THE RIGHT TO LIBERTY OF ASYLUM-SEEKERS AND THE EUROPEAN COURT OF HUMAN RIGHTS IN THE AFTERMATH OF THE 2015 REFUGEE CRISIS

EL DERECHO A LA LIBERTAD DE LOS SOLICITANTES DE ASILO Y EL TRIBUNAL EUROPEO DE DERECHOS HUMANOS TRAS LA CRISIS DE REFUGIADOS DE 2015

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SUMMARY: In the context of the 2015 refugee crisis, European States have pushed for tighter migration control policies by, *inter alia*, extending and toughening the practice of detaining asylum-seekers. The aim of this study is to assess how the European Court of Human Rights (ECtHR) constrains this worrisome practice. Does it grant States the same margin of appreciation as in other migration-related judgments, or does it adopt a more active role in protecting asylum-seekers' right to liberty? To answer this question, this study analyses the case law of the ECtHR after 2015 on the subject and evaluates it in the light of the relevant international human rights treaties, European Union law and scholarly opinion. In doing so, it especially seeks to identify any changes in the Court´s case law that might indicate a reaction of the Strasbourg Court to the political tensions of the refugee crisis.

RESUMEN: Como respuesta a la crisis de refugiados de 2015, los Estados europeos han impulsado políticas más estrictas de controles migratorios, entre otros, extendiendo y endureciendo la práctica de detener a solicitantes de asilo. El objetivo de este estudio es evaluar cómo el Tribunal Europeo de Derechos

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Humanos (TEDH) limita esta preocupante práctica. ¿Otorga a los Estados el mismo margen de apreciación que en otras sentencias relativas a las migraciones, o adopta un papel más activo en la protección del derecho a la libertad de los solicitantes de asilo? Para responder a esta pregunta, el presente trabajo analiza la jurisprudencia del TEDH después de 2015 en esta materia y la evalúa a la luz de los tratados de derechos humanos pertinentes, el Derecho de la Unión Europea y la doctrina. En esta labor, el estudio trata especialmente de identificar cambios en la jurisprudencia del Tribunal que indiquen una reacción de Estrasburgo a las tensiones políticas derivadas de la crisis de refugiados.

KEY WORDS**:** Asylum detention, European Court of Human Rights, right to liberty, detention conditions, margin of appreciation, immigration detention.

*PALABRAS CLAVE**:** Detención de solicitantes de asilo, Tribunal Europeo de Derechos Humanos, derecho a la libertad, condiciones de detención, margen de apreciación, detención de inmigrantes.*

I. INTRODUCTION

The right to liberty of the person is one of the foundational pillars of human rights regimes around the world. Its origins can be traced back to the English *Magna Carta Libertatum* of 1215, and the emergence of the modern State is inconceivable without it. Nonetheless, despite its paramount importance for every human being,[1] States seem to be more readily prepared to restrict the right to liberty of migrants than that of nationals. In effect, particularly since the turn of the century, detaining migrants has become a "routine rather than exceptional practice"[2] through which States seek to control irregular migration, respond to mounting political pressures and maintain and assert their territorial authority.[3] Detention of migrants without a punitive purpose –i.e. detention that falls outside the

* All referenced websites were consulted for the last time on the 13th of January 2020.

[1] In modern human rights declarations, the importance of the right to liberty was recognized in the Declaration of the Rights of Man and Citizen of 1789 (Article 2), the Virginia Declaration of Rights of 1776 (Section 1) and, at the universal level, in the Universal Declaration of Human Rights (Articles 3 and 9).

[2] UNHCR, *Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees*, 2014. Available at: https://cutt.ly/4rxlt7B. Worrisome immigration detention practices in different countries have made headlines in 2019. See for instance as regards the United States: CNN, "This year saw the most people in immigration detention since 2001", 12-11-2018. Available at: https://cutt.ly/Urxleeu; and as regards Spain: El Diario.es, "El nuevo centro de migrantes del puerto de Málaga dedica 2,3 m^2 por persona, la mitad que un calabozo para detenidos", 28-07-2019. Available at: https://cutt.ly/2rWkMam.

[3] SAMPSON, R. and MITCHELL, G., "Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales", *Journal on Migration and Human Security*, vol. 1, n. 3, 2013, pp. 291-305; DUSKOVÁ, S., "Migration Control and Detention of Migrants and Asylum Seekers –Motivations, Rationale and Challenges", *Groningen Journal of International Law*, n. 5, 2017, pp. 23-33, p. 25. Global statistics on immigration detention can be found in the websites of the Global Detention Project and the International Detention Coalition: https://cutt.ly/vrxlrzW and https://cutt.ly/ArxlrK8.

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ambit of criminal law– is often referred to as "administrative detention", although it can either be ordered or applied by the State administration or by a court.[4]

The international community has expressed the concerns of political and civil actors over this practice in a *soft law* document, namely the Global Compact for Migration.[5] In Objective 13 of the Compact, States commit to "use immigration detention only as a measure of last resort" and to "work towards alternatives". Moreover, the United Nations Committee on Migrant Workers is in the process of drafting a General Comment on Migrant´s Rights to Liberty and Freedom from Arbitrary Detention,[6] which reinforces the inclusion of the issue of immigration detention on the international political agenda.

Among the migrants being detained, some are people who have been forced to flee their home countries and are in search of international protection. This practice is particularly troublesome, since detention causes an "independent deterioration of the mental health of people who are already highly traumatised", as an empirical study has shown.[7] Detaining asylum-seekers exposes them to a high risk of re-traumatisation and reduces the future prospect of successful adaptation and eventual integration in the host society.[8]

In the European context, the use of detention as part of migration policies in recent years is very much linked to European State´s "improvised response"[9] to the unprecedented levels of migrants and asylum-seekers that the continent faced in 2015 which was named by the United Nations High Commissioner for Refugees (UNHCR) "the year of Europe´s Refugee Crisis".[10] Although as far back as in 2003 Goodwin-Gill warned of the need to maintain accurate records of all cases where refugees and asylum-seekers are detained,[11] data collection and publication by States on this issue remains very scarce in the European

[4] GOODWIN-GILL, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", in FELLER, E., TÜRK, V. and NICHOLSON, F. (eds.), *Refugee Protection in International Law. UNHCR´s Global Consultations on International Protection,* Cambridge University Press, Cambridge, 2003, p. 232.

[5] Global Compact for Safe, Orderly and Regular Migration, United Nations General Assembly, 19 December 2018 (Res. A/73/195). This is the first international agreement to regulate human mobility at the global level. See FAJARDO DEL CASTILLO, T., "El Pacto Mundial por una Migración Segura, Ordenada y Regular: un Instrumento de Soft Law para una Gestión de la Migración que Respete los Derechos Humanos", *Revista Electrónica de Estudios Internacionales*, n. 38, 2019, pp. 1-34; and VITIELLO, D., "Il Contributo Dell'unione Europea Alla *Governance* Internazionale dei Flussi di Massa di Rifugiati e Migranti: Spunti per una Rilettura Critica Dei *Global Compacts*", *Diritto, Immigrazione e Cittadinanza*, n.3, 2018, pp. 1-44.

[6] Draft General Comment No. 5 on Migrants' Rights to Liberty and Freedom from Arbitrary Detention, Committee on the Protection of the Rights of All Migrants Workers and members of Their Families, 2019. The concept note of the Draft is available at: https://cutt.ly/Srxlymd.

[7] FILGES, T., MONTGOMERY, E., KASTRUP, M., "The Impact of Detention on the Health of Asylum Seekers: A Systematic Review", *Research on Social Work Practice*, vol. 1, n. 16, 2015, p. 13.

[8] ILAREVA, V., "Detention of asylum seekers: interaction between the Return and Reception Conditions Directives in Bulgaria", *EU Immigration and Asylum Law and Policy* [blog], 25-11-2015. Available at: https://cutt.ly/rrxluhf.

[9] VAN MIDDELAAR, *Alarums and Excursions: Improvising Politics on the European Stage,* Agenda Publishing, Newcastle upon Tyne, 2019.

[10] UNHCR, "2015: The year of Europe´s refugee crisis", 8-12-2015. Available at: https://cutt.ly/krxluL7.

[11] GOODWIN-GILL, *supra* note 4, at 238.

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continent.[12] But despite the lack of official statistics, non-governmental organizations show that the detention of asylum-seekers is a highly visible problem in several European countries. A recent report proves that the use of detention of asylum-seekers has increased since 2015 in four Member States of the European Union (EU),[13] and it is equally troubling to see reports of practices in non-EU Member States such as Turkey and North Macedonia, where asylum-seekers are held in overcrowded conditions and unlawfully detained.[14]

The Council of Europe has not remained silent on this issue. After the new wave of detention practices in the context of the 2015 refugee crisis, it has adopted a "five step plan to abolish migrant detention"[15] and is working on a codifying instrument of European rules on the administrative detention of migrants.[16] For the European Committee for the Prevention of Torture (CPT), immigration detention is also a primary focus of its work.[17]

It is in this context that the European Court of Human Rights (ECtHR or "the Court") has been called to action in order to protect asylum-seekers´ right to liberty under Article 5(1)(f) of the European Convention on Human Rights (ECHR)[18], as well as their right to dignity under Article 3 ECHR in situations where asylum-seekers have faced appalling conditions of detention. Although the original role of the ECtHR was to provide remedies in individual cases, the Court has long been dealing with systematic violations of human rights in general terms, setting human rights standards and thus acquiring a constitutional

[12] AIDA, *Asylum Statistics in the European Union: A Need for Numbers*, 2015, p. 7. Available at: https://cutt.ly/lrxliwF; ACCESS INFO EUROPE and GLOBAL DETENTION PROJECT, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe*, 2015. Available at: https://cutt.ly/8rxlizP.

[13] By way of illustration: In Hungary, more than 70% of asylum-seekers in 2017 were *de facto* detained in the "transit zones" under appalling conditions such as food deprivation; in Bulgaria, access to the asylum procedure is not automatic upon submission of the asylum application (as required by EU law) and thus asylum-seekers who have entered the country irregularly are immediately detained for the purpose of removal; in Italy, detention upon arrival after 2015 has occurred through detention in the *hotspots*, administrative detention in pre-removal centres and *de facto* detention on boats; and in Greece, legal uncertainty prevails regarding detention in the context of the implementation of the EU-Turkey Statement. See HUNGARIAN HELSINKI COMMITTEE, *Crossing a Red Line. How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry*, 2019. Available at: https://cutt.ly/drxloyS. See also ILAREVA, *supra* note 8; and MAJCHER, I., *"The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part II)", Border Criminologies* [blog], 05-04-2018. Available at: https://cutt.ly/RrW0YEG.

[14] AIDA, *Place of Detention: Turkey*, 2019. Available at: https://cutt.ly/IrxlsBr; Amnesty International, *North Macedonia 2017/2018*, 2018. Available at: https://cutt.ly/2rxlaDs.

[15] COMMISSIONER FOR HUMAN RIGHTS, "High time for states to invest in alternatives to migrant detention", 31-01-2017. Available at: https://cutt.ly/lrxlspi.

[16] Codifying instrument of European rules on the administrative detention of migrants 1st Draft, European Committee on Legal Co-Operation (CDCJ), 18-05-2017. See MCGREGOR, L., "An Appraisal of the Council of Europe's Draft European Rules on the Conditions of Administrative Detention of Migrants", *EJIL-Talk!* [blog], 19-07-2017. Available at: https://cutt.ly/RrlBrVI.

[17] CPT, *Immigration Detention Factsheet*, CPT/Inf(2017)3, 2017. Available at: https://cutt.ly/frxlf1G.

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

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function.[19] Through the lens of this constitutional role of the ECtHR, the first aim of this study is to systematize the jurisprudence of the Court from 2015 onwards regarding the detention of asylum-seekers[20] in order to elucidate which are the current minimum human rights standards applicable in the "Council of Europe legal space".[21]

The second aim of the study is to evaluate the jurisprudence of the ECtHR regarding the detention of asylum seekers after the 2015 refugee crisis from the perspective of the margin of appreciation doctrine. The constitutional function of the ECtHR entails that the Court –like national constitutional courts[22]– has to consider the political consequences of its judgments, due to the fact that its decisions affect the political community as a whole. Since the 1970s,[23] the ECtHR has given due regard to these political consequences by applying the margin of appreciation doctrine, according to which the Court gives some discretion to States in applying the Convention and only intervenes when it is absolutely necessary to do so.[24] One of the main functions of this doctrine is to react to political pressures coming from States who do not wish to see the Court intervene in sensitive political issues.[25]

Undoubtedly, migration is a burning political area in which States are very jealous of their sovereignty. Consequently, ever since the *Abdulaziz* judgment,[26] the ECtHR has been

[19] HARMSEN, R., "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform", in MORISON, J., MCEVOY, K. and ANTHONY, G., (eds.), *Judges, Transition, and Human Rights*, Oxford University Press, Oxford, 2007, p. 51.

[20] For this study, 30 judgments rendered between 2015 and 2019 which concern the detention of asylum-seekers under Article 5(1)(f) have been drawn from the *European Database of Asylum Law* (EDAL), which is an online database managed by the European Council on Refugees and Exiles (ECRE). Due to the large number of judgments related to the detention of asylum-seekers compiled in this database, only those that concern EU Member States have been selected. This will allow us to analyse the interaction between the ECHR and EU law in the Court's case law. Full judgments will only be quoted one time in the footnotes, and shorter versions will be used in the following citations of the same judgment.

[21] VON BOGDANDY, A., "The Transformation of European Law: The Reformed Concept and its Quest for Comparison", *MPIL Research Paper Series*, n. 14, 2016.

[22] LARENZ, K. *Methodenlehre der Rechtswissenschaft.* Springer, Heidelberg, 1979; HÄBERLE, P., *Verfassungsgerichtsbarkeit zwischen Politik und Rechtswissenschaft,* Athenaeum, Königstein, 1980; GARCÍA DE ENTERRIA,E., *La Constitución como norma y el Tribunal Constitucional,* Civitas, Madrid,1981, p. 180.

[23] *Handyside v. Uk,* no. 5493/72, ECtHR 7 December 1976. Previously, in *Lawless v. Ireland*, the European Commission had made reference to the margin of appreciation for the first time. See *Lawless v. Ireland*, no. 332/57, Report of the European Commission of Human Rights, 19 December 1959.

[24] HUTCHINSON, M. R., "The Margin of Appreciation Doctrine in the European Court of Human Rights", *The International and Comparative Law Quarterly,* vol. 48 n.3, 1999, pp. 638-650. For a discussion on the importance of the doctrine, see also TULKENS, F. and DONNAY, L., "L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme, Paravent juridique superflu ou mécanisme indispensable par nature?", *Revue de Science Criminelle et de Droit Pénal Comparé*, n. 1, 2006, pp.3-23.

[25] In his empirical study, Madsen proves that judicial actions of the ECtHR are reflective of socio-political transformations and political criticism. See MADSEN, M. R., "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?", *Journal of International Dispute Settlement*, n. 9, pp. 199-222.

[26] In *Abdulaziz,* the Court laid down for the first time what has now become its mantra in migration-related cases: "as a matter of well-established international law and subject to its treaty obligations, a State has the

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very deferential to migration policies.[27] The Court's fear of upsetting State Parties has translated into tightly circumscribed rulings which exhibit a bias in favour of the State.[28] Within this theoretical framework, this study will critically assess whether the jurisprudence of the Court regarding the detention of asylum-seekers is also characterized by the self-restraint that it generally shows in migration-related cases and, if so, whether the political tensions of the refugee crisis have led the Court to be even more deferential to State's detention practices.

The study will focus on the requirements under Article 5(1)(f) ECHR as interpreted by the Court (sections II to V), though it will also touch upon the impact of the refugee crisis on the Court's interpretation of the *applicability* of Article 5 in the Hungarian "transit zones" (section VI) and on its reading of Article 3 ECHR regarding conditions of detention of asylum-seekers (section VII).[29] Throughout the study, the intertwining of the Strasbourg case law and with the broader international human rights framework and with EU law will also be present. With respect to the terminology, it is important to note that the term "asylum-seeker" will be used in a broad sense so as to refer to those persons applying for refugee status pursuant to the definition of a "refugee" in the Refugee Convention[30] and to those seeking subsidiary protection, as well as to those persons whose application has been denied but who are exercising their right to an effective remedy (Article 13 ECHR in connection with Article 3).

