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THE RIGHT TO LIBERTY IN THE CONTEXT OF MIGRATION

Master Thesis

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LIST OF ABBREVIATIONS

ATD – Alternatives to Detention

CEAS – Common European Asylum System

CJEU – Court of Justice of the European Union

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

EUCFR – Charter of Fundamental Rights of the European Union

HC – UK High Court

HRC – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

RCD – Reception Conditions Directive

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

INTRODUCTION

The right to liberty is a fundamental human right applicable to all human beings regardless of gender, religion, race, political opinion, sexual orientation, and immigration status. This right establishes that every person has freedom, security and should not be arbitrarily deprived of their liberty. It is one of the fundamental human rights that forms the foundations of democratic societies. Any limitations therefore, must strictly adhere to established guarantees and principles.

The right to asylum is also a human right acknowledged internationally and safeguarded by respected treaties. It is a right established to provide protection to persons who meet the conditions laid out by the Convention Relating to the Status of Refugees 1951 (hereinafter the 'Refugee Convention'), when forced to leave their country due to persecution. The Refugee Convention is the main instrument of international refugee law establishing the criteria for refugee status and the safeguards that come with it. As such, the right to asylum is conferred upon individuals and forms the foundations of the Refugee Convention. It is therefore, a right that must also be safeguarded and applied in tandem with the right to liberty within the asylum context. However, there is no right to be granted asylum which remains solemnly within the sovereign rights of the State, which leads to a conflict.

Sovereignty and territoriality are the foundational pillars of international law and establish unfettered rights available to States. One of these, is the right to control who enters State territory, otherwise known as immigration control. States have the right to draft and effect immigration policies of their choice in the exercise of sovereignty, which allows control of aliens into and onto its territory. One of the most prevalent methods of immigration control is detention, that is, depriving an individual of their liberty by confining them to a certain place whilst their status is determined, until accepted or rejected. The right to liberty is not absolute, meaning detention is within the lawful exercise of State rights. However, this mix of liberty, sovereignty and detention becomes a highly contentious issue when applied within the immigration context, specifically to persons exercising their right to asylum. The States right to control borders has meant liberty of asylum-seekers is given lesser consideration.

Research indicates that there is systematic use of detention measures within European States imposed upon asylum-seekers. Detention has serious consequences on the physical and mental health of individuals, which is magnified for those vulnerable and potentially already coming from harm. Due to such, it is widely accepted by international and regional organisations, that detention should be an exceptional and last resort measure. This is based on

the fundamental importance of protecting the right to liberty. Thus, detention measures must adhere to strict legal and procedural safeguards, to ensure the most effective protection against arbitrary deprivation of liberty. The guarantee of non-arbitrariness requires the indispensable consideration of the principles of necessity and proportionality. However, within the European legal sphere (the Council of Europe and the European Union, for the purposes of this thesis), the right to liberty of asylum-seekers is afforded a lower level of guarantee against arbitrariness as the principles of necessity and proportionality are not sufficiently applied. Therefore, a conflicting division of standards and obligations exists between European and international law.

There is significant overlap of States party to both the international and European regional instruments guaranteeing the right to liberty. Consequently, the division of the norms and obligations being applied in the European region compared to what is interpretively required under international law, is a legal issue. Lower standards of the right to liberty mean that detention measures imposed may be justified under European law, but simultaneously be in violation under international law. Accordingly, there needs to be better cohesion between the international and regional instruments, to ensure that the right to liberty of asylum-seekers is effectively protected. This issue is complicated due to the overarching tension that exists between the State‘s sovereign right to control immigration and the asylum-seekers right to liberty.

A possible solution to the above legal problems that this thesis will aim to propose, is to look at the practice of detention itself. Alternatives to detention measures present a real possibility of ensuring States maintain effective migration control whilst also better protecting the right to liberty of asylum-seekers. Consideration and implementation of alternatives to detention could also bridge the gap between international and regional legal standards, as necessity and proportionality can be sufficiently considered.

Research Problems

1. What are the international and European (Council of Europe and European Union) legal standards on the right to liberty, specifically the interpretation of non-arbitrariness within the asylum detention context?

2. Is the European region adequately protecting the right to liberty of asylum-seekers, in conformity with international principles, specifically necessity and proportionality?

3. Does the overlapping standards and obligations between European and international law, present a larger conflict between sovereignty and human rights?

4. Can alternatives to detention, effectively bridge the division between international and European regional standards on the right to liberty of asylum-seekers, and potentially maintain a fair balance between the States right to control its borders and asylum-seeker‘s liberty?

Relevance of the final thesis

It was reported in 2019 by the UN Refugee Agency that more than 70 million people have been forced to flee their homes because of war, persecution and conflict[1]. This is an extraordinary number of individuals facing harm, serious violations of basic freedoms or even death. These are the people in most need of international protection and thus are forced to seek refuge in other countries.

Fundamental human rights form the foundations of law-abiding democratic societies and are necessary to protect for all individuals regardless of nationality, race, gender, and other characteristics. History has shown that failure to equally apply basic human rights to certain groups of people, eventually can lead to serious and inhumane events, having long lasting consequences for the entire world.

This thesis considers the fundamental right to liberty within the European asylum-seeking context, as there is an increasing use of detention within the region, meaning asylum-seekers are being consistently being deprived of their liberty. Thus, it is vital to establish whether such detention meets the sufficient legal standards to ensure these measures are not arbitrary and therefore justified. However, currently the Council of Europe and the European Union both similarly appear to have adopted a lower guarantee against arbitrariness than provided by international law. Consequently, this gives the impression that it has criminalised the act of seeking asylum as asylum-seekers are increasingly detained without justification. They appear to be persons afforded lower standards of the right to liberty simply on account of them seeking protection, which violates the core aims of international human rights and refugee law.

“It is a gross injustice to deprive of his liberty for significant periods of time a person who has committed no crime and does intend to do so. No civilised country should willingly tolerate such injustices”[2]

Scientific novelty and overview of the research on the selected topic

[1] Sarah Newy, “More than 70 million people forced to flee their homes because of war and persecution“, *The Telegraph,* 19 June 2019, https://www.telegraph.co.uk/global-health/climate-and-people/70-million-people-forced-flee-homes-war-persecution/

[2] Tom Bingham, *The Rule of Law,* (London: Allen Lane, 2011), p. 73.

With the increasing amount of displaced persons seeking protection in Europe due to ongoing and seemingly never ending world conflicts, there is a real need to achieve an effective way of controlling incoming asylum applicants without criminalising and arbitrarily depriving them of liberty. There has been various research conducted on the detention of asylum-seekers in Europe and the right to liberty, and the subsequent case law resulting from the conflict that occurs between the two. Research by Edwards provides a great overview of the legal standards of the right to liberty and right to asylum at the various levels of international law, alongside empirical research of alternative detention measures[3]. An accredited dissertation by Wolfe analyses the prominent use of detention of asylum-seekers in Europe[4]. Journals by O'Nions[5] and Moreno-Lax[6] note some of the legal issues occurring within European jurisprudence regarding the right to liberty of asylum-seekers.

This thesis expands upon the above research because it reveals comprehensively the disparity that exists between the right to liberty guaranteed at the international level and the apparently lower one that is currently applied at the Council of Europe and the European Union level. The thesis analyses this conflict by further looking at the right to asylum present within international refugee law and how such is also not effectively protected. Lastly, the thesis considers the overarching problem that exists in maintaining a fair balance between sovereignty and human rights within the asylum detention context, something that appears to have not been analysed in such scope.

Significance of research

This research thesis provides a comprehensive analysis of the right to liberty established under international and European (Council of Europe and European Union) law, and how such right has been interpreted to apply to asylum-seekers in the detention context. It further considers the international refugee regime and the relationship that occurs between the right to liberty and right to asylum. As such, this thesis could be used as material for

[3] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, https://www.refworld.org/docid/4dc935fd2.html

[4] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

[5] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

[6] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

international organisations, European institutions and scholars looking to understand the legal framework of right to liberty within the asylum context.

The thesis then presents the conflict that exists between overlapping international and European standards. It links such conflict to the broader tension between the State‘s need to maintain immigration control and human rights of the asylum-seeker. These two areas of international law contentiously clash against each other within the European asylum context when detention measures are used. Therefore, this thesis could also be a starting point for European institutions, Courts and legislators looking to better understand and possibly maintain a fairer balance between State rights and asylum-seeker rights. Lastly, the thesis proposes a potential solution. This is the consideration and implementation of alternatives to detention within the law, as the potential measures that can maintain effective immigration control without comprising the right to liberty of asylum-seekers.

Aim of research

The research aims to show that the right to liberty is protected at a lower standard for asylum-seekers in Europe than envisaged and established within the international law. This leads to a violation of the overlapping obligations that States have accepted under international treaties. The research also aims to present the wider conflict that exists between State rights and human rights within the asylum context, with State rights given more consideration at the European level, which consequently undermines the right to liberty and right to asylum. Lastly, the thesis aims to propose that alternatives to detention could be a viable measure that maintains the fair balance between immigration control and protection of the right to liberty of asylum-seekers within the European sphere.

Objectives of research

In pursuance of the above identified aims, the following objectives are established:

1) to identify and analyse the international and regional European legal regime relevant to the right to liberty within the asylum-seeking context, which consequently requires consideration of international refugee law;

2) to present the overlapping obligations that exist between international and European legal instruments in relation to the right to liberty, specifically, the permitted restrictions on liberty via detention measures on asylum-seekers;

3) to analyse if the standards against arbitrariness within the European region have been given a lesser level of guarantee, compared to the standards interpreted under international law;

4) to evaluate and propose alternatives to detention as a solution to the conflict between European and international law, in an attempt to establish a more effective balance between immigration control and the right to liberty of asylum-seekers.

Research Methodology

In pursuance of the aims and objectives, the thesis employs qualitative secondary research through a variety of sources such as: international & regional legal instruments; international & regional reports, commentaries, and interpretations; European Court of Human Rights jurisprudence; Court of Justice of the European Union jurisprudence; scholarly articles and written material; books; online news articles & organisational websites.

In compiling and presenting the information from the above-mentioned sources, a descriptive method was used to present the information in a concise and subject relevant manner. An analytical approach was used when considering legal jurisprudence, commentaries, and scholarly works in order to present the legal issues of the chosen thesis topic. Lastly, an evaluative approach was employed when proposing the chosen recommendations for the identified and analysed legal issues of the thesis.

Structure of research

This research thesis is divided into two main parts. The first part contains 4 main chapters and is primarily aimed at providing an outline of the international and European legal framework relevant to the right to liberty within the asylum-seeking context. The right to liberty is comprehensively provided in Chapter 1, as established in the international and the two European legal spheres; the Council of Europe and the European Union. Chapter 2 then necessarily includes consideration of international refugee law to outline the right to asylum. After, Chapter 3 will describe and define the practice of detention using relevant interpretations and commentaries from international and regional organisations. Then the principles to protect against arbitrary detention, which the right to liberty aims to guarantee against, will be considered. Lastly, Chapter 4 will provide an overview of alternatives to detention.

The second part of the thesis will consist of three chapters, ending with conclusions and recommendations. The three chapters will be analytical in nature. Chapter 5 will analyse the conflicting right to liberty standards of asylum-seekers endorsed by the European Court of Human Rights within the European Convention on Human Rights scope. Chapter 6 will consider the European Union level of standards taking into account the complex legal interplay of EU, European Convention of Human Rights and international law, and why such presents a threat to the right to liberty of asylum-seekers. Chapter 7 will propose alternatives to detention in the form of an European Union directive, with legal analysis as to why such measures have

the potential to solve the identified legal conflicts. Lastly, the end of the thesis will provide conclusions and propose recommendations to the conflicts that have been identified from the analysis.

Defence Statement

Despite international and regional European law establishing safeguards against arbitrary deprivation of liberty, the Council of Europe and the European Union standards still afford a considerably lower protection of the right to liberty for asylum-seekers. This is due to the conflict between the State‘s right to control immigration and the human rights of the asylum-seeker. Alternatives to detention measures could, when effectively considered and implemented, solve this conflict by adequately allowing for State immigration control whilst establishing higher right to liberty guarantees for asylum-seekers.

1. THE RIGHT TO LIBERTY IN INTERNATIONAL LAW

The right to liberty is one of the most fundamental human rights that applies to all human beings without distinction of any kind, including immigration status[7]. It entails that all persons have freedom of movement and freedom from arbitrary detention[8]. The right establishes an absolute prohibition against arbitrary detention, "meaning that it is a non-derogable norm of customary international law, or *jus cogens*"[9]. As such, unjustified detention can never be permitted "for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum-seekers"[10]. The fundamental status of this human right is demonstrated by its codification at the various levels of international law.

