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Immigration Detention in Europe as an Expression of Crimmigration: interactions, tensions and complementarity between EU law and the ECHR

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Contents

INTRODUCTION

Any form of deprivation of liberty constitutes a severe interference in a fundamental human right, that of the right to liberty. The detention of third country nationals in EU Member States has developed into a standard tool of migration management. Traditionally perceived as a necessary trait of an effective returns policy, nowadays, its reach has been extended to include the detention of persons seeking international protection.

In this thesis, I explore the legal framework of immigration detention as set out by the European Union (EU) and the way the European Convention on Human Rights (ECHR) – as the leading regional human rights instrument – contributes to upholding standards and safeguards when it comes to administrative detention of foreigners. Immigration detention is considered to be an expression of the phenomenon of crimmigration. What I will try to demonstrate is the detrimental effect immigration detention – as one of many expressions of the crimmigration phenomenon – has on the rule of law and the upholding of democracy within the European legal order. Moreover, through a comparison and analysis of the interactions between EU law and the leading regional human rights law instrument, the ECHR, it becomes evident that firstly, this relationship has many shortcomings and secondly, repeated concessions in human rights protection can have a detrimental impact for society and the upholding of democratic values.

In the first Chapter, I set out the theoretical background which underpins this study of immigration detention. The work of crimmigration scholars demonstrate the punitive character of administrative detention, the purposes underlying it and the way it developed as a practice and legally within Europe. In Chapter 2 I set out the relevant EU law provisions and the relevant case-law of the CJEU. In the light of the recent rehaul of the entire migration and asylum legal system of the EU, I dedicate a sub-Chapter to the most important legal changes, which are now imminent to become practice. Similarly, Chapter 3 is dedicated to the legal regime of the ECHR, as developed and interpreted by the ECtHR. The last Chapter explores how the two regimes interact with each other, sometimes to complement each other and others to contradict each other. Undoubtedly, the issue of migration management, and therefore of immigration detention, is not easily analysed from a purely legal perspective, due to the heavy, politically charged polemic around it. However, a more sociopolitical analysis would extend well beyond the reach of this thesis.

CHAPTER 1: IMMIGRATION DETENTION AS AN EXPRESSION OF CRIMMIGRATION

A) What is Crimmigration and how does Immigration Detention relate to it?

Immigration detention[1] refers to an administratively-imposed measure against a non-citizen which consists in depriving them from their liberty.[2] Immigration detention, coupled with deportation of undesirable foreigners, emerges as a form of state control on the movement of non-citizens within its territory. In a similar manner to border control, immigration detention operates as an expression of state sovereignty in the sense that the state enjoys certain 'super' powers against immigrants and their fundamental rights, as those are enshrined in the body of human rights instruments which emerged in the middle of the previous century. This customary prerogative of international law has wide legitimisation and recognition, for example, by the European Court of Human Rights (ECtHR), which has recognised it in its relevant case-law on migration and asylum cases.[3] The content of that sovereign right is about controlling the entry and residence of aliens or non-citizens into the territories of states: *detaining them is an adjunct of that right*.[4]

The reason why immigration detention raises theoretical and analytical struggles is because of its special character in relation to every other form of state-imposed, legally defined, form of deprivation of liberty.[5] Traditionally and typically, deprivation of personal liberty is the justice system's enforcement mechanism of criminal law – either pre-emptively or punitively.[6] Immigration detention claims to be a measure imposed for reasons of administrative convenience and in fact, it does not differ in form from any other decision issued by the administration, in the sense that it is not the result of a judicial process but it is a decision that the executive branch of the government issues unilaterally against the foreigner.[7] Deprivation of liberty is undeniably a severe interference to a person's physical integrity and this is

[1] For the purposes of this thesis, 'immigration detention' and 'administrative detention' are used interchangeably and are defined in the same manner.
[2] Izabella Majcher and Clément de Senarclens, 'Discipline and Punish ? Analysis of the Purposes of Immigration Detention in Europe' (2014) 11 AmeriQuests 2, 0
[3] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Human rights files, No. 9 (Council of Europe Publishing 2010), 136
[4] Mole and Meredith, *Asylum and the European Convention on Human Rights* (no. 3) 136
[5] Majcher and de Senarclens, 'Discipline and Punish ? Analysis of the Purposes of Immigration Detention in Europe,' (no. 2) 0
[6] Lorenzo Bernardini, 'Administrative Immigration Detention As a Punitive Measure : Is it Time for a New Standpoint?' in Di Stasi and others (eds), *Migrations, Rule of Law and European Values* (Editoriale Scientifica 2023) 233.
[7] Majcher and de Senarclens, 'Discipline and Punish ? Analysis of the Purposes of Immigration Detention in Europe' (no. 2) 0

something which reflects in the rich procedural guarantees which accompany criminal trials. This raises various theoretical challenges around immigration detention and more specifically in relation to its purpose, its compatibility with human rights standards and its relationship with criminal law.

Immigration detention has been described as one of many expressions of the increasing intertwining of criminal law and immigration law. Juliet Stumpf, in the aftermath of the 2001 terrorist attacks in the United States and the debates it sparked, published a seminal article on the theoretical underpinnings of the phenomenon, which she coined as 'crimmigration'.[8] Theories of crimmigration have developed and are used to explain and analyse the complex relationship between immigration law and policy and criminal law. Crimmigration scholars have described the interactions, shortcoming and contradictions of this complex relationship.

Crimmigration has various expressions and is a multi-faceted phenomenon. On the one hand, crimmigration describes how immigration itself, that means the action of human mobility, has become increasingly criminalized, especially in Western liberal democracies.[9] A direct derivative of the customary prerogative of states controlling their borders, mentioned above, states use coercive powers over aliens who do not abide by national immigration laws.[10] For the purposes of this thesis, the focus is on the criminalisation trend at the EU level and among EU member states, even though the phenomenon of crimmigration has been studied and is expanding rapidly globally and especially in North America and Australia.[11] This expression of the 'criminalisation of immigration' describes how infractions of immigration law provisions are increasingly being dealt with via the machinery of the criminal law. It also refers to the practice of states who introduce criminal offences in their domestic legal orders, which specifically target foreign individuals and infractions of entry and residence requirements.[12] In most EU countries today, entering the territory without an entry visa or staying irregularly in the territory constitutes a criminal offence. In certain cases, these are punished via imprisonment or the imposition of fines.[13]

[8] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 2 American University Law Review 56
[9] Izabella Majcher, '"Crimmigration" in the European Union through the Lens of Immigration Detention' (2013) Global Detention Project Working Paper No. 6, 3
[10] Bernardini, 'Administrative Immigration Detention As a Punitive Measure: Is it Time for a New Standpoint?' (no. 6) 232
[11] Majcher, '"Crimmigration" in the European Union through the Lens of Immigration Detention' (no. 9) 3
[12] Bernardini, 'Administrative Immigration Detention As a Punitive Measure: Is it Time for a New Standpoint?' (no. 6) 233, see fn. 9
[13] Majcher, '"Crimmigration" in the European Union through the Lens of Immigration Detention' (no. 9), 3

What is more though is that a third country national found breaching immigration laws, is subjected to measures which increasingly resemble the enforcement of criminal law.[14] For example, an anticipated irregularly staying migrant, according to EU law, should be deported. Administrative detention pending deportation is standard practice in most EU member states.

In addition, a connecting link between the two forms of crimmigration mentioned is that third country nationals who have been convicted of any criminal offences and who serve prison sentences, could be subsequently stripped of any rights to remain and could be subjected to deportation. As a consequence, a criminally convicted third country national released from prison will continue being deprived of their liberty under the guise of immigration detention and with the explicit purpose of removal.[15]

What emerges from this brief description of the mechanics of crimmigration policies is how migration status has become a characteristic *qualifying* the enjoyment of fundamental human rights. The right to liberty of a third country national with irregular or unsecured migration status seems to be more nuanced than that of a citizen and that that of a simple 'criminal.' What is at stake for the persons themselves is not only the hope and possibility of securing a legal residency, but also the protection of some of their fundamental human rights. Scholars have described this vicious cycle in which third country nationals find themselves in as the very process of exclusion politics.[16]

The other central contradiction of immigration detention, which relates to the 'double standards' of the different treatment with relation to a criminal law detainee is that since it pretends to be a measure of administrative nature, its subject does not enjoy the rich and elaborate procedural guarantees of criminal law subjects.[17] The right to liberty is considered to be among the most fundamental human rights, protected by every human rights legal instrument. Any deprivation of liberty has devastating effects on the life of the detained, removing them from society, depriving them of intimate aspects of their private and family life, imposing controls on their movement and day-to-day life thus leading to an almost total loss of control of their lives and their autonomy.[18] This is why, the criticisms to the nuances

[14] Majcher, '"Crimmigration" in the European Union through the Lens of Immigration Detention' (no. 9) 3
[15] Majcher, '"Crimmigration" in the European Union through the Lens of Immigration Detention' (no. 9) 14
[16] Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2019) 28 Soc & Legal Stud 81, 90
[17] Bernardini, 'Administrative Immigration Detention As a Punitive Measure: Is it Time for a New Standpoint?' (no. 6) 235; Majcher and de Senarclens, 'Discipline and Punish ? Analysis of the Purposes of Immigration Detention in Europe' (no. 2) 0-1
[18] Amanda Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (1st edition, Hart Publishing 2022) 40

and qualifications to the enjoyment of liberty for these categories of persons, have become increasingly loud.

As an exercise of formulating immigration detention as a measure of crimmigration, the next section will attempt to unpack its legal and philosophical underpinnings. Using theories of the purpose of sentencing and penal law, academics have connected the use of immigration detention with more traditional criminal law objectives. This matching constitutes one of the strongest aspects of the relationship between immigration and criminal law.

B) The Purposes of Immigration Detention

That immigration detention aligns with the punitive purposes of criminal sanctions, has already been the subject of rich academic analysis.[19] This is so because scholars discern objectives aligned with punitiveness when analysing the way that administrative detention is currently being employed by European states.[20] Despite administrative detention presenting itself as a non-punitive measure of administrative convenience, the scale and way it is being implemented reveals purposes resembling the purposes sought by criminal law sentencing.

Deprivation of liberty remains as the ultimate expression of the punitive character of criminal law enforcement.[21] Controlling a person's body and existence by confining them constitutes, objectively, one of the harshest, yet still legitimised, treatments by the state towards the individual. Criminal law theorists, who might seem impervious to the doings of crimmigration policies or who refrain from examining the interactions between immigration and criminal law, would traditionally consider deprivation of liberty as something that cannot be 'decriminalised.'[22] Indicatively, as Nikolaos Androulakis wrote in 1998 (freely-translated by myself): "*only one sentence has remained which without a doubt, incorporates the distinct elements of the harsh criminal treatment: deprivation of liberty,* ***imprisonment,*** *as the measure par excellence of painful punishment which sets the human under occupation in his entirety. This is today the punitive point of reference, around which the phenomenon of sentencing*

[19] Bernardini, 'Administrative Immigration Detention As a Punitive Measure: Is it Time for a New Standpoint?' (no. 6) 237, see fn. 31

[20] See for example, among many authorities cited herein: Izabella Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' in Neža Kogovšek Šalamon (ed), *Causes and Consequences of Migrant Criminalization* (Springer 2020); Majcher and de Senarclens, 'Discipline and Punish ? Analysis of the Purposes of Immigration Detention in Europe' (no. 2); Bernardini, 'Administrative Immigration Detention As a Punitive Measure: Is it Time for a New Standpoint?' (no. 6); Bosworth, ''Immigration Detention, Punishment and the Transformation of Justice' (no. 16)

[21] Nikolaos Androulakis, 'Το πρωτείο τις ποινής' (ελληνική μετάφραση του Ιπποκράτη Μυλωνά)' [The primacy of the sentence] (1998) Υπεράσπιση 1171, 1174

[22] Androulakis, 'Το πρωτείο τις ποινής' (no. 21) 1191

exists. This also explains why the prison sentence cannot under any circumstances be de-criminalised, and be imposed, for example, by an administrative authority."[23]

This is telling of the extent to which administrative detention has been normalised. Certainly, such a view stems from the insistence that immigration detention is not punitive but is merely an administrative measure. However, the way in which it is enforced, as well as factors such as its length, the conditions of detention and the guarantees an administrative detainee enjoys or not, define and alter its character. Furthermore, to a defining extent, it can be said that it is the purpose of detention which determines whether it is, as a measure, punitive in nature.[24]

Philosophical theorisations of punishment explore what functions and purposes a punishment serves within society. The defining difference between a punitive sanction and a non-punitive one is that the former is imposed in order to inflict pain, and in this way has an expressive function[25] The expressive function of punishment can be discerned because of its 'stigmatising' effect on the punished person.[26] This is what makes it distinct to administrative or disciplinary sanctions, which are usually not imposed by a judicial power or even if a judge orders them, their function is not to express discontent with the sanctioned person nor stigmatise them.[27]

The most elaborated theories underpinning the purpose of punishment are: retribution, deterrence, prevention (or incapacitation) and rehabilitation. A detailed analysis of these theories and how immigration detention could relate to them extends beyond the reach of this thesis. To remain as brief and relevant as possible, I refer to an analysis by Izabella Majcher, of the purposes behind detention pending deportation on the basis of EU law, in which she locates at least three of the abovementioned rationales in the way immigration detention is employed in the EU. Firstly, she discerns a deterrent purpose. Deterrence understands punishment's expressive function to be the prevention of undesired behaviour in society. The protagonist is the *threat* of the punishment, which is understood to discourage potential offenders from offending and its *audience* is non-citizens contemplating entering or staying

