

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It should be underlined that, as in the case of Article 5.1, even if the ECtHR reviews the compatibility of national law with Article 5.4, it does so in relation to the particular case and not in an abstract manner and, in its rulings, the Court never declares a national law to be in violation of the ECHR but rather rules whether there has been a violation in the particular case at hand.

Finally, it is interesting to see how the ECtHR links the right to have the lawfulness of the detention reviewed by a national court to the right to have the conditions of detention reviewed by a court, which is not expressly found in Article 5.4. In *R.T. v. Greece,* for instance, the Court stated that the asylum-seeker did not benefit from the judicial examination of the lawfulness of detention that the national law provided for, and that "this is all the more true in the case of complaints relating conditions of detention, which are recurrent in the objections raised by foreigners before administrative courts and which certainly deserve an answer for them".[237]

2. **The right to information (Article 5.2) and the right to compensation (Article 5.5)**

2.1. *The right to be informed of the reasons for detention*

"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". With these words, Article 5.2. lays down a right without which Article 5.4 would be void of real meaning, for it is decisive that the asylum-seeker be informed, in a *simple language* ac-cessible to him, of the *factual* and *legal* reasons of his deprivation of liberty, so as to be able to challenge its legality before a court under Ar-ticle 5.4.[238] Since understanding the decision is essential for exercising the right to judicial review, at times (e.g. in *Khlaifia and Others v. Italy*) the Court automatically declared a violation of Article 5.4 after having found a breach of the right to information.[239]

The information on the reasons of detention must be submitted to the asylum-seeker "as soon as possible"; however, the authorities are

[237] *R.T. v. Greece,* no. 5124/11, ECtHR 11 February 2016, §98.

[238] *J.R. and Others v. Greece,* §121, *Khlaifia and Others v. Italy* (Grand Chamber), §115.

[239] *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR (Grand Chamber) 15 December 2016, §132-135.

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not obliged to provide this information in full at once.[240] It is also not required that the information be provided at the very moment of arrest.[241] Once again, the requirement of time calls for the need to "take into account the particularities of the case" to determine whether the person has obtained the information early enough. In *Saadi v. UK*, for instance, the Court found that "giving reasons 76 hours after the start of the detention is not promptly" and breached Article 5.2.[242]

This case-by-case analysis is also necessary to determine whether or not the information provided to the detained asylum-seeker has been *sufficient*.[243] As an example, in *J.R. and others* the asylum-seekers in question coming from Turkey were arrested in Greece with a view to their expulsion. The Court considered that the brochures that the authorities had given to the asylum-seekers did not provide *sufficient* information about this issue, and thus the applicants could not know why they were being detained. Therefore, the ECtHR found a violation of Article 5.2.[244] In the same vein, and although in this case the asylum-seekers did not invoke Article 5.2, the judgment *Thimothawes v. Belgium*[245] adds that decisions to deprive the asylum-seeker of his liberty formulated in a *laconic* and *stereotypical* way do not allow the detainees to know the reasons that justify the decision of detention.

Importantly, from *Khlaifia and Others v. Italy* we learn that information given by the authorities about the legal status of a migrant or about the possible removal measures that could be implemented cannot satisfy the need for information as to the *legal basis* for the migrant's deprivation of liberty.[246] Access to this information in order to be able to challenge it is especially important in the case of asylum-seekers whose claims have been rejected and are awaiting deportation, given that the consequences of the expulsion are potentially irreversible.[247]

In cases where the asylum-seeker did not misunderstand the reasons for his detention, but was rather unable to understand the content of the brochure given to him concerning his *rights as a detainee*, the Court deemed the complaint admissible but decided not to rule under Article 5.2, and declare a violation of Article 5.4 instead.[248] Fur-

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240 *Ibid.*
241 *Suso Musa v. Malta*, § 113.
242 *Saadi v. UK,* no. 13229/03, ECtHR 29 January 2008, § 84.
243 *Ibid.*
244 *J.R. and Others v. Greece,* no. 22696/16, ECtHR 25 January 2018*,* §119-124.
245 *Thimothawes v. Belgium,* no. 39061/11, ECtHR 4 April 2017, §77.
246 *Khlaifia and Others v. Italy* (Grand Chamber)*,* §118.
247 *N.M. v. Romania,* §84.
248 *A.Y. v Greece,* §99, *A.E. v. Greece,* §62.

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thermore, in other cases were it had found a breach of Article 5.4, the Court considered that it was unnecessary to examine whether there had also been a violation of Article 5.2.[249]

Another connection between Article 5.2 and 5.4 is found in the area of admissibility of the application before the ECtHR. The Article of the ECHR that regulates the admissibility criteria is Article 35.1, according to which "the Court may only deal with the matter after all domestic remedies have been exhausted (…), and *within a period of six months* from the date on which the final decision was taken". The Court has declared that, in the absence of an effective remedy under national law (and thus in cases of a violation of Article 5.4), this six-month time limit must be calculated from the date of the omission complained of.[250] If the omission complained of is the lack of sufficient information on the reasons for detention and the applicants wait more than six months since the (allegedly insufficient) information is provided to them to raise a complaint under Article 5.2, the ECtHR will declare these complaints inadmissible[251].

There are two aspects of the case law under the right to information which again show that the Court is more deferential towards States in asylum and immigration detention cases than in other instances.

First, in the 2013 judgment *Suso Musa v. Malta*, the Court set out that "Article 5.2 applies to Article 5.1(f) cases, although less detailed reasons are required to be given than in Article 5.1(c) [criminal detention cases]".[252] This phrase was repeated after 2015 in *Sharma v. Latvia*,[253] although (unlike *Suso Musa*) this case did not relate to an asylum-seeker but to an Indian migrant, and it is thus not possible to make inferences regarding the impact of the refugee crisis on this particular interpretation of Article 5.2.

In any case, note that the HRC, in its interpretation of Article 9.2 ICCPR, does not differentiate between the information that ought to be given to detained migrants and that which should be provided to convicted persons (see the Preliminary Chapter).

Secondly, regarding the language of the information, in *Suso Musa* the Court seemed to establish that asylum-seekers must specifically claim before the authorities that they do not understand the language

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249 *E.A. v. Greece,* §100, *O.S.A. and Others v. Greece*, §58.
250 *Mahamed Jama v. Malta,* §165.
251 *Ibid.*
252 *Suso Musa v. Malta*, no. 42337/12, ECtHR 9 December 2013, § 113.
253 *Sharma v. Latvia*, no. 28026/05, ECtHR 24 March 2016, 87.

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in which the detention decision is written, or ask for an interpreter. Otherwise, the authorities may assume that they understand the information.[254] This places a burden on the asylum-seeker who, in the confusing and hard circumstances of detention, may not even comprehend why he has been given a document with information written in another language. Therefore, we do not agree with the reasoning of the Court and believe that the right under Article 5.2 would be best protected if the authorities had a *positive obligation* to examine whether the asylum-seeker understands the language of the information provided.

2.2. *The right to compensation*

To conclude this section, mention needs to be made to Article 5.5., which enshrines the right of the detainee to "have an enforceable right to compensation" when detention has contravened the provisions of Article 5. In the cases studied, the violation of this sub-article is only alleged once by an asylum-seeker, namely in *Richmond Yaw and Others v. Italy*[255].