1.1 the Right to Liberty in the United Nations

The right to liberty was first established in Article 3 and Article 9 of the Universal Declaration of Human Rights ('UDHR') which accordingly state that "everyone has the right to life, liberty and security of person" and "no one shall be subjected to arbitrary arrest, detention or exile"[11]. The two rights were combined and transferred into Article 9 (1) of the International Covenant on Civil and Political Rights ('ICCPR') which guarantees a person's right to liberty and security of person, and prohibits any arbitrary deprivation of it[12]. The ICCPR is one of the three documents that form the International Bill of Rights (hereinafter referred to as the 'Bill'), together with the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[13]. These are the core instruments of the United Nations ('UN') that aim to advance and protect the fundamental basic human rights of all people[14]. The Bill serves to influence the decisions and actions of all governments and States alike, to ensure that human rights are at the top in the formation and implementation of national, regional and

[7] UN Human Rights Committee (HRC), "General Comment No.18: Non-Discrimination", 10 November 1989, para. 1.
[8] "Right to Liberty and Freedom of Movement", Liberty Victoria, Accessed 10 January 2020, https://libertyvictoria.org.au/content/right-liberty-and-freedom-movement
[9] Working Group on Arbitrary Detention (WGAD), "Revised Deliberation No.5 on deprivation of liberty of mirgants", 4 February 2018, para. 8.
[10] Ibid.
[11] Article 3 and Article 9, *Universal Declaration of Human Rights*, 10 December 1948.
[12] Article 9, *International Covenant on Civil and Political Rights*, 16 December 1966.
[13] Karina Weller, "What is the International Covenant on Civil and Political Rights?", Each Other, Accessed 10 January 2020, https://eachother.org.uk/international-covenant-civil-political-rights/
[14] "International Bill of Human Rights", ESCR-Net, Accessed 10 January 2020, https://www.escr-net.org/resources/international-bill-human-rights

international policy and law[15]. Establishment of core human rights was at the outset, a priority for the UN[16] which is the main international organisation made up of 193 Member States, tasked with promoting and ensuring peace, security and the sustainable development of human rights[17]. The founding legal instrument of the UN, known as the Charter of the UN, clearly speaks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion"[18]. This led to the drafting and adoption of the UDHR which is held:

"*as a common standard for achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among, the peoples of Member States themselves and among the peoples of territories under their jurisdiction*"[19].

Countries recognised "that protective mechanisms at the domestic level alone did not provide sufficiently stable safeguards"[20] and therefore it became evident that the world organisation of the UN must assume "the role of guarantor of human rights on a universal scale"[21]. The UDHR was more of a political proclamation and so there was agreement that it "should be translated into the hard legal form of an international treaty"[22]. This prompted the conclusion of the ICCPR recognising that "the inherent dignity and… the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[23]. Currently with 173 parties[24], States to the ICCPR have accepted clear obligations to respect the human rights embedded within, protect the enjoyment of those rights and to fulfil those rights[25]. The multilateral instrument also established the Human Rights Committee

[15] Ibid.
[16] UN Office of the High Commissioner for Human Rights (OHCHR), "Fact Sheet No.2 (Rev.1), The International Bill of Human Rights", https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf
[17] "About the UN", United Nations, Accessed 11 January 2020, https://www.un.org/en/about-un/
[18] Article 1 (3), *Charter of the United Nations*, 24 October 1945.
[19] UN Office of the High Commissioner for Human Rights (OHCHR), "Fact Sheet No.2 (Rev.1), The International Bill of Human Rights", page. 2, https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf
[20] Christian Tomuschat, "International Covenant on Civil and Political Rights", page. 1.
[21] Ibid.
[22] Ibid.
[23] UN,"Universal Declaration of Human Rights", Accessed 12 January 2020, https://www.un.org/en/universal-declaration-human-rights/
[24] United Nations Treaty Collection,"International Covenant on Civil and Political Rights", Accessed 12 January 2020, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND
[25] Karina Weller, "What is the International Covenant on Civil and Political Rights?", Each Other, Accessed 10 January 2020, https://eachother.org.uk/international-covenant-civil-political-rights/

('HRC') as the primary organ at the international level mandated to supervise application of the ICCPR rights throughout Contracting States[26]. The HRC regularly provides observations on any prevailing human rights situations, noting in particular any concerns and proposing recommendations. These however are not legally binding, as are the communications it provides in specific cases, and therefore considered part of international soft law; a term used to indicate instruments that have no legal binding force[27]. Nevertheless, States are expected to act in good faith to the comments formulated by the HRC, which serves to explain the scope, meaning and implementation of the provisions of the ICCPR[28]. The right to liberty has been articulated by the HRC and it is well established that freedom from arbitrary detention is a rule of customary international law[29]. The HRC sees the right to liberty as peremptory in nature and thus a *jus cogens* norm[30]. Right to liberty is set out in Article 9 (1) of the ICCPR which requires States not to arrest or detain persons except on such grounds that are in accordance with and established by law (lawfulness), provided the arrest or detention is not arbitrary (non-arbitrariness). Article 9 (1) applies to all forms of detention when a person is deprived of their liberty, including detention for immigration purposes[31]. The ICCPR does not provide an exhaustive list of what amounts to deprivation of liberty, nor does it provide a list of permissible grounds under which deprivation of liberty is justified. Rather, Article 9 as a whole serves as a substantive guarantee against any unlawful or arbitrary detention[32]. This potentially offers States discretion in their national legislations regarding migration control. Nevertheless, national legislation must be in conformity with the international human rights obligations. It has been communicated by the HRC in international cases, that national legislation allowing for mandatory detention of migrants without consideration for individual circumstances is unlawful, amounting to arbitrary detention within the scope of Article 9 (1) ICCPR[33]. Thus, for detention to be justified, the lawfulness and non-arbitrariness criteria must be established.

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[26]Christian Tomuschat, "International Covenant on Civil and Political Rights", page. 2.
[27] ECCHR,"Hard Law/ Soft Law", Accessed 12 January 2020, https://www.ecchr.eu/en/glossary/hard-law-soft-law/
[28] Christian Tomuschat, "International Covenant on Civil and Political Rights", page. 3.
[29] Maryam Ishaku Gwangndi, Abubakar Garba, "The Right to Liberty under International Human Rights Law: An Analysis", *Journal of Law, Policy and Globalization*, 37, (2013), Accessed 13 January 2020, https://heinonline.org/HOL/LandingPage?handle=hein.journals/jawpglob37&div=23&id=&page=
[30] UN Human Rights Committee (HRC), "CCPR General Comment No. 29: Article 4L Derogations during a State of Emergency", 31 August 2001, para 11.
[31] UN Human Rights Committee (HRC), "CCPR General Comment No. 8: Article 9 (Right to Liberty and Secuirty of Persons)", 30 June 1982, para. 1.
[32] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 18, https://www.refworld.org/docid/4dc935fd2.html
[33] *C. v. Austrailia*, UN Human Rights Committee (HRC), Communicaiton No. 900/1999, 13 November 2002.

1.2 the Right to Liberty in the Council of Europe

Protection against arbitrary deprivation of liberty is contained in most regional human rights treaties, established in similar terms as the Article 9 of the ICCPR[34]. At the Council of Europe level the right to liberty is embedded in Article 5 of the European Convention on Human Rights ('ECHR'). The ECHR came into full effect in 1953 and was adopted with a view from European Governments to abide by legal commitments, standards of behaviour and to protect the basic rights and freedoms of ordinary people[35]. After the Second World War the Council of Europe was formed to protect human rights, the rule of law and democracy[36], and is comprised of 47 Member States[37]. The Member States all agreed that a legal instrument was needed to secure basic rights for all persons within their borders; nationals and non-nationals alike[38]. As such, the ECHR soon followed and with it, the European Court of Human Rights ('ECtHR') was established. It is the constitutional court mandated to interpret and protect the rights set out in the ECHR[39]. Recognised as one of the fundamental human rights, is the right to liberty.

European States have long recognised the basic *habeas corpus* principle[40] which is a writ (written command) issued by a court detailing the grounds of detention. The English Bill of Rights 1689 contained provisions of personal liberty and security by prohibiting excessive fines and bails, and infliction of cruel and unjust punishments[41]. The French Declaration of the Rights of the Man 1789, stated in Article 7 that there can be no charge, arrest and detention unless prescribed by law[42]. Since then, *habeas corpus* and other basic guarantees have been applied to nationals and non-nationals throughout Europe[43]. This demonstrates that the right to liberty has long been held as a fundamental human right and therefore any limitations upon

[34] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 29, https://www.refworld.org/docid/4dc935fd2.html
[35] Amnesty International UK,"What is the European Convention on Human Rights?", Accessed 15 January 2020, https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights
[36] Eqaulity and Human Rights Commission,"What is the European Convention on Human Rights?", Accessed 15 January 2020, https://www.equalityhumanrights.com/en/what-european-convention-human-rights
[37] Council of Europe, Accessed 15 January 2020, https://www.coe.int/en/web/portal/47-members-states
[38] Eqaulity and Human Rights Commission,"What is the European Convention on Human Rights?", Accessed 15 January 2020, https://www.equalityhumanrights.com/en/what-european-convention-human-rights
[39] Ibid.
[40] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 29, https://www.refworld.org/docid/4dc935fd2.html
[41] Tom Bingham, *The Rule of Law*, (London: Allen Lane, 2011), page. 24.
[42] Article 7, *Declaration of the Rights of Man*, 26 August 1789.
[43] Tom Binggam, *The Rule of Law*, (London: Allen Lane, 2011), page. 58.

one's liberty must be closely controlled under prescribed legal standards. Accordingly, Article 5 (1) of the ECHR establishes that "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure by law"[44]. The provision aims to provide individuals protection against illegal and arbitrary detention, as also provided by Article 9 (1) of the ICCPR. However, the ECHR attempts to employ a more stringent approach against deprivation of liberty by establishing an exhaustive list of grounds under which detention may be carried out and justified[45]; something not included in the ICCPR provision. One of the grounds under Article 5 (1) ECHR is sub-paragraph (f) which permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition"[46]. Therefore, the use of detention measures depriving liberty of asylum-seekers is expressly permitted under the ECHR. Nonetheless, these measures must be in accordance with law for a prescribed purpose (lawfulness criterion) and must not be arbitrary (non-arbitrariness criterion); principles that are also strictly employed in the Article 9 (1) ICCPR.

1.3 the Right to Liberty in the European Union

The European Union ('EU') is a unique regional organisation comprised of 27 European countries, established to govern economic, social and security policies in a uniform manner across all its Member States[47]. Established on common European values, the EU aims to advance the peace, reconciliation, democracy, and human rights in Europe[48]. These goals and values were embedded in the EU Charter of Fundamental Rights ('EUCFR') aiming to provide consistency and clarity on a range of civil, political, economic and social rights throughout EU Member States[49]. The EUCFR contains the fundamental rights and freedoms established by the ECHR and became legally binding on all EU Member States with the entry

[44] Article 5 (1), *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950.
[45] Ibid.
[46] Article 5 (1) (f), *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950.
[47] EUROPA, "The EU in Brief", Accessed 17 January 2020, https://europa.eu/european-union/about-eu/eu-in-brief_en
[48] Ibid.
[49] Equality and Human Rights Commission, "What is the Charter of Fundamental Rights of the European Union?", Accessed 17 January 2020, https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union

into force of the Lisbon Treaty in 2009[50]. Sometimes confused with the ECHR, due to the overlapping human rights provisions, the EUCFR operates within its own separate legal framework. The EUCFR was drafted by the EU and is interpreted by the Court of Justice of the EU ('CJEU'). The CJEU is mandated to interpret and enforce the EU laws, in order to ensure uniform application in every Member State[51].

The EUCFR reaffirms the right to liberty and security of person in Article 6, which corresponds to the Article 5 of the ECHR[52]. In accordance with Article 52(3) of the EUCFR, Article 6 should be interpreted to have the same meaning and scope as the Article 5 ECHR[53]. Accordingly, any limitations that may be imposed on the right to liberty within EU Member States, must not exceed those permitted by the ECHR as interpreted by the ECtHR.

The EU aims to develop a Common European Asylum System (hereinafter referred to as the 'CEAS') offering refugee status to all third-country nationals who require international protection, whilst ensuring compliance with the Refugee Convention principles[54]. It is expressly stated that the CEAS must be consistent with the Refugee Convention[55]. There are several directives and regulations forming the CEAS law[56]. These are the: recast Qualification Directive 2011; recast Eurodac Regulation 2013; Dublin III Regulation 2013; recast Reception Conditions Directive 2003; and recast Asylum Procedures Directive 2013.[57] These legislative acts all serve the different aspects of the CEAS and provide relevant provisions such as permissible detention grounds, procedural safeguards and conditions of detention[58]. For the researched problems and objectives of this thesis, the recast Reception Conditions Directive 2013 (hereinafter the 'RCD') is the most relevant and will be analysed later on. The RCD aims to ensure that humane reception conditions are in place across the EU in order that fundamental rights, such as right to liberty, of asylum-seekers are fully respected and detention measures are applied as an exceptional measure[59].