II. THE GROUNDS FOR DETENTION UNDER ARTICLE 5(1)(F) ECHR

Within the European human rights system, the right to liberty finds its connection to migration control and migrants' rights in Article 5(1)(f), which allows for the detention of migrants in certain cases. As noted by Costello, by putting immigration detention in a category of its own, the ECHR leaves this type of detention subject to looser standards of justification.[31] Throughout this section it will be shown that the Court has used these looser standards to grant States a wider margin of appreciation.

right to control the entry of non-nationals into its territory". See *Abdulaziz, Cabales and Balkandi*, no. 9214/80; 9473/81; 9474/81, ECHR 28 May 1985, §67.

[27] GUIRAUDON, V., "European Courts and Foreigner´s Rights: A Comparative Study of Norm Diffusion", *The International Migration Review*, vol.34, n. 4, 2000, pp. 1088-1125.

[28] DEMBOUR, M. B., *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press, Oxford, 2015.

[29] Besides the need to limit the scope of the study, the reason for this selection is that the case law of the Court regarding liberty-related rights (the right to a judicial review enshrined in Article 5(4) ECHR, the right to information of Article 5(2), the right to compensation of Article 5(5) and the right not to be subjected to inhuman or degrading treatment in detention under Article 3) has been less controversial than that regarding the right to liberty itself and has thus not sparked such an interesting academic debate.

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

[31] COSTELLO, C., "Immigration Detention: The Grounds Beneath Our Feet", *Current Legal Problems*, n. 68, 2015, pp. 143-177., p. 147.

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1. *Saadi v. UK* Takes Hold: Asylum-seekers are still "Unauthorised Entrants"

The first ground on which a State can detain a migrant under Article 5(1)(f) is "to prevent his effecting an *unauthorised* entry into the country". With regard to asylum-seekers who enter a State party in an irregular manner, since 2015 the case law of the Court that began with *Saadi v. UK*[32] has remained intact: "up to the decision on an asylum claim, such detention can be considered to fall under the first limb of Article 5(1)(f), namely to *prevent effecting an unauthorised entry*".[33] Therefore, the Court has accepted what has been termed "detention for administrative convenience".[34]

Indeed, from *Saadi* until today, what Dembour identified as the "Strasbourg reversal" in the migration-related case law of the Court regarding Article 3 and Article 8 ECHR[35] has also taken hold of the Court's interpretation of Article 5(1)(f). This means that, instead of starting with the principle that asylum-seekers are human beings entitled to their right to liberty, Strasbourg regards Article 5 as potentially limiting the "undeniable right of States to exercise sovereign control over the entry and residence of aliens on their territory", a right of which "the ability to detain would-be migrants who have applied through an asylum application for permission to enter the country" is an "essential corollary".[36] Because of this right to control, *national law can decide* the point at which an asylum-seeker can be considered to have effected an "authorised entry" within the meaning of Article 5(1)(f). Only then will detention of an asylum-seeker cease to be permitted by the ECHR.[37]

Several authors have underlined the legal fiction that has been created by the ECHR and by the Court through the use of the term "entry" in Article 5(1)(f). Battjes notes that, under Strasbourg law, the asylum-seeker is both in *and* not in the territory[38]. Indeed, there seems to be a contradiction in the sense that the State is required to regard the asylum-seeker as being present in its territory for the purposes of *non-refoulement* (which suspends expulsion) but, at the same time, it may regard the asylum-seeker as not being present for the purposes of detention.[39] This, in turn, entitles the State to detain the asylum-seeker to "prevent" the entry. For Costello, the Convention system creates a

[32] *Saadi v. UK,* no. 13229/03, ECtHR 29 January 2008.
[33] *Abdullahi Elmi and Aweys Abubakar v. Malta, nos. 25794/13 and 28151/13,* ECtHR 22 November 2016, §141; *O.M. v. Hungary, no. 9912/15,* ECtHR 5 July 2016, §47; *Abdi Mahamud v. Malta, no. 56796/13,* ECtHR 3 May 2016, §128; *Mahamed Jama v. Malta, no. 10290/13,* ECtHR 26 November 2015, §144; *Nabil and Others v. Hungary, no. 62116/12,* ECtHR 22 September 2015, §27.
[34] O'NIONS, H., "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, n. 10, 2008; DE BRUYCKER, P. and TSOURDI, L., "The Challenge of Asylum Detention to Refugee Protection", *Refugee Survey Quarterly*, n.35, 2016, pp. 1-6.
[35] DEMBOUR, *supra* note 28, p. 194.
[36] *Thimothawes v. Belgium*, no. 39061/11, ECtHR 4 April 2017, §58; *J.R. and Others v. Greece*, no. 22696/16, ECtHR 25 January 2018, §108; *Saadi v. UK*, §64.
[37] *Thimothawes v. Belgium*, §59; *Mahamed Jama v. Malta*, §137-138.
[38] BATTJES, H., "Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses", *Netherlands Yearbook of International Law*, vol. 47, 2017, pp. 263-286, p. 274.
[39] *R.T. v. Greece*, no. 5124/11, ECtHR 11 February 2016, §88; *A.Y. v. Greece*, no. 58399/11, ECtHR 5 November 2015 §87.

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fiction of non-presence that invites us to imagine the asylum-seeker as being kept "outside" the State[40] and awaiting approval for his entry –a construction which, according to Moreno-Lax, is at odds with the principle of legal certainty.[41]

However, the term "entry" in Article 5(1)(f) cannot be interpreted in isolation. It must be taken together with the term "unauthorised", which is, in our view, the core concept of the first limb of Article 5(1)(f). From this perspective, the question to be addressed is the following: is it correct to regard as "unauthorised entrants" those individuals who have *irregularly* entered the State but whose asylum application has been formally registered in the asylum system? This section will argue that, to be in line with international law, the Court should develop a more nuanced case law which declares that asylum-seekers may only be detained for specific reasons *before* their application is registered, but once the application has entered the asylum system, asylum-seekers must be regarded as being authorised –and thus not liable to detention under Article 5(1)(f). As will be shown, the Court could easily find inspiration in several sources of international law for establishing such specific reasons that would justify asylum detention. In addition, EU law could also serve as a guideline for the Court, particularly the principle according to which "Member States shall not hold a person in detention for the sole reason that he or she is an applicant".[42]

While it is for the Court to determine the meaning of the term "unauthorised", it must be equally kept in mind that the ECHR does not apply in a vacuum but, rather, in conjunction with other international instruments for the protection of human rights.[43] Article 31(3)(c) of the Vienna Convention on the Law of Treaties lays down that a treaty shall be interpreted in its context, taking into account "any relevant rules of international law applicable in the relations between the parties".[44] Since all State Parties to the ECHR are also Parties to the Refugee Convention and to the International Covenant on Civil and Political Rights (ICCPR),[45] analysing how these treaties regulate the issue of the legal status of asylum-seekers becomes relevant for critically assessing the Court's case law.

With regard to the Refugee Convention, Article 31(2) allows for the administrative detention of "refugees *unlawfully in* the country of refuge". This provision affirms that "(…) such restrictions [including detention][46] shall only be applied until their status in

[40] COSTELLO, *supra* note 31, p. 151.
[41] MORENO-LAX, V., "Beyond *Saadi v UK:* Why The 'Unnecessary' Detention of Asylum Seekers Is Inadmissible Under EU law", *Human Rights and International Legal Discourse,* vol. 5, n. 2, 2011, pp. 166-206, p. 182.
[42] Article 8 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96). For an analysis of the grounds for asylum detention under EU law, see TSOURDI, E. L., "Asylum Detention in EU Law: Falling between Two Stools?", *Refugee Survey Quarterly*, n. 0, 2016, pp. 1-22.
[43] MORENO-LAX, *supra* note 41, p. 187.
[44] Vienna Convention on the Law of Treaties, 23 May 1969 (U.N.T.S. vol. 1155, p. 331).
[45] International Covenant on Civil and Political Rights, 16 December 1966 (U.N.T.S vol. 999, p. 171 and vol. 1057, p. 407).
[46] NOLL, G., "Article 31 (Refugees Unlawfully in the Country of Refugee/Réfugiés en Situation Irrégulière dans le Pays d'Áccueil)", in ZIMMERMANN, A., DÖRSCHNER, J. and MACHTS, F. (eds.), *The 1951*

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the country is regularized or they obtain admission into another country". The problem of the Refugee Convention is that, unlike other human rights treaties, it did not create a treaty monitoring body with the power to issue general guidance to States to facilitate a consistent application of the Convention.[47] Therefore, multiple interpretations arise regarding the question of who can be detained under this provision. Hathaway and Noll thoroughly analyse the *travaux préparatoires* of the Refugee Convention and show that there was no common understanding among all State Parties as to whether asylum-seekers whose asylum claim has been registered can be deemed to be "lawfully in" the territory in the sense of Article 31(2) and are thus prevented from being detained.[48]

Legal doctrine (which, according to the Statute of the International Court of Justice, can act as a subsidiary means for interpreting international treaties)[49] is also divided on this point. One group of authors understands that asylum-seekers enter a country in order to exercise a lawful right to seek and enjoy asylum, and should therefore be regarded as "lawfully in" the territory of the State as soon as they file their asylum application and satisfy the administrative requirements for his application to be processed. Such an interpretation should persist regardless of whether or not the asylum-seeker entered the State's territory in an irregular manner.[50] This would mean that asylum-seekers can only be detained before the process of determining the full merits of the claim has begun. Another group of scholars is of the opinion that asylum-seekers can only be regarded as being "lawfully in" the territory once the State has granted them a positive authorisation to enter the country.[51] This would entail that asylum-seekers awaiting the asylum procedure *can* be detained under Article 31(2) of the Refugee Convention if they entered the territory of the State without such a formal authorisation.

For its part, the United Nations High Commissioner for Refugees (UNHCR) has favoured the view of the former group. In its submission to the Court in *Saadi v. United Kingdom*, UNHCR asserted that "status regularization, for the purposes of Article 31(2), occurs once the asylum-seeker submits to *and meets the host State´s legal requirements* to have his claim evaluated. (…). Thus, once the domestic law formalities for access into

Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary, Oxford University Press, Oxford, 2011, p. 1268.

[47] CLARK, T. and CRÉPEAU, F., "Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law", *Netherlands Quarterly of Human Rights,* vol.17, n.4, 1999, pp. 389-410, p. 402.

[48] HATHAWAY, J. C., *The Rights of Refugees under International Law,* Cambridge University Press, Cambridge, 2005, p. 179; NOLL, *supra* note 46, p. 1273.

[49] Article 38(d) of the Statute of the International Court of Justice, 24 October 1945, states that, in deciding disputes, the ICJ shall apply "judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law".

[50] HATHAWAY, *supra* note 48; FIELD, O. and EDWARDS, A., *Alternatives to Detention of Asylum Seekers and Refugees*, UNHCR Legal and Protection Policy Research Series, 2006. Available at: https://cutt.ly/vrl1AGd; O'NIONS, *supra* note 34.; NOLL, *supra* note 46; MORENO-LAX, *supra* note 41; COSTELLO, *supra* note 31.

[51] GRAHL-MADSEN**,** A., *The Status of Refugees in International Law. Vol. I. Refugee Character*, A.W. Sijthoff, Leiden, 1966; SLINGENBERG, L., *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality*, Hart Publishing, Oxford, 2014.

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determination procedures have been complied with, status is regularized (…)".[52] While the nature of UNHCR is that of an international diplomatic corps rather than that of an international legal body,[53] it does play a key role in providing interpretative guidance on the Convention and in encouraging a harmonized application of its provisions by State Parties,[54] promoting norms of international behaviour.[55] It is therefore regrettable that the ECtHR has disregarded UNHCR's position, without making a reasoned argument of why it chooses to interpret the term "unauthorised" in a different way. Ironically, both in *Saadi v. UK* and in *Suso Musa v. Malta*,[56] the Court refers to the UNHCR's 1999 Guidelines on Detention of Asylum Seekers and Refugees only to underline that they allow for the detention of asylum-seekers. Yet the Court does so without acknowledging that these Guidelines do not grant States the power to detain asylum-seekers merely to prevent their "unauthorised entry". In fact, the revised 2012 UNHCR Guidelines stress that the illegal entry or stay of asylum-seekers by itself does not give the State an automatic power to detain –detention is only allowed when it is based on an exhaustive list of grounds, which can be whittled down to three: public order, public health and national security.[57]

Regarding the ICCPR, Article 9(1) enshrines the right to liberty for every human being and lays down the circumstances under which States may detain a person. While this provision does not give any guidance on the problem at hand, the Human Rights Committee (HRC) has interpreted Article 9(1) in a more liberty-protective way than the equivalent interpretation made by the ECtHR. Although the ICCPR does not make clear that the Committee is to be the final interpreter of the treaty,[58] the fact that the Committee receives periodic reports from States and other parties, along with its experience in applying the Covenant, has led some authors (an even some members of the HRC) to argue that "from a moral point of view, the interpretation provided by the HRC overrides interpretations provided by States".[59] Moreover, recently the Spanish Supreme Court in its judgment 1263/2018 has set a precedent in international human rights law by

[52] Quoted by NOLL, *supra* note 46, p. 1266.
[53] CLARK AND CRÉPEAU, *supra* note 47, p. 402.
[54] CHETAIL, V., "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in RUBIO-MARIN, R. (ed.), *Human Rights and Immigration. Collected Courses of the Academy of European Law*, Oxford University Press, Oxford, 2012, pp. 19-72, p. 64.
[55] CHIMNI, B. S., "The Geopolitics of Refugee Studies: A View from the South", *Journal of Refugee Studies*, vol. 11, n. 4, 1998, pp. 350-374, p. 366.
[56] *Saadi v. UK*, §34; *Suso Musa v. Malta*, no. 42337/12, ECtHR 9 December 2013, §90.
[57] UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, §32-33. Available at: https://cutt.ly/grRP0RH. See also the Conclusion relating to the detention of Refugees and Asylum-Seekers No. 44 (XXXVII), Executive Committee of the High Commissioner´s Programme, 13 October 1986. Document approved by the United Nations General Assembly in its resolution No. 12A (A/41/12/Add.1).
[58] HARRINGTON, J., "The Human Rights Committee, Treaty Interpretation, and the Last Word", *EJIL-Talk!* [blog] 5-8-2015. Available at: https://cutt.ly/mrlBiYv.
[59] CITRONI, G., "The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis State Parties", *EJIL-Talk!* [blog], 28-8-2015. Available at: https://cutt.ly/TrlVxem.

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recognising that the decisions of supervisory bodies of human rights treaties must be complied with by the Spanish State.[60]

In its General Comment on the right to liberty and in the Communication *A v. Australia*, the HRC found that detention of asylum-seekers whose claim is being resolved is generally arbitrary, *except* when there are particular reasons specific to the individual, such as individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.[61] Illegal entry alone, however, cannot be a ground for detention of asylum-seekers.[62] Therefore, the ECtHR's deference to the detention of asylum-seekers "for purely logistical reasons"[63] can hardly be reconciled with the HRC position.

The fact that the ECtHR does not consider the case law of the HRC regarding this issue is not only regrettable, but also reprehensible. In its famous judgment *Ahmadou Sadio Diallo*, the International Court of Justice (ICJ) stated that "although the Court is in no way obliged (…) to model its own interpretation of the Covenant on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body (…)".[64] While the ECtHR has to interpret the European Convention of Human Rights in the light of the ICCPR (Article 31(3)(c) of the Vienna Convention on the Law of Treaties), in this legal exercise the Court is allowed to form its own interpretation of this treaty, which may differ from that of the HRC. However, if the ICJ –which is not a human rights court– ascribes "great weight" to the Committee´s general comments, there is a strong case to be made that a human rights court like the ECtHR should give even greater weight to these comments. This is even more the case if we take into account that, as a Court with the constitutional aspiration of developing general human rights standards within the area of the Council of Europe, the ECtHR needs to deploy external references to enhance the persuasiveness of its interpretation.[65] The Court itself has stated this in the leading judgment *Demir and Baykara v. Turkey,* where it unmistakeably clarified that it views the provisions of the Convention in the broader context of international law.[66]

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[60] Sentencia del Tribunal Supremo (Sala 3ª, Sección 4ª) de 22 de marzo de 2018 (ES:TS:2018:1263). See GUTIÉRREZ ESPADA, C., "La Aplicación en España de los Dictámenes de Comités Internacionales: La STS 1263/2018, un Importante Punto de Inflexión", *Cuadernos de Derecho Transnacional*, vol. 10, n. 2, 2018, pp. 836-851.

[61] Human Rights Committee, General Comment No. 35, 16 December 2014 (CCPR/C/GC/35); *A. v. Australia*, Communication No. 560/1993, HRC 30 April 1997.