From this case, we learn that:[256]

a) The right to compensation presupposes that a violation of one of the other paragraphs of Article 5 has been established by a national authority or by the ECtHR.
b) This right requires *national law* to make it possible for the unlawfully detained asylum-seeker to apply for compensation. Once again, there is a need for the ECtHR to examine national law in order to establish the conformity of the measures with the Convention.
c) The effective enjoyment of the right to compensation must be ensured with a sufficient degree of *certainty*.

Finally, the right to obtain compensation (Article 5.5) has to be clearly distinguished from the right to have the lawfulness of the detention reviewed by a court (Article 5.4) since, when the lawfulness of detention is at stake, an action for compensation does not constitute a remedy in the sense of Article 5.4.[257]

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[254] *Suso Musa v. Malta*, § 116.

[255] *Richmond Yaw and Others v. Italy,* nos. 3342/11, 3391/11, 3408/11, 3447/11, ECtHR 6 October 2016.

[256] *Ibid.,* §91-94.

[257] *Ibid.,* §43.

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3. **Conditions of detention**

Another vital aspect that needs to be taken into account so as to determine whether the asylum detention is in full accordance with the ECHR is the compliance of the conditions of detention with respect for human dignity. The ECHR is the only human rights treaty that does not enshrine a specific provision on detention conditions (Chetail, 2012:57; compare with Art. 10 ICCPR as explained in the Preliminary Chapter). Nonetheless, the ECtHR offers similar protection to migrants and asylum-seekers by applying Article 3 ECHR,[258] according to which "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Moreover, if the detention conditions do not reach the threshold of Article 3 but are still not adequate, they may fail to meet condition number (3) of the "arbitrariness test" and thus be in breach Article 5, as shown above.[259]

The prohibition of ill-treatment under Article 3 ECHR is a fundamental value in democratic societies and of civilisation; and it is therefore absolute, for no derogation from it is permissible regardless of the victim´s behaviour or the circumstances.[260] Even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime, the absolute nature of Article 3 is not diminished.[261]

In the context of asylum detention, the Court has recognised that there is an unavoidable level of suffering inherent to every deprivation of liberty; however, Article 3 demands that the manner and method of execution of the detention measure do not subject the individual to hardship of an intensity exceeding this level of suffering.[262] When the acceptable level of severity is exceeded, the ill-treatment attains what the Court calls a "minimum level of severity", which is necessary for it to fall within the scope of Article 3.[263]

Moreover, when analysing the conditions of detention of asylum-seekers, the Court sometimes affirms that:

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[258] *J.R. and Others v. Greece,* §137.

[259] *A.Y. v. Greece,* §88.

[260] *Thuo v. Cyprus,* no. 3869/07, ECtHR 04 April 2017, §141.

[261] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §158.

[262] *Thuo v. Cyprus,* §157; *Ilians and Ahmed v. Hungary,* §88; *Abdullahi Elmi v. Malta,* §100; *Mahamed Jama v. Malta,* §87; *N.M. v. Romania,* §58.

[263] *Abdullahi Elmi v. Malta,* §100; *Mahamed Jama v. Malta*, §86.

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> "the detention was imposed in the context of immigration, and was therefore a measure which is applicable not to those who have committed criminal offences but to asylum seekers".[264]

According to a partly dissenting opinion of Judge Sajó, this sentence means that "acceptable conditions of detention in the case of asylum-seekers and persons detained pending deportation can differ from those of prison conditions applicable to those who have committed criminal offences";[265] that is, that the threshold for finding a violation of Article 3 ECHR may be lower in the case of asylum detention than in the case of criminal detention. This contrasts with its approach under Article 5, where, although it also asks States to keep in mind that asylum-seekers are not criminals, in practice it grants more protection to persons detained under Article 5.1(c) ECHR (criminal detention) than to asylum-seekers detained under Article 5.1(f), as shown in Chapter 1.

In assessing whether the minimum level of severity has been reached, several factors need to be taken into account. We have classified these factors into four categories, which will be developed in this section:

a) *Transversal issues*, which appear in several judgments that touch upon the conditions of detention: the duration of the degrading treatment, the physical and mental effects and the purpose of the treatment.
b) The *personal space* that the detainee enjoys. This will be considered as a category in itself due to the numerous cases in which the Court takes into account the overcrowding conditions in the detention centre in order to declare a breach of Article 3.
c) The securing of the health and *well-being* of the detainee. This well-being in turn depends on several factors, which will be analysed separately.
d) The *vulnerability* of the asylum-seeker concerned. As is the case with Article 5 ECHR, the concept of vulnerability also plays a role in detention conditions. So as to determine whether the asylum-seeker is vulnerable, his or her sex, age and state of health have to be taken into account.

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[264] *Abdi Mahamud v. Malta*, § 87; Mahamed Jama v. Malta, §95.

[265] Partly Dissenting Opinion of Judge Sajó, *Abdi Mahamud v. Malta,* no. 56796/13, ECtHR 3 May 2016.

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The *burden of proof* of the conditions of detention and the *obligation to investigate* will also be examined, as this plays a major role in the Court´s jurisprudence. Finally, to conclude this section, we will closely look at how the argument that the State is facing a "migration crisis" can affect the decision of the Court regarding detention conditions.

3.1. *Transversal issues: duration of the treatment, purpose of the treatment and physical and mental effects*

We have already seen how relevant the *duration of detention* is in order for this measure to comply with the right to liberty under Article 5. The same is true for detention conditions: the longer the degrading conditions persist, the more probable it is that they reach the threshold of "minimum level of severity" and thus constitute a violation of Article 3.

The duration of detention is particularly important in cases of detention in *police stations*. The Court has reiterated on several occasions that police stations are designed to accommodate people for very short durations, and are not appropriate places for the detention of people who are waiting for the application of an administrative measure such as deportation.[266] Therefore, it has found violations of Article 3 in cases of relatively long detentions in police stations due to the "very nature" of these facilities.[267]

This does not mean that the Court only focuses on the nature of the police station to establish a violation of Article 3. Depending on the case, it also takes into account elements such as *overcrowding*, poor *sanity conditions*, poor *food quality,* lack of *outdoor space* and of *recreational activities*,[268] elements which the Court also considers in judgments related to other kinds of detention facilities.

From its different judgments, we find that the Court considers detention for *one month in a police station* to be in violation of Article 3,[269] while two days is a reasonable detention period, unless the asylum-seeker puts forward a specific argument about why such a short detention amounts to a violation of Article 3.[270]

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[266] *Sh.D and Others v. Greece,* no. 14165/16, ECtHR 13 June 2019; §50, *Khanh v. Cyprus,* no. 43639/12. ECtHR 4 December 2018, §46; *S.Z. v. Greece,* §40; *Thuo v. Cyprus,* §159; *Aarabi v. Greece,* §46.

[267] *Sh.D and Others,* §48; *S.Z. v. Greece,* §40; *Thuo v. Cyprus,* §159.

[268] *A.E. v. Greece,* §43.

[269] *Sh.D. and Others,* §48; *S.Z. v. Greece,* §40; *Aarabi v. Greece,* §46.

