EU LAW AND THE DETAINABILITY OF ASYLUM SEEKERS

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Abstract:

This article examines detention of asylum-seekers, more specifically how European Union (EU) law simultaneously constructs the asylum-seeker as a detainable subject, whilst also limiting states' powers of detention. The power to detain is limited by international refugee and human rights law, but EU law sets more stringent standards. While international refugee law regards the asylum-seeker as a presumptive refugee, EU law seems to take a different view. Nowadays, the legal and physical rite of passage from irregular migrant to asylum-seeker to refugee defines the predicament of refugees who seek protection in the EU. Asylum-seekers are vulnerable to detention as irregular entrants, when they are in transit in search of effective protection, and if they become deportable under the Dublin System. Coercive forms of detention are, too glibly in our view, assumed to be permitted to ensure they cooperate with identification and registration processes. The chapter aims to problematise this detainability of asylum-seekers, examining in particular how their increasing deportability and transferability may increase their detainability. Drawing on empirical examples from the treatment of refugees arriving in the EU in 2015, it suggests that the EU limits on detention need further implementation and institutionalisation.

Keywords: detention, detainability, asylum-seekers, EU

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Introduction

This article examines detention of asylum-seekers, more specifically how European Union (EU) law simultaneously constructs the asylum-seeker as a detainable subject, whilst also limiting states' powers of detention. Nowadays, the legal and physical rite of passage from irregular migrant to asylum-seeker to refugee defines the predicament of refugees who seek protection in the EU. During the large-scale arrivals people seeking refuge in 2015, we have witnessed multiple violations of human rights. For instance, people have been subject to

violence at EU borders,[1] and conditions at points of mass arrivals have been inhuman and degrading, as humanitarian relief has been uncoordinated. This contribution examines another practice that often violates the rights of those seeking refuge: detention.

It is difficult to get an accurate picture of detention of asylum-seekers across the EU. Most states do not provide statistics on immigration detention,[2] while for those that do, figures are rarely disaggregated by immigration status.[3] We aim to examine not only detention itself, but also the legal construction of the asylum-seeker as a detainable subject.[4] By "detainability", we refer to the ways the law produces reasons to detain, as well as constraining detention. To understand detainability, we thus identify not only detention practices, but also various risk factors and vulnerability to detention, and the contexts in which this vulnerability arises.

Section 1 contains a sketch of the principles of the 1951 Refugee Convention (CSR)[5] and international human rights law on detention. Those provisions have been subject of extensive analysis and critique elsewhere, so the purpose of this section is merely to provide the background for the assessment of EU law and Member State practice. In Article 31, the Refugee Convention requires states, under certain conditions, not to penalise refugees for irregular entry. A basic entitlement to free movement for refugees is set out in Article 26 CSR. However, as currently interpreted, these provisions do not prohibit detention, although they do limit it significantly. International human rights law establishes crucial constraints on detention practices, but as many scholars and bodies have argued, accepts immigration control as a basis for detention. As we illustrate, there are diverse approaches *within* international human rights law, some more liberty-protective than other. We focus on the

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[1] For example, on the issue of push-backs in the Spanish enclaves of Ceuta and Melilla, see ECtHR, *ND and NT v Spain*, Application Nos. 8675/15 and 8697/15, currently pending before the ECtHR, and the Joint Intervention by the AIRE Centre, Amnesty International, the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), available at: http://bit.ly/1Om2Dqc (last visited 11 Dec. 2015). On the Bulgarian-Turkish border, see UNHCR Briefing Note, UNHCR calls for an investigation into the death of two Iraqis at the Bulgaria-Turkey border, raises concerns over border practices, 31 March 2015, available at http://www.unhcr.org/551a70379.html (last visited 15 Dec. 2015).

[2] For a discussion, see ECRE, *Asylum Statistics in the European Union: A Need for Numbers*, AIDA Briefing No 2, August 2015, 7-8.

[3] European Migration Network (EMN), *The use of detention and alternatives to detention in the context of immigration policies*, Synthesis Report, 2014, available at: http://bit.ly/1Ksa36I, 9 (last visited 11 Dec. 2015).

[4] N. De Genova, "The Production of Culprits: From Deportability to Detainability in the Aftermath of 'Homeland Security"', 11(5) Citizenship Studies, 2007, 421.

[5] United Nations Convention Relating to the Status of Refugees, Geneva, 28 July 1951, UN Treaty Series vol. 189, 137.

European Convention on Human Rights (ECHR), but note the other systems appear more liberty-protective, a basis on which to critique the ECHR.[6]

Section 2 focuses on the practices in the EU, drawing on various recent empirical examples of state practices. We illustrate that vulnerability to detention arises in several ways. There are three main contexts where this vulnerability arises. First and foremost, on arrival, in the absence of legal routes to claim asylum in the EU, the asylum-seeker is usually an irregular migrant. This phenomenon creates increased risks of detention on arrival, and throughout the process of seeking a place of refuge. Secondly, there are risks when asylum-seekers are in transit. Once in the EU, most asylum-seekers transit several countries. To illustrate, of the over 750,000 people who arrived in Greece this year,[7] only 10,718 had claimed asylum there by the end of October.[8] Nor are they expected to: the "Balkan route" constructed by governments and humanitarian actors is premised on those moving claiming asylum *after* their trek westwards overland. Each border crossing and transit journey raises new detention risks. Thirdly and relatedly, the Dublin System[9] constructs those onward movements as legally problematic, and then once they arrive in their country of refuge, constructs the asylum-seeker as deportable (at least for a time), and accordingly also detainable even if they have a pending asylum claim. We note in particular that identification mechanisms linked to Dublin and the asylum process generally seem to assume a role for detention in coercing compliance with the law, creating vulnerability to detention running through these three contexts.

In Section 3, we assess the apparently tighter regulation of detention of asylum-seekers in EU law, in particular its introduction of a necessity test. EU law now demands greater legal attention to the question of alternatives to detention.[10] Alternatives need careful institutionalisation, in order to ensure that they are genuinely liberty-protective.

Many of the practices identified in the preceding section are legally dubious. No doubt this topic needs judicial attention, but there is as yet a dearth of case-law on detention of asylum-seekers in EU law.

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[6] See also in this issue Lilian Tsourdi in this issue.
[7] See UNHCR, *Refugees/Migrants Emergency Response*, 6 December 2015, available at: http://bit.ly/1W059nR (last visited 11 Dec. 2015).
[8] Greek Asylum Service, *Statistics October 2015*, available at: http://bit.ly/1QIX4nd (last visited 11 Dec. 2015).
[9] 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 stateless person (recast) (Dublin III Regulation) [2013] OJ L180/31.
[10] See also the contribution of Alice Bloomfield in this issue.

1. A Sketch - International Refugee and Human Rights Law on Detention

1.1. International Refugee Law

The CSR barely mentions "asylum", and does not use the term "asylum-seeker". The Convention seems to assume that refugees are easily identifiable, and sets out international standards mainly for their status and rights. Over time, the United Nations High Commissioner for Refugees (UNHCR) offered guidance to states on how to conduct procedures for refugee status determination (RSD). The premise was and remains that refugees are recognised, not made, by states. The first paragraph of the UNHCR Handbook (which contains a chapter on RSD) sets out:

> [a] person is a refugee within the meaning of the 1951 Convention *as soon as he fulfils the criteria contained in the definition*. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. *He does not become a refugee because of recognition, but is recognized because he is a refugee*.[11]

In contrast, EU law does define asylum-seeker, as "a third country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken"[12] and a refugee is someone who is recognised as meeting the decision. For refugees in transit, yet to make a formal asylum claim, EU law fails to recognise the declaratory nature of refugee status.

1.1.1. Article 26 CSR

The CSR establishes a spectrum of rights allocated according to the degree of attachment between the refugee and the state in question.[13] Article 26 CSR on freedom of movement

[11] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951Convention and its 1967 Protocol* HCR/1P/4/ENG.REV3, 2011, para. 28; emphasis added.
[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (RQD) [2011] OJ L337/9, Article 2(i).
[13] Hathaway describes this as the 'structure of entitlement' under the RC: J. Hathaway, *The Rights of Refugees Under International Law,* Cambridge University Press, 2005, 154. See G. Goodwin-Gill and J. McAdam, *The Refugee in International Law,* 3rd edn, OUP, 2007, 524-528, who described it as 'criteria of entitlement.'

applies to those "lawfully in" the territory.[14] While Article 26 clearly applies to recognized refugees, there is debate as to whether it applies to asylum seekers too. One view holds that Article 26 should apply to asylum seekers whose applications have been presented.[15] In this view, then, asylum seekers should generally enjoy a right to free movement once formally in the asylum process, although their movement may be restricted under the same conditions as are "applicable to aliens generally in the same circumstances".[16] On this basis of course, they remain vulnerable to "normal" immigration detention.

Several European governments still contest the applicability of Article 26 to asylum seekers.[17] This controversy reflects the ambiguity of the status of "asylum-seeker". Rather than presumptive refugee, EU law subjects asylum-seekers to a discrete legal regime.