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[50] Ibid.
[51] EUROPA, "Court of Justice of the European Union (CJEU)", Accessed 17 January 2020, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en
[52] Article 6, *Charter of Fundamental Rights of the European Union*, 26 October 2012.
[53] Article 52 (3), *Charter of Fundamental Rights of the European Union*, 26 October 2012.
[54] "Asylum Policy", EUROPARL, Accessed 17 January 2020, https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] European Council on Refugee and Exiles, "The detention of asylum seekers in Europe Constructed on shaky ground?", June 2017.
[59] European Commission, "Common European Asylum System", EUROPA, Accessed 18 January 2020, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en

1.4 the Right to Freedom of Movement

The right to freedom of movement is a right complementary to the right to liberty and is equally established in the UN and European legal instruments. Article 12 of the ICCPR states that everyone lawfully within the territory of a State, shall have the right to liberty of movement and freedom to choose his or her residence in that territory[60]. Article 2 of Protocol 4 to the ECHR and Article 45 of the EUCFR establish the right to freedom of movement on similar terms as the Article 12 of the ICCPR. The general principle of this right is that any person who is considered lawfully within a State's territory, should be entitled to move from place to place without restrictions and to establish themselves in a place of their choice, without the need to justify such choice[61].

Within the interpretation of Article 12 ICCPR, the term 'lawfully within the territory' has been "generally held to include refugees, registered asylum-seekers and registered stateless persons outside their country of habitual residence"[62]. The right to freedom of movement is important within the context of alternatives to detention (which will be discussed below and hereinafter referred to as 'ATD') because these alternative measures usually involve some level of restriction on liberty or on a person's freedom of movement and choice of residence. As such, ATD still fall within the international human right standards[63]. Furthermore, alternative measures that impose severe restrictions on freedom of movement of those lawfully in the territory, may be considered a deprivation of liberty. This means that a particular situation of ATD can move from the standards of Article 12 ICCPR right to freedom of movement, to Article 9 ICCPR right to liberty; strictly considered a fundamental human right and interpreted by the HRC as requiring high level of safeguards [64]. The distinction whether an ATD measure falls within a restriction on freedom of movement or a deprivation of liberty, is "one of degree of intensity, and not one of nature or substance"[65]. This means that it does not matter what

[60] Article 12(1), *International Covenant on Civil and Political Rights*, 16 December 1966.
[61] UN Human Rights Committee (HRC), "CCPR General Comment No.27: Article 12 (Freedom of Movement)", 2 November 1999, para. 5.
[62] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page 43, https://www.refworld.org/docid/4dc935fd2.html
[63] Ibid, page. 42.
[64] *Celepli v. Sweden*, UN Human Rights Committee (HRC), Communication No. 456/1991, 2 August 1994; *Samira Karker v. France*, UN Human Rights Committee (HRC), Communicaiton No. 833/1998, 30 October 2000.
[65] *Guzzardi v. Italy*, Council of Europe: European Court of Human Rights, Application no. 7367/76, 6 November 1980, para. 93.

authorities name or classify the measure as. The overall distinction will be based on the restrictive effects upon a person's movement and liberty.

Limitations upon the right to freedom of movement are permissible. Firstly, the right only applies to persons considered 'lawfully within the territory'. In *Celepi v. Sweden*, this standard was said to encompass registered asylum-seekers[66]. Secondly, Article 12 (3) of the ICCPR establishes grounds under which derogation can be made. The paragraph states that the right to freedom of movement and choice of residence "shall not be subject to any restrictions except, those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others"[67]. The listed grounds are exhaustive, and the United Nations High Commissioner for Refugees ('UNHCR') has clarified that "liberty of movement is an indispensable condition for the free development of a person"[68] and therefore any restrictions upon such right must be strictly necessary[69]. Restrictions must not "nullify the principle of liberty of movement"[70]. Therefore, any restrictions should be necessary in the circumstances which imports an assessment of proportionality, meaning the measures must be the least intrusive way of achieving the stated objectives[71]. Thus, the right to freedom of movement, closely follows the standards as the Article 9 (1) ICCPR right to liberty; both import standards of necessity and proportionality (principles explained further below). With that being the case, a restriction on Article 12 ICCPR will only be deemed necessary when its severity and intensity are proportional to one of the grounds listed under Article 12(3) and when sufficiently related to such ground.

This research thesis primarily focuses on the right to liberty and not the right to freedom of movement. However, the consideration of this right is required within the context of ATD measures. But since the same international principles in the right to freedom of movement and the right to liberty apply, focus will be mainly on these standards. Therefore, when the viability of ATD is analysed in chapter 7 as a potential solution to the problems identified in this thesis, the need to consider the overarching principles of necessity and proportionality will be discussed.

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[66] *Celepli v. Sweden*, UN Human Rights Committee (HRC), Communication No. 456/1991, 2 August 1994.
[67] Article 12 (3), *International Covenant on Civil and Political Rights*, 16 December 1966.
[68] UN Human Rights Committee (HRC), "CCPR General Comment No.27: Article 12 (Freedom of Movement)", 2 November 1999, para. 5.
[69] Ibid, para. 2.
[70] Ibid.
[71] UN Human Rights Committee (HRC), "CCPR General Comment No.27: Article 12 (Freedom of Movement)", 2 November 1999, para. 14.

2. The Right to Asylum in International Law

"Is it a crime to be a foreigner? We do not think so"[72].

Asylum is regarded as a place of refuge where a person can be free from seizure[73]. Such place of refuge can be granted by States, which provide protection to individuals and groups fleeing persecution[74]. These individuals are referred to as refugees and asylum-seekers[75]. Modern international refugee law originated in the aftermath of World War II, which caused one of the biggest displacement of persons and refugee crisis. The UDHR was adopted soon after the war and introduced the fundamental human rights which law-abiding societies have implemented throughout their territories by way of international and regional human rights instruments. One right in Article 14 (1) of the UDHR, is the right to seek and to enjoy asylum in other countries from persecution[76]. This right alongside, the right to leave one's own country (Article 13)[77], and the right to nationality (Article 15)[78], establishes the general principles behind the right to asylum. The intention to create such right can be traced directly to events of the Holocaust[79]. Many countries who took part in the drafting of the UDHR were acutely aware that they had turned away Jewish refugees, likely condemning them to their deaths[80]. Two years after the adoption of the UDHR, the UNHCR was established to help the millions of Europeans who had fled or lost their homes. It had three years to complete its work, yet 70 years later it still stands, protecting and assisting refugees around the world[81]. Under the umbrella of the relevant refugee rights established by the UDHR, the subsequent Refugee Convention was introduced in 1951 and is the key legal document of the UNHCR[82]. The Refugee Convention establishes the definition of refugee, principles of non-refoulement and non-penalisation, and outlines the legal obligations of States to protect those seeking asylum.

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[72] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application No. 13229/03, 29 January 2008, page. 37.
[73] Roman Boed, "The State of the Right of Aslyum in International Law", *Duke Journal of Comparative & International Law*, 5, 1-34 (1994), page. 2, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcil
[74] "Asylum & The Rights of Refugees", International Justice Resource Centre, Accessed 20 January 2020, https://ijrcenter.org/refugee-law/
[75] *Convention Relating to the Status of Refugees*, 28 July 1951.
[76] Article 14 (1), *Universal Declaration of Human Rights*, 10 December 1948.
[77] Ibid, Article 13.
[78] Ibid, Article 15.
[79] United Nations Human Rights Office of the High Commisoner (OHCHR), "Universal Delcaration of Human Rights at 70: 30 Articles on 30 Articles- Article 14".
[80] Ibid.
[81] United Nations High Commissioner for Refugees (UNHCR), "History of the UNCHR", Accessed 20 January 2020, https://www.unhcr.org/history-of-unhcr.html
[82] United Nations High Commissioner for Refugees (UNHCR), "The 1951 Refugee Convention", Accessed 20 January 2020, https://www.unhcr.org/1951-refugee-convention.html

The principle of non-refoulment is considered as one of the core obligations of the Refugee Convention which is written in Article 33 (1) therein. It provides that "no Contracting State shall expel or return ['refoul'] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"[83]. The principle of non-refoulment is universally regarded as a human right in itself[84] and considered part of customary international law[85]. The Refugee Convention specifically designates Article 33 as one of the provisions to which a State may not make reservations, demonstrating its significance[86]. On account of this, States must consider persons exercising their right to asylum honestly and with due diligence so as to not violate their obligation of non-refoulement. Furthermore, States should not view the seeking of asylum as unlawful as established by the non-penalisation principle. The Refugee Convention explicitly provides in Article 31 (1) that Contracting States shall not impose penalties on refugees simply on account of their illegal entry and presence on the territory, if they present themselves to the authorities without delay and show good cause for such illegal presence[87]. At a minimum, this guarantees that the seeking of asylum is not an illegal act, which should encourage governments to establish open and humane reception conditions[88]. The UN Working Group on Arbitrary Detention ('WGAD') has reiterated on numerous occasions that "criminalising illegal entry into a country exceeds the legitimate interests of States to control and regulate immigration and leads to unnecessary and therefore arbitrary detention"[89]. All this leads to the conclusion that the right to asylum does exist and is recognised within international law.

However, the right to asylum must be divided into the right to seek asylum and the right to grant asylum. International law (as mentioned above) confers upon individuals the right to seek asylum whilst enjoying specific safeguards guaranteed by the Refugee Convention and

[83] Article 33 (1), *Convention Relating to the Status of Refugees*, 28 July 1951.
[84] "Asylum & The Rights of Refugees", International Justice Resource Centre, Accessed 20 January 2020, https://ijrcenter.org/refugee-law/
[85] United Nations High Commissioner for Refugees (UNHCR), "The 1951 Refugee Convention", Accessed 20 January 2020, https://www.unhcr.org/1951-refugee-convention.html
[86] Article 42, *Convention Relating to the Status of Refugees*, 28 July 1951.
[87] Ibid, Article 31 (1).
[88] United Nations High Commisioner for Refugees (UNHCR) Executive Committee, "Reception of Asylum-Seekers in the Context of Individual Asylum Systems", Conclusion No. 93 (LIII), 2002.
[89] Working Group on Arbitrary Detenion (WGAD), Report to the Seventh Session of the Human Rights Council, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Inlcuding the Right to Development", 10 January 2008, para. 53.

relevant human rights instruments. However, this must be distinguished from the right to be granted asylum, as such lies beyond the rights of individuals; to that of the sovereign State[90].

2.1 the Right to Grant Asylum

International law deems every State to have exclusive control over its territory and therefore over the persons present within it[91]. Such right flows from a State's territorial integrity which is a pillar of international law[92]. Consequently, absent contrary treaty obligations, States are able to control the entry of aliens into its territory on whatever terms it desires[93]. This is demonstrated by the Declaration on Territorial Asylum adopted by the Assembly of the UN in 1967, which provides that asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the UDHR, shall be respected by all other States[94]. The Committee of Ministers of the Council of Europe also adopted a Declaration on Territorial Asylum in 1977 reaffirming in Article 2 the right of States to grant asylum[95]. Furthermore, there is no right to be granted asylum directly conferred upon individuals. For instance, the granting of asylum is not dealt with in the Refugee Convention. The Refugee Convention did not establish how States should determine if an asylum-seeker meets the definition of a refugee as to do so could have meant that a right to be granted asylum is established[96]. Rather it remains up to States to judge the circumstances being proposed by an asylum-seeker, to determine if they fall within the refugee definition of the Refugee Convention. Likewise, the ICCPR does not confer a right to be granted asylum. Although such proposal was raised at the drafting of the ICCPR, it failed because many Member States did not consider the right to be granted asylum to vest with the individual[97].

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[90] Roman Boed, "The State of the Right of Aslyum in International Law", *Duke Journal of Comparative & International Law*, 5, 1-34 (1994), page. 4, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcil
[91] Guy Goodwin-Gill, and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007).
[92] Ibid.
[93] Roman Boed, "The State of the Right of Aslyum in International Law", *Duke Journal of Comparative & International Law*, 5, 1-34 (1994), page. 5, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcil
[94] Article 1 (1), *Declaration on Territorial Asylum*, 14 December 1967.
[95] Article 2, *Declaration on Territorial Asylum*, 18 November 1977.
[96] Roman Boed, "The State of the Right of Aslyum in International Law", *Duke Journal of Comparative & International Law*, 5, 1-34 (1994), page. 11, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcil
[97] Ibid, page. 10.

Thus, it is generally accepted that the individual's right to asylum, is the right to seek asylum, but not a right to be granted it, as such remains within the exclusive rights of sovereign States[98]. Nevertheless, exclusive rights are not without obligations arising from ratified international legal instruments. Therefore, contracting States party to human rights and refugee legal instruments must adhere to the principles within, when exercising their right to grant (or deny) asylum. The overarching goal of the modern refugee regime is to provide protection to individuals forced to flee their countries, which are unwilling or unable to protect them[99], and this goal must be respected and implemented by States accordingly.