[270] *Aarabi v. Greece,* §47.

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In other detention facilities, the Court found no violation of Article 3 when the asylum-seeker was detained for:

a) Three[271] or four[272] days in a border post
b) Thirteen days in an immigration detention centre[273]
c) One month in a Greek "hotspot",[274] which is quite objectionable, as will be discussed later.

On the other hand, it found a violation of Article 3 when the asylum-seeker was detained for six months in a border post[275] and sixteen months in an immigration detention centre where the asylum-seeker had a delicate state of health.[276]

In any case, whether or not the duration of detention is weighed by the Court to declare a violation of Article 3 really depends on how acceptable or degrading the overall conditions in the detention facility are. For its part, in its case law on Article 5.1(f), as shown above, the duration of the detention is more central: it can be an independent ground on which the Court finds a violation of the prohibition of arbitrariness —regardless of other factors such as whether the detention is in accordance with the law.

The duration of detention is closely connected with the second transversal issue: the *physical and mental effects* of detention on the asylum-seeker. When assessing the impact of detention conditions on the asylum-seeker, the Court takes a comprehensive approach and considers the *cumulative effects* of the detention conditions, as well as the specific allegations made by the applicant.[277]

Mental and physical effects reach the minimum level of severity when the detention conditions expose the asylum-seeker to a feeling of arbitrariness, inferiority, anguish and anxiety capable of humiliating and debasing him and possibly breaking his physical or moral resistance, with a profound effect on his dignity.[278] Particularly, the complete sensorial and social isolation can "destroy the detainee's personality" and constitute a form of ill-treat-ment which cannot be justified even on security grounds.[279]

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[271] *Aarabi v. Greece,* §48.
[272] *A.E. v. Greece,* §40.
[273] *Aarabi v. Greece,* §49.
[274] *J.R. and Others v. Greece,* §125.
[275] *AL.K. v. Greece,* no. 63542/11, ECtHR 11 March 2015, §54.
[276] *Abdi Mahamud v. Malta*, § 87.
[277] *Abdullahi Elmi v. Malta,* §114; *Khlaifia and Others* (Grand Chamber)*,* §163; *Mahamed Jama v. Malta,* §49.
[278] *Abdi Mahamud v. Malta,* §89. See also *M.S.S. v. Belgium and Grece,* §233.
[279] *N.M. v. Romania,* §58.

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Factors that contribute to these feelings of isolation and anxiety are the lack of radio or television sets that allow contact with the outside world,[280] the lack of information on the stage of the asylum-seeker's claims and an atmosphere of heightened tensions and emotions.[281] However, the prohibition of contacting other detainees for security reasons is not in itself a form of degrading treatment.[282]

Finally, another transversal aspect —which, without doubt, has a great impact on the mental effects of the ill-treatment— is whether or not the *purpose of the treatment* is to humiliate and debase the detainee. If this is the case, there is a clear violation of Article 3; conversely, when the authorities demonstrate their *intention to improve* promptly the material conditions of the asylum-seeker, either by transferring the applicant to a different centre or by investing in the renovation of the detention facility, this plays in favour of the State and the Court may find that the minimum level of severity has not been reached, as it did in *Khlaifia and Others*[283] and in *Aarabi v. Greece*[284].

There is, however, a middle point where the authorities have neither a purpose to humiliate nor a good will to improve the detention conditions. In these cases, the absence of a purpose to humiliate cannot conclusively rule out a finding of a violation of Article 3.[285] Thus, when the purpose to humiliate is present, the violation of Article 3 is unavoidable, but the opposite is not always true.

3.2. *Overcrowding*

As the Court has noted, "where overcrowding reaches a certain level, the lack of space in an institution may constitute the key factor to be taken into account in assessing the conformity of a given situation with Article 3".[286] This assertion makes it vital to understand when this level of overcrowding has been reached.

Looking at the jurisprudence, we find that the ECtHR considers that the acceptable minimum standard of living space in multi-occupancy

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[280] *Sh.D and Others v. Greece,* no. 14165/16, ECtHR 13 June 2019.
[281] *Mahamed Jama v. Malta,* §99.
[282] *N.M. v. Romania,* §58.
[283] *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR (Grand Chamber) 15 December 2016, §201.
[284] *Aarabi v. Greece,* no. 39766/09, ECtHR 2 April 2015, §50.
[285] *Abdulahhi Elmi,* §99.
[286] *Khlaifia and Others v. Italy* (Grand Chamber), §165, *Mahamed Jama v. Malta,* §88.

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accommodations is *four square metres*.[287] This measurement follows the recommendations by the Committee for the Prevention of Torture (CPT). The Court takes into account the space occupied by the furniture items in the living area[288] and, when a detainee has the opportunity to move around inside the detention facilities (e.g. to the common room and in the alleys), the measurement of 4 m^2 does not refer only to the space available in the detainee's dormitory or cell, but to the entirety of the space to which he has access.[289]

Although the Court has declared that 4 m^2 is the minimum standard of living space, in practice, when the personal space ranges between 3 and 4 m^2, the detention conditions do not necessarily amount to a violation of Article 3, especially if the asylum-seeker has freedom to spend time away from the dormitory rooms.[290] In these cases, the space factor remains an important consideration in the Court's assessment, but it is then taken together with other factors (explained below) that will finally determine whether or not the conditions of detention are degrading.[291]

Only when the detained asylum-seeker has *less than 3 m^2* of individual space, there is a "strong presumption" of a violation of Article 3.[292] This *iuris tantum* presumption can be rebutted by the State if it demonstrates that the cumulative effects of the other aspects of the conditions of detention compensate for the scarce allocation of personal space.[293] This rebuttal is not an easy task, for the State has to prove that: (1) the reductions in the space are short, occasional and minor; (2) such reductions are accompanied by sufficient freedom of movement outside the cell; (3) the applicant is confined in what is generally viewed as an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention.[294]

In cases of extreme lack of space, however, no rebuttal by the State seems to be possible. For example, in two cases where more than 100 detainees were "crammed" into a 35 m^2 space in the Tychero border post in Greece, the Court automatically declared that there was a violation of Article 3 without examining the other conditions of detention.[295]

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287 *Mahamed Jama v. Malta,* §88.
288 *Ibid.*
289 *Abdi Mahamud v. Malta,* §79.
290 *Mahamed Jama v. Malta,* §92.
291 *Khlaifia and Others v. Italy* (Grand Chamber), §167.
292 *Thuo v. Cyprus,* §158; *Aarabi v. Greece,* §49.
293 *Thuo v. Cyprus,* §158; *Khlaifia and Others v. Italy* (Grand Chamber), §166.
294 *Thuo v. Cyprus,* §158.
295 *R.T. v. Greece,* §52-54; *A.Y. v. Greece,* §57.