[23] Androulakis, 'Το πρωτείο τις ποινής' (no. 21) 1191: «*[…] μια και μόνο ποινή έχει απομείνει που χωρίς καμιά αμφιβολία ενσωματώνει τα διακριτικά στοιχεία της ποινικής σκληρής μεταχείρισης: η στέρηση της ελευθερίας, η* ***φυλάκιση*** *ως το κατ' εξοχήν μέσο οδυνηρής τιμώρησης που θέτει υπό κατοχή τον άνθρωπο στην ολότητα του. Αυτή είναι σήμερα το τιμωρητικό σημείο αναφοράς, γύρω από αυτήν στρέφεται πια καθ' ολοκληρία το φαινόμενο της ποινής. Έτσι εξηγείται και το ότι η ποινή της φυλάκισης δεν επιτρέπεται σε καμία περίπτωση να αποποινικοποιηθεί, επιβαλλόμενη λ.χ. από μια διοικητική αρχή.»*

[24] Izabella Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' in Neža Kogovšek Šalamon (ed), *Causes and Consequences of Migrant Criminalization* (Springer 2020), 113

[25] Charis Papacharalambous, *Κυπριακό Ποινικό Δίκαιο. Γενικό Μέρος* [*Cypriot Criminal Law. General Part]* (2η έκδοση, Νομική Βιβλιοθήκη 2021) 20

[26] Papacharalambous, *Κυπριακό Ποινικό Δίκαιο. Γενικό Μέρος* (no. 25) 20

[27] Papacharalambous, *Κυπριακό Ποινικό Δίκαιο. Γενικό Μέρος* (no. 25) 21

irregularly in the country's territory.[28] Majcher argues that the threat of detention pending deportation hides the objective of discouraging non-citizens from remaining irregularly or even entering in order to seek asylum. By exploring the reality on the ground about how administrative detention in the EU is used, Majcher insists that vague and undefined grounds of detention, such as the risk of absconding, constitutes a *prime example of a mandatory and punitive measure.*[29] Highlighting once more the strong connection between the substantive nature of a measure of detention and its characterisation, she considers that detention because of risk of absconding can only claim to remain an administrative measure – and thus non-punitive – when it is imposed for the shortest time possible, when it respects the principles of necessity and proportionality and when its stated reason, such as the prevention of the risk of absconding is real. Interestingly, even though a deterrent function of administrative detention is widely accepted and attributed to the institutions and policies behind it, there does not seem to be 'empirical proof of the correlation between the prospect of being detained as deterring irregular migration globally.'[30]

The second theory of punishment which Majcher observes to be reflected in the Return Directive of the EU, is retribution or otherwise, the desert-based rationale.[31] Retribution is considered an absolute theory of punishment and even though it differs conceptually from retaliation (*jus talionis,* or 'an eye for an eye') it still contains elements of revenge, albeit in a more nuanced way.[32] It addresses itself to the offender themselves in the sense that punishment sanctions them for their wrongdoings and also gives the offender the chance to reflect and repent.[33] Majcher connects this underlying rationale of punishment with the second ground of detention of the Return Directive: the non-cooperation of the individual with the process of return, a largely undefined concept in the EU Directive. Since risk of absconding is mentioned separately and explicitly, it can be assumed that acts hampering the return process would involve anything the returnee engages in which can be interpreted by the administrative authorities to be constituting non-cooperation. It is difficult to consummate deprivation of

[28] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 113-115
[29] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 115
[30] Charles Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' in Guia and others (eds), *Immigration Detention, Risk and Human Rights* (Springer International Publishing 2016) 114
[31] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24), 115
[32] Papacharalambous, *Κυπριακό Ποινικό Δίκαιο. Γενικό Μέρος* (no. 25) 24
[33] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 115

liberty because of such non-cooperation or prolongation of detention periods because of non-cooperation, with administrative convenience.[34]

Lastly, isolating an offender from society by incapacitating them is considered another consequentialist understanding of the function of punishment.[35] It is based on the premise of prevention[36] and the notion that public order should be protected by the danger presented by such an individual.[37] This concept also sits uneasily with the formally administrative label of immigration detention, since if a migrant presents a threat to society, then it is a reasonable demand of the rule of law that they are subject to criminal law sanctions.[38] It is very difficult to rationalise deprivation of liberty of a person because they represent a threat to society, without granting access to the procedural safeguards of the criminal law.[39] This seems so despite the explicit assertion of the CJEU in *Kadzoev*,[40] that their detention under the Return Directive for reasons of protection of public order, is not allowed.[41] Nevertheless, this type of detention is explicitly allowed for asylum seekers and interestingly, the Recast Return Directive in the New Pact on Asylum (see Part C below) includes this ground of detention for returnees as well.

C) How has Immigration Detention developed within the EU

Immigration detention is not a unique concept to the legal order of the European Union. Nor is it a concept that was born in the 21st century, even though it has significantly risen in prominence in the last thirty or so years.[42]

Evidently, immigration detention is currently being portrayed as a necessary tool in the 'fight' of – predominantly Western – states against 'unauthorised' persons in their territories.[43] With removal prevailing as the best and most desirable reaction to an unauthorised person, it is very

[34] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 115
[35] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 117
[36] Papacharalambous, *Κυπριακό Ποινικό Δίκαιο. Γενικό Μέρος* (no. 25) 28
[37] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 115
[38] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 117
[39] Bernardini, 'Administrative Immigration Detention As a Punitive Measure: Is it Time for a New Standpoint?' (no. 6) 248-249
[40] CJEU, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)* [2009] I-11189
[41] *Kadzoev* (no. 40) para. 70
[42] Daniel Wilsher, *Immigration Detention. Law, History, Politics* (1st edition, Cambridge University Press 2012) ix
[43] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) ix

logical that the increase in numbers of irregular arrivals and irregularly staying persons in Western states' territories, legitimised the rhetoric around the necessity of employing detention in order to ensure removal.

The first restrictions on the free movement of aliens between countries emerged in the late 19th century. At the end of the 19th century and the beginning of the 20th century, states began "sorting" aliens as desirable and non-desirable – initially at ports.[44] Undesirable foreigners would be shortly detained in order to be returned and soon after deportations of criminally convicted aliens or 'rebels' began.[45] Detention was quite inconspicuous in such cases but remained linked to the necessity of protecting national security.

According to Wilsher, the restrictions were a result of changes in the global economic system and the emergence of the nation-state and the way in which it altered and defined societies.[46] As a result of these processes, the notion of the border started establishing itself as *a site of politics and regulation.*[47] The blurred relationship between anti-terrorist/ security measures and immigration measures began at that historical moment and admittedly still accompany modern conceptions of immigration detention, and migration management more broadly.[48] It is on this basis that notions of the law of the enemy or foe and other moral hysterias flourish.[49]

At the EU level, despite the fact that since its initial conception as an economic union, it set forth the notion of free movement of its citizens between the territories of its member states and adopted a ground-breaking policy of *laissez-faire* in migration management for the nationals of the member states, it passionately insists on the perceived security threat posed by third country nationals.[50] Wilsher describes how this double-standard is expressive of both *liberalising and exclusionary tendencies.*[51]

The notion of 'security' vis-à-vis asylum seekers and irregular migrants – and especially when compared to the generous abolition of migration control for 'insiders'[52] – featured high up in the agenda of the states involved in the European supranational project even before 1999[53] when the bloc first acquired competence to legislate on the matter. The introduction of the

[44] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) x
[45] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) xi
[46] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 6-7
[47] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 7
[48] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) xi
[49] See, for example, Charis Papacharalambous, 'The Penal Law of the Foe Revisited' (2015) 17 Eur JL Reform 33
[50] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 173-174
[51] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 174
[52] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 174-179
[53] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 180

Schengen Treaty[54] marked the beginning of the conception of the external border of the EU. Another consolidation of the EU's external borders is the so-called Dublin system, whereby secondary movements of asylum seekers within the Union are expressly prohibited.[55]

In most European countries, immigration detention started spreading in the late 1980s[56] and by 1995, the UNHCR report documenting asylum seeker detention practices in Europe, confirmed such findings.[57] Between 1999-2005, the first phase of the CEAS was created.[58] Interestingly, the Dublin system was in place from 1990 outside the EU legal sphere as a Convention open to be signed only be members of the European Community. With the creation of the CEAS, the EU member states created the Dublin II Regulation and incorporated it into the EU legal system. Then this was subsequently reformed to the Dublin III Regulation and with the proposed reforms underway, the system will be substituted with the so-called Asylum Migration Management Regulation (further discussed in Chapter 2).

The Return Directive was the first legal instrument at the EU level allowing administrative detention.[59] With regards to asylum seeker detention, the first versions of the Reception Conditions Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers and the Asylum Procedures Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, did not foresee it. Detention of asylum seekers appears codified for the first time in the second phase of the CEAS, which was being discussed between 2006-2013.[60] The recast Directives of the second phase of the CEAS are the ones still in place at the time of writing this thesis. However, on 10 April 2024, the European Parliament approved the New Pact on Migration and Asylum, which marks the third recast of the system.

[54] The Schengen acquis (Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders) (2000) Official Journal L 239, P. 0013 - 0018

[55] 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) (2013) L 180/31

[56] Jane Hughes and Fabrice Liebaut, *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (1st edition, Martinus Nijhoff Publishers 1998) 1

[57] Hughes and Liebaut, *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (no. 56) 4, see fn. 1

[58] European Union Agency for Asylum, 'Evolution of the Common European Asylum System (CEAS)' (Executive Summary Asylum Report 2021) <https://euaa.europa.eu/executive-summary-asylum-report-2021/evolution-common-european-asylum-system-ceas> accessed 22 April 2024

[59] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 185

[60] European Union Agency for Asylum, 'Evolution of the Common European Asylum System (CEAS)' (no. 58)

The European Convention of Human Rights, first drafted in 1949, already foresaw the exception for aliens to the right to liberty (Article 5(1)(f)). At Chapter 3, the way this exception has been interpreted and applied will be discussed. This in itself is telling of how nation states perceived border control and potential threats to their sovereignty in the middle of the previous century. That the simultaneous evolution of a rich body of international humanitarian, refugee and human rights law evolved at the same time, which attempted to guarantee people fleeing international protection, but also all human beings, the guarantee of their minimum fundamental rights, is coupled with concerns about security, terrorism and increased state control, is a huge topic that goes beyond the reach of this thesis. It is however, important to have it in mind when reflecting on how the law evolves within dynamic sociopolitical settings.

CHAPTER 2 : EU LAW ON IMMIGRATION DETENTION

Immigration detention involves two broad categories of persons on the move: third-country nationals without a legal permission to be in an EU member state (irregularly staying migrants) and third-country nationals who seek international protection in the EU member state (asylum seekers).[61] Under EU law, irregularly staying migrants are detained with a view to deportation, whereas asylum seekers are detained for other reasons of stated administrative convenience. There is a third detention regime which emanates from the Dublin III Regulation, which regulates transfers of asylum seekers between member states, however this is not explored in this thesis.

The two above-mentioned categories of 'irregularly staying migrants' and 'asylum seekers' are not always completely distinct from each other. A third-country national may shift from the status of an asylum seeker to that of an irregularly staying migrant, and back, within a given span of time. This shifting from one status to the other is reflected in certain EU law provisions concerning immigration detention[62] and came up in cases under consideration by the CJEU.[63] The connection between the two is highlighted in the 2020 Commission Communication about the New Pact of the EU on Migration and Asylum: "*The Commission's 2018 proposal amending the Return Directive also remains a key priority, to close loopholes and streamline procedures so that asylum and return work as part of a single system*."[64]

Detention is very important in the discussions surrounding the proposed reform of the EU's migration and asylum system. After a period of political stalemate,[65] on 10 April 2024, the European Parliament voted in favour of the legislative amendments proposed with the New

[61] Even though "immigration detention" might not reflect accurately the detention of an asylum seeker, it is used as an umbrella term for both forms of detention mentioned.

[62] Article 8 of Directive 2013/32: "*3. An applicant may be detained only: (d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (9), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision*;"

[63] See e.g. CJEU, C-534/11, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* [2013] ECLI:EU:C:2013:343

[64] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the European Border and Coast Guard Agency (Frontex)' (2020) COM(2020) 609 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609#footnote2> accessed 20 April 2024

[65] Politico, 'Meps agree new eu migration deal' (2021) <https://www.politico.eu/article/eu-migration-deal-roberta-metsola-refugees-migration-asylum-rules/> accessed 20 April 2024

Pact on Migration and Asylum.[66] The reform introduces significant changes to the legal framework applicable to EU asylum and migration policies, essentially to reflect the priorities of EU policy-making, which is the prevention of unauthorised entrants[67] and an effective and fast return procedure.[68] For both of these regimes, detention or *de facto* deprivation of liberty is perceived as a necessary tool for their effectiveness.[69] A short analysis of the most relevant to detention provisions under the proposed reform will take place in section 2.2. of this Chapter.

A) The legal provisions in force at the time of writing

The main EU legal instruments of interest to the present discussion are Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter 'Return Directive') and Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) (hereinafter 'Reception Conditions Directive'). Detention is also permitted under Regulation (EU) No. 604/2013 (or the 'Dublin III Regulation') however, this form of detention is not analysed in this thesis. Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) (hereinafter 'Asylum Procedures Directive') also contains some provisions which are relevant to administrative detention.