2.2 the Refugee Convention

The Refugee Convention, as mentioned, is the key legal document of the UNHCR which provides the right to asylum and several safeguards to persons exercising such right. It entered into force in 1951 and became "the centrepiece of international refugee protection"[100] codifying the most comprehensive set of rights for refugees at the international level. It was originally limited in scope to persons fleeing the events occurring before 1st January 1951 and applicable only within Europe. However, the one amendment in the form of a 1967 Protocol, removed these limitations giving the Refugee Convention universal coverage[101]. Over the years it has been supplemented by regional refugee and subsidiary protection regimes, as well as the "progressive development of international human rights law" [102]. The Refugee Convention provides a single definition of the term 'refugee' with the core emphasis being the protection of persons forced to flee persecution due to reasons of race, religion, nationality, membership of a particular social group or political opinion[103]. The Refugee Convention is underpinned by several fundamental principles of non-discrimination, non-penalisation and non-refoulment. It recognises that refugees should not be penalised for their illegal entry or stay, which reinforces the right to asylum and acknowledges that seeking asylum can require refugees to breach normal immigration rules. Prohibited penalties include being arbitrarily detained purely on the basis of seeking asylum. The UNHCR has explained that only if an individual's claim to

[98] Guy Goodwin-Gill, and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007).
[99] "Asylum & The Rights of Refugees", International Justice Resource Centre, Accessed 21 January 2020, https://ijrcenter.org/refugee-law/
[100] Introductory note page 2, *Convention Relating to the Status of Refugees*, 28 July 1951.
[101] Ibid.
[102] Ibid.
[103] Ibid, Article 1.

refugee status is examined before they are subjected to State measures of detention, can the State be certain that its international obligations are met[104]. Failure to take into account the merits of an individual's claim and impose penalties (such as detention) will likely lead to a violation of the State's obligation to protect the human rights of everyone within its territory or subject to its jurisdiction[105], specifically the right to liberty. Article 2 (1) of the ICCPR clearly mentions that "Each State Party… undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant"[106]. Similarly, Article 1 of the ECHR writes that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention"[107]. This demonstrates that there is a complimentary relationship between refugee and human rights law, which should be applied cohesively throughout jurisdictions with the overall object and purpose in mind; to ensure human rights without discrimination. Under the Refugee Convention, the UNHCR has a particular role of promoting these international principles for the protection of refugees and overseeing their application[108]. States undertake to cooperate with the UNHCR in the exercise of its functions, in particular to facilitate its duty of supervising the application of these instruments.

The Refugee Convention provides specific safeguards connected to the right to liberty. Article 26 contains the right to freedom of movement established in similar terms as the Article 12 of the ICCPR, as already discussed above. Article 31 (2) of the Refugee Convention specifically addresses the right to liberty of refugees who have entered State territory. The provision writes that "Contracting States shall not apply to the movements of such refugees, restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country"[109]. In accordance with the provision, some restrictions on the liberty of refugees are permitted. However, these must be applied only when necessary and until status is regularised. Thus, the Refugee Convention shares the same importance on necessity as expressed in the human rights instruments establishing the right to liberty. This is consistent with the Refugee Convention's

[104] Guy S. Goodwin-Gill, "*Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalisation, Detention and Protection*", October 2001, para. 4.
[105] Ibid.
[106] Article 2 (1), *International Covenant on Civil and Political Rights,* 16 December 1966.
[107] Article 1, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950.
[108] Introductory note page.4, *Convention Relating to the Status of Refugees,* 28 July 1951.
[109] Ibid, Article 31 (2).

aim "of extending the protection of the international community to refugees and assuring to refugees the widest possible exercise of… fundamental rights and freedoms"[110].

2.3 Definition of Refugee, Asylum-Seeker and Migrant

The terms refugee, asylum-seeker and migrant are used to describe people who have left their countries, are crossing borders and are in transit[111]. These terms are often used interchangeably but it is important to provide a distinction between them, as there is a legal difference[112].

Refugees have a right to international protection and are defined as persons who have fled their country because they are at risk of serious human rights violations and persecution. Within the Refugee Convention, the term refugee is applied to any person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and is unwilling due to such fear to avail (or otherwise return) themselves to the protection of their country[113]. Developments in international human rights law strengthens this term, by establishing that it should be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination[114].

An asylum-seeker is someone who is seeking protection in another country from serious human rights violations and persecution but has not yet been legally recognised as a refugee and is awaiting a decision on their asylum claim[115]. Nevertheless, the principles of non-penalisation and non-refoulement established from the Refugee Convention equally apply to asylum-seekers as to recognised refugees. The UNHCR has clarified that even though Article 31 is expressed in terms of refugee, the provision would have no practical effect if it is not extended to include asylum-seekers or so called "presumptive refugees" as established in the case of *Adimi*[116]. The case provides a thorough examination of Article 31 and the protections

[110] Guy S. Goodwin-Gill, "*Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalisation, Detention and Protection*", October 2001, para 9.
[111] "Refugees, Aslyum-Seekers and Migrants", Amnesty International, Accessed 24 January 2020, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/
[112] Ibid.
[113] Article 1, *Convention Relating to the Status of Refugees*, 28 July 1951.
[114] Ibid, introductory note page 3.
[115] "Refugees, Aslyum-Seekers and Migrants", Amnesty International, Accessed 24 January 2020, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/
[116] *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, United Kingdom: High Court, 29 July 1999, para. 16.

that stem from it. The provision was interpreted to have a broad purpose to "provide immunity for genuine refugees whose quest for asylum reasonably involved them breaching the law"[117]. Consequently, it was held that the provision must apply as much to refugees as to presumptive refugees, otherwise referred to as asylum-seekers. Therefore, the principles of non-penalisation and prohibition against arbitrary detention for the sole reason of illegal entry equally extend to asylum-seekers.

Migrants do not have an internationally accepted legal definition but are understood to be people staying outside their country of origin. Migrants are not asylum-seekers or refugees because they do not flee persecution, instead leaving their country usually because of work, study or family reasons[118].

This research thesis focuses on asylum-seekers and their right to liberty. It examines the detention of asylum-seekers at the outset of their entrance on State territory, which is known as pre-determination detention; they are detained before any decision is made on their asylum claim. Post-determination detention, refers to measures imposed on persons following a negative decision on their asylum claim. As such, following the above definitions, these persons become migrants and not asylum-seekers, as they are not deemed to have met the required refugee criteria. For that reason, this thesis will focus only on pre-determination detention applied to asylum-seekers.

Overall, it will be important to remember these distinctions because as a category, the asylum-seeker should be distinguished from migrants seeking entry into a State. This is because different rights and guarantees "attach depending on whether the individual is seeking to enter State territory to gain international protection or for economic reasons"[119].

[117] Ibid, para. 15.
[118] "Refugees, Aslyum-Seekers and Migrants", Amnesty International, Accessed 24 January 2020, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/
[119] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page 5, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

3. DEPRIVATION OF LIBERTY BY DETENTION MEASURES

Detention refers to the deprivation of liberty of persons by any form of confinement or imprisonment or the placement of a person in a public or private custodial setting which the person is not permitted to leave at will by order of any judicial, administrative or other authority[120]. Deprivation of liberty in the context of asylum can be referred to as immigration detention and has been defined by several international authorities. The UNHCR has defined immigration detention as "the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities"[121]. The HRC has adopted a broad interpretation of detention to cover all deprivations of liberty "including instances of abduction, house arrest, placement in educational institutions, periods of banishment and detention prior to expulsion"[122]. Similarly, the ECtHR has held that deprivation of liberty can "take numerous…forms"[123]. It is not relevant where the detention occurs nor whether it is described as detention. Deprivation of liberty can occur on islands (*Guzzardi v. Italy*)[124], boats (*Medvedyev v. France*)[125] and transit zones. In *Amuur v. France*[126] it was held that an airport, despite named as an international zone or otherwise a transit zone, did not have extraterritorial status, meaning human rights and refugee obligations continue to apply. The ECtHR also established that the ability to leave detention must be a real possibility and not merely theoretical. Whether a measure is seen as deprivation of liberty or a restriction upon liberty is "one of degree or intensity, and not one of nature or substance"[127]. Nevertheless, the measure of detention is regarded as the factual reality of the "existence of compulsion and the absence of valid consent by the detainee to the confinement in question"[128]. The EU simply

[120] UN General Assembly, "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", 2 April 2012.
[121] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, para. 5.
[122] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 188, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[123] *Guzzardi v. Italy*, Council of Europe: European Court of Human Rights, Application no. 7367/76, 6 November 1980, para. 95.
[124] Ibid.
[125] *Medvedyev and Others v. France,* Council of Europe: European Court of Human Rights, Application no. 3394/03, 29 March 2010.
[126] *Amuur v. France,* Council of Europe: European Court of Human Rights, Application no. 19776/92, 25 June 1996.
[127] Ibid, para. 42.
[128] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 179, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

defines detention as the "confinement of an applicant [asylum-seeker] by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement"[129].

3.1 Arbitrary Detention

Within the asylum context, the aim of the right to liberty is to protect asylum-seekers against arbitrary detention. The definition and scope of arbitrary detention has been discussed at length by the UNHCR. It defined that the detention of asylum-seekers may be considered arbitrary if: it is not in accordance with the law; such law allows for arbitrary practices; it is enforced in an arbitrary way; or it is random, capricious or not accompanied by fair and efficient procedures for its review[130]. It may also be arbitrary if it is disproportionate, or indefinite and when there is no adequate analysis of individual circumstances[131]. The UNHCR explained that for detention to be not arbitrary, it should be in accordance with and prescribed by law and should not include elements of inappropriateness or injustice[132]. The WGAD furthermore places emphasis that detention should only be used when legitimate according to international standards and where other measures are not sufficient[133]. It recommends that the detaining authorities must assess a compelling need to detain based on asylum-seekers individual circumstances (necessity), and that alternative non-custodial measures should always be considered before resorting to detention (proportionality).

Within the scope of Article 31 of the Refugee Convention, the UNHCR reaffirms the exceptional nature of detention and the requirement of individual assessment. It holds that the detention of refugees and asylum-seekers is an exceptional measure and should only be applied when deemed necessary by the appropriate authorities after consideration of circumstances and on the basis of criteria established by law in line with international refugee and human rights law[134]. The importance of individual assessment has been reiterated by the HRC. In its

[129] Article 2 (h), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013.
[130] United Nations High Commisioner for Refugees (UNHCR) Executive Committee, "Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice", 4 June 1999, para. 10.
[131] Ibid, para. 25.
[132] Ibid, para. 10.
[133] UN Commission on Human Rights, "Report of the Working Group on Arbitrary Detention: addendum : report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers", 18 December 1998, para. 26.
[134] United Nations High Commissioner Expert Roundtable, "Summary Conclusions: Article 31 of the 1951 Convention", 8–9 November 2001, para. 11 (b).

communication in *A v. Australia*, the HRC specifically required that the detention be justified on an individual basis. In this case, it was explained that "illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as likelihood of absconding and lack of cooperation, which may justify detention for a period" but without "such factors, detention may be considered arbitrary, even if entry was illegal"[135]. The Council of Europe has also offered clarification on the subject of arbitrary detention. Their Recommendation on Measures of Detention of Asylum Seekers establishes an exhaustive list of circumstances under which detention may be justified[136]. These circumstances relate to identity verification, assessment of elements on which an asylum claim is based, pending decision on persons right to enter state territory, and when protection of national security and public order grounds require.

Overall, the various commentaries from international authorities seem to similarly establish and demonstrate, that detention measures should be seen as exceptional and imposed only when conforming to the required safeguards.

3.2 Detention under Article 9 (1) of the ICCPR

Article 9 (1) of the ICCPR requires that any deprivation of liberty must be in accordance with and authorised by law and must not be arbitrary. This establishes the criteria of lawfulness and non-arbitrariness. Any measure of detention must strictly adhere to these standards.

Firstly, lawfulness requires that a measure of detention has a legal basis. Detention which has no legal basis under domestic legislation would be unlawful and therefore in breach of Article 9 (1). Furthermore, domestic legislation itself, must conform with relevant international human rights obligations. Numerous judgements have held that mandatory detention of asylum-seekers is unlawful because the measures did not consider assessment of international standards, regardless if national legislation allowed for such practices[137]. Moreover, the standard of lawfulness requires all law to be precise as to offer foreseeability and predictability that is reasonable in the circumstances. In other words, "there must be a

[135] *A. v. Austrailia,* UN Human Rights Committee (HRC), Communicaiton no. 560/1993, 3 April 1997, para. 9.4.
[136] Council of Europe: Committee of Ministers, "Recommendation Rec (2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers", 16 April 2003, para. 3.
[137] *A. v. Austrailia,* UN Human Rights Committee (HRC), Communicaiton no. 560/1993, 3 April 1997; *C. v. Australia*, UN Human Rights Committee (HRC), communication No. 900/1999, 13 November 2002.

degree of legal certainty"[138]. Applying this criterion to the context of immigration detention, would require legislation to provide clear grounds for detention and be accessible by those affected by such measures[139].

The assessment of non-arbitrariness within Article 9 (1) ICCPR imports concepts of reasonableness, necessity, proportionality and non-discrimination. Arbitrariness does not necessarily mean against the law but rather is interpreted more broadly[140]. Detention must not only be lawful (within the context of lawfulness as discussed above) but "reasonable in all the circumstances" and "necessary in all the circumstances"[141]. The UNHCR points out that detention of asylum-seekers and refugees must be a measure of last resort. It explains that when assessment is made as to whether detention should be used, consideration must be taken as to whether the detention is necessary and proportional to the objectives to be achieved[142]. This position is based on the general principle that seeking asylum is not an unlawful act but a human right. Therefore, any restrictions on liberty imposed on persons exercising the right to asylum must be based on individual assessment of circumstances rather than for the sole reason they are seeking asylum. In assessing whether detention is necessary in all the circumstances, the standard of proportionality is invoked. The principle of proportionality requires that governments should not take any action that exceeds what is necessary to achieve the pursued objective. In other words, proportionality requires consideration of the least restrictive way to reach the stated aim. Proportionality would apply to the first instance of detention as well as to any extension of it because "detention should not continue beyond the period for which the State can provide appropriate justification"[143]. In other words, a person must not be deprived of their liberty for any period of time longer than is necessary under the justification provided. Since each case must be examined on individual merits and periodically reviewed, a standard acceptable period of detention cannot be expressly determined. But indefinite detention due to legal uncertainness or arbitrary procedures is clearly incompatible with international principles[144].