[62] *A. v. Australia*, §9(2).

[63] BATTJES, *supra* note 38, p. 270.

[64] *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, §66. For an analysis of the judgment, see GHANDHI, S., "Human Rights and the International Court of Justice. The *Ahmadou Sadio Diallo* Case", *Human Rights Law Review*, vol. 11, n. 3, 2011, pp. 527-555.

[65] FAHRAT, A., "Enhancing Constitutional Justice by Using External References: The European Court of Human Rights' Reasoning on the Protection against Expulsion", *Leiden Journal of International Law*, n. 28, pp. 303-322, p. 320.

[66] *Demir and Baykara v. Turkey*, no. 34503/97, ECtHR 12 November 2008, §37-52, 147-154. See FAHRAT, *supra* note 65, p. 319; and SMYTH, C., "The Best Interests of the Child in the Expulsion and

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2. *Nabil v. Hungary*: Asylum-seekers may be Detained "With a View to Deportation"

The second exception to the principle of non-detention of migrants is the case that action is being taken against that person "with a view to deportation or extradition", as stated by the second limb of Article 5(1)(f). As in the first limb of this Article, the question that arises is whether or not this is a valid ground for detaining migrants who have applied for asylum. There is no doubt that asylum-seekers whose claim has been rejected by the highest instance can be detained "with a view to deportation", but what about those who are still awaiting a first decision on their asylum application or the outcome of the review of a negative decision?

In its leading case on the second limb of Article 5(1)(f), *Chahal v. UK*, the Court considered that the period in which the asylum-seeker had been detained on pre-deportation grounds while his asylum claim was still pending "was not excessive".[67] Therefore, as early as 1996, it implicitly authorised detention of asylum-seekers in the context of an expulsion procedure.

More than a decade later, the Court nuanced its position in *S.D. v. Greece* and in *R.U. v. Greece*.[68] In these judgements, the Court used the following logic to find that an asylum-seeker could not be detained "in view of his expulsion": (1) national law –as well as the Refugee Convention- does not allow for the expulsion of an asylum-seeker until his claim has been finally rejected; (2) national law only permits detention for expulsion purposes when that expulsion can be executed; (3) therefore, detention of an asylum-seeker for expulsion purposes is in violation of national law because his expulsion cannot be executed while his asylum claim is still pending.

Costello asserts that these judgements are in tension with *Chahal.*[69] Such tension is visible, however, they cannot be considered to be in direct contradiction to the Court´s position in *Chahal*, because both judgements very much focus on whether or not detention is in accordance with *national law*. Nonetheless, the judgements don't actually conclude that Article 5(1)(f) itself prohibits detention of asylum-seekers "in view of their expulsion".

During the climax of the refugee crisis, namely September 2015, the ECtHR offered clarification on this issue. In *Nabil and Others v. Hungary*, the Court explicitly stated that detention with a view to deportation of an asylum-seeker with a pending asylum claim is admissible under Article 5(1)(f) because "an eventual dismissal of the asylum application could open the way to the execution of the deportation orders".[70] The current section will

First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?", *European Journal of Migration and Law*, vol. 70, n. 103, pp. 70-103, p. 73.

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

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

[69] COSTELLO, C., *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, Oxford, 2016, p. 292.

[70] *Nabil and Others v. Hungary*, §38.

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argue that this interpretation is at odds with the guarantees that the Court provides to detained asylum-seekers when read in the light of the Refugee Convention.

On the one hand, the same argument can be made as in regard to the detention of asylum-seekers under the first limb of Article 5(1)(f). If we follow the view that asylum-seekers whose claim has been registered are *lawfully in the country*, then Article 31(2) of the Refugee Convention cannot be applied to them and thus their detention is in violation of that Convention. But even accepting that the Court is legitimately supporting the view according to which registered asylum-seekers may be *refugees unlawfully in the country*, there are compelling reasons to conclude that pre-deportation detention of asylum-seekers whose claim is being processed is not permissible under international law without further requisites.

Firstly, the prohibition of *refoulement* enshrined in Article 33 of the Refugee Convention and in Article 3 ECHR[71] entails that, in order to determine whether or not the expulsion of the asylum-seeker would put him at risk of persecution, the State has to scrutinise the individual circumstances of the applicant. Therefore, the State cannot promote expulsion until the authorities have made a final decision on the merits that the asylum-seeker is *not a refugee* in the sense of Article 1 of the Refugee Convention.[72] This was in fact acknowledged by the Court in *R.U. v. Greece*, when it stated that "it follows from Articles 31 to 33 of the Refugee Convention that the expulsion of a person who has filed an asylum claim is not permissible until there has been a final decision rejecting the asylum claim".[73] More specifically for second-instance decisions, in *Gebremedhin* the Court affirmed that Article 13 ECHR –in connection with Article 3– requires that remedies against decisions to expel individuals to a country where there may be a risk of *refoulement* must have *automatic suspensive effect*.[74] Even in the case of shared protective responsibility arrangements such as the safe third country concept or the Dublin Regulation,[75] asylum-seekers cannot be expelled until the authorities have declared the application inadmissible after ascertaining that the individual applicant does not face a risk of indirect *refoulement*

[71] The inclusion of the prohibition of *refoulement* in Article 3 ECHR was developed through the case law of the Court. The leading cases in this respect are *Soering v. UK*, no. 14038/88, ECtHR 07 July 1989 and *Vilvarajah and Others v. UK*, no. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, ECtHR 30 October 1991. For a recent publication on *non-refoulement*, see SOLER GARCÍA, C., *Los Límites a la Expulsión de Extranjeros ante el Tribunal Europeo de Derechos Humanos y el Tribunal de Justicia de la Unión Europea*, Aranzadi, Madrid, 2019.

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

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

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

[75] For the safe third country concept, see Articles 38 and 39 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180/60); for Dublin procedures, see Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the member States by a third-country national or a stateless person (recast) (OJ L 180/31).

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(see *Hirsi v. Italy*)[76] or of exposure to inhuman or degrading treatment (see *Tarakhel v. Switzerland*)[77].

Secondly, in order for detention to be justified under the second limb of Article 5(1)(f), the ECtHR requires that there be a *realistic prospect of removal*.[78] However, if the principle of *non-refoulement* forbids deportation until the asylum claim has been rejected, it seems unreasonable to affirm that there is a realistic prospect of removal in the case of an asylum-seeker whose claim has not yet been assessed with a final negative decision. In *Nabil*, the Court appears to liken an "*eventual* dismissal of the asylum application" to a "realistic prospect of removal". But is that reading correct? In our view, the only way to affront this issue in line with the principle of proportionality and of legal certainty is to affirm that there is only a realistic prospect of removal when the claim of the asylum-seeker has been finally rejected. An "eventual dismissal" of the asylum claim seems too remote an event for the purposes of calling the prospect of removal "realistic".

Moreover, the Court has asserted that, in order for detention to be compatible with the second limb of Article 5(1)(f), the expulsion procedure must be *in progress* and the State and the authorities must conduct this procedure with *due diligence*,[79] taking active steps to remove the person from the territory as quickly as possible.[80] However, as noted by Matevzic, actions for the preparation of the expulsion of asylum-seekers, such as contacting the authorities of their country of origin in order to obtain their documents, cannot be carried out while their claim is still under review; because that would put the asylum-seeker at risk of being identified by the prosecuting actor and would thus contravene the very purpose of Geneva Convention.[81] Therefore, the expulsion procedure of an asylum-seeker cannot be *in progress.*

For all these reasons, we disagree with the Court´s view regarding this issue, and consider that the second limb of Article 5(1)(f) cannot be applied to asylum-seekers whose claim is still under consideration, at least not without further requirements. So as not to completely block States' removal policies, the Court could allow for certain exceptions to this rule in cases where the asylum-seeker was already detained for the purpose of removal before lodging the application. Both UNHCR[82] and EU law allow[83] for such

[76] *Hirsi Jamaa and Others v. Italy*, no. 27765/09, ECtHR 23 February 2011.
[77] *Tarakhel v. Switzerland*, no. 29217/12, ECtHR 04 November 2014.
[78] *S.Z. v. Greece*, no. 66702/13, ECtHR 21 June 2018, §54.
[79] *S.Z. v. Greece*, §53; *Thimothawes v. Belgium*, §60; *Abdi Mahamud v. Malta*, §137; *R.T. v. Greece*, §86; *A.Y. v. Greece*, §85; *Nabil and Others v. Hungary*, §29; *A.E. v. Greece*, no. 46673/10, ECtHR 27 February 2015, §49; *S.C. v. Romania*, no. 9356/11, ECtHR 10 February 2015, §57.
[80] *J.N. v. UK*, no. 37289/12, ECtHR 19 May 2016, §107.
[81] MATEVZIC, G., "Detention of asylum-seekers under the scope of Article 5.1(f) of ECHR – some thoughts based on recent ECHR and CJEU jurisprudence", *European Database of Asylum Law* [journal], 14-09-2016. Available at https://cutt.ly/2rlBRbF.
[82] According to UNHCR, asylum-seekers may be detained on grounds of expulsion where there are grounds for believing that the asylum-seeker has introduced an asylum claim merely to *frustrate an expulsion* decision, in order to *prevent absconding* while the claim is being assessed. See UNHCR Guidelines, *supra* note 57, §32-33.
[83] Article 8(3)(d) of the recast Reception Conditions Directive (RCD) allows for the detention of an asylum-seeker who was already detained before making an application when the Member State "can substantiate,

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exceptions, which are closely linked to a reprehensible conduct on the part of the asylum-seeker –a conduct which, in any case, should be duly proved by the authorities on the basis of objective criteria.[84] However, the broad discretion that *Nabil* grants States to detain asylum-seekers in order to effect an expulsion which may never materialise provides for a much lower protection of the right to liberty than these other legal orders. On a positive note, the Court provides detained asylum-seekers awaiting expulsion with a time-related guarantee: when the detained migrant awaiting expulsion applies for asylum, the State has to *speedily* process and decide the asylum claim.[85]

3. A recent example: the grounds for detention and the EU-Turkey Statement

In the cases *Kaak and Others v. Greece*, *O.S.A. and Others v. Greece* and *J.R. and Others v. Greece* we find an example of the large margin of appreciation that the Court gives to States regarding the grounds for asylum detention in the context of a deal which has been at the core of the European response to the refugee crisis: the EU-Turkey Statement.[86] In these judgments, the Court affirmed that the detention of asylum-seekers in the Greek *hotspots*[87] complied with the grounds under Article 5(1)(f) because it was intended "to prevent irregular stay in the Greek territory, to guarantee their eventual expulsion *and* to identify and register [the asylum-seekers] in the framework of the implementation of the EU-Turkey Statement".[88] Although this paragraph may appear to add a third ground for detention under Article 5(1)(f), identification of asylum-seekers is in fact a means to "prevent their effecting an unauthorised entry". This is corroborated by the findings of the Court of Justice of the EU (CJEU) in *K. v. Staatssecretaris*, where that Court concluded that an initial detention for the purpose of identification during preliminary asylum proceedings (Article 8(3)(a) of the recast Reception Conditions Directive or RCD) can be subsumed under the first limb of Article 5(1)(f).[89] The use of this repetitive

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 asylum merely in order to *delay or frustrate the enforcement* of the return decision" [emphasis added]. See in this regard the judgments of the CJEU *Arslan*, EU:C:2013:343 and *Gnandi*, ECLI:EU:C:2018:465, which shed light on the interplay between the RCD and the Return Directive. On the other hand, Article 8(3)(e) allows for detention in order to protect national security or public order in conjunction with an expulsion decision, as interpreted by the CJEU in *J.N.*, EU:C:2016:84. For an analysis of the latter judgment, see PEERS, S. "Detention of asylum-seekers: the first CJEU judgment", *EU law Analysus* [Blog], 9-3-2016. Available at https://cutt.ly/ItBlts0.

[84] TSOURDI, *supra* note 42, p. 15.

[85] *S.M.M. v. UK*, no. 77450/12, ECtHR 22 June 2017, §84-85.

[86] EU-Turkey statement. European Council Press release, 18 March 2016. Available at: https://cutt.ly/XrEjD5K.

[87] For a thorough overview of the legal issues surrounding *hotspots* see ZIEBRITZKI, C. and NESTLER, R., "Hotspots an der EU-Aussengrenze. Eine rechtliche Bestandsaufnahme", *MPIL Research Paper Series*, n. 17, 2017. For the specific issue of detention in these premises, see MAJCHER, I., *supra* note 13.

[88] *Kaak and Others v. Greece*, no. 34215/16, ECtHR 3 October 2019, §103; *O.S.A. and Others v. Greece*, no. 39065/16, ECtHR 21 March 2019, §64; *J.R. and Others v. Greece*, §112.

[89] Judgment of 14 September 2017, *K. v. Staatssecretaris van Veiligheid en Justitie*, C-18/16, EU:C:2018:296, §50-55. See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96).

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phrase by the ECtHR is therefore bizarre, and the reasoning behind it may well be that the Court is implicitly endorsing the EU-Turkey Statement, as argued by Pinjenburg.[90] As a final clarification, it should be noted that the EU-Turkey Statement was not the legal ground on which the Greek authorities relied in these cases for detaining the asylum-seekers –it was national domestic law. The EU-Turkey Statement does not enshrine any provision regarding the detention of migrants and asylum-seekers, but, even if it did, relying on it for the purpose of detaining asylum-seekers would have been an outright violation of Article 5. As we will see in the following section, the detention of a migrant under Article 5(1)(f) must be in accordance with national law. The EU-Turkey Statement can hardly be considered to form part of the Greek legal order, since the Greek Government, like all other EU Member States, do not view the Statement as legally binding. Although there is a heated doctrinal debate on whether or not the EU-Turkey Statement is a treaty,[91] the uncertainty surrounding its legal nature would likely make detention under its provisions incompatible with the principles of clarity, foreseeability and legal security.

III. THE LAWFULNESS OF THE DETENTION AND THE PROHIBITION OF ARBITRARINESS

A State might detain an asylum-seeker for one of the two admissible purposes to which Article 5(1)(f) refers whilst still acting in violation of the Convention. This is the case because the arrest or detention must be "lawful", as both the first paragraph of Article 5 and Article 5(1)(f) set out.[92] The ECtHR has paid special attention to this term, since the lawfulness of the detention is directly connected to the core principle of Article 5: the prohibition of arbitrariness.[93] Indeed, the Court has developed an extensive jurisprudence that sets forth the requirements that the detention must comply with. These requirements apply to detention based on the first limb of Article 5(1)(f) in the same way that they apply to detention grounded on the second limb,[94] and, as a result, the distinction between them is often blurred.[95] Since the authorities restrict a fundamental right through

[90] PIJNENBURG, A., "*JR and Others v. Greece:* what does the Court (not) say about the EU-Turkey Statement?", *Strasbourg Observers* [blog], 21-2-2018. Available at: https://cutt.ly/IrlBG9H.
[91] See, for example, GATTI, M. and OTT, A., "The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law", in CARRERA, S., SANTOS VARA, J. and STRIK, T. (eds.), *Constitutionalising the External Dimension of EU Migration Policies in Times of Crisis,* Elgaronline, 2019.
[92] The first paragraph establishes the obligation of the authorities to follow "a procedure prescribed by law". In *Kahadawa Arachchige and Others v. Cyprus,* nos. 16870/11, 16874/11, 16879/11, ECtHR 19 June 2018, §59, the Court affirmed that the requirements of a "lawful" detention in the sense of Article 5(1)(f) also apply to the obligation of the first paragraph of Article 5.
[93] *Thimothawes v. Belgium*, §56.
[94] *Ibid*, §65; *Ilias and Ahmed v. Hungary,* no. 47287/15, ECtHR 14 March 2017, §62.
[95] CORNELISSE, G., *Immigration Detention and Human Rights,* Brill / Nijhoff, Leiden, 2010, p. 283. For example, in *K.G. v. Belgium*, no. 52548/15, ECtHR 6 November 2018, a case where the asylum-seeker had been irregularly staying in Belgium for many years, the Court found that the he had been detained both in order to prevent his unauthorised entry and to prepare his expulsion.

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detention, it is for them to demonstrate that they have complied with these requirements and thus have the lawful authority to detain the asylum-seeker.[96]

As extensive as the case law of the Court on this point might be, the protection offered to the asylum-seeker by these conditions is limited when balanced against the wide margin of appreciation that the Court grants States by not requiring them to show that detention is *necessary* to achieve any particular aim in the individual case. The current section will first systematize the limitations to the detention of asylum-seekers put forward by the Court and proceed by addressing the controversial issue of the lack of the necessity and proportionality test.