A.1. Detention for the purpose of deportation

Article 15 of the Return Directive foresees the possibility of detaining an irregularly staying migrant who is subject to deportation proceedings. Pre-removal detention is the most common form of administrative detention among EU member states and the one which enjoys most legitimisation.[70] Article 15 makes explicit mention to detention being a measure of last resort: "*Unless other sufficient but less coercive measures can be applied effectively in a specific case, [...].*"[71] Not only should, according to the letter of the law, detention be a measure of last resort,

[66] European Union, 'Pact on Migration and Asylum. A common EU system to manage migration' (2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 20 April 2024

[67] Marco Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and *De Facto* Detention' (2022) 2 European Papers 7, 618-619

[68] Izabella Majcher and Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) European Journal of Migration and Law, 104: "*At the launch of the New Pact on Migration and Asylum in September 20201 and the first responses and discussions, return was one of the buzz words, mentioned over 100 times in the Pact, often in the context of the reasoning that a successful asylum policy requires an effective return policy*."

[69] Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and *De Facto* Detention' (no. 67) 620-621

[70] Wilsher, *Immigration Detention. Law, History, Politics* (no. 42) 185

[71] Paragraph 1

it should only be used when the person concerned manifests a risk of absconding[72] or otherwise hampers the return procedure.[73] None of these two clauses are further defined though. The purpose of this form of detention is to "*prepare the return and/or carry out the removal process"*[74] Despite Article 15's wording not pointing to an exhaustive list of grounds of detention, the CJEU in its judgment in *Ali Mahdi*[75] interpreted the provisions restrictively without allowing room for the elaboration of any "*further grounds for detention, beyond those already codified in Article 15 of the Directive."*[76] It is widely accepted that only those two purposes justify detention for removal purposes: the risk of absconding and when the person is hampering the procedure.[77]

Another observation which grants further certainty to the notion of detention being a measure of last resort is Recital 10[78] of the Return Directive which mentions the granting of a voluntary return period to an irregularly staying migrant, which is to be preferred over forced return. Article 7 of the same Directive provides further detail on the mechanism of voluntary return. It is safe to assume then, that on a plain reading of the Directive, voluntary return should be standard procedure.[79] This grants more significance to the principle of necessity which accompanies this form of detention and is an explicit assertion of the principle of proportionality. In fact, Recitals 13 and 16 of the Returns Directive are dedicated to the importance of respecting the principle of proportionality in detention or other coercive measures against irregularly residing migrants. Generally speaking, the principle of proportionality *'runs like a thread though the whole Directive.'*[80]

Article 15 also sets an EU-wide maximum length of detention of eighteen months. Paragraph 5 sets this maximum to six months and paragraph 6 allows a further extension of up to twelve months when it is shown that the removal process is taking longer than expected and

[72] Article 15(1)(a)
[73] Article 15(1)(b)
[74] Paragraph 1
[75] CJEU, Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1320
[76] *Ali Mahdi* (no. 74) para. 61
[77] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (2nd edition, Oxford University Press 2016) 298.
[78] "*Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund."*
[79] Lorenzo Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' in Maria Grazia Coppetta (ed), *Immigration, Personal Liberty and Fundamental Rights* (CEDAM 2023), 61
[80] Majcher and Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (no. 68) 105

specifically *where regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries.*[81] Member States are of course free to set a lower maximum. This eighteen-month time limit has been heavily criticised as being a very low standard of protection for returnees.[82] The issue of the length of detention, and the ways in which Member States find ways to circumvent the – already long – eighteen-month time limit, is of crucial significance for this discussion. This is so because the length of an administrative detention can be indicative of its arbitrariness – as can the issue of conditions of detention.

The CJEU *Kadzoev* case[83] concerned a migrant in Bulgaria who had spent a whole of thirty-four months in administrative detention. The Luxembourg Court had to examine the different periods of detention, some of which pre-dated the entry into force of the Directive, some during which the applicant had filed yet another asylum application and others during which removal had been suspended because of an appeal he had submitted. The case also raised a very pertinent question about the 'reasonable possibility' of removal taking place. In the specific case, the Russian authorities were not cooperating with the Bulgarian authorities. According to the CJEU, the reasonable prospect of removal must indicate that effecting the removal is a realistic possibility within the period foreseen by the Return Directive.[84] In that case, the Bulgarian authorities put forward the aggressiveness of the person to support their position that they should be allowed to detain him on those grounds, however, the CJEU reiterated that once the maximum period had been used up, the detainee had to mandatorily be released.[85] Interestingly, the Advocate General in his Opinion preceding the case,[86] recognised that Member States could still have available in their arsenal, domestic legal provisions for public order or criminal law, and could thus find a way to detain an individual on those grounds and after the exhaustion of the maximum length of detention for deportation purposes.[87] The Court though, did not adopt nor rule anything similar on this matter.

[81] Article 15(6)
[82] See for example: Costello, *The Human Rights of Migrants and Refugees in European Law* (no. 77) 297; Galina Cornelisse, 'Detention of Foreigners' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Immigration and Asylum Law and Policy in Europe series Vol. 24, Brill 2011) 212 and 223
[83] *Kadzoev* (no. 40)
[84] *Kadzoev* (no. 40) para. 65-66
[85] *Kadzoev* (no. 40) paras. 68-72
[86] View of Advocate General Mazák, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECLI:EU:C:2009:691
[87] View of Advocate General Mazák, *Kadzoev* (no. 86) paras. 95-99

Mitsilegas comments on how the permissible length of detention is one of the features of the Return Directive which permits criminalisation of migration and *waters down* the constrains to states' immigration detention powers.[88] On the other hand, the setting out of a maximum period of detention, even one that is considered too long, provides a tool to the Luxembourg Court to set some constraints to crimmigration policies of Member States.[89] The *Kadzoev* judgment shows how the CJEU, even when faced with the issue of 'public security' concerns of a state, did not allow any leeway for extending the eighteen months period or circumventing the permissible grounds of detention under EU law.

In an interesting demonstration of how crimmigration operates within host Members States, the CJEU has a series of three very important judgments concerning the link between imprisoning an irregular migrant for criminal purposes relating to immigration law infractions, and deporting them. *El Dridi*[90] examined the compatibility of national legislation criminalising the failure to comply with the returns process with the Returns Directive. *Achghubabian*[91] dealt with national legislation criminalising irregular stay and imposing imprisonment as a penalty, and whether this is compatible with the Return Directive. Lastly, in *Sagor*[92] the relevant national legislation criminalising irregular stay foresaw the imposition of a fine instead. The CJEU in these cases examined the compatibility of the sanction with the Return Directive. These three judgments of the CJEU, basing their reasoning on the principles of effectiveness and loyal cooperation, set out that even though the Return Directive does not in principle preclude national legislation criminalising irregular stay, such measures must not be imposed in a way which undermines the objectives of the Directive.[93] Therefore, according to the Court, the finding of a person staying irregularly should first and foremost activate the provisions of the Return Directive, rather than any free-standing criminal law legislation which – especially in the case of *Achghubabian* where imprisonment was imposed by the domestic legislation – delays and frustrates return by imprisoning the individual.[94] The Court considered that a prison sentence for the sole fact of an illegal stay cannot be reconciled with the gradual and explicit

[88] Valsamis Mitsilegas, 'Immigration detention, Risk and Human Rights in the Law of the European Union Lessons from the Returns Directive' in Guia and others (eds), *Immigration Detention, Risk and Human Rights* (Springer International Publishing 2016) 28
[89] Mitsilegas, 'Immigration detention, Risk and Human Rights in the Law of the European Union Lessons from the Returns Directive' (no. 88) 29
[90] CJEU, C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi* [2011] CLI:EU:C:2011:268
[91] CJEU, C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] ECLI:EU:C:2011:807
[92] CJEU, C-430/11 *Md Sagor* [2012] ECLI:EU:C:2012:777
[93] Mitsilegas, 'Immigration detention, Risk and Human Rights in the Law of the European Union Lessons from the Returns Directive' (no. 88) 38-39
[94] *Achughbabian* (no. 91) para. 33

steps of effectuating return, as foreseen by the Return Directive.[95] However, the Court distinguished in the case of *Sagor* the imposition of a fine as it considered that such a measure did not adversely impact the effectiveness of the return procedure.[96] In the same case though, in which the national legislation allowing the imposition of a fine as a criminal sanction then foresaw the possibility of this fine being replaced by an expulsion order or the imposition of home detention, the CJEU adopted the same reasoning vis-à-vis the imposition of home detention: such a measure risks to undermine the effectiveness of the return procedure, especially if it is not foreseen that it should come to an immediate end if and when removal is possible.[97]

These decisions of the CJEU clearly manifest that deprivation of liberty of irregularly staying migrants should be limited to the possibilities foreseen by the Return Directive. This is actually, explicitly stated by the CJEU in *Achghubabian* where the Court considers that an irregularly staying person should be first and foremost subject to a return procedure and when it comes to deprivation of liberty, be at most detained for that purpose.[98] Imprisonment as a result of a criminal conviction or other forms of deprivation of liberty for the purposes of punishing an infraction of domestic legislation criminalising irregular stay is not usually compatible with the objective of the Directive, which is about prioritising a speedy removal. Neither can it be easily reconciled with proportionality and fundamental rights.[99]

A.2. Detention of asylum seekers

Detention of persons with asylum seeker status is regulated by the recast Reception Conditions Directive. Article 8 begins by expressly prohibiting the detention of persons for the sole reason of them being seekers of international protection.[100] This prohibition is repeated in the Asylum Procedures Directive whose Article 26 (1) foresees that "*Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions*

[95] *Achughbabian* (no. 91) para. 39
[96] *Achughbabian* (no. 91) para. 34
[97] *Achughbabian* (no. 91) para. 45
[98] *Achughbabian* (no. 91) para. 38: "*Finally, it is undisputed that the national legislation at issue in the main proceedings, in that it provides for a term of imprisonment for any third-country national aged over 18 years who stays in France illegally after the expiry of a period of three months from his entry into French territory, is capable of leading to imprisonment whereas, following the common standards and procedures set out in Articles 6, 8, 15 and 16 of Directive 2008/115, such a third-country national must, as a matter of priority, be made the subject-matter of a return procedure and may, as regards deprivation of liberty, at the very most be ordered to be detained."*
[99] Mitsilegas, 'Immigration detention, Risk and Human Rights in the Law of the European Union Lessons from the Returns Directive' (no. 88) 44
[100] Paragraph 1

of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU."

Paragraph 2 of Article 8 of the Reception Conditions Directive includes an explicit test of necessity and proportionality of a detention measure against an asylum seeker and paragraph 3 is an exhaustive list of the permissible grounds of detention of asylum seekers under EU law. Sub-paragraphs (a) to (c) of this list mostly relate to reasons of administrative convenience (identity verification, when the asylum processing so requires and to determine their right to enter the territory). Sub-paragraph (f) concerns procedures under the Dublin III Regulation. Sub-paragraph (d) covers the specific situation of persons who are presumed to be applying for international protection merely for the purpose of frustrating an already existing removal procedure against them and sub-paragraph (e) refers to the protection of national security or public order.

It is worth mentioning that there is no foreseen time-limit for detaining asylum seekers, in contrast to the eighteen months' time limit of the Return Directive. Paragraph 1 of Article 9 of the Reception Conditions Directive tries to limit States' discretion on lengthy detentions by providing that "*An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable. // Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention."*

The rest of Article 9 goes on to set out certain other guarantees for detained applicants of international protection, which reflect general standards protected by human rights instruments and in particular, the ECHR. Article 9 (2) imposes a duty to communicate the detention and both its factual and legal basis to the asylum seekers in writing and paragraph (4) specifies that this must be done in a language they understand and it must also include information about receiving free legal assistance. During judicial reviews of the lawfulness of the detention, asylum seekers are allowed to have free legal representation,[101] even though some discretion is allowed to Member States with regards to limiting such financial assistance. Paragraph 3 ensures the right to a speedy judicial review of the detention. The Directive permits such a review to take place *ex officio* or at the request of the detainee. If the detention is unlawful, the

[101] Paragraph 6

detainee must be released. There is also an obligation on Member States to review the detention *at reasonable intervals of time*, especially if the detention is being prolonged.[102]

The conditions of detention of asylum seekers is the subject matter of Article 10 of the Reception Conditions Directive.

Interestingly, the starting point regarding the free movement and right to liberty of asylum seekers, should be the provisions of EU law which actually safeguard that, such as Article 7 of the Reception Conditions Directive. Article 7 explicitly provides for the right to free movement within the territory of the host Member State for asylum seekers.[103] Paragraphs 2 and 3 are limitations to this right.[104] The former refers to dictating the residency of an asylum seeker and the latter goes as far as allowing for the confinement of an asylum seeker at a specific place. Both cite vague public order and legal necessity reasons without specifying any further. This right is also set out in the recast Asylum Procedures Directive: Article 9 foresees that asylum seekers are allowed to remain in the territory of a Member State for the purpose of the asylum procedure but sets some limits for certain asylum seekers, basically who are perceived as 'abusive.'[105]

The principle of free movement of asylum seekers as the default starting point is also reflected in UNHCR's relevant Guidelines on detention of asylum seekers.[106] Some commentators view that it is the Refugee Convention[107] which grants the highest level of protection from deprivation of liberty to asylum seekers, however the literature is divided as to whether the protection of *refugees* from criminal sanctions afforded by Article 31 of the Geneva Convention, actually applies to asylum seekers.[108] It could be said that the prohibition of automatic detention of asylum seekers (based on the fact that they are *potential* refugees) is somewhat inspired by Article 31(1) of the Refugee Convention according to which Contracting States to the Convention are not allowed to penalise refugees for entering or staying illegally

[102] Paragraph 5
[103] Paragraph 1
[104] "*2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection. 3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law."*
[105] Costello, *The Human Rights of Migrants and Refugees in European* Law (no. 77) 295
[106] UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) < https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776> accessed 20 April 2024, 13
[107] Convention and Protocol Relating to the Status of Refugees (1951 and 1967) <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees> accessed 20 April 2024
[108] Costello, *The Human Rights of Migrants and Refugees in European* Law (no. 77) 283

on their territory, given that they came directly from somewhere where they faced a threat to their life or freedom and that they present themselves to the authorities without delay, explaining their illegal entry or stay. Despite the fact that the Refugee Convention does not explicitly prohibit detention and it is not clear what kind of protection it offers to asylum seekers,[109] the prohibition of criminalisation of entry remains an important one. To this effect, it is worth mentioning that both the CJEU in *Qurbani*[110] and the ECtHR in *Saadi*[111] have refused to give Article 31 strong and high importance,[112] despite the fact that arguments favouring an interpretation in the light of Article 31 were presented to both courts.