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[138] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 20, https://www.refworld.org/docid/4dc935fd2.html

[139] Ibid.

[140] *Van Alphen v. The Netherlands*, UN Human Righs Committee (HRC), Communication no. 305/1988, 23 July 1990, para. 5.8.

[141] Ibid.

[142] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, para. 2.

[143] *A. v. Austrailia*, UN Human Rights Committee (HRC), Communicaiton no. 560/1993, 3 April 1997, para. 9.4.

[144] Ibid, para. 9.2; see also Van Alphen v. The Netherlands, para. 5.8.

The ICCPR does not contain an exhaustive list of accepted grounds for detention unlike the ECHR. Instead, States must assess each detention on its circumstances, and each must accordingly be justified. The HRC has provided some recommendation as to possible accepted necessary grounds. In *A v. Australia* the HRC mentioned that likelihood of absconding and a lack of cooperation were deemed as acceptable justifications for detention[145]. Overall, justifications must be based on individual assessment, because without additional factors demonstrating that detention is necessary and proportionate, detention could be arbitrary within the scope of Article 9 (1) ICCPR.

3.3 Detention under Article 5 of the ECHR

Article 5 (1) of the ECHR contains the presumption of liberty, meaning any restriction must expressly be under one of the prescribed grounds of the provision[146]. As previously stated, ground (f) expressly permits the lawful detention of a person to prevent them effecting an unauthorised entry into the country or for deportation procedures[147]. Furthermore, any detention measures applied within the scope of Article 5 (1), must be prescribed by law and should avoid arbitrariness; the same notions applied in the ICCPR and established within international law.

In order to satisfy the lawfulness criteria, the same standards apply as with Article 9 (1) of ICCPR explained above[148]. In summary, any measures of detention must be carried out under domestic legislation that conform to international obligations in order to provide legal certainty. This consideration of lawfulness will also take into account the prescribed grounds under Article 5 (1), which can be contrasted with Article 9 (1) of the ICCPR which does not expressly contain any such grounds. The grounds under Article 5 (1) are exhaustive and should generally be interpreted restrictively because "only a narrow interpretation of the exceptions is consistent with the aim of this provision [right to liberty]"[149].

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[145] *A. v. Austrailia,* UN Human Rights Committee (HRC), Communicaiton no. 560/1993, 3 April 1997, para. 9.4.
[146] Article 5 (1), *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950.
[147] Ibid, Article 5 (1) (f).
[148] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 30, https://www.refworld.org/docid/4dc935fd2.html
[149] *Vasileva v. Denmark,* Council of Europe: European Court of Human Rights, Application no. 52792/99, 25 September 2003, para. 33.

The ECtHR has also made it clear that the purpose of Article 5 (1) of the ECHR is the prevention of arbitrariness[150]. In *Litwa v. Poland* the ECtHR expressed, that it is not enough that deprivation of liberty is executed in conformity with national law but must also be necessary in the circumstances[151]. This would suggest that the principles of necessity and proportionality should be considered in ECHR asylum detention as also required under the international standards. Indeed, in the same case, the ECtHR stated that detention of an individual is such a serious matter that it can only be justified when other, less severe measures have been considered but are found to be insufficient for the objectives being pursued. Despite implying these international principles, the ECtHR in *Saadi v. UK* held that necessity not required. This variation in its approach, is in direct conflict with international human rights and will be analysed further in this thesis.

3.4 Detention under the EU Asylum Law

Article 6 of the EUCFR provides the right to liberty, in identical terms as the Article 5 of the ECHR. As mentioned, this means that any limitations on liberty must not exceed that which is permitted by the ECHR as interpreted by the ECtHR. The RCD (as part of the CEAS) establishes further, the required conditions for the detention of incoming asylum-seekers[152]. The RCD provides the grounds under which detention may be imposed and aims to guarantee against arbitrary detention so that the right to liberty of asylum-seekers is respected. Whether these guarantees are sufficient, will be analysed in Chapter 6 when the right to liberty standards within the EU asylum detention context are considered.

[150] *Litwa v. Poland*, Council of Europe: European Court of Human Rights, Application no. 26629/95, 4 April 2000, para. 73.
[151] Ibid, para. 78.
[152] *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013.

4. ALTERNATIVES TO ASYLUM DETENTION

The previous chapter establishes that justification for asylum detention importantly requires due consideration of necessity and proportionality. These principles do not make detention unlawful, but rather strictly obliges States imposing detention measures to consider individual circumstances and whether detention is necessary within those circumstances. Part of this, also requires the consideration of proportionality, which bring about due assessment of alternative measures before resorting to detention[153]. This is because restrictions on the right to liberty are deemed necessary only when the measure's severity and intensity are deemed proportional to the purpose it is being imposed for and is sufficiently relevant to said purpose[154]. As such, authorities should demonstrate that less restrictive measures were not effectively available in the particular circumstances.

This is where consideration for ATD measures is required and explains why such are a recurrent theme in international soft law[155]. For instance, the UNHCR has stated that there should be an individual assessment of the suitability of detention, and this should include a consideration of alternatives[156]. Ophelia Field even considers that the assessment of non-custodial alternatives is a "pre-requisite for satisfying the principle of necessity in relation to lawful detention"[157].

There is no set definition of ATD. It can be referred to using various terms such as: non-custodial measures; less restrictive measures; less coercive measures; less invasive measures; special measures; or alternative measures[158]. Despite which label is used, the essence of the term is that it refers to a range of different practices that avoid detention. It is agreed that ATD serve to act as non-custodial measures that conform to the principles of necessity and proportionality by allowing for options other than detention thereby respecting the right to liberty of asylum-seekers[159]. Nevertheless, many ATD still involve some form of

[153] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 157, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[154] Ibid.
[155] Ibid, page. 161.
[156] United Nations High Commisioner for Refugees (UNHCR) Executive Committee, "Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice", 4 June 1999.
[157] Ophelia Field, "Alternatives to Detention of Asylum Seekers and Refugees", Legal and Protection Policy Research Series, April 2006, para. 70.
[158] Steering Committee for Human Rights (CDDH), "Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration", 2018, para. 17.
[159] Ibid.

restriction on movement[160]. The UNCHR defines ATD as "any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement"[161]. As such, it is still important to consider ATD within the scope of the right to liberty, because "sometimes what is called an alternative to detention, may in fact be an alternative form of detention"[162]. States that use ATD must ensure that any restrictions upon movement do not amount to the same restrictive force as detention, and therefore a deprivation of liberty. Nonetheless, all restrictions on liberty, wherever full deprivation or in part, are still equally subject to human right guarantees. This is because calling a particular practice an ATD does not remove it from the ambit of international human rights law. As previously mentioned, the case of *Amur v. France* establishes that it does not matter what label detention is given, human rights continue to apply whenever a restriction on liberty is involved[163]. However, not all ATD use conditions which restrict an individual's movement. There are some ATD measures employed where persons are not subject to any conditions for reasons relating to their migration status, such as open accommodation[164]. These forms of ATD are the least restrictive options available to States, which ensure the highest possible compliance with international liberty standards.

Overall, the term ATD refers to a range of restrictive and non-restrictive options that are intended to not fully deprive an asylum-seeker of their liberty, unlike detention. The concept of ATD will analysed in chapter 7, specifically from a legal perspective in order to establish whether alternatives are a viable solution to the legal issues to be discussed.

[160] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 42, https://www.refworld.org/docid/4dc935fd2.html

[161] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, para. 8.

[162] Ophelia Field, "Alternatives to Detention of Asylum Seekers and Refugees", Legal and Protection Policy Research Series, April 2006, para. 13.

[163] *Amuur v. France*, Council of Europe: European Court of Human Rights, Application no. 19776/92, 25 June 1996.

[164] Steering Committee for Human Rights (CDDH), "Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration", 2018, para. 19.

5. THE RIGHT TO LIBERTY STANDARDS OF THE ASYLUM-SEEKER WITHIN THE ECHR SCOPE

As elaborated in the previous chapters, the right to liberty is a fundamental right protected in international and regional human rights instruments, notably the ICCPR, ECHR and EUCFR for the focus of this thesis. Protection of liberty is also emphasised in the Refugee Convention which aims to safeguard asylum-seekers against penalisation measures for their seeking of asylum; considered a human right of its own. Arbitrary detention is a prohibited penalty within such scope. Overall, these human rights and refugee instruments cooperatively establish that any detention measures depriving asylum-seekers of their liberty must be for specific purposes and import guarantees of lawfulness and non-arbitrariness. To sufficiently provide a guarantee against arbitrariness, detention measures should be necessary in all the circumstances as interpreted by the HRC within the context of Article 9 (1) ICCPR. The UNHCR adds that the detention of asylum-seekers should be a measure of last resort, calling detention "inherently undesirable" that "should only be resorted to in cases of necessity"[165] and further, calls upon States not to impose restrictions upon asylum-seekers solely on account of them claiming asylum[166]. Within the European sphere, the Council of Europe Committee of Ministers have also mentioned that any deprivation of liberty should be "exceptional"[167] and called for alternative measures to be considered before imposing detention.

Despite this, European State practice demonstrates that these standards are not always adhered to. Analysis "reveals that the detention of asylum-seekers is on the increase and is fast becoming routine practice"[168] as more people are being detained in the absence of evidence that they pose any sort of danger or that they may abscond[169]. Under international standards, these are circumstances that would normally demonstrate that the detention is necessary and therefore justified. However, the ECHR has taken a different interpretation of what is required

[165] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 35.
[166] Article 31, *Convention Relating to the Status of Refugees,* 28 July 1951.
[167] Council of Europe: Committee of Ministers, "Recommendation Rec (2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers", 16 April 2003, page. 1.
[168] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page.4, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[169] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 150, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

to guarantee against arbitrary detention due to the jurisprudence provided by the ECtHR, which will be examined below.

Frank Brennan believes that the increased use of detention is used to transmit two signals[170]. Firstly, it is a message by governments to potential migrants, that they should seek refuge in other countries and secondly, it is to persuade election voters who wish to take a tougher stance on immigration in an attempt to preserve sovereignty and stand against the "other"[171]. The Council of Europe Committee on the Prevention of Torture have previously stated that conditions in some of the detention facilities in European States are worse than those of prison establishments and some States are resorting to using prisons to accommodate asylum -seekers[172]. However, this thesis does not focus on the conditions of detention, but rather on the legality of the detention as a deprivation of liberty. Thus, what needs to be considered is whether the increasing use of detention measures on asylum-seekers are following effective safeguards to provide a sufficient level of guarantee against arbitrariness.

There is no dispute that States have competence to detain non-nationals for the purpose of regulating immigration within own territories, as per internationally recognised rights of sovereignty and territorial integrity. However, individuals equally have right to liberty and the right to asylum, meaning they should be protected against arbitrary detention regardless of immigration status. This leads to a direct conflict in establishing a fair balance between the State's right to enforce effective migration policies, "which are largely influenced by economic and political considerations"[173], and the human rights of asylum-seekers. Such conflict is evidently seen from the interpretation of Article 5 (1) (f) ECHR asylum detention within ECtHR case law. The ECtHR appears to have failed to provide an adequate interpretation of protection afforded to asylum-seekers right of liberty "due to the inherent restraint that the concept of territorial sovereignty exerts on the protective reach of human rights in the context of immigration control which the court is reluctant to interfere with"[174].

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[170] Frank Brennan, *Tampering with asylum: A universal humanitarian problem,* (St Lucia: University of Queensland Press, 2003), p.xiii.
[171] Ibid.
[172] European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment. Visit report: CPT/Inf (2006) 11 Poland para 59; CPT/Inf (2006) 41 Greece; quoted in Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law,* 10 (2), 149-185, 1 September 2008, page 151.
[173] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 5,https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[174] Ibid, page. 6.

The ECtHR is seen as the constitutional court of Europe that enforces the rights derived from the ECHR and ensures uniform application of those rights throughout national institutions of European States[175]. It is considered as the "most effective trans-national judicial process for complaints brought by individuals and organisations against their own governments"[176] because of the individual application procedure and binding nature of the jurisprudence that follows those applications. The ECtHR allows for effective enforcement of the rights and obligations stemming from the ECHR unlike the ICCPR and Refugee Convention which do not have a dedicated enforcement court. The HRC and UNHCR respectively, provide interpretations, guidelines and communications on contentious human right and refugee cases, but these do not have binding legal force. They are still only considered part of international soft law. As such, the ECtHR is a greater position to ensure fundamental human rights are protected throughout European territory due to having binding force. Yet, analysis of ECtHR jurisprudence on Article 5 (1) (f) of the ECHR reveals that its approach and interpretations have "been less than liberal in the context of the detention of asylum-seekers"[177]. Firstly, there has been a failure to establish an important distinction between asylum-seekers and irregular migrants. This distinction is fundamental as different rights should and do "attach depending on whether an individual is seeking to enter State territory to gain international protection [as entitled under the right to asylum] or for economic reasons"[178]. Secondly, the ECtHR has adopted a lower standard to protect against arbitrariness than guaranteed under international law, by expressly disregarding the necessity principle within the scope of Article 5 (1) (f) asylum detention. This omission of necessity "gives states complete freedom to deprive all asylum-seekers of their liberty whilst their claims are processed"[179] without further consideration. This presents a serious threat to the fundamental right to liberty.