1. Compliance with National Law

First, the deprivation of liberty must "essentially" *conform to the substantive and procedural rules of national law*.[97] This means that the ECtHR may satisfy itself that the State's actions are in compliance with national law[98]. It may, therefore, not need to consider other legal sources so as to determine the lawfulness of a detention. As such, we find an interplay between national law and the ECHR, since the Court has to examine the requirements set out in national law in order to determine whether the detention is in conformity with the Convention. However, the scope of the Court´s task in this connection is subject to limits "inherent in the logic of the European system of protection".[99] In effect, the scope of the ECtHR´s review over national law is restricted, for it is in the first place for the national authorities, most notably the courts, to interpret and apply the domestic law.[100]

The ECtHR thus limits its examination as to whether the national authorities' interpretation of national legislation when issuing or reviewing a detention order is "arbitrary or patently unreasonable"[101] and to whether the *effects* of that interpretation are in conformity with the ECHR.[102] As an example, in *Nabil and Others v. Hungary,* the Court noted that, under Hungarian law, in order to detain a migrant for the purpose of expulsion, the authorities have to prove that the detention is necessary to prevent the individual from frustrating the enforcement of the expulsion.[103] This was not done by the authorities in the case at hand. Although this "proof of necessity" is not required under the ECHR –as will be explained below– the fact that national law prescribed this entailed that the detention became unlawful under Article 5(1)(f). Conversely, in *Mahammad and Others v. Greece* the Court declared that under Greek law, detention of asylum-seekers is

[96] *S.M.M. v. UK,* §85.
[97] *S.Z. v. Greece,* §53; *Kahadawa v. Cyprus,* §59; *S.M.M. v. UK,* §63; *Richmond Yaw and Others v. Italy,* nos. 3342/11, 3391/11, 3408/11, 3447/11, ECtHR 6 October 2016, §69; *O.M. v. Hungary,* §41; *J.N. v. UK,* §75; *Mahamed Jama v. Malta,* §139; *Khlaifia and Others v. Italy,* no. 16483/12, ECtHR (Grand Chamber) 15 December 2016, §91.
[98] *Nabil and Others v. Hungary,* §31.
[99] *Ibid,* §31.
[100] *S.M.M. v. UK,* §64.
[101] *Thimothawes v. Belgium,* §71.
[102] *Ilias and Ahmed v. Hungary,* §63.
[103] *Nabil and Others v. Hungary,* §39-43.

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permitted when it is necessary in order to verify their identity, which *was* the case at hand, and therefore the detention had been lawful under Article 5(1)(f).[104]

When the decision to detain shows a "serious and manifest irregularity" with respect to the requirements set out in national law, the Court has exceptionally declared that the decision is *ex face* unlawful. In order to determine this irregularity, the ECtHR considers whether national jurisprudence is clear about the requirement at hand and whether, in spite of such purported clarity, national authorities have failed to comply with it.[105]

2. Compliance with international law… and EU law?

Where does this leave compliance of the detention with international standards? As already emphasized, the Court uses the term "essentially" [conform to national law],[106] which implies that, whilst national law is the first source that the Court refers to, it is not the only one. The Court has further elaborated this idea in various judgments, asserting that "Article 5(1) refers not only to standards of domestic law but also, where appropriate, to other standards applicable to the persons concerned, including those found in international law".[107] *Compliance with international law* is thus the second condition for a detention to be "lawful".

On the other hand, compliance with EU law is not directly a requisite for detention to be "lawful" under Article 5(1)(f). It is however an indirect requisite, provided that the Directives are clearly transposed in national law –in which case, the Court will again apply the principle of limiting itself to examine whether the interpretation of national law is arbitrary or patently unreasonable. This interaction between EU law and the ECHR results in increased protection for asylum, contributing to the *constitutionalization* of asylum and immigration detention in the EU.[108]

Firstly, EU Member States that are part of the Common European Asylum System are required to establish in their national law that asylum-seekers have a right to remain in the territory until a first-instance decision has been made (Article 9 of the recast Asylum Procedures Directive or APD).[109] Although Member States may refrain from authorising entry or stay of asylum-seekers –and thus detain them– in exceptional situations,[110] it is

[104] *Mahammad and Others v. Greece*, no. 48352/12, ECtHR 15 April 2015, §6.
[105] *Richmond Yaw and Others v. Italy*, §73.
[106] *Nabil and Others v. Hungary*, §30.
[107] *Thimothawes v. Belgium*, §71, *Ilias and Ahmed v. Hungary*, §63.
[108] CORNELISSE, G., "Detention and transnational law in the European Union: constitutional protection between complementarity and inconsistency", in FLYNN, M. J. and FLYNN, M. B. (eds.), *Challenging Immigration Detention: Academics, Activists and Policy-Makers*, Edward Elgar Publishing Ltd, Cheltenham, 2017, pp. 222-238, p. 232.
[109] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180/60).
[110] They may do so in the limited number of cases where the use of a border procedure is allowed (Article 8(3)(c) RPD read together with Articles 43, 31(8) and 33 APD) or for an initial screening in cases where the asylum applicant fails to cooperate with the authorities during the preliminary steps of the asylum claim, especially if there is a risk of absconding (Article 8(3)(a) and (b) RCD as interpreted by the CJEU in *K.*,

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undisputable that once the State has allowed the asylum-seeker to remain in accordance with Article 9 APD, detention is no longer permissible "to prevent an unauthorised entry". This was acknowledged by the ECtHR in *O.M. v. Hungary*,[111] where it observed that "where a State (…) enacts legislation (of its own motion or pursuant to European Union law) *explicitly authorising* the entry or stay of immigrants pending an asylum application, an ensuing detention for the purpose of preventing an unauthorised entry *may raise an issue* as to the lawfulness of the detention under Article 5(1)(f)".

While the expression "may raise an issue" is far from new in the case law of the Court,[112] its use in this context is questionable. It is here argued that the expression "may/could raise an issue" should only be used when it is not certain that a particular situation would be in breach of a fundamental right. However, it is evident that a detention where the entry or stay is authorised would infringe national law and thus violate Article 5(1)(f). This ambiguous statement is therefore unfortunate, as States might regard it as a semi-open door for them to lawfully detain asylum-seekers under the ECHR in order to prevent their "unauthorised entry" even when they act in violation of their own national law. This is even more the case if we read *O.M. v. Hungary* in the light of the pre-2015 judgment *Suso Musa v. Malta,* where the Court stated to a somewhat vaguer degree that "it would be hard" to consider the measure as being compatible with Article 5(1)(f).[113]

Secondly, the EU asylum *acquis* requires Member States to lay down in national law that the detention of an asylum-seeker can only be effected when it is strictly necessary, that is, when no alternatives to detention are viable.[114] If a State does not do this, it is not only violating national and EU law, but also Article 5 ECHR, because of the requirement of this article that national law has to be complied with.

Another example of interaction between the two orders can be found in the Chamber judgment *Ilias and Ahmed v. Hungary,* where, after reiterating the elements of an arbitrary detention, the Court further "noted" that, in accordance with the Asylum Procedures Directive, EU Member States should not hold a person in detention for the sole reason that he or she is an asylum applicant.[115] It thus seems that the ECtHR was taking into account EU law not only to determine if the detention was lawful under national law, but also in order to establish whether or not the detention was arbitrary. This could be seen as a positive advancement of the jurisprudence of the Court since, in a previous judgment

ECLI:EU:C:2017:680). For an explanation of border procedures, see CORNELISSE, G., "Territory, Procedures and Rights: Border Procedures in European Asylum Law", *Refugee Survey Quarterly,* vol. 35, n. 1, 2017, pp. 74-90. In our view, the most problematic ground for detention under EU law is the case when border procedures are used merely because the applicant comes from a "safe country of origin" (Article 31(8)(b) APD), since the ground for detention is not based on a misbehaviour of the asylum-seeker.

[111] *O.M. v. Hungary,* §47.

[112] As an example, the European Commission on Human Rights already used this expression in the Decision *X. v. the United Kingdom*, no. 9088/80, 6 March 1982, §1.

[113] *Suso Musa v. Malta,* no. 42337/12, ECtHR 9 December 2013, §97.

[114] This is established in both primary law (Article 52(1) of the EU Charter of Fundamental Rights) and in secondary law (Article 8(2) RCD, Article 28(2) Dublin Regulation). See MORENO-LAX, *supra* note 41.

[115] *Ilias and Ahmed v. Hungary,* §64.

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against Hungary, namely *Lokpo and Touré v. Hungary*,[116] the ECtHR failed to take into account the violation of this same provision of the APD in its assessment of the lawfulness of detention.[117] However, as will be seen in section VI, the Grand Chamber overturned the positive steps taken in *Ilias and Ahmed*.

In any case, the Court clearly separates its role from the EU *acquis*. For example, in *J.N. v. UK.*, it asserted that "the Return Directive[118] is not to be taken as the only system conceivable in Europe as being compatible with sub-paragraph (f)".[119] Especially when a Directive has not adequately been transposed into the national legal system, the Court has declared that assessing whether national law complies with the Directives is beyond the limits of its competence. In the words of the Court, "it is primarily for national authorities to interpret and apply domestic legislation, *if necessary in conformity with the law of the European Union*.[120] This follows the principle of primacy of EU law –established by the Court of Justice of the European Union in, *inter alia*, *Costa v. ENEL* and *Simmenthal*[121]– according to which national courts have to interpret domestic legislation in conformity with EU law and exclude the application of national legislation that contradicts it.

3. Compliance of national law with the ECHR

The third requirement for a detention to be lawful is that *domestic law itself complies with the ECHR*, including the general principles contained therein –particularly those that refer to the rule of law and to legal certainty.[122] The latter implies that where a national law authorises the deprivation of liberty it must be sufficiently *accessible* and *precise* so that the detainee can *foresee* to a reasonable degree the consequences that will derive from a particular act.[123] The importance of adopting laws which clearly govern the substantive requirements and procedural guarantees of the detention of migrants was particularly stressed by the Grand Chamber in *Khlaifia and Others v. Italy*[124]. This is an aspect of the judgement that has been positively acclaimed by scholars.[125]

In order to assess whether domestic law is sufficiently accessible, precise and foreseeable, the Court carries out an evaluation of the "quality of the law". In doing this, the Court might take into account factors such as the existence of clear legal provisions for ordering

[116] *Lokpo and Touré v. Hungary*, no. 10816/10, ECtHR 20 September 2011.
[117] This observation was made by Costello. See COSTELLO, *supra* note 69, p. 287.
[118] 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 (OJ L 348/98).
[119] *J.N. v. UK*, §91.
[120] *Thimothawes v. Belgium*, §71; *Ilias and Ahmed v. Hungary*, §63.
[121] Judgment of 9 March 1978, *Simmenthal*, C-106/77, EU:C:1978:49; Judgment of 15 July 1964, *Costa v. E.N.E.L.*, C-6/64, EU:C:1964:66.
[122] *Thimothawes v. Belgium*, §62; *Richmond Yaw and Others v. Italy*, §69; *J.N. v. UK*, §76; *Khlaifia and Others v. Italy* (Grand Chamber), §91.
[123] *Richmond Yaw and Others v. Italy*, §70; *J.N. v. UK*, §77.
[124] *Khlaifia and Others v. Italy* (Grand Chamber), §97-108.
[125] ZIRULIA, S. and PEERS, S., "A template for protecting human rights during the 'refugee crisis'? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling", *EU law Analysis* [blog], 5-1-2017. Available at https://cutt.ly/3rlB1A4.

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detention, for extending detention and for setting time limits for detention.[126] However, a general control of the ECtHR over national legislation cannot be invoked by an individual who has not been affected by the incompatibility of national law with the Convention in a particular case; since "the Court has not a task of controlling legislation or practice in the abstract but it must be limited, without forgetting the general context, to address whether the manner in which that law affected the applicant was in breach of the Convention".[127]

The reluctance of the Court to control the compatibility between national law and the ECHR in the abstract might be seen as another instance of deference to State's sovereignty. This deference can be observed in the Chamber judgment *Ilias and Ahmed v. Hungary*, a case in which the Court casted doubts on the "clarity and foreseeability" of the domestic provisions on which the authorities had grounded the detention,[128] but did not make any statement on whether these provisions were compatible with the ECHR. Similarly, in *Suso Musa v. Malta,* in *Abdi Mahamud v. Malta* and in *Mahamed Jama v. Malta,* the Court "expressed reservations" about the quality of all the applicable laws, but nevertheless accepted that these laws provide a sufficiently clear legal basis for the detention of asylum-seekers.[129]

This third requirement also implies that national authorities have to interpret national law not only in conformity with the ECHR but also *in conformity with the jurisprudence of the ECtHR.* This is not expressly stated by the Court, however, it is a direct consequence of this third requirement: if there has to be a consistency at the normative level (between national law and the ECHR), then this consistency must also be applied at the implementation level (between the national jurisprudence and the jurisprudence of the ECtHR). This is again exemplified in *Ilias and Ahmed v. Hungary,* where the Court stated that the national authorities had "elastically interpreted" a general provision of national law in order to detain an asylum-seeker without any formal decision, a procedure which "falls short of the requirements enounced in the Court´s case law".[130]

4. The prohibition of arbitrariness

Finally, the fourth requirement set out by the Court is that any deprivation of liberty must be in accordance with the "fundamental principle"[131] of *protecting the individual from arbitrariness.* Furthermore, this prohibition demands that both the *order* to detain and the *execution* of the detention genuinely conform with the purpose of the restrictions permitted by Article 5(1)(f).[132] Nonetheless, Article 5(1)(f) does not require there to be *automatic* judicial review of immigration detention, although the Court may take the

[126] *J.N. v. UK,* §77, §90.
[127] *Thimothawes v. Belgium,* §71; *J.N. v. UK,* §100; *N.M. v. Romania,* no. 75325/11, ECtHR 10 May 2015, §81.
[128] *Ilias and Ahmed v. Hungary,* §66.
[129] *Abdu Mahamud v. Malta*, §129; *Mahamed Jama v. Malta,* §144; *Suso Musa v. Malta,* §99.
[130] *Ilias and Ahmed v. Hungary,* §68.
[131] *Kahadawa v. Cyprus,* §59; *J.N. v. UK,* §78; *Mahamed Jama v. Malta,* §139.
[132] *S.M.M. v. UK,* §66; *J.N. v. UK,* §80.

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effectiveness of any existing remedy into consideration in its overall assessment of the "arbitrariness test".[133]

The notion of "arbitrariness" in Article 5(1) extends beyond lack of conformity with national law. This means that the deprivation of liberty may be lawful in terms of domestic law but still arbitrary and therefore contrary to the Convention.

But what exactly is arbitrariness? The Court has settled a clear jurisprudence in this respect. To avoid being branded as arbitrary, detention under Article 5(1) (f): (1) must be carried out in *good faith*; (2) must be closely *connected to the grounds* of detention relied on by the Government; (3) there must be some relationship between the ground of permitted deprivation of liberty relied on and the *place and conditions* of detention, and (4) the *length of the detention* must not exceed that reasonably required for the purpose pursued.[134] Interestingly, this "arbitrariness test" is almost identical to the one applied by the British domestic courts, namely the so-called *Hardial Singh* principles.[135]

The requirement of good faith played an important role in *Abdullahi Elmi v. Malta* and in *Aarabi v. Greece*. In both cases –which concerned the detention of minors– assessing whether or not the authorities had acted in good faith entailed an evaluation of the behaviour of the asylum-seeker (e.g. the information he had provided the authorities regarding his age) and of the authorities (e.g. how long it had taken for them to determine the applicant's age). This is, in our view, the correct manner to analyse the good faith requirement. However, in another case, *E.A. v. Greece*, the Court found that "the good faith of the authorities cannot be put into question"[136] merely because the State had justified the detention of the asylum-seeker on the grounds provided for in Article 5(1)(f). Thus, the Court set an *iuris tantum* presumption of good faith when the authorities rely on such a ground. This results in an inconsistency of the Court's case law, as it confuses the requirement that there are *grounds* for detention with the requirement of good faith, the latter of which forms part of the arbitrariness test and demands a scrutiny of the authorities' factual behaviour. The Court's assertion in *E.A. v. Greece* is yet another example of the Court's readiness to accept the actions of the State in recent asylum detention cases –as in other migration-related judgments, it is the State which is most often given the benefit of the doubt.[137]

As for condition number (2) (connection between the detention and the grounds), the State will only comply with it if the grounds relied on to detain the asylum-seeker are provided for in national law, for otherwise there would be a *de facto* detention, that is, a detention "not incarnated by a formal decision of legal relevance",[138] which automatically violates

[133] *J.N. v. UK*, §94.
[134] *S.Z. v. Greece*, §53; *Kahadawa v Cyprus*, §60; *Thimothawes v. Belgium*, §64; *J.R. and Others v. Greece*, §110; *S.M.M. v. UK*, §66; *Abdullahi Elmi v. Malta*, §142; *O.M. v. Hungary*, §41; *J.N. v. UK*, §80; *Mahamed Jama v. Malta*, §140; *Nabil and Others v. Hungary*, §34; *S.C. v. Romania*, §58.
[135] *S.M.M. v. UK*, §57; *J.N. v. UK*, §97.
[136] *E.A. v. Greece*, no. 74308/10, 30 July 2015, §85.
[137] DEMBOUR, *supra* note 28, p. 245.
[138] *Ilias and Ahmed v. Hungary*, §68.