1.1.2. Article 31 CSR – Refugees and "Unlawful Entry and Stay"

Concerning refugees' encounters with migration control, Article 31 CSR is headed "Refugees Unlawfully in the Country of Refuge". Again, it invites us to imagine the refugee, clearly identified as such, but who has entered or remained in their "country of refuge" without "authorization". It does not provide a right to enter, but rather obliges contracting states not to penalise refugees for their "illegal entry or presence", subject to certain conditions. It offers limited protection against detention, as discussed in the next section. Article 31(2) deals with restrictions on movement. Notably, it envisages that refugees may find themselves in countries where they do not get the protection they are due. While the Convention does not regulate asylum, it envisages processes whereby refugees are enabled to claim asylum. Indeed, Article 31(2) specifically provides that "[t]he Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country".

Article 31 CSR: Shield or figleaf?

[14] Article 26 CSR: 'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.'
[15] See Hathaway, *The Rights of Refugees Under International Law*,173, for extensive consideration of the meaning of 'lawful stay.'
[16] Article 26 CSR.
[17] See R. Marx, 'Article 26 (Freedom of Movement/Liberté de Circulation)' in A Zimmermann (ed), *Commentary on the 1951 Convention relating to the Status of Refugees,* OUP, 2011, 1161-1164.

As irregular entrants, asylum-seekers become vulnerable to detention under the general immigration laws of many states. Article 31 CSR envisages as much, but requires states not to penalise refugees for their irregular entry.[18] Article 31 provides that:

> [t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Those falling within this provision are to be immune from penalties and subject only to such restrictions on free movement as are necessary. As to the meaning of "penalties", while some take the view that only criminal sanctions are precluded,[19] several authoritative commentators take the view that at least some forms of detention should be precluded as punitive.[20] Alternatively, even if detention is not always regarded as a "penalty", Article 31(2) provides that the asylum seeker may be subjected only to such restrictions as are necessary.[21]

Article 31 is also relevant when asylum-seekers (qua presumptive refugees) are in transit. The term "coming directly" in Article 31 has been interpreted to include persons who transit through other countries before reaching the country of destination within its protective ambit (limited as that is). Similarly, those who transit countries where effective protection is unavailable may still invoke Article 31 in their country of refuge.[22] Domestic case-law illustrates the correct interpretation of Article 31, which requires states to refrain

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[18] For extensive commentary, see G. Noll. 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary*, OUP, 2011, 1243; G Goodwin-Gil, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' (June 2003) available at: http://bit.ly/1QMsQzI (last visited 11 Dec. 2015).

[19] Cornelisse simply asserts that '[i]t is not plausible that this provision would be violated when a refugee is detained on account of his illegal entry, if the deprivation of liberty is an administrative measure and is not categorized as a criminal sanction as such.' Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill, 2010), 262. She assumes that only Article 31(2) limits detention, requiring it to be 'proportional in view of the individual circumstances of each and every individual.' *Ibid*.

[20] G. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection' in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, 185, 195-196. See also Edwards, above n 5, 11, citing G. Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge/Réfugés en Situation Irrégulière dans le Pays d' Accueil)' in A. Zimmermann (n 36), 1243, 1263-64.

[21] Hathaway explains the 'strictly provisional' nature of the detention power under Article 31(2), with Article 26 of the CSR as the general provision applicable to most asylum seekers who have been admitted to the asylum procedure. Hathaway (n 32), 414, 418-19. Hathaway also discusses 'necessity.' *Ibid*, 423-39.

[22] See e.g. G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd edn, OUP, 2007, 384-385; G. Noll, 'Article 31'.

from imposing penalties on refugees transiting through their territory, on the ground that seeking asylum encompasses the right to seek safe passage from a country with a view to reach and obtain protection in another country.[23] This is captured by the judgment of Lord Rodger in *Afshaw*:

> [i]t follows that a refugee makes a claim for asylum, if he asks the authorities in a country not to throw him out or return him to the country of persecution, even though he simultaneously tells them that he does not wish to settle in their country, but wants to go on to another country. He is asking for temporary asylum until he can continue on his way. Indeed, any other interpretation of article 31 would be absurd, since it would force refugees to make a claim to settle in the country as a precondition to obtaining impunity for their illegal entry or presence.[24]

This dictum seems to allow refugees, even those in transit and yet-to-be formally recognised, protection under Article 31 CSR. As will be seen, this aspect of Article 31 seems to have be widely flouted.

UNHCR has synthesised the legal limits on detention in its revised *Guidelines on detention and alternatives to detention* in 2012.[25] Overall, they make a strong liberty-protective claim: 'These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.'[26] They stress the key principles of the Refugee Convention, including Articles 31 and 26.[27] UNHCR emphasises also refers to the need to consider alternatives to detention, which should be laid down in legal systems and applied in practice.[28] Given their impact on the right to liberty, such alternatives need also be put to

[23] *Adimi* [2001] QB 667 (CA); *Afshaw* [2008] 1 AC 1061 (HL).
[24] *Afshaw*, per Lord Rodger, para 92.
[25] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,* 2012, available at: http://bit.ly/1lpfUQv (last visited 11 Dec. 2015).
[26] UNHCR, *Detention Guidelines 2012,* para 14.
[27] UNHCR, *Detention Guidelines 2012*, paras 11-14.
[28] This also figures among the 3 goals of UNHCR's *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees*, 2014-2019, available at: http://bit.ly/1uzIRyN (last visited 11 Dec. 2015).

scrutiny.[29] To that end, states are required to resort to the least intrusive measure possible; for instance, surrender of travel documents to be preferred over designation of residence or prohibition to leave a specific place.[30]

EU law on asylum must be in accordance with the Refugee Convention,[31] as is reflected in the text of the QD,[32] and Recast QD. The Court of Justice of the European Union (CJEU) repeats that the CSR is:

> the cornerstone of the international legal regime for the protection of refugees and that [the QD was] adopted to guide the competent authorities of the Member States in the application of [the CSR] on the basis of common concepts and criteria.[33]

However, although it was once suggested,[34] the EU has not ratified the Refugee Convention, and not all provisions of the Convention have been deemed to be part of EU law. The CJEU refused to interpret Article 31 CSR in *Qurbani*, on the basis that it fell outside EU law.[35] This is difficult to square with the commitment in the TFEU and various EU legislative measures that the CEAS shall be "in accordance with the [CSR]".

As discussed below, we identify frictions between EU law and the vision of cooperative refugee protection that underpins the Refugee Convention.

1.2 European Human Rights Law

Article 5(1)(f) of the ECHR identifies two forms of immigration detention - "to prevent [the migrant from] effecting an unauthorised entry into the country" and detention "of a person against whom action is being taken with a view to deportation or extradition".

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[29] UNHCR, *Detention Guidelines 2012*, paras 35-37.
[30] UNHCR, *Detention Guidelines 2012*, para 39, Annex A. See also Odysseus Academic Network, *Alternatives to detention: Time for implementation*, 64.
[31] Article 78(1) of the Treaty on the Functioning of the European Union (TFEU) provides that 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'
[32] See, in particular, Recitals 2, 3, 8, 15, 16, 17 and 24 QD, as well as Articles 9(1) and 12(1)(R)QD.
[33] Case C-604/12 *HN* [2014] OJ C 202/6, para 27, citing Cases C-199/12, C-200/12 and C-201/12 *X, Y & Z,* 7 November 2013, para 39 and the case-law cited.
[34] European Council, *Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1, para 6.2.1.
[35] ECJ, Case C-481/13, *Qurbani* [2014]. See Y. Holiday, 'Penalising Refugees: When should the CJEU have jurisdiction to interpret Article 31 of the Refugee Convention?', *EU Law Analysis*, 19 July 2014, available at: http://bit.ly/1OmtMJH (last visited 11 Dec. 2015).

The European Court of Human Rights (ECtHR) routinely examines complaints on immigration detention, and regularly finds on the facts that it violates the right to liberty as it lacked proper basis in domestic law.[36] It has also found detention conditions in several European states to be inhuman and degrading.[37] The ECHR sets the basic pan-European minimum standard for rights protection, but does not preclude EU law from establishing more extensive protection.[38]

While the conditions and legality of detention of asylum-seekers are regulated by the ECHR, the basic notion of the asylum-seeker as detainable has gained support from the ECtHR ruling in *Saadi v UK*.[39] The Court accepted that states could deem asylum-seekers to be unauthorised entrants, even if their claims were being examined. In addition, just as it does with pre-deportation detention,[40] it held that states did not have to show that detention was necessary in the individual case, but rather that it was lawful and non-arbitrary. It has been suggested that on this matter the ECtHR is out of synch with other international human rights bodies, including the UN Human Rights Committee and the Inter-American Court and Commission on Human Rights.[41] The Inter-American approach properly emphasises the preventive character of immigration detention, in the sense that its purpose is to prevent the detainee from engaging in some future conduct, such as fleeing to evade removal. In light of this characterisation, the Inter-American approach posits that the presumption of liberty and the rule of law demand significant constraints immigration detention, over and above those for other forms of detention.[42]

Many scholars too have critiqued the judgment of the Grand Chamber in *Saadi v UK*.[43] It has also been argued that if asylum-seekers whose claims are being determined are no longer "unauthorised entrants", their detention should no longer be permissible under

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[36] See, for example, *Shamsa v Poland* App No 45355/99 (ECHR, 27 November 2003); *John v Greece* App No 199/05 (ECHR, 10 May 2007); *Soldatenko v Ukraine* App No 2440/07 (ECHR, 23 October 2008); *Al-Agha v Romania* App No 40933/02 (ECHR, 12 January 2010).