Similarly, it is not clear whether Article 26 of the Refugee Convention which guarantees the freedom of movement and residence to refugees, applies to asylum seekers.[113] Undoubtedly, the Refugee Convention is the authoritative text of international law whereby the most fundamental principles and guarantees for refugees stem from, however, it makes no explicit mention to asylum seekers and European governments gladly contest the applicability of such provisions to asylum seekers.[114] On the other hand though, given that refugee status recognition is an act of declaratory nature, the treatment of asylum seekers by international law was designed based on this premise: that asylum seekers are potential or "*presumptive"* refugees.[115] In the UNHCR Guidelines, an overall assessment of the principles of international law result in a proposal giving precedence to liberty.[116]

The Directive foresees a very specific ground of detention that applies to asylum seekers who are believed to be 'non-authentic' ones. Article 8 (1) (d) of the Directive is about asylum seekers whose applications were lodged *after* they had already been detained with the purpose of return, therefore under provisions emanating from the regime of the Return Directive. The CJEU dealt with this specific situation in *Arslan*[117] (which was decided during the first phase of the CEAS) and confirmed that indeed, the Return Directive cannot apply to asylum seekers.[118] However, the inclusion of paragraph (d) effectively exists so that detention of

[109] See Cathryn Costello and Minos Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly 47, 51-53
[110] CJEU, C-481/13 *Mohammad Ferooz Qurbani* (ECLI:EU:C:2014:2101)
[111] *Saadi v. Italy* App no. 37201/06 (ECtHR, 28 February 2008)
[112] Costello, *The Human Rights of Migrants and Refugees in European* Law (no. 77) 284
[113] Costello, *The Human Rights of Migrants and Refugees in European* Law (no. 77) 283
[114] Costello, *The Human Rights of Migrants and Refugees in European* Law (no. 77) 283
[115] Costello, *The Human Rights of Migrants and Refugees in European* Law (no. 77) 283
[116] See Costello and Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (no. 109) 52
[117] CJEU, C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* [2013] ECLI:EU:C:2013:343
[118] *Arslan* (no. 117) para 49

returnees is not interrupted because of the lodging of an asylum application. According to *Kadzoev*, the periods a person is detained as an asylum seeker do not count towards the eighteen months maximum for purposes of return.[119] Therefore, it shows that effectively, a person under return procedures could end up spending more than the maximum foreseen period. It is also important to bear in mind that authorities in some Member States apply the provision of paragraph (d) quite broadly and generously, therefore a person who had entered the country illegally and had been arrested for illegal entry without having the possibility to be detained, would be automatically subject to deportation proceedings, to detention pending deportation and then to detention subject to the asylum law provisions.[120]

What remains from this comparison and from the interaction of international, regional and national law as well as a complicated and volatile political climate within the EU, is that asylum seekers exist and try to survive within a generally unclear legal framework. On the one hand, EU law grants them the right to move freely and reside within the territory of Member States. On the other hand, the restrictions are quite wide and unclear, permitting an even wider interpretation and application by Member States. As will be seen at the next Chapter, the ECtHR's interpretation has contributed to the conundrum by adding a new layer of complexity regarding the (un)authorised entry of asylum seekers.[121]

Asylum seekers can also be detained under the Dublin III Regulation,[122] which is not analysed in depth in this thesis. It is, however, important to mention that the purpose of the Dublin Regulation is to implement and enhance the 'first country of asylum' principle in the EU. This essentially means that secondary movements of asylum seekers are prohibited within the EU. The implications of the Dublin regime are far-reaching and have been commented on extensively, however, they extend beyond the reach of this thesis.

B) EU Immigration Detention in Theory and Practice

It is worth noting that the normalisation of administrative detention at the EU level is of course, not unique. Not only does it reflect the universal practice of most countries of the global North

[119] *Kadzoev* (no. 40) paras 40-48
[120] Costello, *The Human Rights of Migrants and Refugees in European Law* (no. 77) 301
[121] Costello, *The Human Rights of Migrants and Refugees in European Law* (no. 77) 285
[122] Article 28 of 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 and Article 8(3)(f) of Directive 2013/33/EU

– in line with the phenomenon of crimmigration[123] - it is also explicitly mentioned in Article 5 of the regional guiding human rights instrument: the European Convention on Human Rights.[124]

It is evident from the provisions mentioned above that the EU has imposed many rules allowing and regulating immigration detention, even though Member States enjoy a certain margin of discretion with relation to certain features of it. In the light of the fact that many crucial aspects of the EU provisions do not have a clear definition, it is apparent that Member States can resort to abusive practices. For example, 'risk of absconding' is quite vague and broad. In the absence of specific procedural guarantees to counterbalance such wide discretion, it is not surprising to read critiques of the EU legal instrument, as unable – and perhaps unwilling – to prevent Member States from resorting to the systematic detention of third-country nationals.[125] Even in the case of the Reception Conditions Directive though, where the list of the grounds of detention is exhaustive, the grounds themselves have been criticised as overtly all-encompassing of virtually any situation an applicant may find themselves in.[126] Moreover, the absence of a maximum period of length of detention is problematic in itself.

It is important to take into account the scale in which immigration detention is actually being used across the EU. Admittedly, finding accurate statistics is a recognised problem in this area.[127] For reasons of convenience, I refer to numbers as they appear in a 2020 comparative study carried out by Izabella Majcher.[128]

Even though before the 2015 "crisis" immigration detention had begun to decrease or plateau, the huge influx of asylum seekers during those years led to a steep increase in the numbers of detention.[129] As Majcher demonstrates through the analysis of available statistics among EU Member States, there is a clear tendency of an increased use of detention in relation to the 2015

[123] Luisa Marin and Alessandro Spena, 'Introduction: The Criminalization of Migration and European (Dis)Integration' (2016) 18 European Journal of Migration and Law 147; Izabella Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum Seekers and Restrictions on Their Movement under EU Law' (2021) 40 Refugee Survey Quarterly, 85

[124] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 59-60

[125] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 62

[126] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 62

[127] Costello and Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (no. 109) 48; ECRE, 'Asylum statistics in the EU: a need for numbers' (2015) AIDA Legal Briefing No. 2; Spalding, *The Treatment of Immigrants in the European Court of Human Rigths* (no. 18) 39

[128] Izabella Majcher, Michael Flynn and Mariette Grange, *Immigration Detention in the European Union* (22 European Studies of Population, Springer, 2020)

[129] Majcher, Flynn and Grange, *Immigration Detention in the European Union* (no. 128) 2

"migration crisis."[130] For example, the Czech Republic had an increase of as high as 254% between 2013 and 2017. Interestingly, even when arrivals of asylum seekers though unauthorised channels significantly decreased, the statistics demonstrate that detention numbers remained steady and unchanged.[131]

The European Commission in its 2020 Communication[132] admits the fall in the number of arrivals and asylum applications: "*1.82 million illegal border crossings were recorded at the EU external border at the peak of the refugee crisis in 2015. By 2019 this had decreased to 142 000*." And "*The number of asylum applications peaked at 1.28 million in 2015 and was 698 000 in 2019*." However, it is widely accepted and well documented that there is a fast expansion and increase in immigration detention across Europe. According to a 2011 estimation of the European Commission, up to six hundred thousand (600,000) persons are detained administratively for immigration purposes across Europe.[133]

As Majcher explains and goes on to analyse, this is partly owed to relevant legislative changes which existed before the "crisis," as well as policy choices at the EU level, which were largely informed and influenced by the same "crisis." Certainly, the growing anti-migration sentiment and mainstreaming of extreme right narratives in the public discourse, further enhanced such trends.[134]

It is important to keep in mind that EU States seem impervious to statistics demonstrating the ineffectiveness of detention when it comes to their number one priority, which is returns.[135] Despite clear and empirically-backed data about how detention does not necessarily ensure a higher-paced and more effective return procedure,[136] states refuse to concede widespread and systematic detention of irregularly staying migrants and asylum seekers. This 'obsession' with returns (a similar analogy can be made to prevention of unauthorised entry of asylum seekers and the need to detain them in order to prevent that) and the insistence that detention serves

[130] Majcher, Flynn and Grange, *Immigration Detention in the European Union* (no. 128)
[131] Majcher, Flynn and Grange, *Immigration Detention in the European Union* (no. 128) 2
[132] European Commission, 'Communication from the Commission on a New Pact on Migration and Asylum' COM(2020) 609 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609> accessed on 23 April 2024
[133] Spalding *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 40
[134] Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (no. 16) 83-84
[135] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 110
[136] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 72

their effectiveness exerts all the more punitive characteristics,[137] as was demonstrated in Chapter 1.

The future of immigration detention in the EU continues and enhances this trend. The reforms of the EU legislative texts on asylum and migration currently underway is choosing to be completely ignorant to the above-mentioned findings and is proposing an even wider use of systematic and automatic immigration detention.

C) The future of immigration detention in the EU: the proposed reforms (New Pact on Migration and Asylum and recast of the Return Directive)

Since 2020, the technocratic and political process for amending the entire Pact on Migration and Asylum began. In September 2020 a Communication by the European Commission[138] set out the top priorities of the Union and set out the proposals for the legislative amendments that should take place. In December 2023, the European Parliament and the Council of the EU reached a "*historic"* political agreement on the proposals of the overhaul of the common system designed to achieve harmonised management of migration across the EU.[139] The political negotiations lasted three years. On 10 April 2024, the European Parliament voted in favour of the ten legal instruments constituting the new pact.[140] The content of the agreement, broadly speaking, is about screening third country nationals arrival, stepping up common technological systems to prevent secondary movements, emphasis on more efficient asylum, return and border procedures, responsibility sharing among Member States for asylum processing and lastly, a focus on crisis management and the fight against smuggling and trafficking of human beings.[141]

It is important to extract from the combined effect of the proposed reforms as well as other stated priorities of the EU, how the overhaul and the overall approach to migration, will affect immigration detention.

[137] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: the Punitive Use of Administrative Pre-removal Detention' (no. 24) 110
[138] Communication from the Commission on a New Pact on Migration and Asylum (no. 132)
[139] European Commission, 'Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum' (2023) <https://home-affairs.ec.europa.eu/news/historic-agreement-reached-today-european-parliament-and-council-pact-migration-and-asylum-2023-12-20_en> accessed 22 April 2024
[140] European Parliament, 'MEPs approve the new migration and asylum pact' (2024) <https://www.europarl.europa.eu/news/en/press-room/20240408IPR20290/meps-approve-the-new-migration-and-asylum-pact> accessed 22 April 2024
[141] European Commission, 'Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum' (no. 139)

The Pact, through the introduction of a new Screening Regulation[142] which would interact with the successor of the Asylum Procedures Directive, the proposed Asylum Procedures Regulation,[143] introduce a compulsory screening procedure for everyone arriving irregularly at Europe's borders to take place within the first five to ten days upon a person's arrival.[144] During this screening period, which will involve identification, registration, health, vulnerability and security checks,[145] the third country nationals are considered as *not having entered the EU.* Moreover, it is only after the screening process has been completed and the persons have been allocated to one of two channels of asylum processing, that they can claim or be considered to have asylum seeker status.[146] One of the channels (of applications which are considered unfounded) will kick-start an accelerated examination procedure to take place entirely on the border ('border procedure' or 'accelerated procedure').[147] Upon rejection of the applications, the return procedure will be set in motion.

On the basis of this legal fiction of non-entry,[148] in a move which seems to be relinquishing EU competency to national law, the proposed Screening Regulation would allow Member States to adopt measures to ensure implementation of the non-entry.[149] These measures, of course, include detention. This has been a major point of criticism by human rights organisations and scholars. Mouzourakis commented that *"the EU legislature would turn back the clock on immigration detention by a decade."*[150] Even if it would apply only to one category of 'asylum seekers,' the retreat on the well-established principle that asylum seekers are *not* automatically detained merely because of being asylum seekers, seems to be stripping the EU legislation and the CJEU jurisprudence of the last fifteen years of any essence.[151]

[142] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final ['proposal for a Screening Regulation']

[143] Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final 2016/0224 (COD)

[144] Rescue.org, 'What is the EU Pact on Migration and Asylum?' (2023) < https://www.rescue.org/eu/article/what-eu-pact-migration-and-asylum> accessed 22 April 2024

[145] Articles 1 and 6 of the proposal for a Screening Regulation

[146] Minos Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (2020) 26 European Law Journal 173

[147] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 173-174

[148] Kelly Soderstrom, 'An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation' (2022) ECRE Commentary

[149] Recital 12 of the proposal for a Screening Regulation

[150] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 174

[151] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 174

Articles 41(14) and 41a(2) of the proposed Asylum Procedures Regulation allow Member States, for purposes of convenience and capacity, to carry out the border procedures at other places within their territory. This would effectively mean that asylum seekers could be transferred anywhere while still being considered as never having entered the EU.[152] This clearly creates and welcomes a carving out of a state of exception and entrenches the marginalisation of asylum seekers by stripping them of some of their last surviving rights.