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the prohibition of arbitrariness. With regard to requirement number (3) (place and conditions of detention), it is here where the jurisprudence of the Court regarding Article 5(1)(f) and Article 3 find its connection: on occasion, the requirement of legality encompasses concerns relating to the detention conditions, especially when the detention of vulnerable individuals is at issue.[139] For this reason, in cases where the Court had already found a violation of Article 3 due to the existence of degrading conditions of detention, it did not consider it necessary to pronounce itself on this matter in the assessment of the arbitrariness under Article 5.[140]

The prohibition of arbitrariness is directly linked with the *principle of proportionality*, which is applied by the Court in a very limited way, namely "only to the extent that the detention should not continue for an unreasonable length of time".[141] Therefore, the "proportionality test" is included in the arbitrariness test, but only regarding the length of the detention –requirement number (4). This interpretation follows the *Chahal* judgement.[142] We may question, however, whether the Court´s interpretation encapsulates the true meaning of "proportionality".

5. The lack of a full proportionality test

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

(1) Proper purpose: the authorization to limit a constitutional right does not only have to be legal, but also *legitimate.* In a constitutional democracy, a proper purpose is one that suits the values of a democratic society.
(2) Rational connection: the use of the means to limit the right would rationally lead to the realization of the law´s purpose. That is to say, the limiting law increases the likelihood of realizing the legitimate purpose.
(3) Necessary means: the legislator has to choose –of all those means that may advance the purpose of the limiting law– that which would *least limit* the human right in question. The means which restrict the right can only be used if the purpose cannot be achieved through the use of other means that would equally satisfy the purpose.
(4) Balancing or proportionality *stricto sensu*: A proper relation ("proportional" in the narrow sense) should exist between the benefits gained by the public when the purpose is fulfilled and the harm caused to the constitutional right of the individual.[143]

If we translate these four requirements to the Court´s jurisprudence, we find that:

(1) Migration control, which is a value generally accepted in democratic societies, is the legitimate purpose for restricting the human right to liberty of migrants. This purpose is reflected in Article 5(1)(f). It is however debatable that migration control *per se*

[139] COSTELLO, *supra* note 69, p. 286.
[140] *A.Y. v. Greece*, §88.
[141] *J.N. v. UK*, §82.
[142] *Chahal v. UK*, no. 22414/93, ECtHR 15 November 1996.
[143] BARAK, A., *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge, 2012.

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(i.e. preventing irregular entry and ensuring expulsion), without additional reasons, can be a legitimate purpose for detaining asylum-seekers, as we have discussed in section II.

(2) In its "arbitrariness test", the ECtHR takes into account whether the detention of the asylum-seeker is closely connected to the grounds of detention relied on by the Government. The Court therefore fulfils this element of the principle of proportionality.

(3) As repeatedly stated by the Court both in the cases analysed that relate to the first limb of Article 5(1)(f) –following *Saadi*– and to the second limb –following *Chahal*–, the State does *not* have to justify the *necessity* of the detention.[144] For example, they do not have to justify that the detention is necessary to prevent the individual from committing an offence or fleeing. Therefore, it does not require the State to look for alternatives to detention before issuing a detention order.

(4) As noted by Moreno-Lax, the search for a "fair balance" between the requirements of the public interest and the protection of individual rights inheres in the entire ECHR.[145] Undoubtedly, the balancing act entails taking into account the *individual circumstances* of the person who is to be detained. However, when it comes to detention of asylum-seekers, the Court only requires States to take into account the individual circumstances of the person when vulnerability is detected, as will be explained in section V. Therefore, the Court very much limits the scope of the balancing test. This is proven by the fact that, in the case law that we have reviewed, the only mention to the balancing act is made in a case regarding detention of children, namely *Bistieva and Others v. Poland*.[146]

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

The Court seems to justify the lack of a "necessity test" by implying that Article 5(1)(f) is less protective than Article 5(1)(c),[147] according to which the authorities have to give *reasonable motives* on why the [criminal] detention is necessary in order to prevent a person from committing an offence or from fleeing after having done so. Thus, the Court uses a literal interpretation of Article 5(1)(f), which indeed does not require a necessity test. The use of the literal method of interpretation in this case may, however, be deemed unacceptable for several reasons.

[144] *S.Z. v. Greece*, §53; *Kahadawa v. Cyprus*, §58; *Thimothawes v. Belgium*, §60; *S.M.M. v. UK.*, §67; *J.N. v. UK*, §81; *R.T. v. Greece*, §84; *A.Y. v. Greece*, §84; *Nabil and Others v. Hungary*, §28; *H.S. v. Cyprus*, no. 41753/10, ECtHR 21 July 2015, §306; *A.E. v. Greece*, §49.
[145] MORENO-LAX, *supra* note 41, p. 84.
[146] *Bistieva and Others v. Poland*, no. 75157/14, ECtHR 10 April 2018, §78.
[147] *Kahadawa v. Cyprus*, §58; *Mahammad and Others v. Greece*, §54.

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Firstly, both the Refugee Convention and the ICCPR establish that the authorities have to carry out a necessity test prior to detaining asylum-seekers. While the former instrument explicitly states in Article 31(2) that restrictions on movement may only be applied if they are *necessary*,[148] Article 9(1) ICCPR sets out that detention may not be "arbitrary", a concept which, according to the HRC, includes elements of inappropriateness, reasonableness, necessity and proportionality.[149] Therefore, the Court should follow a systematic interpretation of Article 5(1)(f) pursuant to the Vienna Convention on the Law of Treaties. As opposed to aforementioned dispute as to whether or not an asylum-seeker is lawfully in the territory of the State, in the case of requiring a necessity test there would be no need for the Court to draw on UNHCR guidelines or on the HRC case law. It is already crystal clear from the Refugee Convention that detention is only permissible when it is *necessary*. Even though the Court seemed to move towards a more systematic interpretation of Article 5(1)(f) in *M.S.S. v. Belgium*, where it reiterated the importance of State compliance with their international obligations when detaining asylum-seekers,[150] its jurisprudence after the refugee crisis does not reflect this line of thought.

Secondly, the Court generally leaves a wide margin of appreciation to State Parties for justifying interferences of human rights only when no consensus in the law and practice of the State Parties on a particular issue can be found.[151] However, the existence of a consensus that detention must be a last resort is visible throughout the European continent: in EU law,[152] in resolutions of the Council of Europe[153] and in national law of European States. As Dembour explains:

> This consensus has been expressed not only by NGOs and independent experts but also from within the ranks of political institutions; not only in distant lands but also from within Europe; not just by close majorities but also through processes which reflect a broad consensus; not in the distant past but very recently.[154]

Thirdly, in cases related to other administrative detentions which do not explicitly require States to carry out a necessity test –i.e. paragraphs (b), (d) and (e) of Article 5– the Court clearly and systematically demands an individual motivation of the necessity with respect to each detention decision. This was underlined by Judges Karakas and Turkovic in their

[148] UNHCR has consistently warned States that the necessity requirement implies that they ought to look for alternatives to detention. For the most recent documents, see UNHCR Guidelines, *supra* note 57; and UNHCR, *Beyond Detention*, *supra* note 2.
[149] Human Rights Committee, *supra* note 61, §12.
[150] *M.S.S. v. Belgium and Greece*, §216-218. This was reiterated in *N.M. v. Romania*, §5.
[151] FAHRAT**,** *supra* note 65, p. 317.
[152] See note 111. For a comparative study of practices on alternatives to detention in EU Member States, see DE BRUYCKER, P., BLOOMFIELD, A., TSOURDI, E. L. and PÉTIN, J., *Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation*, Odysseus Network, 2014. Available at https://cutt.ly/drxfbpm.
[153] Committee of Ministers Recommendation R (2003) to member states on measures of detention of asylum seekers, adopted on 16 April 2003; Detention of asylum seekers and irregular migrants in Europe, Parliamentary Assembly of the Council of Europe Recommendation 1900 (2010), 28 January 2010.
[154] DEMBOUR, *supra* note 28, p. 383.

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dissenting opinions to the judgment *Thimothawes v. Belgium*.[155] Therefore the Court gives more leeway to States when detaining migrants and asylum-seekers in the context of migration control than when detaining other individuals, including those who have not complied with the lawful order of a court (Article 5(1)(b)).

Finally, as noted by Cornelisse, the very nature of human rights requires that interferences with these rights be kept to a minimum. To accept that the right to liberty of migrants can be restricted –even when these restrictions are not necessary– fails to recognize that this right counts as a human right.[156] A possible reason of why the Court affords such a substandard level of protection for detained migrants and asylum-seekers, Cornelisse states, is the Court's perception of territorialised sovereignty as a natural and innocent concept and its portrayal of detention as a "necessary adjunct" to the sovereign State's "undeniable right of control" over its territory.[157]

Only taking into account the length of detention and not compelling States to carry out a necessity and balancing test can have very negative effects on the right to liberty of asylum-seekers, especially given the wide interpretation that the ECtHR has given to the grounds for detention under Article 5(1)(f). O'Nions gives the example of an asylum-seeker who has been a victim of torture and trauma, and who is detained for "only" 7 to 10 days. This would probably satisfy the "proportionality test" for the ECtHR (as it did in *Saadi v. UK*). However, since no alternatives to detention are sought and his particular circumstances are not taken into account, there is a significant possibility that this short-term detention would have a severe detrimental effect on his welfare.[158]

We began this section by referring to the Court´s statement that protecting the individual from arbitrary detention is the core purpose of Article 5 ECHR. Nonetheless, it is clear that this protection is not equally applied to all individuals. Immigrants and asylum-seekers seem to have less of a right to liberty than others, since the proportionality test that States are required to perform in cases of the detention of migrants is much less substantive than in other cases.[159] It is true that the deficiencies caused by this are partially covered by the use of the concept of "vulnerability", as will be explored in section V. However, the Court's use of the vulnerability concept is still on shaky ground, and, in any case, should not act as a replacement for a full four-step proportionality test.

[155] Dissenting Opinions of Judges Karakas and Turkovic, *Thimothawes v. Belgium,* no. 39061/11, ECtHR 4 April 2017, §14-15.
[156] CORNELISSE, *supra* note 108, p. 227.
[157] CORNELISSE, *supra* note 95, p. 310.
[158] O'NIONS, *supra* note 34, p.181.
[159] Cornelisse has called the test employed by the ECtHR "proportionality lite". See CORNELISSE, *supra* note 95, p. 296.

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IV. THE DURATION OF DETENTION

The length of detention is the main issue that preoccupies every detainee. "How long will I stay here?" is the first question that they ask at the detention centre. Lack of an exact time limit to detention leads to deep insecurity and anxiety.[160] In its report on immigration detention in the United Kingdom, which is the only European country without a statutory general time limit on immigration detention, Amnesty International concludes that indefinite detention –whether or not the detainee suffers from pre-existing conditions or trauma– regularly results in serious and lasting harm, both to the detainee and the people close to them.[161] One of the migrants interviewed by this organisation described her experience of indefinite detention as "emotional torture"[162]. It is reasonable to assume that, for traumatised asylum-seekers who, as mentioned above, suffer from an independent deterioration of their mental health caused by detention,[163] the uncertainty of not knowing when that situation will end only exacerbates that trauma.

Not only Amnesty International, but also UNHCR,[164] the HRC[165] and other organizations[166] have called for the UK to adopt time limits for immigration detention. Yet despite the importance that the ECtHR gives to the duration of detention both in the safeguards under the second limb of Article 5(1)(f) and in the arbitrariness test, the Court has refused to read such limits into its interpretation of Article 5(1)(f), stressing that the lawfulness of the deprivation of liberty under this provision depends on the *particular circumstances* of each case.[167] Therefore, in *J.N. and Others* and in *S.M.M.*, the ECtHR failed to condemn this practice by the UK, stating that, because domestic law permits the detainee to challenge the lawfulness of the detention at any time, the absence of fixed time limits does not give rise to any increased risk of arbitrariness.[168] Whether national law sets time limits or not is a factor that the Court might take into consideration in its assessment of the "quality of the law", but this does not entail an obligation for States to establish a maximum period of immigration detention.[169] This was restated in a later case against Belgium.[170]

Due to the absence of time limits under Article 5(1)(f), the element of duration needs a case-by-case analysis so as to be able to foresee the possible outcome of a judgement in future cases. Following the Court's interpretation of proportionality as a principle linked

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[160] ILAREVA, *supra* note 8.
[161] AMNESTY INTERNATIONAL, *A Matter of Routine: The Use of Immigration Detention in the UK*, 2017, p. 27. Available at: https://cutt.ly/grxljbg.
[162] *Ibid*, p. 21
[163] FILGES *et al.*, *supra* note 7, p. 40.
[164] UNCHR, "UNHCR's priorities for the UK Government", 4-05-2017. Available at https://cutt.ly/FrxlkvV.
[165] Human Rights Committee, Concluding observations of the on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, 17 August 2015 (CCPR/C/CO/7).
[166] LIBERTY, "Immigration Detention: Consensus for Change", 2017. Available at https://cutt.ly/2rxllDY.
[167] *J.N. v. UK*, §83; *A.E. v. Greece*, §50; *S.C. v. Romania*, §57.
[168] *J.N. v. UK*, §97-98; *S.M.M. v. UK*, §70.
[169] *J.N. v. UK*, §90-93; *S.M.M. v. UK*, §70.
[170] *K.G. v. Belgium*, no. 52548/15, ECtHR 6 November 2018.

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to the duration of detention, it has in some cases considered the duration "reasonable" or "not excessive" and, in others, "unreasonable".

The Court has found the following length of detention not to be "excessive"[171]:

(1) In what the Court considered to be a "short period of time": 5 to 7 days in an immigration detention centre.[172]
(2) When an ordinary expulsion procedure was in progress, for the completion of administrative formalities: 3 months.[173]
(3) In complex expulsion procedures that, in addition, required the processing of various asylum applications*:* 5 months.[174]
(4) Following the application of an interim measure by the Court which suspended the expulsion procedure: 1 year.[175]
(5) In the processing of the asylum claim filed by a detained migrant:
    a. When national law obliges authorities to process the asylum claim of a detainee "with absolute priority": 1 and a half months.[176]
    b. When there is a risk that the detainee absconds, misusing the asylum procedure, and the conditions of detention are adapted for asylum-seekers: 5 months.[177]
    c. When the detainee had been considered as an undesirable person by a national Court, which complicated the asylum application: 8 months[178] and 1 year.[179]
(6) After a decision to grant subsidiary protection has been issued and before the asylum-seeker is notified of it: 3 days, which the Court considers reasonable due to the "practical implications arising from the need to notify the decision".[180]
(7) In the age assessment procedure of an asylum-seeker who turned out not to be a minor: 8 months (although the Court expressed reservation about the duration of the procedure but still found the duration not to be unreasonable).[181]

On the contrary, the Court has found the following duration of detention to be "unreasonable"[182]:

(1) After it was clear that there was no realistic prospect of removal of the applicant but the detention continued: 21 days.[183]
(2) In expulsion procedures:
    a. Where the applicant did not obstruct his deportation: 4 months.[184]

[171] *S.C. v. Romania*, §63.
[172] *Kahadawa v. Cyprus*, §63.
[173] *R.T. v. Greece*, §87; *A.Y. v. Greece*, §86.
[174] *Thimothawes v. Belgium*, §81.
[175] *H.S. v. Cyprus*, §314.
[176] *E.A. v. Greece*, §88.
[177] *Nassr Allah v. Latvia*, no. 66166/13, ECtHR 21 July 2015, §60.
[178] *S.C. v. Romania*, §63.
[179] *N.M. v. Romania*, §96.
[180] *Nassr Allah v. Latvia*, §58.
[181] *Mahamed Jama v. Malta*, §150.
[182] *Thimothawes v. Belgium*, §55.
[183] *S.Z. v. Greece*, §58.
[184] *A.E. v. Greece*, §54.