[37] See among others *Suso Musa v Malta*, App No 4337/12 (ECHR, 23 July 2013); *MSS v Belgium and Greece*, App No 30696/09 (ECHR, 21 January 2011); *Mayeka and Mitunga v Belgium*, App No 13178/03 (ECHR, 12 October 2006).

[38] Charter of Fundamental Rights of the European Union [2000] C364/1, Article 52(3).

[39] ECtHR, *Saadi v. United Kingdom* (Judgment), (2008), Application. No. 13229/03.

[40] *Chahal v United Kingdom* (1996) 23 EHRR 413, European Court of Human Rights, 15 November 1996.

[41] See further C. Costello, "Immigration Detention: The Grounds Beneath Our Feet" 68 CLP, 2015, 143, 170-171; C. Costello 'Human Rights & the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law ' (2012) *Indiana Journal of Global Legal Studies* 257.

[42] IACHR, *Rafael Ferrer-Mazorra et al. (United States),* Report No. 51/01 (Merits), Case No. 9903, para 219 (4 April 2001), available at: http://bit.ly/1MO9c12 (last visited 11 Dec. 2015).

[43] See e.g. V. Moreno-Lax, *Beyond Saadi v UK: The 'Necessity' Requirement for Administrative Detention of Asylum Seekers in the EU*, Reflexive Governance in the Pub. Interest, Working Paper No. REFGOV-FR-31, 2010; H. O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience" 10 EJML, 2008, 149.

Article 5(1)(f). This would mean that states would have to justify any detention under the same conditions as detention of insiders, namely coercive detention under Article 5(1)(b). This provision enables states to detain a person "for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law", but subject to strict conditions.[44] Importantly, the mere fact of being an irregular migrant, asylum-seeker or refugee should not grant the state a general power to use detention to coerce compliance with the law. As is discussed further below, in official EU policy discourse, there is, in contrast, a tendency to assume that legal duties on asylum-seekers are *ipso facto* enforceable by means of detention.

Later cases have constrained detention, in particular by signalling the importance of examining alternatives to detention in individual cases. In *Rusu v Austria*,[45] for instance, the detention was deemed arbitrary mainly due to the failure to adhere to the Austrian domestic legal standards, in particular its necessity test. However, the Court also emphasised that it was implausible on the facts to treat the applicant as attempting to effectuate an unauthorised entry. This was because on the facts, Rusu was trying to leave Austria. This suggests that in the case of those transiting, careful attention is required to the factual situation. If neither preventing unauthorised entry, nor deportation back home are in view, then the basis for detention is unclear. The implications of *Rusu* need further legal clarification.[46]

In *Musa v Malta*,[47] the Court applied *Saadi v UK*, and condemned the Maltese detention practices as "arbitrary",[48] mainly due to the unsuitable place and conditions of detention. Importantly, it also stated that there was "some merit" to the applicants' argument that if asylum seekers are authorised in their stay (either under national or EU law), then there is no lawful basis for their detention under Article 5(1)(f).[49] It has been suggested that this move, to regard asylum-seekers, or at least those whose claims have been made, as legally present, is "irresistible under EU law, given the [Directives'] clear statement of the right to

[44] See further C. Costello (n. 31), 156-157.
[45] *Rusu v Austria*, App No 34082/02, European Court of Human Rights, 2 October 2008.
[46] See N. Mole & C. Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe, 2010, 151, pointing out that *Rusu* is a Chamber judgment delivered by seven judges, four of whom had been dissenters in *Saadi v United Kingdom*, and two of whom had voted with the majority; see also G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty,* Martinus Nijhoff Publishers 2010, 312, suggesting that this 'one case' where the court closely analysed the proportionality of the detention was striking in that it concerned 'a person who was not at all "out of place" in the global territorial ideal, but instead on her way back to the country where she "belonged"'.
[47] [2013] ECHR 721, European Court of Human Rights, 23 July 2013.
[48] *Ibid*, para 105.
[49] *Ibid*, para 97.

reside of the asylum seeker".[50] Indeed, the CJEU has emphasised this right of residence in *Arslan*,[51] in distinguishing the scope of application of the Return Directive (RD)[52] and the Recast Reception Conditions Directive (RRCD).[53] If our reading is correct, asylum seekers – at least those formally in the asylum process – should not be regarded as "effectuating unauthorized entry".[54]

This section only provides a crude sketch of the ECtHR case-law. The shortcomings of *Saadi,* namely allowing states to construct asylum-seekers indefinitely as "unauthorised entrants" and not imposing a "necessity test" are both potentially cured in EU law, as is set out in the next section. Remarkably though, as yet, there has been no case-law on the detention of asylum-seekers in EU law. In contrast, case-law on the Returns Directive has produced numerous important rulings.[55] Concerning asylum-seekers, the Court has clarified that they cannot be held in pre-deportation detention, keeping the regimes for both forms of detention separate. Yet, as the next section sets out, in spite of the legal limits, the practice of EU States under EU law reflects an increasing detainability of asylum seekers.

2. The Detainability of Asylum Seekers in EU Law and Practice

The EU's engagement with refugee protection has focused on asylum and asylum-seekers. We have a complex set of legal instruments that are all about this institution, asylum, regulating who is obliged to grant it, and to whom. This legal regime creates a legal subject, the asylum-seeker, both highly regulated, and legally and materially vulnerable.[56] This part examines in turn three contexts in which the asylum-seeker is vulnerable to detention: (1) as an irregular entrant to the EU; (2) in transit in search of effective protection; (3) as deportable

[50] Article 7(1) RRCD and Article 9(1) RPD. See C Costello, *The Human Rights of Migrants and Refugees under European Law* (OUP 2016), 290.
[51] Case C-534/11 *Arslan* [2013] OJ C 225/13.
[52] 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 [2008] OJ L348/98.
[53] 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 [2013] OJ L180/96.
[54] See also ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation* (June 2015) AIDA Legal Briefing No 1.
[55] M.L. Basilien-Gainche, "Immigration Detention under the Return Directive: The CJEU Shadowed Lights", 17(1) EJML, 2015, 104.
[56] See on that point *MSS v Belgium and Greece*, App No 30696/09, European Court of Human Rights (ECtHR), 21 January 2011, para. 232.

under the Dublin System. Throughout these processes, asylum-seekers are in effect required to submit to identification mechanisms, which appear to licence coercive detention.

It has long been observed that the refugee regime contains a highly territorialised norm of *non-refoulement*, and weak collective norms of burden- or responsibility-sharing. The shift to the EU context has not obviously expanded the territorial scope of *non-refoulement* or asylum (although the Schengen Borders Code[57] and Maritime Surveillance Regulation[58] arguably do), or provided for institutionalised responsibility-sharing. Instead, we see in practice a contraction of territorial responsibilities and institutionalised responsibility-shifting, rather than –sharing in the Dublin System. In order to claim asylum, one must be on the territory of a Member State, or at least its territorial waters as per the Recast Procedures Directive ("Recast PD" or "RPD").[59] However, border controls and exclusion are de-territorialised, with shared practices and institutional mechanisms outside the territory rendering entry more difficult. The ECtHR ruling in *Hirsi v Italy* has clarified that human rights-based non-refoulement may apply beyond the states territory, if it is exercising 'effective control' over persons on the high seas.[60] But in practice, actually claiming asylum outside the state remains impossible for most refugees.[61]

We note at the outset that even our expansive view may not capture the full spectrum of vulnerability to detention. For instance, those transiting Turkey appear to be vulnerable to detention, which may breach their human right to leave any country. We do not examine the practices of non-EU states with whom the EU cooperates on containing refugees, as these are not directly regulated by EU law. Nonetheless, some of the detention conducted by Turkey appears to be in response to the EU-Turkey deal signed on 29 November 2015.[62]

We also bracket out the vulnerability of rejected asylum-seekers to pre-deportation detention. While we do not contest the basic premise that those who have been properly

[57] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1.
[58] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93.
[59] 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 (recast) [2013] OJ L180/60.
[60] *Hirsi Jamaa v Italy* (2012) 55 EHRR 627.
[61] In spite of the fact that embassies may under certain circumstances have human rights obligations to individuals seeking refuge. On this point, see further K Ogg, K Ogg 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33(4) Refugee Survey Quarterly 1.
[62] Agence France-Presse, 'Turkey detains 3,000 refugees after EU deal' (2015) *The Guardian* 4 December 2015, available at: http://www.theguardian.com/world/2015/dec/04/turkey-detains-3000-refugees-after-eu-deal (last visited 11 Dec. 2015).

determined to lack international protection needs may be deported, mutual recognition of negative decisions means that the *wrongfully* rejected asylum-seeker does not have the legal opportunity to seek protection elsewhere.

Finally, there is a further limit to our analysis: we focus in this contribution on administrative detention, rather than criminal incarceration. However, as irregular migration is increasingly being criminalised, we note that development also, but do not subject it to exhaustive examination.