The detention of asylum-seekers in Europe can be grouped into three stages following the categorisation provided by Guild: initial detention for the purposes of identification; detention during the asylum claim determination process; and detention post-determination or

[175] Ibid, page. 13.
[176] Greer (2006), 1, quoted in Tara Wolfe, "The Detention of Asylum Seekers in Europe", page. 13.
[177] Tara Wolfe, "The Detention of Asylum Seekers in Europe", page. 13.
[178] Ibid, page. 5,
[179] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 173, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

otherwise pending expulsion procedures[180]. These stages will hereinafter be referred to as the 'Guild stages' and will be used throughout the legal analysis below.

5.1 the Conflicting ECtHR Judgement in *Saadi*

The failure to distinguish asylum-seekers from irregular migrants and disregard for the necessity principle was for the first time evident in the controversial case of *Saadi v. UK*[181]. The case concerned Dr. Saadi who was of Kurdish descent living in Norther Iraq, who then fled the region and claimed immediate asylum upon arrival in the United Kingdom. Initially upon arrival, Dr. Saadi claimed asylum, had been granted temporary admission and was allowed to stay in a hotel of his choice, with an obligation to report each day to the authorities. This is a significant factor to remember because it means the case concerned the detention of an asylum-seeker after initial identity checks had been carried out, during the determination of his asylum claim which is regarded as the second stage following the typology provided by Guild above. The applicant was asked to return to the airport on two occasions, with which he complied. But on the second time, he was detained and transferred to a reception centre where he was held for seven days. Consequently, he made a claim before the UK High Court (hereinafter referred to as the 'HC') based on a violation of his right to liberty under Article 5 ECHR by a measure of arbitrary detention. The HC held that the detention did not have to be necessary for the reasons of preventing absconding or public order grounds. It further held that all entry was deemed unauthorised until expressly permitted by the UK Home Office (national immigration authority). Thus, the HC concluded that the action to detain was proportionate enough to preventing unauthorised entry and therefore permissible within the merits of Article 5 (1) (f) of the ECHR. Widely criticised, the Grand Chamber of the ECtHR upheld these interpretations. The decision sits in direct conflict with international human rights and refugee law because it deems all asylum-seekers as unauthorised and disregards necessity to guarantee against arbitrariness within the right to liberty.

Article 5 (1) (f) ECHR provides two limbs for detention. The first limb is for persons attempting to exercise "unauthorised entry"[182] and is applicable to the first two Guild stages of

[180] Elspeth Guild, "A Typology of Different Types of Centres for Third Country Nationals in Europe", February 2006.
[181] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008.
[182] Article 5 (1) (f), *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950.

the asylum procedure; initial detention for identification purposes and detention during asylum determination process. The second limb of Article 5 (1) (f) will only apply to the third Guild stage, for expulsion procedures once the asylum-seeker has received a negative decision on their claim. This would therefore, render the asylum-seeker as a irregular migrant meaning they are liable for removal, which can reasonably justify a measure of detention. Thus, detention during the third Guild stage is not within the particular focus of this thesis.

The Grand Chamber in *Saadi* "in an apparent reversal of the presumption in favour of liberty"[183] accepted the interpretation that asylum-seekers are unauthorised for the purposes of the first limb of Article 5 (1) (f). This is a substantially conflicting interpretation of 'unauthorised' within the asylum context because it fails to make a fundamental distinction between an asylum-seeker and irregular migrant. What constitutes as an 'unauthorised entry' has a direct effect on when an asylum-seeker can be lawfully detained. By deeming all asylum-seekers as attempting to exercise unauthorised entry, the ECtHR appears to have allowed for "the indiscriminate and increasingly restrictive asylum policies of Western Europe"[184] to automatically detain asylum-seekers "on the grounds of practicality and administrative convenience"[185] (grounds expressly argued by the UK Government and accepted in *Saadi*). There have been cases where asylum-seekers are regarded as lawfully present within the territory of the State for the purposes of the right to freedom of movement, and the HRC opined this in its communication in *Celepi v. Sweden*[186]. Following this, asylum-seekers should be recognised as lawfully present for the purpose of Article 5 (1) (f) ECHR as they are exercising an internationally recognised human right to asylum as protected by the Refugee Convention. The dissenting opinion in *Saadi* of Justice Collins at the HC indeed put forward this argument and explained that if an applicant has done all they reasonably can to report to authorities and do not present any risk, then in no way can they be regarded as unauthorised and so as effecting an unauthorised entry[187]. This dissenting opinion is in conformity with the standards provided by the HRC and UNHCR, and thus compatible with international human right and refugee

[183] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 181, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[184] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 149, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[185] Ibid.
[186] *Celepli v. Sweden*, UN Human Rights Committee (HRC), Communication No. 456/1991, 2 August 1994.
[187] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page 172, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

principles. However, the majority of the HC placed great emphasis on sovereignty and the right of a State to control its own borders, which was accepted and further endorsed by the ECtHR. This demonstrates that there exists an apparent tension between sovereignty and human rights.

In the *Saadi* proceedings, it was not disputed that the applicant's detention amounted to a deprivation of liberty within the meaning of Article 5 of the ECHR. The UK government instead, needed to demonstrate that the deprivation of liberty was permissible within sub-paragraph (f) of Article 5 (1). It submitted that the reason for Dr. Saadi's detention was to "enable a speedy examination of his claim"[188]. Although this appears to be a reason for the benefit of the asylum-seeker, it is nonetheless a reason of administrative convenience. Under international liberty standards, administrative convenience cannot justify the deprivation of liberty because it is not necessary in all the circumstances and equally not proportionate. Thus, it would be considered arbitrary. However, the ECtHR separated the requirement of non-arbitrariness from a requirement of necessity, thereby justifying the argument of administrative convenience which was deemed proportionate enough for the purpose of preventing unauthorised entry.

5.2 Interpretation of Unauthorised Entry

Khlaifia v. Italy[189] establishes clearly that Article 5 (1) (f) allows a State to control the liberty of foreigners within the immigration context. As discussed briefly above, the way States achieve such control, is increasingly through the use of detention measures within the European sphere. Article 5 (1) (f) confers the power of detention upon States when a person is deemed to be effecting an unauthorised entry (the first limb). Therefore, the significant part of the first limb is the interpretation of unauthorised entry, because once this appears to be satisfied, the detention of an individual is permitted and justified.

The Grand Chamber in *Saadi* discussed the meaning of unauthorised entry at length. It agreed with the HC's approach that until an asylum-seeker has officially been granted permission to remain, they are not deemed to have effected a lawful entry[190]. The UK Government contended that the term 'unauthorised entry' was describing the factual situation

[188] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 47.
[189] *Khlaifia and Others v. Italy*, Council of Europe: European Court of Human Rights, Application no. 16483/12, 15 December 2016, para. 89.
[190] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 65.

of a person attempting to enter without authorisation. This argument however seems to completely disregard the specific circumstances of asylum seeking and fails to recognise the right to asylum. The Grand Chamber observed that the interpretation provided by the HC is consistent with a "States undeniable right to control aliens entry into and residence in their country"[191] which permits the State to control "would-be immigrants who had applied for permission to enter, whether by way of asylum or not"[192].

As mentioned, the principle of State sovereignty is not without possible restriction. Sovereign rights are nonetheless subject to international obligations stemming from conventions that States have willingly consented to. Accordingly, the right to asylum is part of international refugee law, particularly safeguarded by the universally recognised Refugee Convention. Although the right to asylum could arguably be regarded more of a privilege than a right[193] (as there is no right conferred upon individuals to be granted asylum), it is nevertheless a right that "does provide some legal justification for maintaining a distinction"[194] because "certain rights… inevitably attach until status is determined for the system of protection envisaged by the [Refugee] Convention to operate effectively"[195].

Article 31 of the Refugee Convention is specifically relevant to the liberty of asylum-seekers. Sub-paragraph (1) therein provides that asylum-seekers should not be penalised for illegal entry as long as they present themselves without delay to the authorities and show good cause for the illegal entrance[196]. Sub-paragraph (2) permits some restrictions on the movements of asylum-seekers who have entered illegally but must be necessary and only applied until his or her status is regularised[197]; this provision is closely associated with the right to liberty. The Refugee Convention serves to provide the "widest possible exercise of these fundamental rights and freedoms"[198] to persons who are forced to leave their countries. These persons usually have no choice but to enter another State's territory through 'unlawful' or 'unauthorised' means in order to seek protection from persecution because understandably they would not have access to official normal entry procedures in their country of residence.

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[191] Ibid, para. 64, citing *Amuur v. France*, application no. 19776/92, 25 June 1996, para. 41.
[192] Ibid, para. 44.
[193] Helen O'Nions, "The Erosion of the Right to Seeky Asylum", *Web Journal of Current Legal Issues*, 2, (2006), https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[194] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page.6, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[195] Guy Goodwin-Gill, , and Jane McAdam, *The Refugee in International Law.* (Oxford: Oxford University Press, 2007).
[196] Article 31 (1), *Convention Relating to the Status of Refugees*, 28 July 1951.
[197] Ibid, Article 31 (2).
[198] Ibid, preamble.

The UK Court in *Adimi*[199] recognised that the accumulation of non-entrée policies and practices pursued by European States makes it impossible for a refugee to enter legally. The Refugee Convention acknowledges this and thus establishes the non-penalisation principle in the Article 31 provision to provide protection to liberty of refugees and "presumptive refugees"[200] alike. As such, States should be reminded that genuine asylum-seekers do not willingly choose to leave their countries, but rather they are forced in order to save themselves and their family against harm or even death. That is the reason why the right to asylum is internationally regarded as a human right, because it serves to provide protection to those in real need, when no other options are available.

However, the ECtHR in *Saadi* did not effectively draw attention to these considerations nor principles and failed to sufficiently establish a distinction between irregular migrants and asylum-seekers. Undoubtedly, there is a challenge in assessing and processing asylum claims, particularly in making such distinctions. This challenge is intensified when irregular migrants attempt to use the asylum process in order to gain entry into Europe. "Despite the controversy that surrounds such a statement"[201], there is evidence to support it.

Research conducted by Terretta found that asylum claims were consistently made by Cameroonians for better economic prospects rather than persecution[202]. Although economic reasons can be closely linked with political asylum (a genuine persecution ground), they nonetheless "are not valid for claiming political asylum"[203]. The study found that Transparency International marked Cameroon as "one of the most corrupt countries in the world… particularly adept at filing faked asylum claims"[204]. The UK Border Agency stated that "the majority of asylum applicants from Cameroon are refused and deported"[205] as they are not genuine asylum-seekers. The WGAD, has also reported before that a considerable amount of asylum-seekers were economic migrants and only a small percentage were genuine asylum-seekers[206]. This has strong implications for the position of asylum-seekers as well as States, in

[199] *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, United Kingdom: High Court, 29 July 1999, para. 3.
[200] Ibid, para. 16.
[201] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page.6, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[202] Meredith Terretta, "Fraudulent Asylum Seeking as Transnational Mobilization: The Case of Cameroon", *African Asylum at a Crossroads: Activism, Expert Testimony, and Refugee Rights*, 58-74, https://www.jstor.org/stable/j.ctt1rfsp0z.7?seq=1#metadata_info_tab_contents
[203] Ibid, page. 59.
[204] Ibid.
[205] Ibid.
[206] E/CN.4/1999/63/Add 3 para 20, quoted in Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page.6,

law and in practice which unfortunately puts more pressure on asylum systems[207]. However, these studies were period specific and limited to a specific group of persons, meaning they should not be taken out of context and applied to all asylum-seekers. Furthermore, despite these findings, such factors could be considered more of an administrative and practical burden rather than an issue of law.

Acknowledging, the Refugee Convention does not establish a procedure that must be followed by a Contracting Party in asylum determination, which does leave a practical burden on States. Determination procedures are left to the discretion of the States, to establish a procedure it considers most appropriate[208]. With irregular mixed population movements, maintaining a distinction between genuine asylum-seekers and irregular migrants is an unprecedented challenge no doubt[209]. But such discretion should be considered favourably rather than a negative, because it maintains State sovereign rights. Theoretically, if a determination procedure was codified within the Refugee Convention, then arguably the right to grant asylum shifts onto individuals. This could have been detrimental to the Refugee Convention, with States refusing to ratify or implement the principles within, as sovereignty is diminished. Consequently, the Refugee Convention and therefore international refugee law, would not be at the important level it is today.