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b. Where the applicant did not cooperate with his deportation but, at the same time, the authorities did not act with due diligence in the expulsion procedure: 1 year.[185]
c. After the Court lifted the interim measure which suspended the expulsion procedure but the applicants were kept in detention without an explanation from the Government: 23 days.[186]

(3) In the assessment of an asylum application:
a. 4 months, since this period breached national law, according to which the asylum application of a detained person should be considered an "absolute priority".[187]
b. 7 months and 12 days, in a case where, although complex due to the risk of absconding and the fact that the applicant was asking for more time to submit documents for his asylum claim, the authorities did not act with due diligence in processing the asylum application.[188]

(4) After subsidiary protection was granted to the asylum-seeker and no justification was given by the Government for continuing the detention: 5 days.[189]
(5) After the Government finally rejected the asylum application but did not start the expulsion procedure and gave no explanation for the extension of the detention period: 9 months[190] and 3 months.[191]
(6) In the age assessment procedure of two asylum-seekers who turned out to be minors: 8 months (compare with number 7, above).[192]

From this analysis we may conclude that the Court takes into account both the behaviour of the State *and* of the asylum applicant in order to determine whether or not the duration of detention is in breach of Article 5(1)(f). Nonetheless, the variety of situations and the difference in the assessment of the "reasonableness" of the duration of detention in each case by the Court –which, in some instances, even considers 1 year of detention to be reasonable– makes it difficult to draw a general trend from the case law. The approach in this sense therefore adds to the highly casuistic methodology of the Court in immigration cases, which Judge Martens referred to as "a lottery".[193]

It can be argued that refraining from setting a fixed time limit, despite the wide consensus among European States[194] and international institutions, is another way of granting States

[185] *J.N. v. UK*, §108.
[186] *H.S. v. Cyprus*, §320.
[187] *A.E. v. Greece*, §52.
[188] *S.M.M. v. UK*, §77-88.
[189] *Mahamed Jama v. Malta*, §157.
[190] *Abdi Mahamud v. Malta*, §137-138.
[191] *S.C. v. Romania*, §64.
[192] *Abdullahi Elmi v. Malta*, §145-148.
[193] Dissenting opinion of Judge Martens in *Boughanemi v. France*, no. 22070/93, 24 April 1996. See DEMBOUR, *supra* note 28, p. 182.
[194] Apart from the fact that the UK is the only European State which does not set a time limit, EU law also provides for time limits in Article 43(2) APD, in Article 15(5) of the Return Directive and in Article 28(3) Dublin Regulation, which was interpreted by the CJEU in *Khir Amayry v. Migrationsverket*, C-60/16, EU:C:2017:675. It is however regrettable that EU law does not set any time limits when the detention of the asylum-seeker is carried out for the purposes of verifying his identity (Article 8(3)(a) RCD),

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a wide margin of appreciation. This deference is all the more striking when considering that in *Sh.D. and Others v. Greece,* the Court itself recognised that not setting a maximum time limit in national law can lead to a "quite long" period of detention.[195] Unfortunately, this risk does not seem sufficient for the Court to read the requirement of a fixed time limit into its interpretation of Article 5(1)(f).

V. DETENTION OF VULNERABLE ASYLUM-SEEKERS: THE VULNERABILITY PUZZLE IN THE ECTHR'S JURISPRUDENCE

When judges or legislators use the notion of vulnerability, they aim to provide a higher level of protection for a particular group or individual.[196] In the context of the right to liberty under the ECHR, understanding the concept of vulnerability and its legal implications proves to be difficult, because there is no systematic interpretation of the concept by the Court. Consequently, when reading different judgements that relate to vulnerability, we might come to different conclusions. As noted by Heri, the Court often slips considerations of vulnerability into its judgments without further discussion.[197] Given that the impact of detention for vulnerable people may be proportionally higher than for others, and especially since there is no explicit prohibition of the detention of vulnerable individuals in any human rights regime,[198] searching for clarification has become an important issue in recent works.[199] In the framework of this study, the concept of vulnerability also needs to be analysed, for it might give an answer to the question that has already been hinted in section II(5): Does the application of this concept by the ECtHR compensate for the gaps that we have found in its jurisprudence?

The concurring opinion of Judge Lemmens in the *Thimothawes* judgement may be of help as a starting point for answering this question. In this opinion, Lemmens interprets the recent jurisprudence of the Court regarding vulnerability and states that, when detaining migrants and asylum-seekers, authorities are required to implement a "vulnerability test".[200] This test –which we understand forms part of the "arbitrariness test"– is composed of three steps:

determining the elements of the application for international protection (Article 8(3)(b) RCD) or protecting national security and public order (Article 8(3)(e) RCD).

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

[196] PÉTIN, J., "Exploring the Role of Vulnerability in Immigration Detention", *Refugee Survey Quarterly*, n. 35, 2016, pp. 91-108, p. 92.

[197] HERI, C., "The Responsiveness of a Positive State – Vulnerability and Positive Obligations under the ECHR", *Strasbourg Observers* [blog], 13-10-2016. Available at: https://cutt.ly/LrlBo1b.

[198] PÉTIN, *supra* note 196, p. 99.

[199] See, for instance, BRANDL, U. and CZECH, P., "General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?", in IPPOLITO, F. and IGLESIAS SANCHEZ, S. (eds.), *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, Oxford, 2015.

[200] Concurring Opinion of Judge Lemmens, *Thimothawes v. Belgium*, §7.

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

If these steps are not followed, then the detention of the vulnerable person *could* raise an issue under Article 5(1)(f).[201] When reading this, we might think that the Court finally recognises that States have carry out a *necessity test* when detaining migrants and asylum-seekers, that is to say, that States are obliged to look for alternatives to detention.

However, this optimism vanishes when analysing the nuances of the "vulnerability test". First, looking for an alternative measure of detention only becomes a requirement when a *particular vulnerability* of the asylum-seeker is detected, which is not the case in all instances of detention. The meaning of this concept will be explained below. Second, even if the State does not put into practice any of the three steps of the "vulnerability test", the consequence is not a blatant breach of Article 5(1)(f): it merely "could raise an issue" under that Article. Similarly to the case of the interaction between the ECHR and EU law (section III(2)), the use of this ambiguous expression might give leeway to States to not take into account the vulnerability of the applicant and yet still lawfully detain an asylum-seeker under Article 5(1)(f).

Nevertheless, even a necessity test in cases where a particular vulnerability is detected is a move forward from the absolute "no-necessity test" approach. As pointed out by Ventury,[202] vulnerability can serve to reinforce an asylum-seeker´s procedural and substantial rights, in particular by limiting State´s *arbitrariness*. Moreover, according to Heri,[203] the concept has the potential to raise the standard of protection afforded to applicants because it imposes a *positive obligation* on the State to conduct an individualized assessment once vulnerability is detected. An example of this positive obligation can be found in *Abdi Mahamud v. Malta,* a case about the detention of an asylum-seeker with health problems. Although national law did not exempt vulnerable individuals from detention, the Court declared the detention to be *arbitrary* because the Government had not taken any *active steps* to detect such vulnerable detainees and had excessively delayed the applicant's vulnerability assessment procedure.[204]

However, even if there is a positive obligation under the ECHR to carry out an individual "vunerability assessment" (which is not one hundred percent clear, as the opinion of Judge Lemmens shows), the positive impact of this obligation on asylum-seekers´ rights seems to be undermined by the fact that the Court requires *them* to prove their particular vulnerability when challenging the lawfulness of a detention before the ECtHR. Indeed, in *Thimothawes v. Belgium,* the Court stated that the asylum-seeker "has to establish that he was in a situation which could *prima facie* lead to the conclusion that his detention is

[201] *Ibid.*
[202] VENTURI, D., "The potential of a vulnerability-based approach: some additional reflections following O.M. v. Hungary", *Strasbourg Observers* [blog], 25-10-2016. Available at https://cutt.ly/trlBVju.
[203] HERI , *supra* note 197.
[204] *Abdi Mahamud v. Malta,* §130-136.

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not justified".[205] This conclusion is rather unfortunate, and we agree with Wissing in his argument that it should be for the State to reason why a less coercive measure could not be effective in an individual case and not for the asylum-seeker himself to prove why an alternative measure would be more suited to his situation.[206]

In the 2016 case *O.M. v. Hungary* the Court seemed to be lowering that threshold of proof,[207] since it required States to especially protect asylum-seekers who "*claim* to be a part of a vulnerable group".[208] However, the later judgement *Thimothawes,* from 2017, shows that the Court has not moved from its earlier position requiring asylum-seekers to prove their vulnerability. Taking these two judgements together, we may draw the following hypothesis: when the asylum-seeker has fled his country of origin *because of* his vulnerability (as was the case in *O.M.*, where the person had fled his country because of his sexual orientation), he doesn't have to prove that he belongs to that vulnerable group; but if that is not the case (like in *Thimothawes*), then the burden of proof falls on the asylum-seeker. Nevertheless, this hypothesis should be taken with caution since, as advanced at the beginning of this section, the Court's jurisprudence regarding vulnerability is not consistent and it could be that in future cases the Court requires an asylum-seeker in a similar condition as *O.M.* to prove his vulnerability.

Examples of cases where the Court has asked asylum-seekers to prove their vulnerability can be found in *Thimothawes* itself, in which the Court established that the asylum-seeker had not proved why his mental health lead to the conclusion that he could not be detained.[209] Similarly, in *S.M.M. v. UK* the Court found that the national courts had already assessed that the mental illness of the asylum-seeker could be satisfactorily managed within detention, and that the applicant had not established any reasons why a divergence of this assessment would be required.[210] A final example is the case of underage asylum-seekers, who have to prove their vulnerability as minors by letting the State determine their age through an age-assessment procedure, which may also involve detention, as will be discussed below.

Turning now to the central question of when does a migrant or asylum-seeker present a "particular vulnerability that opposes detention" for the purposes of the vulnerability test, once again the answer is not straightforward. In its widely acclaimed[211] 2011 judgement *M.S.S.*, the Court held that all asylum-seekers are a "particularly underprivileged and vulnerable population group in need of special protection (…) because of everything they have been through during their migration and the traumatic experiences they are likely to have endured previously".[212] Despite this reference to past experiences, it must be

[205] *Thimothawes v. Belgium*, §79.
[206] WISSING, R., "Systematic detention of asylum seekers at the border. Need for an individualized necessity test", *Strasbourg Observers* [blog], 9-6-2017. Available at https://cutt.ly/lrlBNMd.
[207] HERI, *supra* note 197.
[208] *O.M. v. Hungary*, §53.
[209] *Thimothawes v. Belgium*, §79.
[210] *S.M.M. v. UK*, §69.
[211] PERONI, L., "M.S.S. v. Belgium and Greece: When is a Group Vulnerable?", *Strasbourg Observers* [Blog], 10-2-2011. Available at: https://cutt.ly/RrlBFrK; DEMBOUR, *supra* note 28, p. 422.
[212] *M.S.S. v. Belgium and Greece*, §232.

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underlined that, for the ECtHR, vulnerability is not derived from an applicant´s individual personal circumstances, but rather from his affiliation to a group with special needs.[213]

This group-centred approach to vulnerability is made clear by the Grand Chamber in the case *Khlaifia and Others v. Italy*. While the Chamber of the ECtHR considered irregular migrants to be particularly vulnerable because they had undergone a "dangerous journey on the high seas";[214] this argument was later dismissed by the Grand Chamber, which observed that the applicants were not asylum-seekers and, therefore, they "did not have the specific vulnerability inherent in that status".[215] This move has been described as a "step back" from the Chamber´s protection of irregular migrants.[216]

Following the reasoning developed in *M.S.S.* and *Khlaifia*, therefore, it seems clear that the mere fact of applying for asylum triggers the obligation of the authorities to implement steps (2) and (3) of the "vulnerability assessment" before placing the asylum-seeker under arrest. However, the analysis becomes more complicated when we add *Abdullahi Elmi v. Malta* and *O.M. v. Hungary* into the picture. In these judgements, the Court finds that, in addition to their status as asylum-seekers, the applicants were *even more vulnerable* than other asylum-seekers because they were minors (in *Abdullahi*) and because they belonged to the LGBTI community (in *O.M.*).[217] Although this distinction between a more general and a more specific vulnerability might seem confusing, Venturi argued that this is a positive step, because by taking a nuanced, flexible and layered approach to the concept, the Court acknowledges specifically the risks of a double vulnerability: as an asylum-seeker and as a member of another extremely vulnerable group[218].

We would also endorse this view if it weren't for the fact that, in other judgements like *Mahamed Jama,*[219] *S.M.M. v. UK.* and *Thimothawes,* the fact that the asylum-seeker lacked (or could not prove) a double vulnerability meant that the "vulnerability test" was no longer required by the Court. Therefore, the general vulnerability of all asylum-seekers has been effectively emptied of meaning, and we can thus affirm that, as of 2020, only the vulnerability of certain asylum-seekers triggers the obligation of authorities to carry out a "vulnerability test" when restricting their right to liberty. As warned by Brandl and Czech, the concept of the vulnerability of asylum-seekers allows us to distinguish various grades of vulnerability derived from the personal circumstances of the individual concerned, *so long as the general state of vulnerability is sufficiently respected* [emphasis added].[220] However, in view of the developments presented above, it can hardly be maintained that the Court respects the general state of vulnerability of asylum-seekers in its recent judgments.

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[213] BRANDL and CZECH, *supra* note 199, p. 249.
[214] *Khlaifia and Others v. Italy*, no. 16483/12, ECtHR 1 September 2015, §135.
[215] *Khlaifia and Others v. Italy* (Grand Chamber), §194.
[216] VENTURI, D., "The Grand Chamber´s ruling in Khlaifia and Others v. Italy: one step forward, one step back?", *Strasbourg Observers* [blog], 10-1-2017. Available at https://cutt.ly/trlBVju.
[217] *Abdullahi Elmi v. Malta*, §113; *O.M. v. Hungary*, §53.
[218] VENTURI, *supra* note 202.
[219] *Mahamed Jama v. Malta*, §100.
[220] BRANDL and CZECH, *supra* note 199, p. 251.

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So which groups of asylum-seekers does the Court now find vulnerable in the sense of triggering the "vulnerability test"? In its recent case law, one clear group stands out: unaccompanied and accompanied minors. The second most common group are those with a deteriorated psychological and/or physical state of health, although in the cases analysed the state of health has a greater impact on the Court's assessment of the conditions of detention under Article 3 than on that of Article 5(1)(f). Thirdly, since *O.M. v. Hungary*, LGBTI asylum-seekers are now also considered exceptionally vulnerable.

Special reference will now be made to the first group. The obligation to only detain children in an immigration context as a measure of last resort when no alternative is available was first laid down in *Rahimi v. Greece* in 2011.[221] To come to this conclusion, the Court especially draws on Article 3 of the United Nations Convention on the Rights of the Child,[222] which requires States to take into account the best interests of the child when taking decisions that concern minors.[223]

The strong liberty-protective approach that the Court takes when assessing cases of detained minors in search for asylum can be observed in different judgements of recent years. For instance, in what has been termed an "uncharacteristically damning language",[224] the Court has stated in *Abdullahi Elmi v. Malta* that if the authorities delay the release of children after having established that they are in fact underage, this raises "serious doubts as to the authorities' good faith".[225] Similarly, in *Mahamed Jama v. Malta*, the Court did not accept the Government's argument that an extremely long detention period could be justified purely because the age assessment procedure in cases of persons close to adulthood is lengthier.[226]

However, the fact that in both judgements the Court appears to tacitly endorse the idea that States can detain asylum-seekers pending the result of an age determination process has been criticized by Rooney. She finds this kind of detention difficult to reconcile with the established principle of international law (recognized by the United Nations Committee on the Rights of the Child)[227] that children should be given the benefit of the doubt in administrative proceedings.[228]

As a final example, in *Bistieva and Others v. Poland* the Court has pointed out that the protection of the child´s best interests involves *keeping the family together*.[229] This takes

[221] *Rahimi v. Greece*, no. 8687/08, ECtHR 05 July 2011. See also *Popov v. France*, nos. 39472/07, 39474/07, ECtHR 19 January 2012.
[222] Convention on the Rights of the Child, 2 September 1990 (U.N.T.S. vol. 1577, p. 3).
[223] *Sh.D. and Others v. Greece*, §69; *Bistieva and Others v. Poland*, §78.
[224] ROONEY, C. (2017). "Age: What's in a Number? Detention of Minors Pending Age Determination and the Case of Abdullahi Elmi & Ors V Malta", *Border Criminologies* [blog], 16-01-2017. Available at: https://cutt.ly/wrlBJPx.
[225] *Abdullahi Elmi v. Malta*, §146.
[226] *Mahamed Jama v. Malta*, §148.
[227] UN Committee on the Rights of the Child, General Comment No. 6, 1 September 2005 (CRC/GC/2005/6).
[228] ROONEY, *supra* note 224.
[229] *Bistieva and Others v. Poland*, §78.