2.1 Seeking asylum in Europe: Induced irregular migration and detainability

2.1.1 Detainability on arrival

Asylum seekers ought to be relatively immune from detention, as presumptive refugees. However, as they lack safe and legal means of travel to seek asylum in Europe, they risk detention as irregular migrants. People seeking refuge in Europe have few legal (or even illegal but safe) routes to claim asylum, so the asylum-seeker is generally an irregular migrant. There is nothing new in that acknowledgement. The politics and practices of non-entrée have been acknowledged for decades. Grahl-Madsen identified in 1983 that part of "the tragedy of our times [was] that several states by various methods are seeking to prevent or at least to discourage refugees from reaching their shores to seek sanctuary".[63] Several scholars have analysed in depth the lack of safe and legal routes to claim asylum.[64]

To illustrate, some of those currently seeking protection may not have passports, such as some stateless Palestinians displaced from Syria. Without passports, their legal travels routes are limited, although EU law recognises their particular protection needs.[65] But even those with, say, Syrian passports, are generally not able to enter the EU legally to claim asylum. As the EU's own Fundamental Rights Agency (FRA) has illustrated,[66] once war starts, it becomes virtually impossible for people to get a Schengen or other temporary visa to

[63] A. Grahl-Madsen, 'Identifying the World's Refugees' 467(1) Annals AAPSS, 1983, 11; J. Hathaway, 'The emerging politics of non-entrée', 91 Refugees, 1992, 40.
[64] T. Gammeltoft-Hansen, *Access to Asylum: International refugee law and the globalization of migration control*, Cambridge University Press, 2011, 2. J. Hathaway and T. Gammeltoft-Hansen, *Non-refoulement in a world of cooperative deterrence*, U Mich. Law & Econ. Research Paper No. 14-016, 2014; M. den Heijer, *Europe and Extratteritorial Asylum,* Hart Publishing, 2012; B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff, 2010.
[65] ECJ, Case C-31/09 *Bolbol* [2010] ECR I-553917; ECJ, Case C-364/11 *El Kott* [2013].
[66] FRA, *Legal entry channels in the EU for persons seeking international protection: a toolbox*, FRA Focus 02/2015, available at: http://bit.ly/1BwnxuK (last visited 11 Dec. 2015).

travel: without even changing the visa rules, decision-makers seem to assume that the risk of over-staying is high. A likelihood or even possibility of claiming asylum becomes a tacit ground for rejection of the visa. Indeed, for those who seek only temporary respite from war or persecution as a student or visitor, they often are left with no choice but to seek asylum after clandestine entry, as it may be the only way of protecting themselves against deportation as other forms of mobility or migration are blocked.

Alternative visa categories for those wishing to seek asylum exist, but are not opened up in practice.[67] The Schengen Borders Code permits authorities to issue humanitarian visas, but in practice these are rarely used. Some states do issue humanitarian visas to facilitate claiming asylum[68] and some European states formerly ran embassy procedures, but rather than an expansion of these programmes to meet greater need, we have seen their contraction.[69] For asylum-seekers this means irregular journeys have become the norm. Irregular journeys by regular means of travel (planes and ferries) are exceptional, due to carrier sanctions. Carrier sanctions are blunt tools of extraterritorial and privatised border control, which mean that those without their papers in apparent order are not permitted to board regular means of travel.

In political discourse, resettlement is cast as the alternative safe route of choice, but it is qualitatively different. Resettlement normally depends on refugees' willingness to wait (often for years) for their status to be determined in a neighbouring country, usually by UNHCR. Then potential countries of resettlement vet applicants a second time. Then resettlement happens, usually for a tiny minority deemed deserving.[70] Resettlement could become a tool to offer protection quickly and to many. We have seen the newly elected Canadian Prime Minister Trudeau use resettlement to offer swift safe passage. Canada's turning away of the family of Aylan Kurdi was well documented,[71] and restoring Canada's justly proud tradition of refugee protection was an electoral issue. However, resettlement, without significant political backing, is often a containment strategy.

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[67] See U. Iben-Jensen, *Humanitarian Visas: Option or Obligation?*, Study for the LIBE Committee, PE 509.986, 2014.
[68] See e.g. UNHCR, *Resettlement and other forms of legal admission for Syrian refugees* (24 November 2015) available at: http://bit.ly/1Go2Z7J (last visited 11 Dec. 2015) mentioning Brazil and Switzerland among others.
[69] For instance, UNHCR characterised the abolition of the Swiss embassy procedure as a 'major setback': UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Switzerland*, April 2012, available at: http://www.refworld.org/docid/4f9662cc2.html [accessed 15 December 2015], 3.
[70] See UNHCR (n 51).
[71] See A. Macklin, 'Canadians Have a Decision to Make That Will Affect Syrian Refugees', *New York Times,* 15 Sep. 2015, available at: http://nyti.ms/1Kdcs69 (last visited 11 Dec. 2015).

As a consequence, by far the most common routes of entry nowadays are dangerous boat journeys. These arise as EU land borders appear to be inaccessible or impassable. For instance, the ongoing mass influx from Turkey to Greece has seen as many as 750,000 people arrive in the Greek islands in 2015,[72] usually on precarious rubber dinghies, while the Turkish land border with Greece, and its border with Bulgaria, remain largely inaccessible. The means of arrival are significant, in that such irregular crossings make humanitarian assistance necessary. The journeys are often traumatic, not only as they are life-threatening, but also as smugglers tend to detain people pre-departure.[73] Evidence about treatment at the hands of smugglers in Libya is even more harrowing.[74] This is important to bear in mind, as it goes to the legally salient issue of the vulnerability of those arriving.

When considering detention risks, we distinguish between the asylum-seeker who uses regular means of transport, but arrives irregularly, and the more typical situation of the irregular arrival by irregular means. Some asylum-seekers do manage to use regular means of travel. For instance, if someone has good false documents, or procures a real visa by illicit means, or travels with a smuggler using the passport of another, they may be able to bypass airport and airline checks. In that case, while their journey is less dangerous, they may be at risk of detention on arrival even if they promptly claim asylum. To give just two illustrations, some Member States employ fictions of extra-territoriality to justify forms of "border detention". Others have created specific detained asylum-processes even for those who arrive using regular means of transport.

On border detention,[75] some Member States have attempted to treat international zones of airports as not within their "jurisdiction". Notably, the ECtHR has rejected such fictions.[76] This move seems to hinder the creation of extra-legal detention spaces on the territory. Notoriously, that practice is the institutional premise of Australian detention practices, with some Australian islands been "excised" from the territory by legal fiction. However, the ECHR position has not been adopted by all national systems. In the case of detention in the context of the "airport procedure" in Germany, the Federal Constitutional

[72] UNHCR, *Refugees/Migrants Emergency Response – Mediterranean* (data as of 27 November 2015) available at: http://bit.ly/1W059nR (last visited 11 Dec. 2015).
[73] See e.g. P. Kingsley, 'Trading in souls: inside the world of people smugglers', *The Guardian* 7 Jan. 2015; P. Kingsley, 'Risking death in the Mediterranean: the least bad option for so many migrants', *The Guardian* 17 April 2015, available at: http://bit.ly/1DZ1LCq (last visited 11 Dec. 2015).
[74] Amnesty International, *Libya is full of cruelty': Stories of abduction, sexual violence and abuse from migrants and refugees,* MDE 19/1578/2015, 2015, available at: http://bit.ly/1O6F1r9 (last visited 11 Dec. 2015); Human Rights Watch, *The Mediterranean Migration Crisis: Why People Flee, What the EU should do,* 2015, available at: http://bit.ly/1JiHDhl (last visited 11 Dec. 2015).
[75] See further the contribution of Galina Cornelisse in this issue.
[76] *Ibid*, para 68.

Court has rejected the position that asylum-seekers are deprived of their liberty, contrary to *Amuur*.[77] In most cases, however, the initiation of such procedures is resisted given the authorities' difficulty to comply with the short two-day time-limit to issue a decision. In the first half of 2015, 342 out of 382 potential airport procedures were never conducted by the Federal Office for Migration and Refugees (BAMF) on that ground.[78] By way of contrast, Switzerland concedes that asylum-seekers undergoing its "airport procedure" are effectively deprived of their liberty, and grants detainees a right to appeal against their confinement in airport transit zones.[79]

Some states have created specific detained procedures for asylum-seekers. For instance, the UK detained fast-track, until recently, meant that even those applying for asylum promptly on arrival were at risk of detention. In *Saadi v UK*, the ECtHR deemed this detention practice permissible under Article 5(1)(f) ECHR, as is discussed above, subject to significant requirements of legality and non-arbitrariness. However, after much litigation, the UK Courts have now issued two significant legal blows to the practices. First, its operation was deemed to have entailed procedural unfairness. The court accepted that detained asylum-seekers were placed at serious procedural disadvantage not due to their own conduct, but on the sole basis of the Home Office decision's to detain.[80] In addition, the extension of detention into the appeal stage was deemed to have lacked a clear basis in UK domestic law.[81] The judge's comments in that case give a sense of the legal quagmire in which asylum-seekers found themselves. At issue was whether the rules on detention were published and clear, a basic requirement of the rule of law. With some understatement, Beatson LJ noted that the regulation of detention was such that there was "an absence of clarity or confusion… by those responsible for administering the policy". Given this official confusion, he asked, "how [could] it be said that this was clear to applicants outside the system and to those advising them?"[82]

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[77] BVerfGE 2 BvR 1516/93, German Federal Constitutional Court, 14 May 1996, 94, 166.
[78] AIDA, *Country Report Germany: Fourth Update*, 2015, 34.
[79] Article 108(4) Swiss Asylum Act. See AIDA Country Report Switzerland: First Update (October 2015), 70.
[80] On 12 June 2015, after 15 years of operation, the High Court deemed the appeals process to be *ultra vires* due to its intrinsic unfairness to asylum seekers. *Detention Action* [2015] EWHC 1689, High Court (Nicol J) 12 June 2015. See A. Harvey, 'Recent Challenges to Accelerated Procedures Involving Detention in the UK', *EDAL,* 7 Aug. 2015, available at: http://bit.ly/1MRBJX0 (last visited 11 Dec. 2015); C. Briddick, 'The Legality of the Detained Appeal Process: Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors' *Oxford Human Rights Hub,* 18 June 2015.
[81] *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634, United Kingdom: Court of Appeal (England and Wales), 16 December 2014.
[82] *Amuur v France* (1996) 22 EHRR 533, ECtHR, 25 June 1996 para 68.