Nevertheless, even though there is a practical burden on States, there is guidance for maintaining the necessary distinction provided by the UNHCR. In its third-party submission before the ECtHR in the *Saadi* case, it stated that immunity from penalisation does not apply when there are reasonable grounds to suspect a migrant has used a claim for asylum as a means to obtain entry through deception[210]. Indeed, UNHCR guidelines explain that an initial period of detention for the purposes of identification is not prohibited[211]. This initial detention is a "State's justifiable need to identify whether the individual is an asylum-seeker and thus potentially deserving of protection or to establish whether they pose a threat to national

https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

[207] Meredith Terretta, "Fraudulent Asylum Seeking as Transnational Mobilization: The Case of Cameroon", *African Asylum at a Crossroads: Activism, Expert Testimony, and Refugee Rights*, 58-74, https://www.jstor.org/stable/j.ctt1rfsp0z.7?seq=1#metadata_info_tab_contents

[208] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 10, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

[209] Ibid.

[210] UN High Commissioner for Refugees (UNHCR), "UNHCR intervention before the European Court of Human Rights in the case of Saadi v. United Kingdom", 30 March 2007, para. 14.

[211] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, para. 24.

security"[212], which would otherwise justify any further detention measures because necessity can be established. Therefore, determination procedures are not left solely to the State to figure out. Important guidance is provided, should States choose to accept it.

Overall, "distinctions need to be made between irregular migrants and those seeking international protection for the purposes of establishing the beneficiaries under the Refugee Convention"[213]. Therefore, States should not group all entrants into one group as 'unauthorised' for reasons of practicality to lessen the administrative burden. Protection of liberty should be prioritised above such reasons. As such, an effective distinction should be maintained between asylum-seekers and irregular migrants. This should provide asylum-seekers a guarantee against automatic detention measures following the non-penalisation principle under Article 31 of the Refugee Convention. Subsequently, the fundamental right to liberty can be better protected for asylum-seekers.

At the ECtHR Grand Chamber appeal in *Saadi*, the UNHCR expressed its concerns in a third-party submission as to the legality of the HC and first instance Chamber judgement. It attested that the initial decision "(1) assimilated the position of asylum-seekers to ordinary immigrants, (2) considered that an asylum-seeker effectively had no lawful or authorised status prior to the successful determination of the claim and (3) rejected the application of a necessity test to the question whether detention was arbitrary" [214]. The UNHCR contested that the interpretations made in relation to Article 5 (1) (f) ECHR asylum detention measures, permits States to detain on grounds of administrative convenience with wide discretion which is incompatible with the general principles of international human rights and refugee law. It explained that when correctly interpreted "Article 5 (1) (f) should provide robust protection against detention for asylum-seekers". The provision's purpose is to prevent unauthorised entry by way of detention, but asylum-seekers should be distinguished from general classes of illegal entrants. To be able to detain asylum-seekers under Article 5 (1) (f), requires stricter grounds. The detention must be considered necessary "in the sense that less intrusive measures would not suffice, and proportionate to the aim pursued"[215]. The UNHCR further added that States have an obligation under international refugee law "not to refoule persons who had accessed the jurisdiction or territorial frontier and claimed the fundamental right to seek and enjoy

[212] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page.8, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[213] Ibid, page.10.
[214] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 54.
[215] Ibid.

asylum"[216]. With these international principles in mind, the UNHCR asserted that once a State has admitted an asylum-seeker to domestic asylum procedures, such person should be deemed to have complied with national law. Thus, the asylum-seekers temporary entry into and presence on State territory should not be classed an 'unauthorised' because the granting of the temporary admission for the purposes of claiming asylum, is exactly the "authorisation by the State temporarily to allow the individual to enter its territory consistent with the law"[217]. Applied to the facts of Dr. Saadi, he was granted temporary admission and was only detained after initial identity checks had been conducted, during the second Guild stage of his asylum determination. As such, under the UNHCR's approach, Dr.Saadi was lawfully present on UK territory for the purpose of seeking asylum. Therefore, he should not have been detained under the Article 5 (1) (f) ECHR as it must have been demonstrated that were more circumstances to deem the detention as necessary, conforming to the international right to liberty and non-penalisation standards. Hathaway also expresses this reasoning, stating that it would be contrary to international principles to categorise an asylum-seeker, who has submitted an application for refugee status, as unlawfully present[218].

Marx further elaborates on the need to maintain a distinction between asylum-seekers and irregular migrants[219]. He states that the term 'lawfully' applied in cases relating to the right to freedom of movement within the Article 12 ICCPR scope encompasses persons seeking refugee status, as soon as such person is present within the territory of the State, compared to other immigrants who may have additional requirements imposed on their right of entry or stay, for instance entry visa requirements. The HRC has also held that for the purposes of Article 12 ICCPR a person entering 'illegally' (that is, not through official means of travel with prior authorisation), will otherwise be regarded as lawfully present within the territory of a State when their status is regularised[220]. Within the asylum context, this would occur when an asylum-seeker has accessed determination procedures. The term 'lawfully' should be interpreted in its ordinary meaning within the object and purpose of the rights it stems from. These rights are the right to liberty and freedom of movement. Such rights are inherent to persons seeking asylum within the immigration context. Hathaway even proposes that "in

[216] Ibid, para. 56.
[217] Ibid.
[218] James C. Hathaway, "The Rights of Refugees under International Law", *Human Rights Law Review,* 7 (2), (2007), Chapter 3.1.2.
[219] R. Marx, 'Article 26 (Freedom of Movement/Liberté de Circulation)', quoted in Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 14, https://www.refworld.org/docid/4dc935fd2.html
[220] *Celepli v. Sweden,* UN Human Rights Committee (HRC), Communication No. 456/1991, 2 August 1994.

principle, refugee protection is not about immigration. It is intended to be a situation-specific human rights remedy"[221] and Edwards argues that "the inclusion of Article 14 [right to seek asylum] of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places international refugee law within the human rights paradigm"[222]. Therefore, the right to asylum could be regarded as fundamentally important as the right to liberty. As such, these two rights (liberty and asylum) should be considered in tandem within the asylum context to ensure the highest level of protection of both rights. That is the reason why "as a category the asylum-seeker can and must be distinguished from other non-nationals seeking entry into Europe"[223] because they are persons exercising an international human right as first articulated by Article 14 of the UDHR and then further safeguarded by the Refugee Convention. To accept all asylum-seekers as 'unauthorised' as the ECtHR did in *Saadi*, deprives the right to asylum and consequently the right to liberty of much meaning, as asylum-seekers are consistently subjected to detention measures without regard to individual circumstances. This manifestly goes against the object and purpose of the international human rights and refugee regime to provide guarantees against arbitrary deprivation of liberty and penalisation of asylum-seeking. Again, it is necessary to emphasise the HRC's comments that "the question of whether an alien is lawfully within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they [restrictions] are in compliance with the State's international obligations"[224]. This would fundamental require conformity with international human rights and refugee standards.

However, a problem of the recommendations and guidelines provided by the HRC and UNHCR respectively, is that they are considered soft law only. The contrary approach taken by the ECtHR in *Saadi* clearly demonstrates that these interpretations are not legally binding and therefore protection efforts are only as effective as authorities choose to enforce them[225]. The ECtHR did not accept that as soon as an asylum-seeker has made themselves

[221] Hathaway (1997), quoted in Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 11, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[222] Edwards (2005), quoted in Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 11, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[223] Ibid, page.5.
[224] UN Human Rights Committee (HRC), "*CCPR General Comment No.27: Article 12 (Freedom of Movement)",* 2 November 1999, para. 4.
[225] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 11, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

known and accessed asylum procedures, they are seeking to effect an authorised entry[226]. It contended that to accept the interpretation that detention under the first limb of Article 5 (1) (f) only applies when individuals attempt to evade entry restrictions (or otherwise deceit in some way), would too narrowly restrict the State's power to "exercise its undeniable right of control"[227]. Therefore, it is evident that the ECtHR is reluctant to interfere with sovereignty and "as such fails to harmonise the competing interest of the State in migration control and the human rights of the asylum-seeker"[228]. Furthermore, the interpretation adopted in *Saadi* reveals the ECtHR's own inconsistency in protecting the right to liberty of asylum-seekers.

The ECtHR expressed its reservations in *Thimothawes v. Belgium*[229] and *Mahamed Jama v. Malta*[230] of the practice of authorities automatically placing asylum-seekers in detention without an individual assessment of circumstances. However, deeming asylum-seekers as attempting to exercise unauthorised entry makes them "liable to detention at any time"[231] and "creates great uncertainty for all asylum applicants"[232]. This is because States automatically have the power to detain (and appear to be doing so given the routine use of detention) under Article 5 (1) (f) for the sole purpose of preventing 'unauthorised entry', without further individual consideration. Such inconsistency is particularly noticeable in the ECtHR's approach in cases not concerning asylum detention measures. It has held in *Paramanathan v. Germany* (which concerned Article 2 (1) of Protocol 4 to the ECHR establishing freedom of movement) that an asylum-seeker who has been admitted conditionally, pending determination of the asylum application, would lose lawful status if conditions of temporary admission were breached[233]. The case did not concern asylum detention as under Article 5 (1) (f) of the ECHR but asylum-seekers were still regarded as lawfully present. Similarly, in *Sultani v France*, it was held that a failed asylum-seeker can no

[226] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 65.
[227] Ibid.
[228] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 14, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[229] European Court of Human Rights, Press Release, "Detention of an asylum-seeker at the Belgian border did not infringe the right to liberty and secuirty secured under the Convention", 2017, page. 2.
[230] *Mahamed Jama v. Malta*, Council of Europe: European Court of Human Rights, Application no. 10290/13, 26 November, para. 146.
[231] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law,* 10 (2), 149-185, 1 September 2008, page 174, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[232] Ibid.
[233] *Paramanathan v. Germany*, Application No. 12068/86, quoted in Tara Wolfe, "The Detention of Asylum Seekers in Europe", page 17.

longer be regarded as lawfully in the territory[234]. Thus, it is contradictory that the ECtHR has applied a substantially more restrictive approach to asylum-seekers under Article 5 (1) (f) in unbalanced favour of the State‘s rights.

In conclusion, the ECtHR‘s decision in *Saadi* to deem asylum-seekers as attempting to exercise unauthorised entry, fails to maintain the required distinction between asylum-seekers and irregular migrants. Consequently, it appears there is no recognition from the ECtHR that an application for asylum is a lawful act. It could be said that this “makes a mockery of the right to seek and enjoy asylum”[235] which has partially been recognised in *M.S.S. v Belgium and Greece*[236]. Overall, this leads to a lower standard of the right to liberty afforded to asylum-seekers under Article 5 (1) of the ECHR than what is envisaged under Article 9 (1) of the ICCPR, and also under Article 31 Refugee Convention.

5.3 Omission of the Necessity Test

International standards on the right to liberty, mainly Article 9 (1) ICCPR as well as Article 31 (2) of the Refugee Convention, establish that an effective guarantee against arbitrary deprivation of liberty must include the consideration of necessity. This involves examination of individual circumstances to determine if detention is in fact needed to achieve the purpose it is used for. Furthermore, consideration should be made as to whether less restrictive measures are available to achieve the same purpose. This is the proportionality principle and would involve forethought as to ATD measures within the asylum detention context. The HRC has communicated in cases that failure of immigration authorities to consider factors specific to the individual, for instance lack of cooperation with authorities or likelihood of absconding, and to examine the availability of less intrusive measures, might render the detention of an asylum-seeker arbitrary[237].

[234] Sultani v France, 20 September 2007, quoted in Tara Wolfe, “The Detention of Asylum Seekers in Europe“, page 17.
[235] Tara Wolfe, “The Detention of Asylum Seekers in Europe“, (dissertation, University of Bristol, 2012), page. 17, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf.
[236] *M.S.S. v Belgium and Greece*, Council of Europe: European Court of Human Rights, Application No. 30696/09, 21 January 2011, para 251.
[237] *A. v. Austrailia*, UN Human Rights Committee (HRC), Communicaiton no. 560/1993, 3 April 1997; *C. v. Austrailia*, UN Human Rights Committee (HRC), Communicaiton No. 900/1999, 13 November 2002.

The UNHCR has stated that the detention of asylum-seekers is "inherently undesirable"[238] but can be exceptionally resorted to as long as "in conformity with general norms and principles of international human rights law"[239]. Therefore, the ECHR should be interpreted in harmony with the international rules found in human rights treaties that States have consented to abide by[240]. Furthermore, fundamental human rights (like the right to liberty) should be given a broad construction and limitations narrowly construed so as to give practical and effective protection to such rights[241]. Thus, with necessity as well as proportionality being the main principles under international standards to guarantee against arbitrariness within the right to liberty, these should also be the standards adopted within the ECHR, to ensure effective protection against arbitrary deprivation.