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Finally, the Grand Chamber judgment *Khlaifia and Others v. Italy* sheds light on a very particular issue: the element of overcrowding has a different weight on the Court´s assessment of a violation of Article 3 when the migrants are detained in a prison, a cell or a confined space and when they are detained in an "accommodation centre". In the latter case, even when the centre exceeds its capacity by a percentage of between 15% and 75%, the Court finds that this is alleviated by the fact that migrants can move around the facility, communicate by telephone and contact representatives of humanitarian organisations and lawyers.[296]

3.3. *Well-being of the detainee*

The health and well-being of the asylum-seeker need to be secured for the detention conditions to comply with Article 3. This well-being depends in turn on several factors:

3.3.1. Basic hygiene requirements and privacy

For the hygiene conditions to amount to inhuman or degrading treatment, hygiene problems need to affect the asylum-seeker's personal situation, and they need to be "general",[297] which is an undeterminated legal concept. Nonetheless, from the analysed jurisprudence we can derive that there are no general hygiene problems when there is a shortage of hygiene products and some people sleep on mattresses on the floor;[298] or when certain materials (such as bras, sanitary pads and running shoes) are not readily available but the authorities provide the detainees with clothes, even if only sporadically and with the help of private donations.[299] On the other hand, the Court has found hygiene conditions to be degrading when the applicants did not have the possibility of using toilets with respect for privacy,[300] when they had no access to running water[301] or when the washing facilities were in a serious state of disrepair and a large number of people had to sleep on the floor.[302]

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296 *Khlaifia and Others v. Italy,* §193.
297 *Aarabi v. Greece,* §49.
298 *Ibid.*
299 *Mahamed Jama,* §23.
300 *Khlaifia and Others v. Italy* (Grand Chamber)*,* §159.
301 *Sh.D. and Others,* §50.
302 *Amadou v. Greece,* §52; *Mahammad and Others v. Greece,* §46.

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A closely related issue is the element of privacy. A total lack of privacy in the cell amounts to a violation of Article 3. Factors that affect the privacy of the detainees are, among others, the lack of any furniture in which individuals can store their personal belongings[303] and the lack of proper screens or doors in toilets and showers.[304]

3.3.2. Ventilation, light and heating

Cold and heat are to be taken into account for the purposes of Article 3, as they may affect well-being and, in extreme circumstances, even health.[305] However, the authorities cannot be expected to provide the most advanced technology, and therefore if ceiling fans are in place, the Court does not find that the heat that the asylum-seeker suffers amounts to a violation of Article 3.[306] If the rooms have windows, this also improves the ventilation of the detention facility.[307] In the same manner, even if no heating is installed, the provision of blankets may compensate this "to some extent", although the assessment will depend on the circumstances.[308]

On the other hand, lighting inside the cells is an important factor to be considered, as the Court does in *Abdullahi Elmi v. Malta*,[309] where it grounds its finding that there is a breach of Article 3, among others, on the fact that the immigration detention centre lacked enough light.

3.3.3. Access to outdoor exercise and organised activities

Regardless of how good the material conditions might be in their cells, access to outdoor exercise for at least *one hour per day* is a fundamental component of the protection afforded to those deprived of their liberty under Article 3, and the authorities have to provide safe exercise space irrespective of any fears of escape —concerns which have to be addressed by other relevant measures that do not impinge on the well-being of the detainees.[310] In contrast to the element of

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[303] *Abdi Mahamud v. Malta,* §86.

[304] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §189.

[305] *Abdullahi Elmi v. Malta,* §109, *Abdi Mohamud v. Malta,* §84, *Mahamed Jama v. Malta,* §96.

[306] *Abdi Mohamud v. Malta,* §85.

[307] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §190.

[308] *Mahamed Jama v. Malta,* §96.

[309] *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13, ECtHR 22 November 2016*,* §105-109.

[310] *Abdi Mahamud v. Malta,* §81-83, *Mahamed Jama v. Malta,* §94.

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overcrowding, the lack of access to outdoor exercise during a specific period of time does not amount in itself to a violation of Article 3, but it is a matter to which the Court gives importance when assessing the cumulative effects of detention.[311]

These outdoor exercise facilities must be reasonably spacious, whenever possible, provide shelter from inclement weather, and they must offer inmates proper opportunities for recreation and recuperation.[312] Preferably, this one hour of outdoor exercise should be part of a broader programme of out-of-cell activities.[313]

3.3.4. Quality of the food

Finally, detained asylum-seekers must be provided with proper meals regularly. The Court does not set out specific characteristics of how this food should be or how often the authorities ought to provide detainees with it, however it does say that the meals should be "balanced", not affect the detainees' health and be culturally appropriate.[314] For example, the Court found a violation of Article 3 in a Greek detention facility where some detainees only received one meal a day and the food contained pork, which they could not eat for religious reasons.[315] Moreover, the Court, in line with reports from relevant organisations, has been particularly concerned in cases where children did not have access to milk and adapted meals.[316] However, in none of the cases analysed did the Court find a breach of Article 3 solely on the grounds of the inadequate quantity or quality of the food.

3.4. *Conditions of detention for vulnerable asylum-seekers*

Vulnerability is not only relevant for the purposes of Article 5, but also regarding detention conditions. As in the case of Article 5(1)(f), the Court has downplayed the significance of the general vulnerability of asylum-seekers. In both the Chamber and the Grand Chamber judgment *Ilias and Ahmed v. Hungary*, the Court found that "while it is true that asylum-seekers are considered particularly vulnerable (…), the ap-

311 *Mahamed Jama v. Malta,* §95.
312 *Ibid.,* §82, *Mahamed Jama v. Malta,* §93.
313 *Mahamed Jama v. Malta,* §89.
314 *Mahamed Jama v. Malta,* §95-98.
315 *Mahammad and Others v. Greece,* §46.
316 *Ibid.,* §33, §46.

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plicants in the present case were not *more vulnerable* than any other adult asylum-seeker detained at the time".[317] Therefore, the State had not breached Article 3. This distinction between the "general" vulnerability of asylum-seekers and the "special" vulnerability of particular asylum-seekers (notably minors and people with health problems) implies that States no longer have an obligation under Article 3 ECHR to assess the particular needs of a detainee —and to adapt the detention conditions to those needs— merely because he is an asylum-seeker.

In this section we will focus on the particular consequences that the application of the vulnerability concept has had in the post-2015 judgments of the Court regarding detention conditions.

Again, minors are the group that concerns the Court the most. In the words of the Court, "minors have specific needs"[318] that are related, in particular, to their age and lack of independence, but also to their status as asylum-seekers.[319] Domestic authorities thus have the duty to protect children and take appropriate measures as part of their *positive obligations* under Article 3 ECHR.[320] This entails that the State has to adapt the conditions of detention to the age of the minor, even when detention only lasts for a short period of time.[321] In practice, this adaptation means that minors have to receive proper psychological, social and educational assistance from qualified personnel, entertainment facilities for persons of their age and information concerning their situation.[322]

A judgment that the Court cites quite often in its post-2015 jurisprudence is *Popov v. France,* from which we can emphasise the particular importance that the Court gives to the physical and psychological effects of the detention on minors; for it states that, when minors suffer from *stress and anxiety* due to the hostile psychological environment and the lack of privacy, there is a violation of Article 3 even if this anxiety is not medically proven.[323] The younger the minor, the more the Court is concerned by the "traumatic consequences" of the detention conditions.[324]

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[317] *Ilias and Ahmed v. Hungary,* §92; *Ilias and Ahmed v. Hungary* (Grand Chamber), §192.