These examples of border and fast-track asylum detention are by no means isolated. The fiction of extra-territoriality has more recently been extended to detention facilities established at states' borders, as was the case in Hungary's newly built transit zones on its frontiers with Serbia and Croatia.[83] Though located on Hungarian soil, the container-made facilities are for legal purposes deemed to operate outside the country's territory. In this section we simply note that such practices may rest on legally dubious assumptions, such as fictions of non-presence, or an assumption that fair asylum procedures may be conducted whilst asylum-seekers are in detention.[84] The purpose of this section is simply to note the assumptions that create risks of detention. EU law regulates this context, as is set out below.

2.1.2. EU Law and Detention on Arrival

EU law now regulates both asylum procedures and reception conditions. The approach to regulating detention has changed considerably through the development of the two phases of the CEAS.

The original Reception Conditions Directive (RCD)[85] and Procedures Directive (PD)[86] made bald references to detention.[87] Article 18 PD baldly stated that "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum". The original proposal for the RCD contained a detailed provision on detention,[88] largely modelled on UNHCR ExCom Committee Conclusion No 44.[89] However, negotiating wrangles produced oblique, piecemeal provisions instead. Article 7 RCD provided that "[a]sylum seekers may move freely within the territory of the host Member States". However, Member States may decide on "the residence of the asylum seeker for reasons of public interest, public

[83] For a discussion, see Hungarian Helsinki Committee, *No country for refugees*, Information Note, 2015.
[84] See further ECRE, *Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary,* 2015.
[85] Council Directive 2003/9/EC of 17 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.
[86] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.
[87] For analysis of both, see D. Wilsher, 'Immigration Detention and the Common European Asylum Policy' in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU immigration and asylum law after 1999,* Hart Publishing, 2007, 418-425; K. Hailbronner, "Detention of Asylum Seekers" 9 EJML 159, 2009, 169.
[88] European Commission, *Proposal for a Council Directive laying down minimum standards for the reception of asylum seekers*, COM(2001) 181, Article 7(2).
[89] See generally UNHCR, ExCom Conclusion No 44 (XXXVII) 1986. See also Wilsher (n 115) 422.

order, or, when necessary, for the swift processing and effective monitoring of his or her application".[90] This provision seemed to fall far short of Article 26 CSR, as discussed above.

The legal framework on detention of asylum seekers has become more elaborate with the second phase of the Common European Asylum System (CEAS). The Recast RCD contains more elaborate rules on the detention of asylum seekers. Article 8(1) thereof reiterates the prohibition on detaining an asylum seeker "for the sole reason" of applying for international protection, referring to Article 26(1) of the Recast PD. Detention is permissible only "when it proves necessary and on the basis of an individual assessment of each case", and if less coercive alternatives cannot be applied.[91] Member States are required by the Recast RCD to lay down in their national law rules concerning alternatives to detention such as "regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place".[92]

Moreover, Article 8(3) sets out six exhaustive grounds for detention: (a) determining the applicant's identity or nationality; (b) determining elements of the claim, particularly in where there is a risk of absconding, (c) determining the applicant's right to enter, (d) preventing an applicant from delaying or frustrating a return procedure, (e) on national security or public order considerations, or (f) under a Dublin procedure, where detention is only permissible to prevent a "significant risk of absconding".[93] Naturally, these grounds require close examination. They are broadly formulated, although as detention must be neccessary in order to be permitted, they must be interpreted narrowly in individual cases. While the Dublin system is also operated by countries which are not otherwise bound by the Recast RCD – including EU Member States Ireland, Denmark and the UK that have opted out of the Directive, as well as non-EU countries Switzerland, Liechtenstein, Norway and Iceland – the Directive's standards on detention conditions, procedural guarantees and safeguards for vulnerable detainees bind all states applying detention in the context of the Dublin III Regulation.[94]

The role of EU law: fingerprinting as a basis for coercion

[90] Article 7(2) RCD.
[91] Article 8(2) RRCD.
[92] Article 8(4) RRCD.
[93] Article 28(2) Dublin III Regulation.
[94] Article 28(4) Dublin III Regulation, citing Articles 9, 10 and 11 RRCD.

On arrival, EU and Dublin States are obliged to fingerprint asylum seekers and irregular migrants.[95] That State obligation is often imagined as creating a duty on individuals on arrival, but that is too hasty.[96] The existence of an obligation on Member States in an EU Regulation – "[e]ach Member State shall promptly take the fingerprints of all fingers of every applicant" – means that Member States must give effect to that obligation whilst also respecting fundamental rights and legality. Their international human rights obligations are also unaffected, if the Regulation affords them any discretion. In practice, the EU Regulation is complemented by obligations in domestic law.[97] However, it cannot be assumed that a duty on the Member States set out in EU law automatically creates obligations on individuals, unless that is clearly set out in law.

The European Commission has issued a set of legally questionable guidelines on coercive measures to take asylum seekers' fingerprints in accordance with the Eurodac Regulation,[98] which have been endorsed by Member States in the Council.[99] Fingerprinting becomes all the more relevant given that registration in the Eurodac database,[100] set up to assist the operation of the Dublin system, is a prerequisite for eligibility for relocation.[101] Among other measures, the guidance recommends states to apply detention for the purpose of fingerprinting asylum seekers on their territory, on the ground that such a measure is necessary to verify their identity and nationality.[102] However, assuming that the storage of a person's fingerprints in the Eurodac database verifies her identity or nationality amounts to a misreading of the database's core objective. In a critique of the guidance, ECRE explains that Eurodac does not *per se* determine either identity or nationality, as the only personal information recorded therein concerns fingerprint set and sex;[103] Eurodac only informs

[95] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' […] [2013] OJ L180/1, Articles 9 and 14.
[96] ECRE, *Comments on the European Commission Staff Working Document on the implementation of the Eurodac Regulation as regards the obligation to take fingerprints* (June 2015), 2. *Contra* FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac* (October 2015), FRA Focus 05/2015, 6-7, which argues that asylum-seekers and migrants have a duty to provide fingerprints.
[97] See e.g. Austrian BFA-Procedure Act, Article 42, Bulgarian Asylum and Refugees Act, Article 30(9); Swedish Aliens Act, Chapter 9, Section 8.
[98] European Commission, *Staff Working Document on implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, SWD(2015) 150, 27 May 2015.
[99] Council of the European Union, *Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, 11013/15 ASIM 60 EURODAC 8, 17 July 2015.
[100] See Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' […] [2013] OJ L180/1.
[101] Article 5(5) Relocation Decisions.
[102] This is a ground for detaining asylum seekers under Article 8(3)(a) RRCD.
[103] Article 11(a) and (c) Eurodac Regulation. Interestingly, Article 4(2) of the recast Qualification Directive provides that applicants must cooperate with the authorities towards establishing their identity by providing "all the documentation at the applicant's disposal regarding the applicant's age, background, including that of

Member States on the possibility an asylum seeker's transit through another country,[104] and may only help authorities to verify identity or nationality if it reveals that the person has been fingerprinted in another country and that country hols information on her identity or nationality.[105]

The relevance of detention to fingerprinting arises out of the guidance's erroneous assumption that a national duty on the Member States translates into an obligation on the individual and that, if the individual is in breach of that obligation, coercion may be applied. That elision is antithetical to the rule of law. Even if the obligation on the Member States to fingerprint is translated into an obligation on the individual to submit to fingerprinting, the existence of a legal duty does not in itself create a ground for detention under the law. Pause for a moment to consider the implications of general power to detain: those who park on double-yellow lines, or fail to pay their taxes on time might be detained simply for being in breach of those clear legal duties. That detention requires specific grounds is reflected under Article 5(1)(b) ECHR. Detention to *coerce* compliance with a legal obligation must meet stringent conditions in order to be permissible under Article 5(1)(b) ECHR.