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us to a collateral issue to the right to liberty of minors: the right to family life (Article 8 ECHR). While a core element of this right is the mutual enjoyment by parent and child of each other's company, if detention is prolonged, then the Court has found a violation of Article 8 even when the family unity was maintained.[230] In any case, the detention of families accompanied by children has to be limited as far as possible by all necessary means.[231]

With regard to asylum-seekers with a deteriorated state of health, the Court first recognized them as vulnerable (and thus required authorities to carry out the "vulnerability test") in the 2011 judgement *Yoh-Ekale Mwanje v. Belgium*.[232] It has continued to recognise them as such in more recent years.[233] Some authors hoped that this judgement would mean a move away from *Saadi* and *Chahal* and that, in the future, the Court would require authorities to implement a necessity test in all asylum and migration detention cases.[234] However, as this study has shown, this has not been the case.

Finally, regarding LGBTI asylum-seekers, which is the most recent group that has been recognized as vulnerable, the Court grounded their vulnerability on the fact that they may be unsafe in custody among other detained persons who come from countries with widespread cultural or religious prejudice against such persons.[235]

VI. DETENTION IS DETENTION NO MORE: *ILIAS AND AHMED V. HUNGARY* (GRAND CHAMBER)

More recently, in November 2019, the Grand Chamber rendered the judgment *Ilias and Ahmed v. Hungary*,[236] which overturned the Chamber judgment with regard to Article 5(1)(f). The case concerned two asylum-seekers in Hungary who were required by Hungarian law to stay in a "transit zone" at the border with Serbia for 23 days while they awaited the outcome of their asylum application. The legal issue at stake was not only whether Article 5(1)(f) had been complied with, but the more fundamental issue of whether the confinement in the "transit zones" –a closed, fenced and heavily guarded container complex[237]– could be categorised as a deprivation of liberty within the meaning of Article 5. While analysing the distinction between restriction on freedom of movement and deprivation of liberty is beyond the scope of this study, this judgment is relevant to our analysis because it represents a new type of deference to State sovereignty: finding that there has been no detention at all.

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[230] *Ibid*, §85.
[231] *Ibid.*
[232] *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, ECHR 20 December 2011, §44.
[233] S.*M.M. v. UK*, §76; *Abdi Mahamud v. Malta*, §88.
[234] LAVRYSEN, L., "Less stringent measures and migration detention: overruling Saadi v. UK?", *Strasbourg Observers* [blog], 25-01-2012. Available at https://cutt.ly/crlBmmk; COSTELLO, *supra* note 31, p. 155.
[235] *O.M. v. Hungary*, §53.
[236] *Ilias and Ahmed v. Hungary*, no. 47287/15, ECtHR (Grand Chamber), 21 November 2019.
[237] Report (SG/Inf(2017)33) of Ambassador Tomas Bocek, Special Representative of the Secretary General of the Council of Europe on migration and refugees.

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It is true that asylum-seekers in Hungarian transit zones are able to leave the transit zone, but only in the direction from which they came, i.e. Serbia, a country which denies their right to (re)apply for asylum[238] and where there is, therefore, a risk of chain *refoulement*.[239] Since, according to Hungarian law, an asylum-seeker who leaves Hungarian territory will have his asylum application terminated, the Chamber rightly affirmed that declaring Article 5 inapplicable would "compel the applicants to choose between liberty and the pursuit of a procedure ultimately aimed to shelter them from the risk of exposure to treatment in breach of Article 3 of the Convention".[240] Yet this is exactly what the Grand Chamber did by finding that the applicants were not deprived of their liberty,[241] once again ignoring the view of UNHCR in an issue related to asylum detention.[242]

The Grand Chamber thus effected an unfortunate reversal of the Chamber's "milestone judgment"[243] which some authors had considered unlikely "in light of the Court's consistent jurisprudence".[244] However, the judgment is full of inconsistencies which have been pointed out by the partly dissenting opinion of two judges and by the legal commentator Stoyanova.[245] Building on these critiques, we will highlight three elements of the judgment which most clearly reinforce the doctrine of the margin of appreciation.

Firstly, the Strasbourg reversal[246] has been expanded since, in addition to the right to control their borders, the Court has included a State's right to "prevent foreigners circumventing restrictions on immigration".[247] While focusing on the prerogatives of the State, the right to seek asylum was given less emphasis by the Grand Chamber, as it found

[238] UNHCR, 2016, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, 2016. Available at https://cutt.ly/SrxlOGa.
[239] Report of Ambassador Tomas Bocek, *supra* note 237.
[240] *Ilias and Ahmed v. Hungary*, §56.
[241] *Ilias and Ahmed v. Hungary* (Grand Chamber), §249.
[242] For UNHCR, confinement in the transit zone "severly restricts the freedom of movement and can be qualified as detention". See *Ilias and Ahmed v. Hungary* (Grand Chamber), §19. Other international institutions such as the United Nations Working Group on Arbitrary Detention (UNWGAD) also held this view. See UNWGAD, "UN human rights experts suspend Hungary visit after access denied", 15-11-2018. Available at https://cutt.ly/hrxlFUE.
[243] KILIBARDA, P., "The ECtHR´s Ilias and Ahmed v. Hungary and Why It Matters", *EJIL: Talk!* [blog], 20-03-2017. Available at: https://cutt.ly/vrlBzUk.
[244] DRINÓCZI, T. and MOHAY, Á., "Has the Migration Crisis Challenged the Concept of the Protection of the Human Rights of Migrants? The Case of Ilias and Ahmed v. Hungary (Invited Contribution)", in KUZELEWSKA, E., WEATHERBURN, A. and KLOZA, D. (eds.), *Irregular Migration as a Challenge for Democracy*, Intersentia, Cambridge, 2018, pp. 97-112.
[245] Partly Dissenting Opinion of Judge Bianku, joined by Judge Vucini. *Ilias and Ahmed v. Hungary* (Grand Chamber), pp. 75-80; STOYANOVA, V., "The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode", *Strasbourg Observers* [blog], 23-12-2019. Available at: https://cutt.ly/orxlBce. The main inconsistency was the Court's finding that Hungary had breached Article 3 for not properly assessing whether the applicants would be at risk of ill-treatment when returned to Serbia but, at the same time, argued that the applicants had not been detained because they could return to Serbia without a "direct threat to their lives and physical integrity" –an assessment which the dissenting judges considered "mere speculation".
[246] DEMBOUR, *supra* note 28.
[247] *Ilias and Ahmed v. Hungary* (Grand Chamber), §213. See STOYANOVA, *supra* note 245.

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that the applicants had stayed in the transit zones voluntarily,[248] thus disregarding the fact that seeking asylum is "a necessity, not a choice".[249] Interestingly, it appears that the Grand Chamber acknowledged the Strasbourg reversal when it declared that "the starting point regarding the applicants' individual position *vis-à-vis* the authorities is entirely different".[250] Indeed, the Strasbourg reversal means exactly this: having a "different" starting point, namely State sovereignty instead of human rights.

Secondly, in order to find that there had been no deprivation of liberty, the Grand Chamber did not only take account of the fact that Hungarian law did not designate the transit zone as a detention centre,[251] but also of the fact that the authorities were "convinced" that the applicants could leave in the direction of Serbia.[252] Giving such weight to the authorities' assessment of the situation is, without doubt, a sign of widening the margin of appreciation, which "turns the clock back many years on the interpretation of Article 5".[253]

Thirdly, the Grand Chamber affirmed that in drawing the distinction between detention and restriction on liberty of movement, "its approach should be practical and realistic, having regard to the present-day conditions and challenges".[254] This sentence begs the question as to whether the Grand Chamber was referring to the "challenges" faced by Hungary or to those faced by the Court itself. In effect, the Chamber judgment *Ilias and Ahmed* had sparked stark criticism from the Hungarian Government, which asserted that the Court's decision was "unenforceable" because it did not respect Hungary's sovereignty.[255] An even greater threat for the Court were the voices being raised by pro-government members of the Hungarian parliament –amongst other national institutions– according to which, in response to *Ilias and Ahmed*, Hungary should withdraw from the ECHR.[256]

It therefore seems reasonable to conclude that these political pressures lead the Court to adopt a "realistic" approach which, in practice, meant levelling down the previous judgment so as to maintain Hungary's trust in the European human rights system. To do this, the Court almost seemed to praise the Hungarian Government for having processed the applicant's claims so fast[257] even though it was dealing with what was "clearly a crisis situation".[258] Taking into account the context of the European refugee crisis as a way to justify a lower human rights protection is something that the Court has done not only with

[248] *Ilias and Ahmed v. Hungary* (Grand Chamber), §220.
[249] Partly Dissenting Opinion of Judge Bianku and Judge Vucinic, *supra* note 245, p. 75.
[250] *Ilias and Ahmed v. Hungary* (Grand Chamber), §221.
[251] *Ibid*, §210.
[252] *Ibid*, §236.
[253] Partly Dissenting Opinion of Judge Bianku and Judge Vucinic, *supra* note 245, p. 77.
[254] *Ilias and Ahmed v. Hungary* (Grand Chamber), §213.
[255] NAGY, B., "Restricting access to asylum and contempt of courts: Illiberals at work in Hungary", *EU Immigration and Asylum Law and Policy* [blog], 18-09-2017. Available at: https://cutt.ly/Drxl9XU.
[256] *Ibid.*
[257] STOYANOVA, *supra* note 245.
[258] *Ilias and Ahmed v. Hungary* (Grand Chamber), §228.

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respect to Article 5 but, more worryingly, to the Convention provision which embodies the "fundamental values of a democratic society": Article 3.

VII. CONDITIONS OF DETENTION UNDER ARTICLE 3 AFTER THE REFUGEE CRISIS

While the ECHR is the only human rights treaty that does not enshrine a specific provision on detention conditions,[259] the ECtHR offers similar protection to migrants and asylum-seeker by applying Article 3 of the Convention,[260] according to which "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Moreover, if the detention conditions do not fall under the threshold of Article 3 but are still not adequate, they may be fail to meet condition number (3) of the "arbitrariness test" and thus be in breach Article 5, as shown above.[261]

Due to the absolute nature of the prohibition under Article 3,[262] the margin of appreciation as regards detention conditions plays a much less important role than with regard to the right to liberty. However, three of the judgments analysed demonstrate signs that the deference to States after the 2015 refugee crisis has partly reached the case law on detention conditions.

In the first place, what leads us to this tentative conclusion is the Court's consideration in these judgments of States' *difficulties in managing a migration crisis*. The first time the ECtHR referred to this issue was in 2011, in the case *M.S.S. v. Belgium and Greece*, where it recognized that States which form the external borders of the European Union were experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers, but nevertheless stated that, in view of the absolute nature of Article 3 ECHR, these difficulties could not absolve a State of its obligation under that provision. Therefore, the Court would *not* take into account these objective difficulties when assessing whether or not there had been a violation of Article 3.[263] The same argument was made by the Court in *Hirsi Jamaa and Others v. Italy* in the same year.[264]

Five years later, the Grand Chamber issued the landmark judgement *Khlaifia and Others v. Italy*, which related, among other issues, to the detention of migrants in Lampedusa in 2011 in the context of the post-Arab Spring influx of migrants to Europe. While this judgement strengthened migrants' and asylum-seekers' rights under Article 5 (as shown above), its interpretation of Article 3 regarding detention conditions signalled a step backwards with respect to the principles established in its previous judgements.[265] In this

[259] CHETAIL, *supra* note 54, p. 57.
[260] *J.R. and Others v. Greece*, §137.
[261] See *supra*, note 134.
[262] *Thuo v. Cyprus*, no. 3869/07, ECtHR 04 April 2017, §141.
[263] *M.S.S. v. Belgium and Greece*, §223.
[264] *Hirsi Jamaa and Others v. Italy*, §122.
[265] ZIRULIA and PEERS, *supra* note 125.

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case, the Court bent somewhat the argument made in *M.S.S.* and *Hirsi*, and stated that "while constraints inherent in a migration crisis cannot, *in themselves*, be used to justify a breach of Article 3, it would be artificial to examine the facts of the case without considering the general context in which those facts arose".[266] Therefore, the Court would "bear in mind, together with other factors (…) the situation of extreme difficulty confronting the Italian authorities".[267]

Although the Court did indeed take into account other factors in order to rule that there had been no violation of Article 3, in the words of Goldenziel, "the willingness of the Court to consider the context of a migration crisis erodes the absolute character of the prohibition within Article 3".[268] His criticism is in line with that of other authors. Venturi casts doubts as to whether the mass arrivals were really impossible to predict and, thus, likely to preclude a proper organization;[269] while Zirulia and Peers suggest that the Court should have taken into account that the unlawful deprivation of liberty inflicted by the Italian government in violation of Article 5 had contributed to aggravating the consequences of the humanitarian emergency.[270] Goldenziel goes further and states that "the Court could have easily declared that Italy was liable for violating Article 3 citing specific actions that the State could have taken to avoid [the situation of extreme difficulty]".[271]

A parallel conclusion to that of *Khlaifia and Others* was reached by the Court in the 2017 case *J.R. and Others v. Greece*, a case concerning the detention of asylum-seekers who had crossed the Aegean Sea from Turkey to the Greek island of Chios in 2016. In this judgement, the Court took into account that the detentions of the asylum-seekers occurred at a time when there was an exceptional and sudden increase in migratory flows, which had created organisational, logistical and structural difficulties in the small island of Chios.[272] Although the fact that the Court declared that the situation in Chios was "chaotic" can be regarded as a wakeup call from the Court to the EU and Greece,[273] it is worrying that the Court, once again, seemed to raise the threshold of severity required under Article 3 in situations where the State is faced with a migration crisis.

J.R. and Others takes us to the second reason leading us to the conclusion that the Court defers to the judgment of States regarding the detention conditions of asylum-seekers. As in *Khlaifia and Others*, in *J.R.* the Court did not limit itself to taking into account the critical situation in Chios and laid down further arguments to declare that there had been

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[266] *Khlaifia and Others v. Italy* (Grand Chamber), §185.
[267] *Ibid.*
[268] GOLDENZIEL, J., "Khlaifia and Others v. Italy", *American Journal of International Law*, vol.112, n.2, 2018, pp. 274-280, p. 279.
[269] VENTURI, D., "The Grand Chamber´s ruling in Khlaifia and Others v. Italy: one step forward, one step back?", *Strasbourg Observers* [blog], 10-1-2017. Available at https://cutt.ly/trlBVju.
[270] ZIRULIA and PEERS, *supra* note 125.
[271] GOLDENZIEL, *supra* note 268, p. 280.
[272] *J.R. and Others v. Greece*, §138. This was reiterated in 2019 in *Kaak and Others v. Greece*, §64.
[273] *J.R. and Others v. Greece*, §141. See GATTA, F.L., "Detention of migrants with the view to implement the EU-Turkey Statement: the Court of Strasbourg (un)involved in the EU migration policy". *Cahiers de l´EDEM* [blog], 30-03-2018. Available at: https://cutt.ly/OrlVXXl.

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no violation of Article 3. In our view, however, these other arguments are not well-justified. First, the Court found that the problems denounced by the report of the CPT "were not such as to amount to a breach of Article 3".[274] This conclusion is surprising, since the CPT's report drew attention on elements of the conditions of detention which, in other judgements, the Court had taken into account in order to declare a violation of Article 3: overcrowding,[275] inadequate quality of both the food and the water[276] and lack of medical care.[277] This finding is all the more troubling given that one of the applicant's was mentally ill, to the extent that she tried to commit suicide in two occasions.