Not only is this short time span not realistic and runs the risk of mistakes taking place but it promotes mass, automatic detention at the borders of countries of first arrival, since asylum seekers will be considered as not having entered yet. This first sifting of asylum claims will result in some people getting channelled to accelerated procedures, which will take place at the borders. Border asylum procedures worry commentators for a variety of reasons which include the fact that appeals against decisions won't have suspensive effect as well as the fact that they will inevitably result in longer periods of detention since persons will be immediately subject to return procedures initially as rejected asylum seekers and then under the Return Directive.[153] The Commission calls this a "seamless procedure at the border" and shifted its focus to these 'single-thread' border procedures after negotiations for reframing the CEAS reached a stalemate in 2016.[154]

The combined effect of the provisions of the proposed Asylum Procedures Regulation and the proposed Crisis Regulation [155] allow for extensions to border procedures, if certain circumstances exist (a so-called "crisis"). During this time, which could span up to nine months, or even indefinitely depending on the behaviour of the person involved and other factors such as returnability, the person will be in detention and not have access to any rights associated with the asylum seeker status. This is considered as a big regress on the autonomous development of EU law standards of detention.[156]

[152] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 174
[153] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 174
[154] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 173
[155] Article 41(11) of the proposed Asylum Procedures Regulation, Article 4(1)(b) of the proposed Crisis Regulation and the interaction between Article 41a(2) of the proposed APR in conjunction with Article 5(1)(a) of the proposed Crisis Regulation
[156] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 175

Apart from the "hollow asylum seeker status"[157] as Mouzourakis names it, another regime is created by the proposed Crisis Regulation,[158] which would repeal the current Temporary Directive. Mouzourakis names this the "privileged asylum seekers status"[159] and is a procedure that would allow Member States to grant a tweaked version of the current subsidiary protection status to persons fleeing from a specific country in conflict. Even though this is the approach that commentators applaud and would like to see more of in the EU proposals of migration management, Mouzourakis considers that the standards are still high, that it allows for political intervention or blocking of defining a situation as "a crisis" and lastly, that it adds unnecessary layers of complexity to an already opaque and difficult situation.[160]

With regards to irregularly residing third country nationals and the Return Directive, it is worth mentioning that the Commission issued its recast proposal from 2018,[161] two years before the proposal on the New Pact on Migration and Asylum, and shortly after the European Agenda on Migration.[162] Despite the Pact's stated objective of rendering asylum and return a part of a single, seamless process, the Return Directive remains the central tool of achieving effective returns. The Return Directive has never been recast since its introduction in 2010 Succumbing to pressures by Member States on lowering the level of protection afforded to returnees and vamping up return efforts at an EU wide scale, as early as 2015, the Commission was adopting action plans and issuing handbooks for Member States.[163] Several such steps culminated in the Proposal for a recast of the Directive, a move that scholars have characterised as unjustified and hasty.[164]

That return is and remains the number one priority of the European bloc is evident and undoubted.[165] The most important reforms proposed to the Return Directive are threefold. Firstly, the proposal suggests that 'risk of absconding' should be defined by providing a list of

[157] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 172
[158] Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM/2020/613 final [proposal for a 'Crisis Regulation']
[159] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 176
[160] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146) 180
[161] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) COM(2018) 634
[162] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 66
[163] Majcher and Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (no. 68) 107
[164] Majcher and Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (no. 68) 107-108
[165] Evident since the 2015 European Agenda on Migration and runs like a thread through the entire New Pact.

non-exhaustive situations which would trigger its application.[166] Even though more legal clarity is usually welcome as it promotes legal certainty, in this case, it seems that the proposed Directive will include a catch-all formula allowing the detention of returnees. Moreover, since the list will not be exhaustive, Member States will be allowed to include further situations within the definition. Even more strikingly though, the proposal suggests that risk of absconding is presumed for certain scenarios,[167] therefore placing the burden of proof on the returnee to reverse that presumption. This approach renders completely obsolete the test of necessity and proportionality of EU law and the case-law of the CJEU.[168] The second proposal will entrench the concept of non-cooperation into the Directive by spelling out four obligations of returnees and by including non-cooperation explicitly as a ground proving a 'risk of absconding.'[169] Evidently this translates into more and easier detention of returnees.[170] In addition to these three changes, the proposal seeks to introduce a new ground permitting detention for the purpose of return, that the third country national presents a risk to 'public policy, public security or national security.'[171] This proposal reflects permitted grounds of detention of asylum seekers and is entirely antithetical to the CJEU judgment in *Kadzoev*. Lastly, apart from the foreseen maximum period of detention permitted by the return regime of the EU, the proposal of the Return Directive seeks to introduce a *minimum* period of three months.[172] Certainly, the goal in all such cases remains to return the detainee as soon as possible and faster than the three months, however the introduction of a *minimum-maximum mandatory period of detention*[173] is a blow to the principles of necessity and proportionality.

It is clear that the EU is moving away from a rights-based approach and adopting a very hard line to administrative detention with broad discretion for Member States and minimum legal remedies available to asylum seekers and returnees. With regards to asylum seeker detention, Gerbaudo describes the proposed reforms as the institutionalisation (so the codification into law) of measures related to the 'hotspot approach' of 2015.[174] These measures relate to border

[166] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 67-68
[167] Articles 6(1)(m), (p), (n) and (o) of the proposal for a recast of the Return Directive
[168] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 67-68
[169] Article 7 of the proposal for a recast of the Return Directive
[170] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 69
[171] Article 18(1) of the proposal for a recast of the Return Directive
[172] Article 18(5) of the proposal for a recast of the Return Directive
[173] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 71
[174] Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and *De Facto* Detention' (no. 67) 616

procedures and *de facto* confinement[175] and were initially justified as 'emergency' measures due to the "crisis" of 2015. However, according to Gerbaudo, the proposed amendments convert such urgent measures of dealing with a crisis into 'standard migration management tools.' Mouzourakis describes how the New Pact leads to a "fragmentation of asylum seeker status"[176] since, in his view, the proposed reforms to the asylum directives result in different categories of asylum seekers. Each category then has access to less or more human rights protection. This is a further example of qualification of human rights protection according to status.

With regards to deportations, it is obvious how the rhetoric of detention being necessary in order to guarantee the 'effectiveness' of returns, [177] becomes entrenched in law. The proposed reforms to the Returns Directive as well as the seamless procedure in asylum and deportation demonstrates how the obsession with returns renders detention a *sine qua non* for EU member states. Despite empirical evidence challenging the notion that effective returns are dependent upon a strict detention regime, the EU is readily adopting measures and devising ways of confining asylum seekers at borders, rendering detention more automatic and granting less judicial protection to administrative detainees. Even though EU law and the interpretations of the CJEU up to now have offered some form of guarantee and protection to immigration detainees, it looks like the future is grim in this respect.

[175] Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and *De Facto* Detention' (no. 67) 616
[176] Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (no. 146)
[177] Bernardini, 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 65-66

CHAPTER 3: IMMIGRATION DETENTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights (ECHR) sets the regional minimum standard of protection of human rights.[178] According to the European Court of Human Rights (ECtHR), Article 5, which guarantees the right to security and liberty, is "*in the first rank of the fundamental rights that protect the physical security of the individual*."[179] In this Chapter, the approach of the ECtHR in immigration detention cases, dealt with under paragraph (f) of Article 5(1) of the Convention, will be discussed, from a critical viewpoint.

A) Deprivation of Liberty according to the ECtHR

Whether the situation complained of by an applicant constitutes a deprivation of liberty is a question which determines the applicability of Article 5 in the case under examination by the Strasbourg Court.[180] In immigration cases, this exercise is of special importance given the widespread use by states of methods particular to migration/ border control such as confinement of irregularly arriving persons in 'transit zones' or 'reception/registration centres.' As with many legal concepts understood or defined differently in each Contracting State, the ECtHR has adopted an autonomous definition of 'deprivation of liberty.'[181] This approach means that the ECtHR does not give excessive weight to the domestic definition (or lack thereof) of a specific situation and that the Court will conduct its own assessment in order to determine whether a specific situation amounts to a deprivation of liberty within the meaning of Article 5 of the Convention.[182] If a confinement does not amount to a deprivation of liberty, then it can be considered as a mere 'restriction of movement' to which Article 2 of Protocol No. 4 to the Convention applies.[183] For example, Grand Chamber ('GC') cases *Ilias and Ahmed v. Hungary*[184] and *Z.A. and Others v. Russia*[185] dealt with the particular issue of asylum seekers being held in transit zones and reception centres, respectively. In both these cases, the GC had to first determine the applicability of Article 5.

[178] Costello and Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (no. 109) 54
[179] *Denis and Irvine v. Belgium* Apps nos 62819/17 and 63921/17 (ECtHR, 1 June 2021)
[180] *De Tommaso v. Italy* App no 43395/09 (ECtHR, 23 February 2017), § 80
[181] *Khlaifia and Others v. Italy* App no 16483/12 (ECtHR, 15 December 2016) § 71
[182] *Khlaifia* (no. 181) § 71
[183] *Khlaifia* (no. 181) § 71
[184] *Ilias and Ahmed v. Hungary* App no 47287/15 (ECtHR, 21 November 2019)
[185] *Z.A. and Others v. Russia* Apps nos 61411/15 and others (ECtHR, 21 November 2019)

The Court approaches this issue in an all-round and pragmatic manner taking into account the nature and the intensity of the impugned restrictions. As the standard principle, borrowed from UNHCR's Guidelines on Detention[186] spelled out by the Court in Article 5 applicability cases: "*the difference between a deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance."*[187] Therefore, factors such as the duration of the confinement, its intensity, whether the persons could leave the zone or area, whether and to what extent police surveillance[188] or other type of constant supervision[189] was present will be taken into account by the Court when deciding whether the applicants had been deprived of their liberty within the sense of Article 5. In addition to this, other factors such as whether the persons can retreat back into the country they came from[190] in the absence of any refoulement concerns, or the way that they behaved when trying to enter,[191] will also form part of the holistic assessment of the particular characteristics of each case.

In one of the first important cases dealing with this issue, *Amuur v. France* the Court did not accept the government's argument that the applicants, who were asylum seekers confined in an airport transit zone, could at any moment evade their confinement by choosing to fly to another country or even the country they had come from (in this instance, Syria).[192] This reasoning was followed again by the Court in its subsequent judgment in *Riad and Idiab v. Belgium*,[193] which also concerned detention in an airport transit zone. In *Ilias and Ahmed v. Hungary*, however, where the applicants were confined in the transit zone on the land border between Hungary and Serbia, the Grand Chamber of the Court qualified its reasoning in *Amuur* and accepted that the fact that the applicants could walk into Serbia as a factor indicating that their confinement did not amount to a deprivation of liberty.[194] This qualification was largely

[186] CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (not yet published) para. 220

[187] *Ilias and Ahmed* (no. 184) § 212: "*In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her specific situation in reality and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question (see* Nada v. Switzerland *[GC], no. 10593/08, § 225, ECHR 2012, and* Gahramanov v. Azerbaijan *(dec.), no. 26291/06, § 40, 15 October 2013). The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see* De Tommaso v. Italy *[GC], no. 43395/09, § 80, 23 February 2017, with the references therein; see also* Kasparov v. Russia, *no. 53659/07, § 36, 11 October 2016)."*

[188] *Amuur v. France* App no 19776/92 (ECtHR, 25 June 1996) § 38-49

[189] *Shamsa c. Pologne* Apps nos 45355/99 et 45357/99 (ECtHR, 27 November 2004) § 44-47

[190] *Ilias and Ahmed* (no. 184)

[191] *O.M. and D.S. v. Ukraine* App no 18603/12 (ECtHR, 15 September 2009) §§ 112-120

[192] *Amuur* (no. 188) §§ 46-49

[193] *Riad and Idiab v. Belgium* Apps nos 29787/03 and 29810/03 (ECtHR, 24 January 2008)

[194] *Ilias and Ahmed* (no. 184) §§ 240-243

based on the fact that the applicants did not face a direct threat to their life or safety in Serbia – as the applicants in *Amuur* had contended with relation to Syria, which is a country not bound by the Refugee Convention – and were merely unsatisfied with the poor functioning of the asylum system in Serbia.[195]

In the same Grand Chamber case, the factors to be taken into account when making this assessment were spelled out by the Court and have been since followed when assessing whether a situation amounts to a deprivation of liberty: "*i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants*."[196]

B) The Contents and Guarantees of Article 5 of the Convention

In the light of the fact that Article 5 is not an absolute right but one which states can restrict accordingly, as well as of the fact that deprivation of liberty is standard practice for a variety of reasons globally, it would not be accurate to say that the purpose of Article 5 is to prohibit any sort of deprivation of liberty.[197] On the contrary, what the protection of Article 5 guarantees is that one will not be detained arbitrarily.[198] The ECtHR has explicitly characterised Article 5's purpose as being "*to protect individuals from arbitrariness.*"[199]

First and foremost, for a detention to be lawful it must be *in accordance with a procedure prescribed by law.*[200] The Court will take into account national legal provisions in order to determine whether they clearly spell out a procedure legitimising a deprivation of liberty. What is more though, in the light of the exhaustive list of permissible grounds of detention of Article 5 (1), domestic law itself should be in accordance with the Convention in order to be considered as lawful by the Court. The examination of lawfulness is very closely linked to general rule of law concerns in the sense that a law foreseeing an interference to a fundamental human right, must comply with the principle of legal certainty.[201] This is a concept which runs through the entire thinking of the ECtHR's assessment of the lawfulness of state interreferences in

[195] *Ilias and Ahmed* (no. 184) § 242
[196] *Ilias and Ahmed* (no. 184) § 217
[197] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 47
[198] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 47
[199] *Öcalan v. Turkey* App no 46221/99 (ECtHR, 12 May 2005) § 83
[200] Article 5 (1)
[201] *Khlaifia* (no. 181) § 92

protected rights. The principle of legal certainty demands that a law is foreseeable in its application by allowing a person to be able to sufficiently understand the consequences of their actions. It also takes into account the quality of the law in the sense of its accessibility, precision and foreseeability.[202] The quality of the law itself relates to safeguards against arbitrariness and in the determination of a detention's compatibility with the Convention, it refers to the clarity of the domestic legal provisions in issues such as the reason of detention, its extension, its time-limit and its effective judicial review.