In its Article 5(1)(b) case-law, ECtHR has clarified that detention under this ground may not be of punitive character and must cease as soon as the obligation is discharged, while a balance must also be struck between the nature of the obligation to be secured and the deprivation of the person's liberty.[106] This Article 5(1)(b) case-law reflects a commitment to the right to liberty and the limited used of detention. Notably, the FRA recalls this case-law in its recent report.[107]

However, that basic limitation on coercive detention is often lost in the official EU discourse on Dublin and the duties of asylum-seekers on arrival.

It may well be reasonable to ask people who arrive irregularly to register on arrival, including by providing fingerprints. However, registration may be coupled with Eurodac fingerprinting and the Dublin System, or perceived to be. This seems to be widely understood, creating fear that fingerprinting puts one at risk of later removal under Dublin.

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relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection." No mention is made therein on providing fingerprints.

[104] ECRE, *Comments on the European Commission Staff Working Document "on implementation of the Eurodac Regulation as regards the obligation to take fingerprints"*, 2015, available at: http://bit.ly/1CYNZBs, (last visited 11 Dec. 2015), 4-5.

[105] FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac,* 05/2015, 2015, 7.

[106] *Vasileva v Denmark* (2005) 45 EHRR 27; *Ostendorf v Germany*, App No 15598/08, European Court of Human Rights, 7 March 2013.

[107] FRA (n 86).

This creates perverse incentives for refugee and migrants to evade registration.[108] The practical difficulties with the Dublin system in the context of irregular arrivals are stark. While it might be appropriate to designate responsibility for dealing with asylum-claims on the states that issue humanitarian visas,[109] the place of irregular arrival[110] is geographical happenstance. Additionally, irregular access points are limited, meaning that some points of arrival become the sites of mass influx and humanitarian crisis. In these circumstances, the otherwise reasonable practice of registration on arrival becomes deeply problematic due to its linkage with the Dublin System.

The measures taken by the EU as emergency response to the "refugee crisis" are layered onto this System. The proposed establishment of a coordinated EU inter-agency presence in first reception and registration facilities at main points of arrival ("hotspots") in Italy and Greece suggests that registration and related allocation processes will take placed in confined spaces. In its explanatory note on the "hotspot" approach, the Commission has placed considerable emphasis on detainability of asylum seekers by alerting Member States to "possible detention" throughout every step of the process. Detainability is assumed to arise from a person's refusal to be fingerprinted, to deportation to a third country, to carrying out a transfer under the Dublin Regulation or to examining the asylum claim *in situ*.[111] There is a legally dubious conflation in the discourse between detention as a means of migration control (which as discussed above falls under Article 5(1)(f) ECHR) and coercive detention, which is tightly constrained under Article 5(1)(b).

2.2. Detainability in transit and the prevention of "absconding"

The reality of refugee movements across Europe is such that arrival in the EU cannot be equated with arrival in a place of refuge. Transit in search of protection, highly pertinent in the current European context, means that refugees usually travel through several countries before reaching safe haven. At present, the so-called "Balkan route" typically involves entering the EU in Greece, and then leaving the EU again to transit the Former Yugoslav Republic of Macedonia (FYROM) and Serbia, and then to enter the EU once more via Croatia or Hungary, then Slovenia. As well as several crossings of "EU external borders"

[108] E. Guild *et al*., *Enhancing the Common European Asylum System and alternatives to Dublin*, European Parliament, Civil Liberties, Justice and Home Affairs, PE519.234, 2015, 57.
[109] Article 12 Dublin III Regulation.
[110] Article 13 Dublin III Regulation.
[111] European Commission, *Explanatory note on the "Hotspot" approach*, 2015, available at: http://bit.ly/1N46jcT (last visited 11 Dec. 2015) 12.

(triggering double-counting by FRONTEX),[112] there are evidently other risks on that route.[113] As our focus in on EU law, we do not examine the detention practices of the non-EU Member States on that route.

Some countries of transit have permitted, even facilitated the travel of asylum-seekers through their territory so as to ensure that they may reach their destination unencumbered. Others, however, prevent the movement of people through coercive measures. For instance, the recent criminalisation of irregular entry in Hungary, leading refugees and migrants entering through the Serbian border to prosecution and expulsion, is far from faithful to the precepts of Article 31 CSR.[114] The poor quality of legal assistance available to defendants in such cases also accounts for this, as the non-penalisation clause of the Convention does not seem to be invoked as a defence to conviction.[115] Beyond the imposition of criminal sentences, refugees entering Hungary also face the risk of administrative detention,[116] which is most commonly grounded on the existence of a "risk of absconding" on the basis that they seek to leave the country.[117] This contrasts with the approach taken in other transit countries such as Greece, where the majority of asylum seekers detained are deprived of their liberty for reasons other than the prevention of absconding.[118] More strikingly, until early October 2015, this contrasted with Hungary's own policy with regard to persons entering through the Croatian border, who benefitted from organised transport to the Hungarian-Austrian border with a view to continuing their journey.[119]

Similarly, in the Czech Republic, those attempting to transit to claim asylum elsewhere have been confined in overcrowded detention centres under terrible conditions and without adequate legal aid, as funding for legal assistance was cancelled in June 2015.[120] The systematic use of detention is legally dubious. Even to comply with the ECHR standards, there must be an assessment of the basis for detention and its relationship with the purposes

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[112] N. Sigona, 'The Politics of Counting People at Borders: Brief Twitter Conversation with @FRONTEXEU', 13 Oct. 2015, available at: http://bit.ly/1L9gRHP (last visited 11 Dec. 2015).
[113] Amnesty International, *Europe's Borderlands: Violations against refugees and migrants in Macedonia, Serbia and Hungary,* EUR 70/1579/2015, 2015.
[114] Hungarian Helsinki Committee, *No country for refugees: New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, 18 September 2015, 7.
[115] For an example, see ECRE, *Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary*, 23.
[116] Between January and September 2015, Hungary detained 1,839 asylum seekers: *Ibid*, 26.
[117] *Ibid*, 26-27.
[118] Between January and September 2015, a total of 2,164 applicants for international protection were detained in Greece: Greek Asylum Service, *Asylum Statistics September 2015*, available at: http://bit.ly/1H3TuRx (last visited 11 Dec. 2015).
[119] ECRE, *Crossing Boundaries*, 33.
[120] Organisation for Aid to Refugees (OPU), 'Refugees being treated like criminals in Czech detention centres', *ECRE Weekly Bulletin*, 14 Sep. 2015, available at: http://bit.ly/1F9TMoR (last visited 11 Dec. 2015).

set our in Article 5(1)(f). Moreover, the reasonableness of detention to prevent transit to other Member States is in doubt. The plea from civil society has simply raised the question "why refugees get arrested at all".[121] It appears as if illict purposes such as deterrence may be motivating factors.

The practices of detaining asylum-seekers to prevent onward movement do find some basis in EU law. While the legality of any general detention practice is doubtful, the EU asylum *acquis* appears to acknowledge preventing onward movement as a basis for detention in Article 8(3)(b) RRCD. It states that detention is permitted if it is necessary "in order to determine those elements on which the application for international protection is based" if they "could not be obtained in the absence of detention." Onward movement framed as the applicant's "risk of absconding." The provision's drafting is clumsy, and a sound interpretation would need to test any proposed detention carefully for its "necessity", which as discussed below, also requires states to examine and rule out alternatives to detention. Specifying absconding risk not as a ground, but rather an element of detention justified in order to assess the asylum claim, seems empirically problematic. Linking detention with the proper conduct of an asylum process is dubious. Detention is liable to impede access to the sorts of information, support and advice that facilitates the open communication and trust that is a necessary feature of reliable refugee status determination.[122] We highlight this problematic provision not only for what it permits in law, but for what it signals in terms of the political construction of the asylum-seekers. They are constructed in the political imagination as obliged to claim asylum, or else if they manifest a likelihood of moving on, be detained.

2.3. Detaining the "deportable asylum seeker"

The third context in which asylum-seekers are at risk of detention arises out of their deportability under the Dublin Regulation. The entire basis of Dublin creates a category of asylum-seekers whose claims have not yet been determined, who are nonetheless deportable to another state in order to have the claims assessed there. Safe third country practices have the same effect, though their impact on detention is less well regulated. This deportability, and hence detainability, undermines the protective nature of making an asylum-claim, which

[121] *Ibid*.
[122] C. Costello, *The Human Rights of Migrants and Refugees in EU Law*, 294.

normally would prevent the deportation of an asylum-seeker until her claim is determined, left that deportation amount to *refoulement*.