The Court also seems to ignore the findings of the other third parties which again describe circumstances of the conditions of detention that, taken cumulatively, could breach Article 3: little outdoor space, rudimentary hygiene conditions, insufficient meals and lack of protection against the cold at night, with some people having to sleep on the floor. In any case, even if these conditions did not amount to a violation of Article 3, the Court should have at least discussed these findings by these parties and justified why they did not exceed the minimum threshold of severity of the ill-treatment. *J.R. and Others* –and the later judgments which refer to it, *O.S.A. and Others* and *Kaak and Others v. Greece*– thus confirm Dembour's criticism that "most often the finding that the minimum level of severity required to engage Article 3 is not reached is left unreasoned".[278] Moreover, the ECtHR noted that the duration of detention of the asylum-seekers was "characterized by its brevity", which added to the finding that there had been no ill-treatment.[279] Although this argument was reasonable in the case of *Khlaifia and Others,* where the migrants only spend three days in detention, the same cannot be said of *J.R. and Others,* where the asylum-seekers spent one month in the conditions described above.

Finally, the third ground for our argument is that, as in the case of Article 5(1)(f), the Court has downplayed the significance of the general vulnerability of asylum-seekers in both the Chamber and the Grand Chamber judgment *Ilias and Ahmed v. Hungary,* where the Court found that "while it is true that asylum-seekers are considered particularly vulnerable (…), the applicants in the present case were not more vulnerable than any other adult asylum-seeker detained at the time".[280] Therefore, States do no longer have an obligation under Article 3 ECHR to assess the particular needs of a detainee –and to adapt the detention conditions to those needs– merely because he is an asylum-seeker.

[274] *Ibid,* §144.
[275] The Court found overcrowding detention conditions to be in breach of Article 3 in *R.T. v. Greece; A.Y. v. Greece, Thuo v. Cyprus, Khlaifia and Others v. Italy* (Grand Chamber), *Mahamed Jama v. Malta* and *Abdi Mahamud v. Malta*.
[276] This was found to violate Article 3, together with other factos, in *Mahamed Jama v. Malta*, *Mahammad and Others v. Greece*.
[277] For example, in *Ilias and Ahmed v. Hungary* (§85), the fact that medical services were available was a factor that lead the Court not to find a violation of Article 3. *A contrario*, the lack of medical services, especially for asylum-seekers suffering from health problems, is a factor that may amount to a violation of Article 3.
[278] DEMBOUR, *supra* note 28, p. 227.
[279] *J.R. and Others v. Greece,* §145.
[280] *Ilias and Ahmed v. Hungary,* §92; *Ilias and Ahmed v. Hungary* (Grand Chamber), §192.

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VIII. CONCLUSIONS

The hardships faced by the millions of refugees who have reached European soil since 2015 have only been exacerbated by the "odd detention practices"[281] introduced by States. However, this situation does not seem to have changed the ECtHR's jurisprudence set in *Saadi* and *Chahal* towards a more liberty-protective approach to the detention of asylum-seekers. If anything, it has reinforced the "reversal of the presumption in favor of liberty", as Moreno-Lax puts it.[282] This study has shown that the Strasbourg reversal, whereby the Court takes a deferential approach to State sovereignty in migration-related case law,[283] has also been applied by the Court in its case law on asylum detention; and that such an approach has been particularly strengthened in the aftermath of the 2015 refugee crisis. We have argued this based on the following reasons:

a) Asylum-seekers are still regarded by the Court as "unautho
rized entrants", following its jurisprudence established in the leading case *Saadi.* Neither the numerous critiques that the Court received over this finding nor the fact that it contradicts both the UNHCR Guidelines on detention and the case law of the HRC appear to have had an impact on the Court´s reasoning. Asylum-seekers who reach EU Member States are more likely to escape this comparison with irregular migrants when filing an application before the ECtHR, since EU law does generally not regard asylum-seekers as unlawfully staying migrants. Even in these cases, however, the Court´s ambiguous wording in *Suso Musa v. Malta* and *O.M. v. Hungary* does not categorically forbid EU Member States from detaining asylum-seekers merely in order to "prevent their unauthorized entry" under the first limb of Article 5(1)(f).

b) While in the 2011 cases *S.D. v. Greece* and *R.U. v. Greece* it appeared that the Court was moving away from the *Chahal* jurisprudence in forbidding the State from detaining an asylum-seeker "in view of his expulsion", the 2016 case *Nabil and Others v. Hungary* has clearly shown that the Court only rejects this kind of detention when it is found to be in violation of national law. According to this judgment, the Convention itself allows for an asylum-seeker to be detained for pre-deportation purposes without any requirements concerning the individual behavior of the applicant, which, as we have argued, is at odds with human rights law and with the Court's own interpretation of the second limb of Article 5(1)(f). The harsh assertion made by the Court in *Nabil* has certainly not gone unnoticed, since the CJEU referred to it in *J.N. v. Staatssecretaris* when interpreting Article 6 of the Charter of Fundamental Rights of the European Union,[284] the EU equivalent of Article 5 EHCR.[285]

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[281] This phrase was used by the Court itself in *Suso Musa v. Malta*, §100; *Abdullahi Elmi v. Malta.* §113; *Abdi Mahamud v. Malta*, §131; and *Mahamed Jama v. Malta*, §146.
[282] MORENO-LAX, *supra* note 41, p. 181.
[283] DEMBOUR, *supra* note 28, p. 194.
[284] Charter of Fundamental Rights of the European Union, 7 December 2000 (OJ C 326, 26.10.2012, p. 291-407).
[285] Judgment of 15 February 2016, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, C-601/15 PPU, EU:C:2016:84, §79. For a commentary of this important judgment, see SLINGENBERG, L., "Introductory Note to J.N. v. Staatssecretaris voor veiligheid en justitie (C.J.E.U.)", *International Legal Materials*, vol. 56, n. 5, pp. 931-950; and CORNELISSE, *supra* note 108.

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c) The Court has continued the practice of not requiring States to apply a full proportionality test when detaining migrants and asylum-seekers, thus offering a lower level of protection than the Refugee Convention and the ICCPR. In these cases, States are not required under the ECHR to carry out a necessity test and (often) a balancing test, two of the essential elements of the proportionality principle. Instead, the Court has constructed an arbitrariness test which very much relies on the duration of detention in order to determine whether or not a detention is arbitrary. This is a cause for concern since, if the requirements of necessity and balancing are not strictly applied, States might be encouraged to extend the use of asylum detention as they do not need to look for alternatives.[286] Moreover, the safeguards related to the duration of the detention are not the most adequate when assessing compliance with the principle of legal certainty, as the Court has refused from setting a maximum period of detention permitted under the ECHR and it is difficult to foresee which duration will be considered lawful by the Court.

d) The more liberty-protective steps taken by the Court in the 2011 judgment *M.S.S. v. Belgium* have been diluted in the post-2015 judgments, especially in *Thimothawes v. Belgium*. While in *M.S.S.* the Court acknowledged that all asylum-seekers are vulnerable individuals and that, as such, a vulnerability test has to be carried out by States; after the refugee crisis the Court has emptied this general vulnerability of asylum-seekers of meaning, since it has only required States to carry out this test when the asylum-seeker was part of a more specific vulnerable group. Moreover, these groups of asylum-seekers have to *prove* that they are vulnerable in order for the vulnerability test to be triggered. This is particularly troublesome in the case of minors, who can then be detained pending the result of an age determination procedure –a measure at once at odds with the principle of giving children the benefit of the doubt.

e) In the Grand Chamber judgment *Ilias and Ahmed v. Hungary*, the ECtHR found a novel way to grant deference to State's sovereignty in asylum detention cases; by declaring that the confinement of asylum-seekers in the Hungarian transit zone does not amount to a deprivation of liberty and, thus, that Article 5 ECHR is not applicable at all. Besides the inconsistencies of the judgment, the reasoning of the Court shows several signs of an attempt to pacify the Hungarian State by taking a "realistic" approach. This approach gives great weight both to the Government's arguments and to the alleged difficulties that the State was facing in coping with the mass influx of migrants.

f) With regard to the detention conditions under Article 3, a State-protective change in the jurisprudence of the Court has been found with respect to the element of "State´s difficulties in managing a migration crisis". While in *M.S.S.* and *Hirsi Jamaa* the Court refused to take into account this element when assessing whether or not there had been a breach of Article 3, after 2015 the Court raised the threshold required for a violation of this provision when the State is faced with a migration crisis. This can be seen from the judgments delivered in *Khlaifia and Others v. Italy* and in *J.R. and Others v. Greece.* Moreover, in order to declare that there was no violation of Article 3 in the latter judgment, the Court failed to discuss the evidence presented to it regarding the deplorable

[286] O'NIONS, *supra* note 34, p. 176.

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conditions in the Greek hotspots. Finally, blurring the significance of the vulnerability of asylum-seekers under Article 3 may also be a form of granting more power to States as it weakens their responsibility to adapt detention conditions to their needs.

We may now answer the two research questions posed by this study:

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

Yes, it clearly does. The deference to State's sovereignty is especially visible in the Court´s interpretation of Article 5(1)(f), which gives more leeway to States to detain migrants and asylum-seekers than in other detention cases and offers a lower protection than both EU law and other international human rights instruments by allowing the detention of asylum-seekers for "administrative convenience".

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

We do not find a radical change in the Court´s case law, since the Court was already deferential to State´s sovereignty in asylum detention cases before the refugee crisis. Nonetheless, this deferential approach has in some cases been made clearer (e.g. in *Nabil*) and in other cases even further expanded (e.g. in *Thimothawes, Khlaifia, J.R. and Others* and in the Grand Chamber judgment *Ilias and Ahmed*). Therefore, we can tentatively conclude that European State´s renewed preoccupation with strengthening their borders after 2015 has led the Court to widen the scope of the margin of appreciation and to be more lenient towards the practice of asylum detention when interpreting Article 5(1)(f) and, to a lesser extent, Article 3 ECHR.[287]

This trend goes in line with the reaction that the Court has had regarding the interpretation of the Convention after the reform process of the European human rights system initiated in 2010 in Interlaken (Swizterland). Throughout this on-going process, which includes the adoption of the Brighton Declaration in 2012, the Brussels Declaration in 2015 and the Copenhagen Declaration in 2018,[288] the 47 Council of Europe Member States have sent a clear political signal to the ECtHR stating their wish to rationalize the Court´s role

[287] This partly contradicts the finding of DRINÓCZI and MOHAY, who argue that, while the 2015 crisis has lead European States to adopt a less human rights-centred approach towards migration, at the level of human rights institutions we have not seen a change in trend. Yet these authors only take into account the Chamber judgment *Ilias and Ahmed*, which has now been overturned as regards Article 5, and do not analyse other judgments which do show such a change in trend in the ECtHR, at least in respect to asylum detention. See DRINÓCZI and MOHAY, *supra* note 244, p. 109.

[288] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration. Council of Europe, 19 and 20 April 2012; High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration. Council of Europe, 27 March 2015; High Level Conference meeting in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, Copenhagen Declaration. Council of Europe, 12 and 13 April 2018.

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in the protection of human rights and to enhance the position of the States.[289] The legal outputs of this process –and in particular of the Brighton Declaration- have been the adoption of Protocol 15 and Protocol 16 to the ECHR which, among others, reinforce the subsidiarity principle and introduce further obstacles in the filing of applications to the Court.[290]

As Madsen shows in his empirical study comparing the case law of the Court before and after the Brighton Declaration, the ECtHR has responded to this political message by providing more subsidiarity in cases of Article 8 ECHR (right to privacy), Article 35 (access to court) and Article 3.[291] The same can be said generally for migration-related cases, where the Court has often retracted from earlier more human rights protective pronouncements in response to the attack by States.[292] As we have seen, in the area of asylum detention the Court has also retracted from or changed the course of more liberty-protective cases like *M.S.S. v. Belgium and Greece, R.U. v. Greece* and *S.D. v. Greece.* Therefore, the Court´s tendency to be more deferential to State´s sovereignty in recent years is not an exclusive feature of its asylum detention case law.

Admittedly, the ECtHR emphasizes the domestic protection of rights, as shown by the many cases in which the Court refers to domestic law in order to assess the compatibility of the asylum detention with Article 5 ECHR. However, it should not be forgotten that *compliance with international law* is also a criterion set by the Court to determine the lawfulness of the detention. Yet, by not upholding the standards set by the Refugee Convention and the ICCPR, the Court takes this requirement less seriously than the national law criteria. With regard to the 1951 Refugee Convention, Noll has noted that, due to the difference between contemporary migratory realities and those of the drafting period of the Refugee Convention, Article 31 –the article referring to the detention of asylum-seekers– is not applied in a straightforward manner.[293] It is certainly regrettable to observe that, not only do States fail to apply this article in a consistent way, so too does an international human rights court with a long tradition of defending individuals.

Furthermore, as pointed out by Costello, without a clear ECtHR review of the purposes and necessity of detention, domestic law and rule of law criteria may offer little protection in practice.[294] Taking national law as the main parameter for assessing compatibility with Article 5 ECHR may offer sufficient protection in States whose national law fully transposes the EU asylum *acquis* –which, for the most part, makes up for the shortcomings of the ECtHR's case law– or in States that apply equivalent standards (i.e. Denmark and Ireland). But certain EU Member States either transpose EU law belatedly

[289] MADSEN, *supra* note 25; LAMBRECHT, S., "Undue political pressure is not dialogue: The draft Copenhagen Declaration and its potential repercussions on the Court´s independence" *Strasbourg Observers* [blog], 2-3-2018. Available at: https://cutt.ly/9rlBvRt.
[290] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013 (CETS, No. 213); Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 November 2013 (CETS, No. 214).
[291] MADSEN, *supra* note 25, p. 221.
[292] DEMBOUR, *supra* note 28, p. 508.
[293] NOLL, *supra* note 46, p. 1276.
[294] COSTELLO, *supra* note 69, p. 292.

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–such as Greece, where the RCD was transposed three years after the transposition deadline set by the Directive[295]– or even actively pursue to disobey EU law, as is the case of Hungary.[296] In addition, after Brexit the United Kingdom will stop being bound by the first generation of the EU asylum *acquis* and by the Charter of Fundamental Rights, and the country's standards of immigration detention fall short of offering the high protection of EU law.[297] The self-restraint of the ECtHR is even more problematic in the case of the European non-EU States where EU law does not offer an additional protection to detained asylum-seekers. For instance, Turkish law allows for detention for the purposes of assessing an asylum application on the merits,[298] something completely forbidden under EU law.

In any case, a full protection of the right to liberty of asylum-seekers by the ECtHR should not be made dependent on the standards set by EU law, let alone by national law. If the Court is to live up to its role as a promulgator of human rights standards in the European continent, it should at the very least uphold the international standards that are already in place. At a time when the foundations of European law, such as the liberal character of all EU Member States and the presumption of law-abidingness, are under strain,[299] this seems as important as ever.

As a final remark, we would like to add that the criticism made in this study does not purport to undermine the relevance of the ECtHR for the protection of asylum-seekers. On the contrary, by systematizing the many different legal issues on which the Court elaborates in its recent case law, we have shown that the Court has developed a rich jurisprudence which is of great value when national courts do not properly effect their function of defending the right to liberty of asylum-seekers. Our intention was rather to offer constructive criticism by highlighting the elements of the Court´s case law where we believe there is still room for improvement. In our view, providing the highest possible standard of protection to detained asylum-seekers should be a priority for the Court when dealing with these cases. As noted by several authors, the protection of migrants is a central function of international human rights, since they do not claim protection as members of a family, clan or nation but as members of humanity, and are thus more likely to see their rights violated by States.[300] Detention is never a solution to the movements of refugees and asylum-seekers,[301] and the Court should make this clearer.

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[295] GREEK COUNCIL FOR REFUGEES, *Reception Conditions, Greece*, 2019. Available at: https://cutt.ly/QrlNgW5.

[296] EUROPEAN COMMISSION, "Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones", 25-07-2019. Available at: https://cutt.ly/arlNob5. For analysis of the legal challenge posed by Hungary and Slovakia of the EU relocation scheme before the CJEU see ABRISKETA URIARTE, J., "La Reubicación de los Refugiados: Un Déficit de Solidaridad y una Brecha en la Unión Europea. Comentario a la Sentencia del Tribunal de Justicia de 6 de Septiembre de 2017, Asuntos C-643/15 Hungría y Eslovaquia contra el Consejo", *Revista General de Derecho Europeo*, n. 44, 2018, pp. 1-30.

[297] COSTELLO, *supra* note 31, p. 176.

[298] GLOBAL DETENTION PROJECT, *Turkey Immigration Detention Profile*, 2014. Available at: https://cutt.ly/urlNauJ.

[299] VON BOGDANDY, *supra* note 21, p. 6.

[300] GUIRAUDON, *supra* note 27, p. 1092; COSTELLO, *supra* note 31, p. 159.

[301] GOODWIN-GILL, *supra* note 4, p. 234.

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

> Are we now also to accept that Article 5 ECHR, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so.[302]

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

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