[318] *S.F. and Others v. Bulgaria,* no. 8138/16, ECtHR 7 December 2017, §79; *Abdullahi Elmi v. Malta,* §103.

[319] *Abdullahi Elmi v. Malta,* §103.

[320] *Popov v. France,* nos. 39472/07, 39474/07, ECtHR 19 January 2012, §91.

[321] *S.F. and Others v. Bulgaria,* §88.

[322] *Sh.D. and others,* §50; *Abdullahi Elmi v. Malta,* §111.

[323] *Popov v. France,* §92.

[324] *S.F. and Others v. Bulgaria,* §89; *Abdullahi Elmi v. Malta,* §104.

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As it does in the case of Article 5, also in judgments regarding Article 3 the Court makes reference to the 1989 Convention on the Rights of the Child so as to reinforce its arguments. In these occasions, it refers to Article 22.1 of this Convention, which encourages States to take appropriate measures to ensure that children seeking refugee status receive appropriate protection and humanitarian assistance, *whether the child is alone or accompanied by his or her parents*.[325] We thus see that, although a State's obligation concerning the protection of migrant minors may be different depending on whether they are accompanied or not,[326] a possible violation of Article 3 is not limited to cases of unaccompanied minors.

The Court also follows reports by the CPT in order to declare a violation of Article 3, particularly those which find unacceptable the detention of unaccompanied or separated minors *in police stations and border guard posts,* even if it is for allegedly "protective" purposes.[327] Moreover, detaining a child asylum-seeker in an adult detention centre has led the Court to find a breach of Article 3 in all its case law except two —in one of them because the complaint was inadmissible and in the other one, the above-mentioned *Aarabi v. Greece*,[328] because the detention was due to a mistake in the age of the applicant, which he had perpetuated (Babha, 2018:154).

Notably, in cases of minor asylum-seekers, the Court has set a lower threshold in order to deem the *duration of a detention* as a violation of Article 3. For example, in cases of detentions in police stations, the Court has found a violation of Article 3 when the detention lasted for 24 days, 8 days[329] or even 32 hours when the conditions were particularly degrading[330] (whereas a detention of over a month is necessary in the case of adults, as noted above). This differentiation between adults and minors can be seen in *S.F. and Others v. Bulgaria*,[331] a judgment in which the Court found a breach of Article 3 with respect to the three minor asylum-seekers but not with respect to their mother.

Regarding asylum-seekers with a deteriorated state of health, a distinction should be made between the characterisation of the asylum-seeker's health condition under domestic law, which is for the national

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325 *Abdullahi Elmo v. Malta,* §103; *Popov v. France,* §91.
326 *Abdullahi Elmi v. Malta,* §112.
327 *Sh.D. and Others,* §50.
328 *Aarabi v. Greece,* no. 39766/09, ECtHR 2 April 2015.
329 *Sh.D. and Others,* §50.
330 *S.F. and Others v. Bulgaria,* §84.
331 *S.F. and Others v. Bulgaria,* no. 8138/16, ECtHR 7 December 2017*,* §88.

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courts to determine and in regard to which the ECtHR cannot substitute the national courts' assessment;[332] and the characterisation of his health condition under the ECHR. Therefore, the state of health of an asylum-seeker may make him or her vulnerable under national law but not under the ECHR for the purposes of Article 3.

When there are temperature problems inside the detention facilities, asylum-seekers with health problems may require further measures than those adopted for the rest of the detainees (for example, giving them blankets for the cold may not be enough).[333]

In some cases, asylum-seekers were subject to a double vulnerability: for being minors and for being mentally ill. This was the case in *Sh.D. and Others*,[334] where the minor attempted suicide and was diagnosed with a severe depression, but was kept in detention in a Greek police station.

Finally, in the case of female asylum-seekers, in the judgments analysed the Court does not expressly refer to them as vulnerable, but it does set out certain requirements for their conditions of detention which are different from the requirements regarding other asylum-seekers. Indeed, the ECtHR has pointed out that for women's privacy to be respected, the authorities have an obligation to employ a reasonable number of female staff in centres were women asylum-seekers are detained; since being dealt with and surrounded by male officers most of the time creates a considerable degree of discomfort to female detainees. Even if male staff is trained to distribute intimate products, this does not compensate for the lack of female staff.[335]

3.5. *Burden of proof and the duty to investigate*

Regarding the burden of proof of the conditions of detention during the proceedings before the ECtHR, we find that it mostly falls on the national authorities. While it is true that the detainee must provide the Court a detailed and consistent description of the allegedly degrading conditions,[336] once this has been done, it is the Government who has to submit to the ECtHR the relevant information

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[332] *Ilias and Ahmed v. Hungary,* §87.

[333] *Abdi Mahamud v. Malta,* §85.

[334] *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia,* no. 14165/16, ECtHR 13 June 2019*,* §50.

[335] *Ibid., Mahamed Jama v. Malta*, §97.

[336] *S.Z. v. Greece,* §38.

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on the material conditions of detention capable of corroborating or refuting the allegations, because it is the Government alone who has access to this information. Therefore, the principle *affirmanti incumbit probatio* does not apply to cases about detention conditions of asylum-seekers.[337]

In fact, the ECtHR does not need to establish the veracity of each element that is in dispute about the detention conditions: the Court may find a violation of Article 3 on the basis that the Government has *failed to refute* any serious and well-founded allegations presented by the applicant.[338] As an example, in the case *S.F. and Others v. Bulgaria*,[339] the applicants submitted a video that recorded the situation of the cell where they had been detained, and even though it was not possible to ascertain that it had been recorded in that cell, the Court took the video into account simply because the Bulgarian Government had not submitted their own footage of the place so as to refute the applicants´ claims.

In any case, the Court does not only rely on the information provided by the parties in order to assess the violation of Article 3. It also reasons its judgments with the help of reports from different actors, especially when neither party offers relevant information regarding a specific allegation of the asylum-seeker.[340] We observe that the Court always relies on reports from the CPT, but not exclusively, since it often draws on reports from NGOs (Human Rights Watch or Amnesty International), UN institutions (UN Special Rapporteur on Torture, UNHCR), national institutions (Cypriote Ombudsman, Greek National Commission for Human Rights…) and sometimes from the Assembly of the Council of Europe. Moreover, in judgments in which the Court has already ruled that there was a violation of Article 3 in a case that occurred in the same detention area and during the same period, the Court has automatically found a violation of Article 3 without the need to further analyse the parties' submissions.[341]

Finally, reference has to be made to cases in which the asylum-seeker does not only complain about the conditions of detention but also claims that he has been directly ill-treated by the authorities. In these cases, the burden of proof also falls on the Government whenever allegations of ill-treatment at the hands of the police or other

[337] *Khanh v. Cyprus*, §47-48.
[338] *S.Z. v. Greece,* §39, *R.T. v. Greece,* §51, *A.Y. v. Greece,* §56.
[339] *S.F. and Others v. Bulgaria,* no. 8138/16, ECtHR 7 December 2017, §74-75.
[340] *Abdullahi Elmi v. Malta,* §109.
[341] *E.A. v. Greece,* §51.