When it comes to arbitrariness, a concept applying generally to state interferences with fundamental rights but has a very specific importance in Article 5 cases, the ECtHR does not limit its examination to the mere fact of conformity with domestic law.[203] Arbitrariness is a broad concept and difficult to discern clearly. Elements of bad faith on behalf of the authorities, disparities between the reasons and conditions of detention, absence of proportionality in certain aspects of the measure, speediness of detention order renewals, the reasoning given for the detention and other factors particular to each case under consideration could be taken into account by the Court.[204]

In the specific context of paragraph (f) of Article 5(1), the Grand Chamber spelled out in *Saadi* that freedom from arbitrariness entails that "*such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see Amuur, cited above, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued.*"[205]

Another specificity important to Article 5(1)(f) and established by *Saadi,* is the absence of a test of necessity. This is a stark contrast to the strict necessity and proportionality assessment the Court carries out when examining cases of pre-trial detention, for criminal purposes, under paragraph (c).[206] Proportionality is also absent from the test developed by the Court's case law

[202] *J.N. v. the United Kingdom* App no 37289/12 (ECtHR, 19 May 2016), § 77
[203] *A. and Others v. the United Kingdom* [GC] App no 3455/05 (ECtHR, 19 February 2009) § 164
[204] *Saadi* (no. 111) §§ 68-74 and cases cited therein
[205] § 74
[206] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 48

in immigration detention cases[207] or appears in a very restricted way and only applies to very specific situations. These are further discussed below.

C) Immigration Detention in the Jurisprudence of the ECtHR

Two assertions are of crucial importance in order to better comprehend the approach of the ECtHR in immigration detention cases. Firstly, that the Convention itself, in sub-paragraph f of paragraph 1 of Article 5 foresees and allows an interference to a person's liberty for the purpose of prevent their unauthorized entry into the country or for effectuating their removal therefrom and secondly, that even beyond this explicit permission, the Court, by taking heed of States' concerns relating to influxes of migration movements, imbues its approach with the sovereign right of States to control their borders and react accordingly to immigration law infractions.[208]

As mentioned already, *Saadi* was the first case which clearly set out the test of the Court when determining arbitrariness in immigration detention cases. The applicant was a failed asylum seeker from Iraq who had been detained for seven days while he was an asylum seeker. The most important aspect that the *Saadi* judgment gave rise to was whether asylum seekers could be considered as attempting to be effectuating an unauthorised entry into the country and therefore whether the first limb of Article 5(1)(f) could be applicable to them. This was answered in the affirmative by the Grand Chamber, in a judgment which had a dissenting opinion of six out of the seventeen judges and which received criticism in its failure to distinguish between asylum seekers who are often forced to flee and travel without any documentation and irregular migrants.[209]

With regards to developing the test of arbitrariness under Article 5(1)(f), the Grand Chamber derived guidance from previous case-law of the Court in order to formulate certain criteria.[210] First and foremost, and in contrast to the test for criminal pre-trial detention under Article

[207] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 53
[208] *Saadi* (no. 111) § 64: "*Whilst the general rule set out in Article 5 § 1 is that everyone has the right to liberty, Article 5 § 1 (f) provides an exception to that general rule, permitting States to control the liberty of aliens in an immigration context. As the Court has remarked before, subject to their obligations under the Convention, States enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory" (see* Amuur, *cited above, § 41; Chahal, cited above, § 73; and Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, §§ 67-68, Series A no. 94). It is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. It is evident from the tenor of the judgment in Amuur that the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5 § 1 (f)."*
[209] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 54
[210] *Saadi* (no. 111) §§ 69-74

5(1)(c), the Court clarified by adopting its thinking in *Chahal*[211], that detention under Article 5(1)(f) does not demand a necessity test.[212] According to the reasoning of the court, since according to *Chahal* which related to a detention with a view to deportation, there is no need for a necessity test, the same would need to apply for the first limb of Article 5(1)(f). Even though an excessively long period of detention could be an indication of arbitrariness, the Court in *Chahal*, linked the length of detention with its stated purpose. Therefore, even long periods of detention (six years in the case of *Chahal*) can be justified as long as they somewhat relate to the ground and purpose of the detention.[213] In other situations, the Court examined arbitrariness in the light of the relationship between the stated ground of detention and the place and conditions of detention.[214]

There should also be connection between the reason of detention and the exception foreseen and relied on by the government under Article 5(1). In the specific context of paragraph (f), as was decided in *A and Others v. UK*, detaining the applicants without a true view to deportation due to realistic hurdles to removal, is not allowed. Lastly, the Court takes into account the element of good faith on behalf of the authorities.[215]

Similarly, the Court avoided delving into the issue of proportionality or alternative forms of detention. This was a point of disagreement of the six dissenting judges in *Saadi*.[216] The judgment restricts proportionality to the issue of the reasonableness of the length of the detention, without placing any emphasis on a need for an individualised assessment of each person subject to detention. According to O'Nions[217] a true proportionality assessment is about balancing the harm caused to the individual through the imposition of the measure and the public interest goal pursued through its imposition. It is worth mentioning though, that some judgments of the Court contemplating the compatibility of immigration detention with Article 5(1)(f) do contain a *"concealed proportionality test"*[218] which relates directly with the factor of the detention and its purpose having a genuine relationship. For example, in *Yoh-Ekale Mwanje c. Belgique*[219] the Court took into account the personal circumstances of the applicant

[211] *Chahal v. the United Kingdom* [GC] App no 22414/93 (ECtHR, 15 November 1996)
[212] *Saadi* (no. 111) § 72
[213] *Chahal* (no. 211) §§ 115-117
[214] *Saadi* (no. 111) § 69
[215] E.g. *Čonka v. Belgium* App no 51564/99 (ECtHR, 5 February 2002)
[216] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 57
[217] Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 European Journal of Migration and Law 149, 181
[218] Cornelisse 2016, 79-80
[219] *Yoh-Ekale Mwanje c. Belgique* App no 10486/10 (ECtHR, 20 December 2011)

who was very seriously ill, dependent upon and available to the authorities and whose mental health had severely deteriorated while detained. The Court assessed that the authorities' failure to envisage a less coercive measure against the applicant, which had been available to them, before resorting to detention, and especially for seven additional weeks constituted a violation of Article 5(1)(f). At the same time though, the factor of length is still present in this concealed proportionality assessment of the Court, even though the special mention to the particular circumstances of the applicant is more similar to a necessity and proportionality test.

In cases of detention of migrant children, the ECtHR has been stricter in its approach. By including an explicit test of necessity and proportionality relating to the obligation of the authorities to take into account the personal circumstances of the child and to only use detention as measure of last resort,[220] the Court has consistently demanded from states a higher threshold of scrutiny when it comes to minor migrants detained under Article 5(1)(f).

The absence of a necessity test for detention under Article 5(1)(f) of the Convention and the extremely limited form of the proportionality test introduced (only in relation to the length) has been the subject of extensive commentary by academics and human rights institutions.[221] However, it is important to mention that the ECtHR does not *preclude* Contracting States from introducing a necessity and proportionality requirement in their national legislation.[222] It merely does not examine itself whether the measure was proportionate to the aim pursued under the Convention. One point of criticism has been the fact that the principle of proportionality is a concept inherent in the entire system of protection offered by the Convention.[223] The balancing exercise between human rights protection and public interest considerations permeates almost every substantial and qualified (not absolute) Article of the Convention and constitutes a general mechanism of protection of individuals from state interference with their fundamental rights. Proportionality is not only inherent in the Convention protection system but is a well-established principle of any adjudication of constitutional matters.[224] Its purpose is to safeguard that protected, individual rights are not taken or *traded* away unchecked for

[220] *Popov v. France* Applications nos. 39472/07 and 39474/07 (ECtHR, 19 January 2012) § 119
[221] Galina Cornelisse, 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' in Guia and others (eds), *Immigration Detention, Risk and Human Rights* (Springer International Publishing 2016); Cornelisse, 'Detention of Foreigners' (no. 82); Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) and others cited herein.
[222] Cornelisse, 'Detention of Foreigners' (no. 82) see fn. 20
[223] *Soering v. the United Kingdom* App no. 14038/88 (ECtHR, 7 July 1989) § 161 and Cornelisse, 'Detention of Foreigners' (no. 82) 215
[224] Cornelisse 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' (no. 221) 78

some other public gain or interest.[225] Therefore, it seems odd to preclude an assessment of proportionality when considering deprivations of liberty.

Cornelisse does a comparison of the approach of the Strasbourg Court in cases of immigration detention with cases of detention of persons of unsound mind, foreseen by paragraph (e) of Article 5(1).[226] Under this paragraph, the Court demands that the measure of detention is necessary. It accepts its lawfulness only when other less severe measure have been examined and can be shown to be ineffective to achieve the stated goal, which is protecting either the individual and/or the public interest.[227] Even though the Court still allows a wide margin of appreciation to states when it comes to assessing the necessity and proportionality of a detention under Article 5(1)(e) – an approach reflecting the principle of subsidiarity – it is consistent in its view that given the seriousness of depriving someone of their liberty, the lawfulness of the measure for the purposes of Article 5(1)(e) compatibility depends upon such an assessment having been made.[228] Effectively though, absent a test of necessity and proportionality for a lawful immigration detention, states enjoy an even wider margin of appreciation under Article 5(1)(f), even though the Court has never explicitly said this in any of its judgments.[229]

Spalding analyses the disparities between pre-conviction detention under Article 5(1)(c) and immigration detention under the ECHR.[230] She considers that these two forms of detention actually perform similar functions, which can be summarised broadly as being to ensure the person's compliance with and availability to the state authorities and in order to protect the general public. Given these similarities, the author analyses how it is not persuasive to assume that the absence of a necessity and proportionality test for immigration detentions is justified for reasons relating to the higher risk of a migrant absconding or to an absence of fear about their reputation or to the fact that the authorities know little about them. Spalding argues that the difference in treatment in two forms of detention performing similar functions cannot be explained.[231]

[225] Cornelisse 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' (no. 221) 78
[226] Cornelisse 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' (no. 221)
[227] *Varbanov v. Bulgaria* App no 31365/96 (ECtHR, 5 October 2000) § 46
[228] Cornelisse 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' (no. 221) 216
[229] Cornelisse 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for Its Management?' (no. 221) 219
[230] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 60-62
[231] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 62

Interestingly, post-conviction detention pursuant to Article 5(1)(a) of the Convention also lacks a necessity or proportionality test under the ECtHR case-law and is restricted to an examination of its good faith and whether the authorities are genuinely imposing the conviction or no.[232] However, it cannot be overlooked that a post-conviction detention is the result of a criminal trial which is strictly protected by the rich guarantees of Article 6 of the Convention. In stark contrast, administrative detention decisions are issued by administrative authorities who the detainees never see face-to-face and the review by a judicial body only happens subsequently and in some countries, only after the detainee themselves have requested a judicial review of the administrative decision.[233]

Cornelisse explores some of the reasons behind this stance of the Strasbourg Court when it comes to immigration detention.[234] Naturally, considerations of the political sensitivity of the topic and the perception of how important it is for national sovereignty are often cited as influencing the Court's deference to state immigration policies. However, the ECtHR has often criticised states for their dealings with immigrants and especially under Articles 3 and 8 of the Convention.[235] Another reason could be the observation of how exclusion politics trickle into the workings of the law. On the one hand, there are rights which are universal and thus applicable to every human being and others which are based upon citizenship, which are of a more *contractual nature.*[236] The right under consideration applies to 'everyone' therefore non-nationals are still allowed to claim and expect that their liberty would be protected in the same way as everyone's and due to their membership of humanity. However, it is evident that states – at least those of the global North – are increasingly influenced by exclusion politics when dealing with migration management. That means that rights become qualified according to one's immigration status and by virtue of their non-membership to that country's citizenship.[237] Still though, it seems unconvincing for the same reason as above, that the ECtHR would subscribe to such a logic in its interpretation of the Convention. Cornelisse considers that the only convincing theorisation of this disparity is the sovereignty of nation states and its inextricable and persistent link with territoriality.[238] The Westphalian territorial order as it emerged in the 17th century remains unchallenged by modern evolutions of international human

[232] *Saadi* (no. 111) § 71 and cases cited therein.
[233] For example, in Cyprus, see section 9Στ(6) of the Cypriot Refugees Law (περί Προσφύγων Νόμος (6(I)/2000))
[234] Cornelisse, 'Detention of Foreigners' (no. 82)
[235] Cornelisse, 'Detention of Foreigners' (no. 82) 219
[236] Cornelisse, 'Detention of Foreigners' (no. 82) 219
[237] Cornelisse, 'Detention of Foreigners' (no. 82) 219-220
[238] Cornelisse, 'Detention of Foreigners' (no. 82) 220

rights law and supranational tribunals. Since states have a right (and perhaps a duty according to this logic) to control their national borders, it is only natural that the coercion used to enforce that right differs when dealing with a question perceived to be challenging the very existence and notion of that territoriality-contingent sovereignty.[239] According to Cornelisse, this is the most plausible explanation of the immigration detention case-law of the ECtHR.

D) Procedural Guarantees under the Convention System

The definition of a 'criminal charge' under the ECHR and the way the ECtHR has applied it in administrative detention cases, is what has determined that immigration detainees are deprived of Article 6 protection when it comes to their detention.