The Dublin System

The original Dublin Convention of 1990 made no mention of detention, but is premised on the deportability of asylum-seekers back to states where their claims ought to be examined. Nonetheless, as it created a class of deportable asylum-seekers, it creates reasons to detain. The Dublin II Regulation too was silent on detention. Arguably there were EU legal issues that could have been litigated under these incarnations of Dublin. For instance, if detention was being taken pursuant to Dublin, then it could be deemed to fall within the scope of EU law, and subject to the general principle of law (including proportionality) and the EU Charter of Fundamental Rights. However, it was not until Dublin III that a detailed provision on detention was included: states may detain an asylum-seeker "to secure transfer procedures" where "there is a significant risk of absconding", on the basis of an individualised assessment and subject to necessity and unavailability of less coercive alternatives.[123]

Under the Dublin III Regulation, states are required to determine the circumstances that lead to assuming that an asylum seeker is at "significant risk of absconding" on the basis of "objective criteria defined by law".[124] In a different context, that of pre-deportation under the RD, the CJEU has considered the meaning of "absconding" in *Mahdi*, and helpfully clarified that lack of proper documents could not be equated with an absconding risk.[125]

Accordingly, the EU asylum *acquis* sets a different standard for the ground of detention in normal cases ("risk of absconding") where detention is ostensibly necessary to assess elements the asylum claim,[126] and standard under Dublin ("significant risk of absconding"), which relates to detention pending deportation to another Dublin State.[127] Jurisprudence from domestic courts in Austria, Germany and the Czech Republic clarifies that Member States may only use detention against the "deportable asylum seeker" on the basis of Dublin-specific criteria.[128] This issue has recently been submitted by way of

[123] Article 28(2) Dublin III Regulation.
[124] Article 2(n) Dublin III Regulation.
[125] Case C-146/14 PPU *Mahdi*, Court of Justice of the European Union, 5 June 2015.
[126] Article 8(3)(b) RRCD.
[127] Article 28(2) Dublin III Regulation.
[128] German Federal High Court, V ZB 31/14, 26 June 2014; Austrian Administrative High Court, VwGH 2014/21/00755, 19 February 2015; Krajský soud v Ústí nad Labem, 42A 12/2015-78, 5 August 2015.

preliminary reference to the CJEU for clarification.[129] Yet, contrary to their duty to lay down such criteria in law, a number of Member States continued to detain asylum seekers ahead of a Dublin transfer even in the absence of clearly defined criteria.[130] This resembles the widespread use of detention under the Dublin II Regulation, whose absence of express provision granting states powers to detain asylum seekers ahead of a transfer did not prevent them from doing so in practice.[131]

Moreover, in the states that have recently aligned their legislation with the Dublin III rules, the interpretation of the notion of "absconding" in practice is underpinned by broad, open-ended and often ambiguous criteria in several countries.[132] By way of example, a sufficient link between the asylum seeker and the country of residence in the form of "family relations, sufficient resources or secured residence" in Austria is taken to imply a risk of absconding.[133] In Poland, the lack of identity documents is in itself sufficient evidence of such a risk.[134] For Switzerland, in rather circular reasoning, such a risk may be inferred where an asylum seeker demonstrates conduct in the country or abroad which leads the authorities to believe that she will not cooperate with instructions.[135] More strikingly, Germany relies on particularly far-reaching criteria to identify a risk of absconding, such as the fact that an asylum seeker having paid sums of money to irregularly enter the country so substantial to her that she is likely to avoid deportation for those expenses not to be made in vain.[136] These examples signal an unduly wide reading of the permissibility of detaining asylum seekers in view of deportation, contradicting states' duty to narrowly interpret any restriction on the right to liberty under Article 5 ECHR.

In practice, the deportability of certain categories of protection seekers does lead to increased detainability, as in several countries asylum seekers subject to a Dublin procedure are systematically more liable to detention than other applicants in the course of the asylum

[129] See EDAL, 'The Czech Republic: Supreme Administrative Court seeks preliminary ruling on Dublin III detention', 24 Sep. 2015, available at: http://bit.ly/1Mmgl9W (last visited 11 Dec. 2015).
[130] As of December 2014, this included as many as 10 states. See ECRE, *Information Note on Directive 2013/33/EU*, 2015, available at: http://bit.ly/1McmV54 (last visited 11 Dec. 2015), 19.
[131] M. Mouzourakis, *We Need to Talk about Dublin': Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union,* RSC Working Paper No 105, 2014, 26.
[132] For an overview, see AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, available at: http://bit.ly/1ighgPs (last visited 11 Dec. 2015) 86-87.
[133] Article 76 Austrian Aliens Police Act, as amended in July 2015.
[134] Articles 87(2) and 88a(1) Law on Protection, as amended in November 2015.
[135] Article 76a Swiss Federal Law on Foreigners, as amended in July 2015.
[136] Article 2(14) German Residence Act, as amended in July 2015.

procedure. This tends to be the case even in respect of countries that do not systematically impose deprivation of liberty for the purpose of assessing an asylum claim.[137]

Deportability and detainability beyond Dublin

The transferability, and thus deportability, of asylum seekers remains a running thread in the EU beyond the remit of the Dublin system, as different responsibility-allocation arrangements are gradually emerging in 2015. The European Agenda on Migration,[138] issued by the Commission as a response to the need for a reformed migration policy, has fuelled increasing debates on alternative mechanisms of distribution of responsibility between Member States which, albeit based on different criteria than Dublin, may nonetheless entail transfers of applicants from one country to another. The two emergency relocation schemes agreed in September 2015 for 160,000 persons from Italy and Greece entail a temporary derogation from the responsibility criteria of the Dublin system.[139]

There are many historical precedents of mass evacuation and safe passage.[140] Specifically in the EU context, predecessors of relocation such as the project for intra-EU Relocation from Malta (EUREMA) were governed by voluntariness.[141]

Yet the current legal measures around relocation do not go any further than Dublin in addressing the crucial question of voluntariness on the side of the asylum seeker.[142] In times of emergency, the EU therefore derogates from the scheme of the Dublin Regulation, but not from its coercive logic. Coercion risks becoming, yet again, a central feature of responsibility

[137] In Poland, all asylum seekers transferred under the Dublin Regulation were detained during the first half of 2015: ECRE, *AIDA Country Report Poland: Fourth Update*, 2015, available at: http://bit.ly/1QIW7vh, (last visited 11 Dec. 2015) 64. Moreover, in 2013, Sweden detained a total 248 asylum seekers under the regular and accelerated procedures, and 1,239 persons under Dublin procedures: ECRE, *AIDA Country Sweden: Second Update*, April 2015, available at: http://bit.ly/1AAceVn (last visited 11 Dec. 2015) 44.
[138] European Commission, *A European Agenda on Migration*, COM(2015) 240, 13 May 2015.
[139] See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L239/146; Council Decision (EU) No 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80 (hereafter 'Relocation Decisions').
[140] See M. Zieck, 'The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement' Amsterdam Law Forum, 2013, 45, available at: http://bit.ly/1lQBgJI (last visited 11 Dec. 2015); R. Colville, 'The Hungarian Refugees – 50 Years On' 144 (3) Refugees, 2006, 12; UNHCR, 'Flight from Indochina' in *State of the World's Refugees* (2000) available at: http://bit.ly/1Nfm9PS (last visited 11 Dec. 2015); WC Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response,* Zed Books, 1998; A. Betts, *Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA*, UNHCR Working Paper No 120, 2006.
[141] European Asylum Support Office (EASO), *EASO Fact-Finding Report on intra-EU Relocation Activities from Malta,* 2012, available at: http://bit.ly/1Xnu88x (last visited 11 Dec. 2015).
[142] On the contrary, the principle of the asylum-seeker's consent to relocation is derogated from Recital 23 Relocation Decisions.

allocation, with a view to making relocation 'work'. For the target of 160,000 relocated asylum seekers to be met, the EU would need to ensure ways to transfer the envisaged asylum-seekers (only those with strong protection needs based on past evidence of high recognition rates for their nationalities)[143] to Member States with which they are unfamiliar. Preference matching systems could be designed to offer those eligible for relocation a reasonable range of option, and ensure they can make informed decisions, but without those systems, coercion be appear to be the 'easy' option. If coercive removal is contemplated, and deportability translates into detainability, the relocation system may replicate the worst feature of Dublin, in spite of its good intentions.

In practice, it is difficult to imagine how coerced transfers could be legal, ethical or workable. The logic of Dublin is to return people to a state where they could have sought protection. In contrast, relocation could amount to deporting someone to a state where they have no links. To do so without providing information and counselling in order to ensure that the transfer is voluntary would no doubt be amenable to ethical challenge. Moreover, as many states have agreed to accept asylum-seekers under the relocation programme, some preference matching mechanism could be established, to offer people a reasonable range of options, and ensure a greater degree of autonomy.

In practice, transfers appear to starting at a slow pace as of yet, with a total of only 159 transfers as of 3 December 2015, to Sweden, Finland, France, Germany, Spain and Luxembourg.[144] It appears in these cases, as the pool of asylum-seekers is massive, offering the chance of safe passage to a country of asylum has been done without great formality. However, if the numbers of persons entering in particular Greece in need of safe passage are to be transferred, the importance of setting up non-coercive systems is crucial.

We suggest that the notion of "absconding" needs very careful reconsideration in EU law.[145] The term is usually invoked in the criminal law context, where those against whom there is a reasonable suspicion of having committed a crime flee in order to evade prosecution. The usage in the context of refugee movements reflects an inappropriate analogy with those facing criminal charges who seek to evade a criminal process and sanction. Those

[143] Only nationalities with an EU-wide average recognition rate of 75% or more, on the basis of the latest quarterly Eurostat statistics are eligible for relocation. In accordance with latest statistics, this includes Syrians, Eritreans and Iraqis. Explain mechanism and countries at present: Syria, Iraq, Eritrea. Notably, although Afghans make up 24% of irregular arrivals to Greece, they are not eligible for relocation on this basis. See UNHCR, *Refugees/Migrants Emergency Response – Mediterranean* (11 Dec. 2015): http://bit.ly/1PUbYmN.