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similar agents are arguable and based on corroborating factors, such as the existence of injuries of unknown and unexplained origin.[342]

But what is more interesting is that, in instances of direct ill-treatment by the authorities, Article 3 has a "procedural limb", which is the *duty* of the authorities to *carry out an effective official investigation* on the allegations.[343] Therefore, the detained asylum-seeker can challenge, under Article 3, both the ill-treatment and, if applicable, the failure of the authorities to investigate the claim. The investigation is not effective when: (1) It is not carried out promptly, (2) The investigator does not contact the legal representatives of the asylum-seeker, (3) The investigator takes at face value the authorities' explanations despite the inconsistency of these explanations or despite the availability of documents that could contradict the authorities' version if the facts, and (4) The conclusions of the investigator lack a thorough jus-tification, are somewhat contradictory and do not refer to all relevant facts.[344]

3.6. *Article 3 and the management of a migration crisis. Special mention to* J.R. and Others v. Greece

In this last part of Section 3 we will discuss a specific example of a case where a violation of Article 3 may arise despite the absence of a purpose to humiliate from the part of the authorities: the situation in which a State faces objective difficulties in *managing a migration crisis.*

The first time the ECtHR referred to this issue was in 2011, in the case *M.S.S. v. Belgium and Greece,* where it recognised that States which form the external borders of the European Union were experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers, but nevertheless stated that, in view of the absolute nature of Article 3 ECHR, these difficulties cannot absolve a State of its obligations under that provision. Therefore, the Court would *not* take into account these objective difficulties when assessing whether or not there had been a violation of Article 3.[345] The same argument was made by the Court in *Hirsi Jamaa and Others v. Italy* in the same year.[346]

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342 *Khlaifia and Others v. Italy* (Grand Chamber), §205.
343 *Thuo v. Cyprus,* §125.
344 *Thuo v. Cyprus,* §129-140.
345 *M.S.S. v. Belgium and Greece,* no. 30696/09, ECtHR 21 January 2011, §223.
346 *Hirsi Jamaa and Others v. Italy,* no. 27765/09, ECtHR 23 February 2011, §122.

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Five years later, the Grand Chamber of the ECtHR issued the landmark judgment *Khlaifia and Others v. Italy*,[347] which related, among other issues, to the detention of migrants in Lampedusa in 2011 in the context of the post-Arab Spring influx of migrants to Europe. While this judgment strengthened migrants' and asylum-seekers' rights under Article 5 (as shown in Chapter I), its interpretation of Article 3 regarding detention conditions signalled a step backwards with respect to the principles established in its previous judgments (Zirulia and Peers, 2017). In this case, the Court somewhat bent the argument made in *M.S.S.* and *Hirsi,* and stated that "while constraints inherent in a migration crisis cannot, *in themselves,* be used to justify a breach of Article 3, it would be artificial to examine the facts of the case without considering the general context in which those facts arose".[348] Therefore, the Court would "bear in mind, together with other factors, (…) the situation of extreme difficulty confronting the Italian authorities".[349]

Although the Court did indeed take into account other factors in order to rule that there had been no violation of Article 3 —such as the short duration of the detention and the freedom of movement of the migrants within the reception centre—, in the words of Goldenziel (2018:279), "the willingness of the Court to consider the context of a migration crisis erodes the absolute character of the prohibition within Article 3". His criticism is in line with that of other authors. Venturi (2017) casts doubts as to whether the mass arrivals were really impossible to predict and, thus, likely to preclude a proper organisation; while Zirulia and Peers (2017) suggest that the Court should have taken into account that the unlawful deprivation of liberty inflicted by the Italian Government in violation of Article 5 had contributed to aggravating the consequences of the humanitarian emergency. Goldenziel (2018:280) goes further and states that "the Court could have easily declared that Italy was liable for violating Article 3 citing specific actions that the State could have taken to avoid [the situation of extreme difficulty]".

A parallel conclusion to that of *Khlaifia and Others* was eached by the Court in the 2017 case *J.R. and Others v. Greece,* a case concerning the detention of asylum-seekers who had crossed th Aegean Sea from Turkey to the Greek island of Chios in 2016. In this judgment, the Court took into account that the detention of the asylum-seekers

[347] *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR (Grand Chamber) 15 December 2016.

[348] *Khlaifia and Others v. Italy* (Grand Chamber)*,* §185

[349] *Ibid.*

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occurred at a time when there was an exceptional and sudden increase in migratory flows, which had created organisational, logistical and structural difficulties in the small island of Chios.[350] This was reiterated in a similar case in 2019, *Kaas and Others v. Greece*.[351] Although the fact that the Court declared that the island of Chios was "totally unprepared" and that the situation was "chaotic"[352] can be regarded as a wakeup call from the Court to the EU and Greece (Gatta, 2018), the Court, once again, seemed to raise the threshold of severity required under Article 3 when the State is faced with a migration crisis.

As in *Khlaifia and Others,* the Court also laid down further arguments to declare that there had been no violation of Article 3, and did not limit itself to taking into account the critical situation in Chios. However, in our view, these other arguments were not well-justified. First, the Court found that the problems denounced by the report of the CPT "were not such as to amount to a breach of Article 3".[353] This conclusion is surprising, since the CPT's report drew attention on elements of the conditions of detention which, in other judgments, the Court had found to exceed the minimum level of severity: overcrowding, inadequate quality of both the food and the water and lack of medical care. This finding is the more troubling given that one of the applicants was mentally ill, to the extent that she tried to commit suicide on two occasions. The Court's concept of vulnerability should thus have been applied in assessing detention conditions.

Moreover, the Court ignored the findings of the other third parties to the case such as Human Rights Watch and the Hellenic Council for Refugees, which again described circumstances of the conditions of detention that, taken cumulatively, could breach Article 3: little outdoor space, rudimentary hygiene conditions, insufficient meals and lack of protection against the cold at night, with some people having to sleep on the floor. In any case, even if these conditions did not amount to a violation of Article 3, the Court should have at least discussed these findings by the NGOs and justified why they did not exceed the minimum threshold of severity. *J.R. and Others* —and the later judgments which refer to it, *O.S.A. and Others*[354] and *Kaak and Others v. Greece*[355]— thus confirm Dembour's criticism that "most often the

[350] *J.R. and Others v. Greece,* no. 22696/16, ECtHR 25 January 2018*,* §138.
[351] *Kaak and Others v. Greece*, no. 34215/16, ECtHR 3 October 2019, §64.
[352] *Ibid.,* §141.
[353] *Ibid.,* §144.
[354] *O.S.A. and Others v. Greece*, no. 39065/16, ECtHR 21 March 2019
[355] *Kaak and Others v. Greece*, no. 34215/16, ECtHR 3 October 2019.

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finding that the minimum level of severity required to engage Article 3 is not reached is left unreasoned" (Dembour, 2015:227).

Second, the Court noted that the duration of detention of the asylum-seekers was "characterised by its brevity".[356] Although this argument was reasonable in the case of *Khlaifia and Others,* where the migrants only spent three days in detention, the same cannot be said of *J.R. and Others,* where the asylum-seekers spent one month in the conditions described above.

[356] *J.R. and Others v. Greece,* §145.