As has been already mentioned, the most problematic aspect of immigration detention in relation to other forms of detention, can be boiled down to the wide discretion states enjoy when it comes to procedural guarantees. Procedural fairness for purposes of administrative detention can in no way be compared to the stringent and explicit guarantees persons detained for criminal purposes enjoy.

Under the ECHR, Article 6 envisages a broad and very rich right to a fair trial in both criminal and civil trials. With regards to its criminal limb, Article 6(1) foresees that *in the determination […] of any criminal charge against [them]* everyone can enjoy a speedy judicial process, a fair and public hearing carried out by an independent and impartial tribunal established by law. Whether a charge is of a criminal nature is a matter considered by the Court preliminarily, when determining whether Article 6 in its criminal limb will apply at all to the facts of the case under consideration.

To this effect, the Court developed the well-known *Engel*[240] criteria. As a first step, the Court considers what is the characterisation of the offence given formally by domestic law. Secondly, the intrinsic nature of the offence and its prescribed sanction is examined by the Court and lastly, the severity of the penalty the person risks incurring. As with many other concepts, the notion of a criminal charge has an autonomous meaning for the purposes of the Convention. Therefore, the characterisation given by domestic law (the first criterion) is not decisive in itself, especially when domestic law does not classify the charge as criminal.[241] When assessing the second criterion, the Court takes into account a variety of factors which relate, *inter alia*,

[239] Cornelisse, 'Detention of Foreigners' (no. 82) 221
[240] *Engel and Others v. the Netherlands* App no 5100/71 and others (ECtHR, 8 June 1976) §§ 82-83
[241] Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (no. 18) 80

to whether the offence is considered as criminal in other High Contracting States to the Convention,[242] whether the purpose behind the proceedings are punitive or deterrent,[243] which authority initiated the proceedings,[244] and others. Generally speaking, the two last criteria are not necessarily cumulative to each other, but alternative.[245] However, a cumulative approach by the Court is not excluded if it is necessary to conclude as to the existence of a criminal charge.[246]

The Strasbourg Court has never applied the *Engel* formula in immigration detention cases and confines them to sub-paragraph (f) paragraph 1 Article 5, which explicitly permits detention for immigration-related purposes.[247] It is worth mentioning, that from as early as the 1970s and 1980s, the European Commission of Human Rights (the Court's predecessor) adopted the position that the criminal limb of Article 6 does not apply in situations involving deportations or detention for immigration control purposes, since they do not constitute proceedings of a criminal nature.[248] With its *Maaouia v. France*[249] judgement in 2001, the ECtHR explicitly excluded Article 6 fair trial guarantees in any migration-related matter, since they are always considered to be part of administrative law. The case concerned an exclusion ban of ten years from French territory of the Tunisian applicant who had been convicted for armed robbery and assault. As is usually the case with third country nationals convicted of criminal offences, after he served his prison sentence, he was subjected to a deportation order and the ten-year exclusion order. The former was quashed by a French court, however, the rescission proceedings he initiated against the latter lasted more than four years. On this basis, he complained to the Court that his rights under Article 6 had been violated on account of the excessive length of the rescission proceedings.

The reasoning of the Court regarding the applicability of the criminal limb of Article 6, can be summarised as follows: exclusion orders of aliens are not characterised as criminal charges in the Council of Europe and in most states, these decisions are taken by the administration and

[242] *Öztürk v. Germany* App no 8544/79 (ECtHR, 21 February 1984) § 53
[243] *Bendenoun v France* App no 12547/86 (ECtHR, 24 February 1994) § 47
[244] *Benham v. the United Kingdom* App no 19380/92 (ECtHR, 10 June 1996) § 56
[245] *Nicoleta Gheorghe c. Romanie* App no 23470/05 (ECtHR, 3 April 2012) § 26
[246] *Bendenoun* (no. 243) § 47
[247] Bernardini, 'Administrative Immigration Detention As a Punitive Measure : Is it Time for a New Standpoint?' (no. 6) 242
[248] *Agee v. the United Kingdom* App no 7729/76 (European Commission of Human Rights, 17 December 1976)
[249] *Maaouia v. France* [GC] App no 39652/98 (ECtHR, 5 October 2000)

they *constitute a special preventive measure for the purposes of immigration control.* For these reasons, they do not concern the determination of a criminal charge against the applicant.[250]

The Court did not carry out the usual test adhering to the autonomy of the concept of a 'criminal charge' and did not even apply the *Engel* criteria in the usual step-by-step manner. Despite the fact that the government had argued that the measure had been used as a deterrent (a usual indication of a charge of a criminal nature), the ECtHR did not address this matter at all. Most importantly, the severity of the measure against the applicant was not examined, even though the third *Engel* criterion is considered to be quite important in this exercise.[251]

In general terms, the ECtHR has refused to examine the alleged punitiveness of immigration measures under criminal law consideration. The Strasbourg Court accepts that these measures are preventive in nature and form part of administrative law.[252] In *Uner v. Netherlands*, the Grand Chamber reiterated the *Maaouia* principle when deciding that a residence permit revocation and ten-year ban from the country after a criminal conviction did not fall within the remit of Article 6.[253] The arguments of the parties to the proceedings and the reasoning of the Grand Chamber reflect this insistence that still accompanies the Court's logic today, which is that immigration control measures are not intended to punish or double punish but are preventative rights of the state, necessary to protect society.[254]

Therefore, immigration detainees are precluded from arguing that their detention is a 'criminal charge' when attempting to claim protection similar to the one afforded to persons subjected to criminal proceedings. Paragraphs (2) mentions one of the most precious guarantees of the criminal justice system: the presumption of innocence. Paragraph (3) spells out some *minimum rights* that every person facing a criminal charge enjoys under the Convention: to be informed in a language they understand,[255] to prepare their defence adequately,[256] to have legal counsel and representation or legal aid,[257] to examine witnesses against him and have witnesses for him[258] and to have available interpretation, if needed.[259] These procedural safeguards and the

[250] *Maaouia* (no. 249) § 39
[251] *Engel* (no. 240) § 40
[252] *Üner v. the Netherlands* [GC] App no 46410/99 (ECtHR, 18 October 2006)
[253] Article 4 of Protocol No. 7 (right not to be tried or punished twice) also raised and argued but since the Protocol had not been ratified by the Netherlands, the complaint on this ground was declared inadmissible.
[254] § 56
[255] Sub-paragraph (a)
[256] Sub paragraph (b)
[257] Sub-paragraph (c)
[258] Sub-paragraph (d)
[259] Sub-paragraph (e)

rich case-law developing them are not applicable in immigration detention cases because it is a measure not officially recognised as punitive and thus criminal.

It is also worth mentioning, that the *Maaouia* case excluded immigration related procedures from the protection of the civil limb of Article 6 as well.[260] In that case, the Court made special mention to Article 1 of Protocol No. 7 to the Convention which deals specifically with procedural safeguards afforded to foreigners under removal procedures.[261] Although relevant for an in-depth study of deportation proceedings, what is important for the purposes of this thesis is that these do not apply to detention cases. Therefore, the rich notion of what constitutes a 'fair trial' for purposes of the Convention, does not have any bearing in domestic proceedings which relate to the determination of detaining a third country national – no matter for how long or in what conditions.

The only applicable guarantees relevant to a detention under Article 5(1)(f) are the ones foreseen in Paragraphs (2), (4) and (5) of Article 5[262] and which concern: the right to be informed about the reasons of the detention,[263] the right to have the lawfulness of detention speedily examined by a court and be released in case of an unlawful detention[264] and the right to be compensated in the case of unlawful detention.[265] In addition to these explicit guarantees, are the principles developed by the ECtHR (as analysed throughout this chapter) concerning the absence of arbitrariness and bad faith, as analysed above. The length, place and conditions of detention also need to be of an adequate nature with relation to the purpose of the detention. Beyond these general principles, immigration detainees are not guaranteed under the ECHR any further rights. Most importantly, the judicial processes which relate to the lawfulness of their detention must not adhere to any specific standards of fairness and thus states are awarded a quite vast margin of discretion to this effect.

It is interesting to point out how for example, the conduct of the detainee is a factor consistently taken into account by the ECtHR when assessing the overall lawfulness of detention under Article 5(1)(f). Therefore, the fact that a person has behaved in a way which obstructed the

[260] §§ 33-41
[261] "*1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."*
[262] Paragraph (3) applies only to detention on remand under Article 5(1)(c)
[263] Article 5(2)
[264] Article 5(4)
[265] Article 5(5)

work of the authorities or who is perceived to be uncooperative will weigh against them in the overall consideration of the compatibility of the measure with the Convention. This is important to contrast with the guarantees enjoyed by persons detained in the frame of criminal proceedings: pre-trial detentions must fulfil the necessity and proportionality test developed by the Court, and also enjoy extra fairness pursuant to Article 5(3)[266] whereas post-conviction detainees enjoy the wide range of guarantees of the criminal justice system, *no matter how serious* the offence they have been convicted of was.

It is evident that the approach of the ECtHR concerning immigration detention is attempting to maintain a very fine balance in a very delicate topic for all High Contracting States. As a battlefield between state sovereignty and human rights of non-citizens, migration issues touch upon the existence and survival of the entire system of Westphalian political organisation. The next Chapter will assess two important aspects of this battlefield on a legal and sociopolitical level: firstly, how EU law and the ECHR interact with each other and secondly, what is the eventual cost for human rights protection.

[266] Right to be taken promptly before a court

CHAPTER 4 : THE RELATIONSHIP BETWEEN EU LAW AND THE ECHR AND ITS CONSEQUENCES FOR HUMAN RIGHTS IN EUROPE

The previous three Chapters demonstrated how immigration detention is an expression of crimmigration, how the EU legislates and approaches the matter and how the ECtHR adjudicates on it with regards to its human rights dimension. These analyses already brought to the fore certain similarities and interactions between the legal regimes of the EU and the ECHR. Furthermore, it is evident how these two supranational institutions complement each other in order to maintain political stability or avoid interference with policy-level choices at the national level. Unfortunately, this relationship has resulted in a greater erosion in human rights protection in the European continent. With the EU hardening its stance on migration and asylum legislation and the ECtHR seemingly willing to permit concessions in human rights protection for foreigners, the threshold for the safeguarding of human rights is steadily lowering. This does not leave the rule of law and other democratic concepts unscathed.

The CJEU takes into account the Strasbourg jurisprudence and the interactions between the two in human rights protection are an important topic of study. According to Article 52 of the Charter of Fundamental Rights of the EU, the ECHR is the guiding jurisprudential instrument for interpretation of the provisions of the Charter. Academics often point out though, that it is Advocate Generals in their opinion who mostly engage with the ECtHR and other Council of Europe instruments.[267]

It is widely accepted that up to now, the CJEU has adopted a stricter approach than the ECtHR in immigration detention cases because of the second's diversion of the necessity and proportionality test. This of course, can be explained by the difference in these two systems: the EU does not succumb as easily to claims of national sovereignty whereas the ECtHR has a more limited jurisdiction to dictate to states what to do with their borders. It is evident though that in the proposed reform of the EU system, the standards are set to become lower and the road to more arbitrary detention will be opened. Even though the CJEU has been less deferential than the ECtHR to immigration detention, it seems that the rest of the EU institutions have been more eager to 'benefit' from the concepts developed by the ECtHR in immigration detention cases.

[267] Costello, *The Human Rights of Migrants and Refugees in European Law* (no. 77) 311

A) Interactions, Tensions and Complementarity between EU law and the ECHR

A.1. Grounds of detention

At first, some tensions or contradictions between EU law and the ECtHR's jurisprudence on Article 5 should be mentioned. One such terrain is the grounds of detention themselves. The ECtHR has not given a clear-cut answer on this yet, however, there are some recent Communicated Cases which seem to have the potential of addressing a potential compatibility of some of the grounds of detention foreseen by EU law with the exceptions permitted by Article 5 of the Convention.[268] EU law seems to, *prima facie,* not be in full compliance with Article 5(1)(f) of the ECHR. On the other hand, though, the ECtHR has creatively devised the correct legal interpretations which essentially allow for both irregular third-country nationals and applicants of international protection to be detained relatively easily.

Costello approaches the issue of the grounds of detention through a very interesting and important lens: by *assuming* that there is nothing wrong with the conditions (and length) of administrative detainees.[269] This is pointed out in order to highlight once more that, in contrast with other forms of detention, which tend to be better regulated and certain in terms of length, in administrative detention, these factors have a decisive function in the determination of whether a deprivation of liberty can be considered fair and lawful.

In her article dealing with the grounds of detention and the effect of the ECtHR's lax approach to immigration detention, through focusing on the UK, Costello finds not only that it is a form of much more relaxed detention[270] but it is also effectively, a *ground-less* form of detention. In the absence of a necessity and proportionality requirement, the notion of a deprivation of liberty being cut to measure to the person subjected to it (personalised, in the light of specific circumstances) is rendered entirely useless. Through an analysis of the impact of the two leading judgments in the detention of asylum seekers (*Saadi*) and in pre-deportation detention (*Chahal*), Costello argues that the ECtHR does not demand nor guarantee that there is any real ground of detention of a third country national in any one of those two situations. This issue, however, remains to be seen.

[268] See Communicated cases *B.A. v. Cyprus* App no 24607/20 and *K.A. v. Cyprus* App no 63076/19, both raising a question on the compatibility of the detention of asylum seekers for reasons of national security with Article 5 of the Convention

[269] Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 Current Legal Problems 143, 145

[270] Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (no. 269) 147

What groundless detention results in, according to Costello, is this type of detention being coercive, punitive and preventive.[271] Therefore, in line with the voices of crimmigration theorists dismissing the allegedly purely administrative purposes of immigration detention.