[144] European Commission, *Member States' Support to Emergency Relocation Mechanism* (3 December 2015) available at: http://bit.ly/1WMhASJ (last visited 11 Dec. 2015).

[145] See again EDAL, 'The Czech Republic: Supreme Administrative Court seeks preliminary ruling on Dublin III detention', 24 Sep. 2015, available at: http://bit.ly/1Mmgl9W (last visited 11 Dec. 2015).

who do not seek asylum in transit countries, or avoid the asylum process as they wish to move onwards, may be defying the logic of the Dublin System, but they do so for a range of reasons. In some cases, moving on is to escape inhuman and degrading conditions. If EU Member States cannot return asylum-seekers to Greece due to those conditions, it seems deeply problematic to suggest that exercising the right to leave Greece to escape those conditions is "absconding". Similarly, if states do not offer asylum in proper conditions, the usage of the term "absconding" seems here too inapt. "Absconding", which EU law strives to prevent through express powers of detention, could simply be exercising the human right to leave any country.[146]

We should also bear in mind that, for asylum-seekers undergoing RSD, trust between the individual and the state, or the lack thereof in practice, is crucial to the workings of the asylum process. If we coerce asylum-seekers to ensure they will cooperate with the host state, there is a real risk in hampering trust, a prerequisite for such cooperation.[147]

3. Necessity and Alternatives to Detention in EU Law: Testing the Limits

In this final section, we identify the importance of EU standards in limiting recourse to detention. While the preceding section explored how EU practices create the detainable subject of the 'asylum-seeker', EU law also limits detention, going beyond the human rights standards sketched in Section 1. Naturally, we cannot assess each and every detention practice identified above. This Section's purpose is simply to open up the question of legality under EU law, and consider why, as yet, those higher standards have not prompted institutional reforms.

Perhaps the most significant additional constraint brought by EU law is the requirement that detention be necessary in the individual case. Detention must be necessary in EU law, meaning it must be a last resort. If other alternative mechanisms will meet the same aim, detention will be unnecessary, and hence prohibited. Potentially, that signals a significant limitation on detention, in particular beyond the standard of non-arbitrariness traditionally articulated in the case-law of the ECtHR. However, based on the practices

[146] D. Kochenov, "The Right to Leave any Country including your own in International Law" 28 Conn J Int L, 2012, 43; Council of Europe, *The Right to Leave a Country* (Council of Europe, 2013).
[147] See further C. Costello, Immigration Detention: The Grounds Beneath Our Feet, 166-167; and See further, C. Costello and E. Kaytaz *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UN High Commissioner for Refugees (UNHCR), June 2013.

identified above, we also note that EU law produces reasons to detain. Accordingly, to be a meaningful constraint on detention, a necessity test requires clear delineation of the permissible purposes of detention.[148] Accordingly, we suggest that there are three challenges that need urgent attention in EU law. First, greater clarification of grounds is required, particularly on the meaning of "absconding" in the context of onward movement as discussed above. Secondly, the necessity test requires examination of whether alternatives to detention (ATDs) are available. The requirement to examine alternatives to detention now also appears in some ECtHR jurisprudence under Article 5(1)(f).[149] The move to require consideration, and indeed institutionalisation, of ATDs reflects developments at the international level, as discussed above in relation to the UNHCR revised *Guidelines on detention and alternatives to detention* of 2012.[150] Thirdly, these constraints are meaningless without effective remedies, or even more importantly, constraints that avoid detention in the first place.

On alternatives to detention in EU law, the obligation to lay down rules on less coercive alternative measures stems from Article 8(4) of the Recast RCD, which requires Member States to consider measures "such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place". Nevertheless, while avoiding the deprivation of liberty and effects thereof for the individual asylum seeker, the use of alternatives to detention does not fully alleviate her of other adverse consequences of restrictions on freedom of movement. Without proper monitoring, ATDs can also exacerbate vulnerabilities and deprive persons from vital rights such as that to information and legal assistance. It may often so happen that asylum seekers under house arrest face greater difficulties in acquiring information or contacting legal representatives than those in closed detention centres.[151] Ensuring that persons are informed and benefit from legal aid throughout the process is echoed in the UNHCR Guidelines as a key factor to the efficiency of ATDs.[152]

The introduction of ATDs in the Recast RCD undoubtedly marks an effort in the EU legal framework to move away from detention. However, that move has yet to prompt institutional reform. In several Member States, notably the Netherlands, Greece and Bulgaria, the codification of ATDs in the legal framework has not brought about their practical

[148] *Ibid*.
[149] See e.g. *Yoh-Ekale Mwanje v Belgium*, App No 10486/10, European Court of Human Rights, 20 December 2011.
[150] UNHCR (n 15).
[151] See e.g. ECRE, *AIDA Country Report France: Fourth Update*, December 2015.
[152] UNHCR, *Detention Guidelines 2012*, para 41.

implementation.[153] In other States, the rules governing alternatives remain opaque and poorly defined, thereby leaving considerable ambiguity as to their implementation. A study by the Odysseus network, published in January 2015, explores this implementation gap.[154]

In Member States where ATDs are in fact applied, their implementation often seems to entail systematic application, rather than careful individual assessment of necessity. In Hungary, for instance, as many as 10,866 asylum seekers were imposed a designated place of stay during the first half of 2015 as an ATD. The less intrusive option of imposing a bail requirement was rarely.[155] Without proper configuration, ATDs could therefore become another means of entrenching the detainability of refugees. The blanket introduction of house arrest for asylum-seekers awaiting Dublin transfers in France,[156] which need not satisfy a test of necessity or proportionality, is an equally worrying illustration of this normalisation of detention-like practices, under the guise of ATDs. Evidently ATDs are not a panacea to avoid detention.

The effectiveness of EU law is generally understood to rest on its domestication, and combination of both institutional and individual enforcement. EU norms are part of domestic law, but when those norms themselves create obligations for individuals, their rights-restrictive impact needs limitation. We see in EU discourse, the duties on asylum-seekers are wrongly assumed to be *ipso facto* enforceable by means of detention. Moreover, the account of the effectiveness of EU law assumes governments generally heed their own courts. Some of the contemporary detention practices of EU Member States are in flagrant breach of all three sources of law – refugee, human rights and EU law. The CJEU has been seized of preliminary references on detention cases arising out of the events of 2015,[157] and the Commission has initiated numerous infringement actions related to the implementation of the CEAS.[158] But these *ex post* remedies are cold comfort to those who have been illegally detained.

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[153] ECRE, *AIDA Country Report Netherlands: Fourth Update*, November 2015, available at: http://bit.ly/1Ne8uwZ, (last visited 11 Dec. 2015) 66; ECRE, *AIDA Country Report Greece: Fourth Update*, November 2015, available at: http://bit.ly/1kV0Kpc, (last visited 11 Dec. 2015) 92; ERCE, *AIDA Country Report Bulgaria: Fourth Update*, October 2015, available at: http://bit.ly/1Ijc43o, (last visited 11 Dec. 2015) 54.

[154] See Odysseus Academic Network, *Alternatives to immigration and asylum detention in the EU: Time for implementation*, January 2015, 88, referring to Sweden and Austria.

[155] ECRE, *AIDA Country Report Hungary: Fourth Update*, November 2015, available at: http://bit.ly/1Oi73hQ, (last visited 11 Dec. 2015) 61-62.

[156] Article L742-2 French Code on Entry and Residence of Foreigners and on the Right to Asylum (Ceseda), as amended in July 2015. See also AIDA Country Report France: Fourth Update (December 2015), 91.

[157] See e.g. EDAL, 'The Czech Republic: Supreme Administrative Court seeks preliminary ruling on Dublin III detention', 24 Sep. 2015, available at: http://bit.ly/1Mmgl9W (last visited 11 Dec. 2015).

[158] See European Commission, 'European Commission adopts 40 infringement decisions to make European Asylum System work', IP/15/5699, 23 September 2015.

Conclusion

This contribution revealed that in spite of muli-layered legal constraints, asylum-seekers are vulnerable to detention. We have identified three contexts in which that vulnerable arises: as an irregular entrant, in transit in search of effective protection, and when asylum-seekers are liable to transfer under the Dublin System. Throughout these processes, asylum-seekers are in effect required to submit to identification mechanisms, which appear to licence coercive detention. As long as the EU fails to offer safe and legal routes to seek asylum, asylum seekers are at risk of detention as irregular entrants. The entire basis of Dublin and safe third country practices create a category of asylum-seekers whose claims have not yet been determined, who are nonetheless deportable to another state in order to have the claims assessed there. While human rights, international refugee law, constrain detention, EU law limits detention further, by requiring detention to be 'necessary', and explicitly prohibiting detention if alternatives would achieve the same aim. In order to make that guarantee meaningful, judicial enforcement and institutional change are required. More deeply, the role of law in producing reasons to detain, constructing asylum-seeker as detainable, undermines legal duties to refugees, who are refugees even before governments recognise them as such.