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Conclusions

The hardships faced by the more than a million refugees that reached European soil in 2015 did not change the ECtHR's jurisprudence on asylum detention set in *Saadi* and *Chahal* towards a more liberty-protective approach regarding asylum detention. If anything, it reinforced the "reversal of the presumption in favour of liberty", as Moreno-Lax (2011:181) puts it. This study has shown that the Court's approach to asylum detention, which was already quite deferential to State sovereignty before 2015 (Tsourdi, 2016:19), was particularly strengthened in the aftermath of the refugee crisis. We have argued this based on the following reasons:

a) In the post-2015 judgments analysed, the Court still considered that States may detain asylum-seekers merely to prevent their "unauthorised" entry, following its line of case law established in *Saadi v. UK*. While it is for the Court to interpret the terms enshrined in the Convention (in this case, the term "unauthorised" in the first limb of Article 5.1(f)), what we find most objectionable from this approach is the fact that the Court has not attempted to justify why it reaches a conclusion that diverges from the views of UNHCR and the Human Rights Committee, both of which deny that asylum-seekers may be detained merely on account of their illegal entry. On the other hand, in *O.M. v. Hungary*, it seems that the Court considered that the "right to remain in the territory" under EU law is akin to an "explicit authorisation", and that therefore asylum-seekers in the territory of EU Member States can generally not be detained for "preventing their unauthorised entry" (with some exceptions such as border procedures).
b) While in the 2011 cases *S.D. v. Greece* and *R.U. v. Greece,* it appeared that the Court was moving away from the *Chahal* jurisprudence towards prohibiting States from detaining asylum-see-

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kers "in view of his expulsion", the 2016 case *Nabil and Others v. Hungary* clearly showed that the Court only rejects this kind of detention when it is found to be in violation of national law. Following this judgment, Article 5.1(f) itself allows, as a general principle, for detention of asylum-seekers "in view of their expulsion". We have argued that this is at odds with the Court's own case law, especially in the light of *non-refoulement*, and that the general principle should be reversed: asylum-seekers may not be detained for expulsion purposes, with perhaps some exceptions (in particular, preventing asylum claims whose only aim is to frustrate expulsion). The assertion made by the Court in *Nabil* did not go unnoticed, since the CJEU referred to it in *J.N. v. Staatssecretaris* when interpreting Article 6 of the EU Charter on Fundamental Rights.[357]

c) The Court has continued the practice of not requiring States to apply a full proportionality test when detaining migrants and asylum-seekers, thus offering a lower level of protection than the Refugee Convention and the ICCPR (as interpreted by the HRC). We have seen that, under general human rights law, the proportionality test is composed of four elements: proper purpose, rational connection, necessary means and balancing or proportionality *stricto sensu.* However, the Court does not require States to carry out a necessity test and (often) a balancing act, two of the essential elements of the proportionality principle. Instead, it has constructed an *arbitrariness test* which very much relies on the duration of detention in order to determine whether or not a detention is arbitrary. This test also relies on the element of "good faith of the authorities", but in one post-2015 judgment (*E.A. v. Greece*) the Court merely stated that "the good faith of the authorities cannot be put into question" without actually considering their behaviour in the particu-lar case. Thus, the arbitrariness test has some weaknesses. Be-cause of this, Cornelisse (2010:296) called the test employed by the ECtHR "proportionality lite"; and O'Nions (2008:173) no-ted that the separation of arbitrariness form necessity leads to a false dichotomy.

d) The more liberty-protective steps taken by the Court in the 2011 judgment *M.S.S. v. Belgium* were diluted in the post-

[357] Judgment of 15 February 2016, *J.N. v. Staatssecretaris van Veiligheid en Justitie,* C-601/15 PPU, EU:C:2016:84*,* §79.

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2015 judgments, especially in *Thimothawes v. Belgium*. While in *M.S.S.* the Court acknowledged that all asylum-seekers are vulnerable individuals and that, as such, a vulnerability test has to be carried out by States (which filled the gap in the Court's case law regarding the proportionality test); after the refugee crisis the Court emptied this general vulnerability of asylum-seekers of meaning, since it only required States to carry out the vulnerability test when the asylum-seeker was part of a more specific vulnerable group (minors, people with health issues and LGBTIs). Moreover, at times the Court asked these groups to *prove* that they were vulnerable in order for the vulnerability test to be activated.

e) Although the jurisprudence of the ECtHR regarding detention conditions (Article 3) was generally less problematic, a more State-protective change in the case law of the Court has been found with regard to the element of "States' difficulties in managing a migration crisis". While in *M.S.S.* and *Hirsi Jamaa* the Court refused to take into account this element when assessing whether or not there had been a breach of Article 3, after 2015 the Court has raised the threshold required for a violation of this provision to take place when the State is faced with a migration crisis. This can be seen in *Khlaifia and Others v. Italy, J.R. and Others v. Greece* and *Kaak and Others v. Greece.* Moreover, in *J.R.*, the Court found that Greece had complied with Article 3 without dis-cussing the evidence presented to it regarding the deplorable conditions in the Greek hotspots. The Court also blurred the significance of the vulnerability of asylum-seekers under Arti-cle 3 in the Chamber and Grand Chamber judgments *Ilias and Ahmed v. Hungary*, weakening States' responsibility to adapt detention conditions to their needs.

Finally, in the case law of the Court under Article 5(2) (right to information of the reasons for the detention) we have found a further instance of deference towards State sovereignty, which did not however come up in the post-refugee crisis judgments: the Court requires less detailed reasons to be given to migrants and asylum-seekers than to persons detained under criminal law (Art. 5.1(c)). This distinction is not made by the HRC when interpreting the equivalent provision in the ICCPR (Article 9.2).

In the light of these findings, we may now answer the two questions posed at the beginning of this study:

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1. *Does the ECtHR approach the cases of asylum detention with self-restraint, in line with other migration-related cases?*

In many instances, it does. The deference to States' sovereignty is especially visible in the Court´s interpretation of Article 5.1(f), which gives more leeway to States to detain migrants and asylum-seekers than in other detention cases by not requiring States to carry out a full proportionality test, and offers a lower protection to the right to liberty of asylum-seekers than the Refugee Convention and the ICCPR.

It seems appropriate here to quote a paragraph of the dissenting opinion of Judge Sajó in *Abdi Mahamud v. Malta*, since he highlights two problematic aspects of the Court's case law under Article 5.1(f), namely the legal uncertainty regarding the "duration of detention" and the easiness with which the Court accepts that illegal entry alone can be a ground for detention of asylum-seekers:

> "I have serious reservations concerning the very approach adopted by the Court's case-law *vis-à-vis* the detention of asylum-seekers. In *Saadi v. the United Kingdom*, seven days' detention in very specific circumstances and in view of the need to cooperate with the authorities was considered as non-arbitrary detention for the purposes of preventing entry. *That period has been greatly extended* in the last decade. I consider this development an extremely problematic extension of the idea of prevention of entry which is, after all, an event limited in time. When it comes to asylum-seekers, once the asylum-seeker has established a prima facie case, *only weighty reasons* can be accepted as grounds for detention."[358]

Thus, asylum-seekers (and especially, their lawyers) may have more difficulties in convincing the Court that there has been a violation of Article 5.1 than persons detained under grounds other than migration control. Yet this does not mean that there are no venues for doing so. For example, as argued in this study, the Court's own case law on States' obligation to carry out expulsions with "due diligence" may be used to challenge the lawfulness of detention of asylum-seekers, who cannot be expelled without an assessment of the risk of *non-refolement*. Similarly, the different elements of the "arbitrariness test" can be strategically used in favour of the asylum-seeker; and referring to provisions under EU and domestic law can also be a manner of prompting the Court to find a violation of Article 5.1. On a different note, given the variations in the case law regarding the element of the duration of

[358] Partly Dissenting Opinion of Judge Sajó, *Abdi Mahamud v. Malta,* no. 56796/13, ECtHR 3 May 2016.