A.2. Detention of asylum seekers

This potential tension is all the more evident for the case of asylum seekers and the foreseen grounds of detention in Article 8 (3) of the Reception Conditions Directive. Detention for the purpose of return as a *ground* of detention seems simpler and more straightforward, even though the reality on the ground might be that a person switches from one migration status to the other. The extension of immigration detention by EU law to include persons with asylum seeker status is legally and conceptually difficult. Immigration detention was a concept developed around removing persons from states' territories or preventing them from entering the territory. This reflects precisely in Article 5(1)(f) of the Convention. It is clear that asylum seekers and international refugee law present a challenge to sovereign European states who struggle to control their borders and territorial sovereignty against perceived external threats. This is so because asylum seekers as presumptive refugees, should both be allowed entry into territories where they seek protection and cannot be removed to countries where they will face a risk to their life or bodily integrity. Moreover, the Universal Declaration of Human Rights[272] and the Refugee Convention protect the right of persons to seek international protection in countries which offer such protection. The EU included the right to asylum in the Charter of Fundamental Rights, at Article 18. However, with the 2013 recast of the Reception Conditions Directive grounds of detention for persons seeking asylum were introduced in the EU legal order. These provisions were meticulously drafted in order to be able to adhere to regional human rights standards and more specifically, to the ECHR's twofold and exhaustive exception to the fundamental right of liberty and security. From its own side though, the ECtHR avoided a legal confrontation with the EU bloc by interpreting the way various EU member states used their immigration detention powers as generally compatible with the Convention demands. That doesn't mean to say that the ECtHR does not often find states to have violated Article 5(1)(f) for a variety of reasons and in accordance with the standards it set out. However, it has been shown that the ECtHR prefers a watered-down approach in this matter.

EU law, in accordance with the Refugee Convention, spells out clearly that an asylum seeker is not residing irregularly within the territory of the country he or she is seeking asylum.

[271] Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (no. 269) 155
[272] Article 14

According to academic commentary on this matter,[273] a legal paradox arises from this: an irregularly staying migrant can be detained (and subjected to various measures) with a view to deportation and this is justified exactly because of that irregular status. What is it, however, that justifies administratively detaining a *regularly* residing third country national?[274]

Even though this theoretical discussion is vast and cannot be possibly covered by this thesis, what is relevant to mention is how both the EU and the ECtHR have managed to fit within the first limb of Article 5(1)(f) the administrative detention of asylum seekers. The first limb refers to the *prevention of an unauthorised entry.* Through its well-established jurisprudence, the Strasbourg Court has manipulated the principle established by international refugee law which dictates that refugees should not be penalised for using illegal methods to effectuate an entry into the country where they seek international protection. According to *Saadi* and subsequent case-law, an asylum application does not *per se* preclude detention pursuant to Article 5(1)(f) and the determination of a state having granted authorisation to a person to be on their territory is *not* therefore determined by the introduction of such an application. The legality or not of the presence of asylum seekers on the territory of a state, especially in the light of the principle of *non-refoulement,* is an important matter of discussion. At most, asylum seekers should be considered as legally residing on the territories of the states where they seek protection.[275] At worst, they should *at least* be considered as *"temporarily, conditionally authorised entrants"*[276] Even though this issue cannot be exhausted here, what should be highlighted is what Costello and Mouzourakis have named the *detainability* that the two categories of third-country nationals share. In essence this means that these categories of persons are subject to being detained in European countries merely because of their migratory status.[277] The tension within this finding is that it is in stark contravention of the provision of the Directive itself which guarantees that an asylum seeker will not be detained merely because of his or her status as such. When practice is clearly contravening rules of international law, then it is clear how this can adversely affect the efficacy of the justice system itself, rule of law and the principle of legal certainty.

[273] Bernardini 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 63-64
[274] Bernardini 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 64
[275] Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (no. 269) 172
[276] Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (no. 269) 172
[277] Bernardini 'Detained, Criminalised and then (Perhaps) Returned: the Future of Administrative Detention in EU Law' (no. 79) 65

The perplexity surrounding the (un)authorised entry of asylum seekers is further enhanced with the New Pact on Migration and Asylum. Through the complete eradication of the status of an asylum seeker as we know it, states are granted a blank cheque to resort to automatic detention of everyone arriving on their borders while remain formalistically compatible with their ECHR obligations. Scholars and human rights institutions have named this the "legal fiction of non-entry"[278] and it seems to be in stark contravention to international human rights and refugee law. The legal implications, however, remain to be seen.

B) The Struggle of Procedural Fairness

From the analyses in Chapters 3 and 4, it becomes evident that EU law and the relevant CJEU interpretations have been up to now, stricter in their demands of procedural justice when it comes to immigration detention. The defining characteristic of this contention is the fact that EU law (including CJEU authoritative interpretations) demand a test of necessity and proportionality by states. This is applicable in both regimes of detaining illegally staying third county nationals with a view to deportation and asylum seekers for other stated reasons of administrative convenience. Regrettably, the ECtHR did not adopt a similar test in its case-law.

When it comes to using some of the rich guarantees of the criminal law to the benefit of detained third country nationals, both European regimes stubbornly refuse to acknowledge the increasing interrelationship between immigration policies and penal law objectives. As was demonstrated in Chapter 1, rich academic analysis stands firm in its contention that immigration detention practices across Europe are increasingly being used to achieve wider goals which relate to retaliation, deterrence and prevention. Practice and theory back up the finding that it seems all the more artificial to label immigration detention as a mere measure of administrative convenience. On the one hand, the ECtHR via its leading judgment in *Maaouia v. France* precludes the application of any fair trial guarantees to immigration measures. This is explained by the mere fact that those measures do not constitute a criminal charge.

On the other hand, in the field of EU law, Article 47 of the Charter of Fundamental Rights, which has a wider scope of application than Article 6 of the Convention, applies to all areas which are regulated by EU law and guarantees an effective right to judicial protection. Admittedly, this grants a protection of a wider scope to immigration detainees, in the sense that it safeguards a judicial review proceeding of a *full and ex nunc* nature.[279] However, given the

[278] Kelly Soderstrom, 'An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation' (no. 148)
[279] See *mutatis mutandis*, CJEU, C–556/17, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* [2017] ECLI:EU:C:2019:626

requirement of Article 5 (4), that a detention found to be unlawful must obligatorily be terminated, it is questionable what is the added value of an examination of both facts and merits. In some jurisdictions (for example, Cyprus), this has resulted in asylum courts conducting a wider scope of examination of detention cases than any other administrative decision, which is confined to a revisional, *ex tunc* examination of the lawfulness of the measure in law and procedure, but not in merits.

A central gap in human rights protection still remains though: persons can only rely on EU law articles (including the Charter) before national courts. The EU justice system does not foresee a mechanism of bringing complaints against states by individuals. Such a remedy regionally exists only before the ECtHR, pursuant to Article 34 of the Convention. It becomes apparent then, that there are limited ways in which individuals can argue and claim that the judicial protection afforded to the alleged interferences with their human rights, is restrictive and problematic. Even though this entire machinery is based upon the principle of subsidiarity, it is doubtful that national courts would be willing to overstep legislators at the national or supranational level and conclude that any additional guarantees of judicial protection should be granted to immigration detainees.

The CJEU has of course, in accordance with the principle of direct effect of EU law, precluded Member States from denying third country nationals in detention access to a judicial review of a detention measure. By applying Article 47 of the Charter, read in light of the relevant detention provisions under both the Return and the Reception Conditions Directives, the Luxembourg Court imposed on the Hungarian referring court to apply directly EU law and examine the lawfulness of the detention complained about.[280] Even though this interpretation doesn't offer anything new in terms of protection of fundamental rights nor in terms of the principles governing EU law, it is telling of both the circumventions undertaken by Member States in the field of immigration detention and the stance of the CJEU to remain consistent and firm in its interpretation of EU legislations. Once again, the New Pact on Migration and Asylum is set to shake this entire approach to its core.

C) Lower Human Rights Protection for Everyone

"*Immigration detention is one of the singularly most disturbing contemporary practices from the point of view of the rule of law and human rights."*[281] This is, I contend, because when it

[280] CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS* (no. 186)
[281] Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (no. 269) 143

becomes unpacked, it is very difficult to find any valid reason to defend it, as it stands today in Europe. The punitive character of administrative detention and its qualification of a fundamental human right according to migration status, cannot easily be reconciled with the universality of human rights protection regimes. The consequences of these policies affect so-called European democratic values and they also devastatingly and adversely affect the people on the move themselves.

Gosme[282] develops a notion of 'sanctions' which goes well beyond the fact of deprivation of liberty through administrative detention and even its special character which undoubtedly makes it of a punitive nature. Gosme argues that, for at least a certain group of irregular migrants, who he calls the *non-enforceable exhausted returnee*,[283] the reality on the ground in most EU countries is a state of constant transition between administrative detention, imprisonment for criminal purposes and freedom-in-limbo. He explains how all three spaces, including freedom-in-limbo, are exclusionary spaces and, in this sense, their converging functions which are retribution, deterrence, incapacitation and enhances removability, all interacting and coexisting with each other, serve the real goals of the migration and asylum systems which are mostly socio-economic and narrated through the lens of 'securitisation.'

What is interesting from Gosme's analysis is how deportation itself is conceived as a 'sanction.' Even though this argument would not hold to the standard of the ECtHR's interpretation of a criminal sanction and its traditional, subtle approach in balancing States' political interests in a subject as 'sensitive' as migration and asylum, when studied empirically, the notion of deportation as a sanction has a compelling appeal. In the way that Gosme phrases it, the above-mentioned converging functions of the three exclusionary spaces result in an 'enhanced removability' of that specific category of migrant, a removability greatly contingent on an internalisation process: *'through the gradual erosion of the will, desire, or capacity to obstruct removal, as well as the ability to live a dignified life in the EU.'*[284] A more humane approach to the matter would go as far as regarding that mere state of being and shifting between confinement and a fearful 'liberty' as a 'sanction' in itself.

There is another observation that lends validity to Gosme's implicit suggestion about removal functioning as a sanction as well: through the narrative of prioritising removal and through allowing imprisonment solely for exhausted returnees, state ensure that the irregular migrant

[282] Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' (no. 30)
[283] Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' (no. 30)
[284] Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' (no. 30) 113

will one way or another be excluded: either they accept removal, or sooner or later will be imprisoned for not having accepted removal.[285] Freedom-in-limbo is also acting deterrently, with some EU member states explicitly admitting that regularisation for that group of irregular migrants is excluded with the clear objective of deterring them from not cooperating with the authorities.[286] Gosme basically argues that the deterrence objective is hidden behind the *entire* policy and not only detention.

Similarly, the fear of detention, deportation and a life of irregularity and illegality, is looming over every person on the move towards the countries of the global North. With the introduction of the New Pact on Migration and Asylum, detention becomes the new normal and even the most basic, minimum guarantees to third country nationals are disappearing. By implicitly devising the "legal fiction of non-entry" the ECtHR has gifted the EU with the necessary tools to vamp up its deterrence strategies while still remaining formally compatible with its Convention obligations.

Perhaps the most controversial and challenging situation rapidly developing is confinement of asylum seekers at transit zones, including land borders, ports or airports. Within the frame of controlling their borders and enforcing state sovereignty, European states seem to be enjoying a blank cheque when it comes to depriving asylum seekers at transit zones. On the one hand, the ECtHR consistently and undisputably allows Contracting States to respond to influxes using confinement measures and on the other hand, the EU seems to be investing its efforts at exactly these spots. This is not only one of the reasons that the metaphor of a fortress has been attributed to the Union but it is also a perilous situation from the viewpoint of human rights protection.

Employing measures which are clearly punitive and meant to deter and incapacitate their subjects while denying stringent procedural fairness, is a dangerous path. European policy-makers can no longer hide behind administrative convenience for the measures used in migration control. The least that can be done to counter balance the increasingly harsh laws, is the granting of a protection similar to that granted in criminal proceedings. Crimmigration though describes exactly this: the criminalisation of immigration in a distinct sphere, other than that of the criminal law, one stripped of its guarantees as these have been developed.

[285] Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' (no. 30) 116
[286] Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' (no. 30) 117

CONCLUSION

Immigration detention is only one of the many expressions of the criminalisation of migration in Europe and worldwide today. Because of the severity of depriving a person of their liberty, the qualification of the right according to migration status is a very serious concession in human rights protection. From a sociological perspective, this is a form of exclusion politics present in the entire approach in migration management in Western liberal democracies today.

By using the lens of crimmigration and the relevant analyses of immigration detention exhibiting punitive characteristics, I attempted to demonstrate that administrative detention can no longer remain deprived of procedural fairness. Even though the EU contained important safeguards for third country nationals, such as the principle of necessity and proportionality as well as maximum time limits for the detention of returnees, the New Pact on Migration and Asylum introduces radical changes to the entire regime of migration management within the EU. Detention is foreseen to increase dramatically and become automatic, drawing from legal concepts developed by the ECtHR. Even though the ECtHR often finds that states arbitrarily detain individuals and third country nationals, in the light of the scale of immigration detention and the recognised gap in procedural protection of detainees, the absence of a test of proportionality and necessity as well as the exclusion of the application of Article 6 from immigration detention cases, results in a qualified, lower level of protection for these persons.

The two legal regimes operate in a somewhat common but distinct political and legal framework. Even though their interaction contains contradictions and possible tensions, there is a tendency of complementarity between the case-law of the two European courts. Since this thesis has been written at the wake of the implementation of the New Pact on Migration and Asylum, this relationship will surely undergo further developments. What the future holds for the universality of human rights, and their protection in Europe, remains to be seen.

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