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detention, the judgments that favour the particular applicant can be selectively quoted to support his case. Finally, persuading the Court to return to its interpretation of the vulnerability concept set out in *M.S.S.* might be a more ambitious strategy, but not implausible. Referring to the Court's assertion (made in the context of Articles 5.1 and 3) that asylum-seekers are not criminals could be of help in this regard. [359]

Moreover, the case law of the Court under Articles 5.2, 5.4 and 3 ECHR is (for the most part) more rights-protective, and it could be that an application that fails in its objective to have the Court find a violation of Article 5.1, may succeed in triggering a violation finding under these other provisions. As an example, in the much criticised case *Saadi v. UK*, Mr. Saadi was not found to be unlawfully detained, but the Court did consider that the authorities' 76-hour delay in informing him of the grounds for his detention had violated Article 5.2 ECHR.

2. *Have political tensions after the 2015 refugee crisis in any way affected the Court´s judicial approach towards the detention of asylum-seekers?*

We do not find a radical change in the Court´s case law, since the Court was already deferential to States' sovereignty in asylum detention cases before the refugee crisis. Nonetheless, this deferential approach has in some cases been made clearer (e.g. in *Nabil*) and in other cases even further expanded (e.g. in *Thimothawes, Khlaifia*, *J.R. and Others*, *Kaak and Others*). Therefore, we can tentatively conclude that European States' renewed preoccupation with strengthening their borders after 2015 led the Court to widen the scope of the margin of appreciation and to be more lenient towards the practice of asylum detention when interpreting Article 5(1)(f) and, to a lesser extent, Article 3 ECHR.

This trend goes in line with the reaction that the Court had regarding the interpretation of the Convention after the reform process of the European human rights system initiated in 2010 in Interlaken (Switzerland). Throughout this process, which includes the adoption of the Brighton Declaration in 2012,[360] the Brussels Declaration in 2015[361] and

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[359] *Ilias and Ahmed v. Hungary*, §64; *Abdi Mahamud v. Malta,* §87; *Mahamed Jama v. Malta,* §95.

[360] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration. Council of Europe, 19 and 20 April 2012.

[361] High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration. Council of Europe, 27 March 2015.

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the Copenhagen Declaration in 2018,[362] the Council of Europe Member States sent a clear political signal to the ECtHR stating their wish to rationalise the Court's role in the protection of human rights and to enhance the position of the States (Madsen, 2018; Lambrecht, 2018). The legal outputs of this process —and in particular of the Brighton Declaration— have been the adoption of Protocol 15[363] and Protocol 16[364] to the ECHR which, among others, reinforce the subsidiarity principle and introduce further obstacles in the filing of applications to the Court.

As Madsen (2018:221) shows in his study, which compares the case law of the Court before and after the Brighton Declaration, the ECtHR responded to this political message by providing more subsidiarity in cases of Article 8 ECHR (right to privacy), Article 35 (access to court) and Article 3. The same can be said generally for migration-related cases, where the Court has often retracted from earlier more human rights protective pronouncements in response to the criticism by States (Dembour, 2015:508). As we have seen, in the area of asylum detention, the Court also retracted from or changed the course of more liberty-protective cases like *M.S.S. v. Belgium and Greece, R.U. v. Greece* and *S.D. v. Greece*. Therefore, the Court's tendency to be more deferential to States' sovereignty is not an exclusive feature of its case law on asylum detention.

Admittedly, the ECtHR emphasises the domestic protection of rights, as shown by the many cases in which the Court refers to domestic law in order to assess the compatibility of the asylum detention with Article 5 ECHR. However, it should not be forgotten that *compliance with international law* is also a criteria set by the Court to determine the lawfulness of the detention. Yet, by failing to refer to the standards set by the Refugee Convention and the ICCPR, the Court seems to take this requirement less seriously than the national law criteria. If the Court is to live up to its function as a setter of human rights standards in the European continent, the right to liberty of asylum-seekers should not be made dependent on the standards set by national law. As pointed out by Costello (2016:292), without clear ECtHR review of

[362] High Level Conference meeting in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, Copenhagen Declaration. Council of Europe, 12 and 13 April 2018.

[363] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013 (CETS, No. 213).

[364] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 November 2013 (CETS, No. 214).

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the purposes and necessity of detention, domestic law may offer little protection in practice.

This study has shown that the Court has developed a rich jurisprudence on asylum detention which is of great value when national courts do not properly effect their function of defending the right to liberty and related rights of detained asylum-seekers. Especially in cases concerning liberty-related rights, the Court's jurisprudence is consistent, well-reasoned and mostly offers strong protection to detained asylum-seekers.

However, we have also intended to make a constructive criticism by underlying the elements of the Court's case law where there is still room for improvement. In our view, providing the highest possible standard of protection to detained asylum-seekers should be a priority for the Court when dealing with these cases. As noted by Guiraudon (2000:1092) and Costello (2015:159), the protection of aliens is a central function of international human rights, since they do not claim protection as members of a family, clan or nation but as members of humanity, and are thus more likely to see their rights violated by States. Detention is not a solution to the movements of refugees and asylum-seekers (Goodwin-Gill, 2003:234), and the Court should make this clearer.

We would like to conclude by quoting the vibrant words of the dissenting opinion of several judges in the *Saadi* case, which very much sum up the main idea that we have tried to convey in this study:

> "Are we now also to accept that Article 5 ECHR, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so."[365]

[365] *Saadi v. UK,* Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann, and Hirvelä, §35.

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The detention of migrants who have not committed a crime is one of the most disturbing contemporary practices from the point of view of human rights (Costello 2015). Administrative detention of asylum-seekers poses an additional problem: it causes an independent deterioration of the mental health of people who are (potentially) already highly traumatised (Filges *et al.* 2015). The intention of this book is to systematise in a comprehensive manner the obligations that States owe to detained asylum-seekers under the European Convention on Human Rights (ECHR). This objective is pursued through an analysis of the judgments of the European Court of Human Rights (ECtHR) regarding Article 5 (right to liberty and related rights, such as the right to a judicial review of the detention) and Article 3 ECHR (conditions of detention) in cases in which the applicant was an asylum-seeker. This case law review is placed within the broader context of the human rights guarantees offered by the Refugee Convention and the International Covenant on Civil and Political Rights (ICCPR). The book also seeks to identify whether the tighter migration control policies pushed for by European Union Member States after 2015 impacted the Court's case law on asylum detention. With this twofold approach, it hopes to serve as a guide for strategic litigation before national courts and the ECtHR, as well as to contribute to the academic debate on how the European Court could raise its standards of protection in migration-related cases.

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