The ECtHR in *Saadi* acknowledged that detention measures need to be carried out with due diligence and accepted that they must not be arbitrary as guaranteed by the right to liberty in Article 5 of the ECHR. However, within the application of Article 5 (1) (f), it was held that the requirement of necessity could be separated from the requirement of non-arbitrariness and therefore does not need to be considered[242]. The ECtHR Grand Chamber stated that detention measures must be compatible with the overall purpose of Article 5 "which is to safeguard the right to liberty and ensure that no one should be disposed of his or her liberty in an arbitrary fashion"[243]. However, it reasoned that States should have a broader discretion when imposing detention measures on people who have uncertain immigration status "than is the case for other interferences with the right to liberty"[244]. The reasons for this wider margin of appreciation was not further specifically elaborated, but it could be down to the ECtHR's underlying views on the importance of national sovereignty and territoriality. This appears to be highly contradictory against its own views "that detention of a person is a major interference with personal liberty and must always be subject to close scrutiny"[245]. Furthermore, implying that asylum-seekers have a lesser guarantee for their right to liberty than other cases of detention under Article 5 (1) could be seen as discriminatory. This is because some of the other

[238] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 35.
[239] Ibid.
[240] Ibid, para. 55.
[241] Ibid.
[242] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law,* 10 (2), 149-185, 1 September 2008, page. 173, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[243] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 66.
[244] Ibid, para. 45.
[245] Ibid.

detention grounds under Article 5 (1) require an assessment of necessity. Such point will be analysed further below. But instead of requiring necessity within Article 5 (1) (f) asylum detention, the ECtHR explained that "to avoid being branded as arbitrary, the detention must be carried out in good faith; must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate… and the length of the detention should not exceed that reasonably required for the purpose pursued"[246]. This interpretation of non-arbitrariness applied to the circumstances of Dr.Saadi's detention, meant that the UK authorities were deemed to have acted in good faith in order to ensure that the applicants claim could be processed more efficiently. This reason of administrative convenience was regarded as sufficiently connected to the purpose of preventing 'unauthorised entry'; a term contentious in itself, as already analysed above. The result is that a State is able to detain an asylum-seeker even when not necessary to achieve the stated purpose. The UNHCR mentioned that detention "effected purely for reasons of expediency or administrative convenience"[247], would fail the necessity test required by international human rights and refugee law. Without a doubt the process of examining asylum claims "might involve necessary and incidental interference with liberty"[248]. However, this should only apply to the initial (1st Guild stage) screening of the asylum process and "not generally during refugee status determination unless necessary in the individual case"[249]. Reasons for initial screening might relate to public order grounds such as verifying identity, documentation or health reasons[250]. These are reasons that can be regarded as necessary within individual circumstances. Therefore, any further detention past the first Guild stage may constitute arbitrary detention when not in conformity with the necessity principle because the remainder of the determination procedure can likely be achieved through less restrictive options such as ATD measures. Theoretically, if necessity under international standards had been considered in the case of *Saadi*, it could have been established (based on facts of the case) that the applicant did not present any grounds to deem him as a risk, meaning that less restrictive ATD options were viable and could have been employed whilst his asylum claim was considered. Unfortunately, little weight was afforded to the consideration of alternatives even if such are "regarded as an

[246] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 74.
[247] Ibid, para. 57.
[248] Ibid.
[249] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 24, https://www.refworld.org/docid/4dc935fd2.html
[250] Ibid.

essential part of the assessment process in international soft law"[251] as expressed by the HRC and UNHCR respectively.

The disregard for the necessity principle in Article 5 (1) (f) ECHR asylum detention leads to an erroneous division between the right to liberty expressed in Article 9 (1) of the ICCPR and the Article 5 (1) right to liberty of the ECHR. This is because following the ECtHR interpretation of non-arbitrariness, gives a considerably lower guarantee against arbitrariness when necessity is not required[252]. Such is a legal problem, because there is significant overlap between the States party to both the ICCPR and ECHR. The disparity in standards could mean that a decision to detain following Article 5 (1) (f) of the ECHR may be justified, but at the same time be considered arbitrary under Article 9 (1) of the ICCPR[253]. This may well be the case, given that "the Court's [ECtHR] definition of what constitutes arbitrary detention in the immigration context is very restrictive and denotes a radical departure from the position under international human rights law"[254]. Clearly, the ECtHR's interpretation of arbitrariness is at odds with the international legal provisions. It also appears to go against its own reasoning, demonstrating the inconsistency in protecting the liberty of asylum-seekers. The ECtHR emphasised in *Saadi* that when the object and purpose of Article 5 of the ECHR is considered within its context as well as the international law background, regard must be had "to the importance of Article 5 in the Convention [ECHR] system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty"[255]. However, even though the international human rights and refugee standards offer greater protection to this fundamental human right, these were not "given significant attention in the reasoning of the Grand Chamber"[256]. This disregard to ensure conformity with international human rights law, goes against the general principles of the interpretation of treaties.

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[251] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 175, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

[252] Ibid, page. 174.

[253] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page.43, https://www.refworld.org/docid/4dc935fd2.html

[254] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 19, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

[255] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 63.

[256] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 174, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

5.3.1 the Requirement to Consider International Standards

Articles 31-33 of the Vienna Convention on the Law of Treaties (hereinafter the 'VCLT') entail the general principles for interpreting conventions, treaties and other legal international instruments[257]. These principles are recognised as part of customary international law, as for instance stated by the International Law Commission[258]. Following the VCLT, the rules and principles of international law are material for the purposes of interpretation, and terms of a provision must be interpreted in light of its object and purpose[259]. The context of the ECHR is "the effective protection of individual human rights"[260]. Specifically, the object and purpose of the Article 5 therein, is to safeguard the fundamental human right to liberty, meaning it should be interpreted in a way to ensure the highest level of protection. To achieve such, would require an interpretation of guarantees that promotes consistency and harmony taking into account any relevant rules and principles of international law. The ICCPR, having global recognition, is the main international instrument for the purposes of comparison. Article 9 (1) contained in the ICCPR is the key provision guaranteeing the right to liberty, as derived from Article 3 and Article 9 of the UDHR. The provision is directly relevant to the detention of asylum-seekers[261]. As such, following the VCLT rules of interpretation, Article 5 (1) (f) of the ECHR should be interpreted in conformity with Article 9 (1) of the ICCPR so that the right to liberty is effectively safeguarded.

The HRC is the authority responsible for overseeing the ICCPR's application and provides important, albeit not legally binding, interpretations of the fundamental rights contained within. It has specifically linked the notion of non-arbitrariness in the right to liberty with that of necessity which includes consideration of proportionality . The HRC has stated that in order to satisfy the requirement of non-arbitrariness and therefore ensure that any detention conforms to Article 9 (1) of the ICCPR, such measures must be "necessary in all the circumstances of the case"[262]. The principle of proportionality is also relevant within this

[257] Article 31-33, *Vienna Convention on the Law of Treaties*, 23 May 1969.
[258] International Law Commission (ILC), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report A/CN.4/L.682, 13 April 2006, para. 168.
[259] Article 31(1), *Vienna Convention on the Law of Treaties*, 23 May 1969.
[260] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 62.
[261] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 19, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[262] *A. v. Austrailia*, UN Human Rights Committee (HRC), Communicaiton no. 560/1993, 3 April 1997 ; *Van Alphen v. The Netherlands*, UN Human Righs Committee (HRC), Communication no. 305/1988, 23 July 1990 ; *C. v. Austrailia*, UN Human Rights Committee (HRC), Communicaiton No. 900/1999, 13 November 2002.

context and requires contemplation of whether the objectives, which detention is used for, can be achieved in a less restrictive way. These principles are central to the notion of non-arbitrariness and provide an effective guarantee against unjustified deprivation of liberty. As a result of this, the HRC interpretative guidelines of Article 9 (1) ICCPR should also be given due consideration within the Article 5 (1) (f) ECHR asylum detention. Indeed, the UNCHR also maintains this requirement of consistent interpretation with international standards. In its submission to the *Saadi* case, it reminded the Grand Chamber that the ECHR "had to be interpreted in harmony with other rules of international law of which it formed part, particularly where such rules were found in human rights treaties which State Parties to the Convention [ECHR] had ratified and were therefore willing to accept"[263]. It pointed out that Article 53 of the ECHR particularly provides that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party"[264]. Therefore the UNHCR maintained that interpretations should be formulated in a way which ensures human rights the "most practical and effective protection"[265]. Limitations to these rights should be narrowly construed and be "in accordance with developments in international law so as to reflect the increasingly high standard being required in the area of the protection of human rights"[266]. The ECtHR itself in *Vasileva v Denmark* stated that "only a narrow interpretation of [the] exceptions [to the right to liberty and security of person] is consistent with the aim of that provision"[267]. This leads to the conclusion that Article 5 (1) (f) of the ECHR should guarantee the same high standards as Article 9 (1) of the ICCPR which requires "that any deprivation of liberty imposed in an immigration context should be lawful, necessary and proportionate" [268].

However, the ECtHR evidently deviated from this approach, bringing its decision in direct conflict with the international standards. By disregarding necessity in Article 5 (1) (f) ECHR asylum detention, the ECtHR has given States "complete freedom to deprive all asylum-

[263] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 55.
[264] Article 53, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950.
[265] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 55.
[266] Ibid.
[267] *Vasileva v. Denmark*, Council of Europe: European Court of Human Rights, Application no. 52792/99, 25 September 2003, para. 33.
[268] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 59.

seekers of their liberty whilst their claims were being processed, without any requirement to show that the detention was necessary"[269]. Thus, the ECtHR's approach demonstrates a significant departure from international law ultimately offering asylum-seekers less protection against arbitrary deprivation of liberty.

5.3.2 a Lower Standard of Non-Arbitrariness for Asylum-Seekers

During the deliberations in *Saadi*, the Grand Chamber mentioned the other grounds of Article 5 (1) ECHR under which detention may be justified. It stated that under these grounds, an assessment of whether the detention was necessary to achieve the stated aim, is required. This appears to confirm a distinction suggested from the case of *Chahal v. UK*[270], that "asylum seekers have less of a right to liberty than those suspected of criminal offences and persons of unsound mind"[271] as necessity is not required under ground (f). The notion of non-arbitrariness is relevant to all the grounds consistent with the core aim of Article 5; to protect liberty by providing a substantial guarantee against arbitrary deprivation measures. There is no comprehensive definition of non-arbitrariness formulated by the ECtHR, but this should include common elements in order to effectively and uniformly provide such guarantee[272]. However, the level of standards for non-arbitrariness considerably differ depending on the ground that is being claimed[273]. The sub-paragraphs (b), (d) and (e) under Article 5 (1) each in turn concern: "detention of a person for non-compliance with a lawful order of a court or to secure the fulfilment of an obligation prescribed by law"[274]; "detention of a minor by lawful order for the purpose of educational supervision or … for the purpose of bringing him before the competent legal authority"[275]; and "detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants"[276]. The core principle established by the ECtHR to guarantee against arbitrariness under these

[269] Ibid, para. 60.
[270] *Chahal v. The United Kingdom*, Council of Europe: European Court of Human Rights, Application No. 22414/93, 15 November 1996.
[271] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 171, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[272] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page 180, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[273] Ibid.
[274] Article 5 (1) (b), *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950.
[275] Ibid, Article 5 (1) (d).
[276] Ibid, Article 5 (1) (e).

grounds is that detention "is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained"[277]. Therefore, detention in these cases must strictly include an assessment of whether the measure is necessary and proportional to the particular circumstances, which is in conformity with the international standards. For instance, in *Litwa v Poland* which concerned detention under sub-paragraph (e), detention was deemed lawful only when "necessary in the circumstances"[278]. On the contrary, no such higher standard of non-arbitrariness is adopted under ground (f) asylum detention. This difference in standards between ground (e) and (f) cannot be explained by the text of the articles as neither sub-paragraph contains a necessity test. There is no literal reference to the notion of necessity contained in any of the Article 5 (1) grounds, apart from (c). Yet the ECtHR maintains that such notion is implicit for the non-arbitrariness guarantee within the grounds of (b), (d) and (e)[279]. From the legal construction of the sub-paragraphs and overall purpose of Article 5 (1), this reasoning should be applied within ground (f) also. Not only would this ensure a higher guarantee of liberty for asylum-seekers, it would ensure the ECHR is "interpreted in such a way as to promote internal consistency and harmony between its various provisions"[280]. Nevertheless, this has evidently not been achieved by the ECtHR is *Saadi* as necessity was omitted from Article 5 (1) (f) asylum detention. This divergent approach demonstrates that the ECtHR affords asylum-seekers a lesser standard of the right to liberty, potentially "reflecting a view that asylum-seekers are 'different or 'others' whose human rights are limited by reason of their flight"[281].

5.4. the Flawed Analysis of why Necessity is not Required

[277] *Enhorn v. Sweden*, Council of Europe: European Court of Human Rights, Application no. 5629/00, 25 January 2005, para. 44 ; *Hilda Hafsteinsdottir v Iceland*, Council of Europe: European Court of Human Rights, Application no. 40905/98, 8 June 2004, para. 51 ; *Varbanov v. Bulgaria*, Council of Europe: European Court of Human Rights, Application no. 31365/96, para. 46.
[278] *Litwa v Poland*, Council of Europe: European Court of Human Rights, Application no. 26629/95, 4 April 2000, para 78.
[279] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 184, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[280] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 82.
[281] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 149, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

The ECtHR in the case of *Chahal v. UK* reasoned that the wording of the second limb of Article 5 (1) (f) does not demand that detention be reasonably considered necessary[282]. This case concerned detention during deportation procedures, as per the second limb of Article 5 (1) (f). In the ECtHR's explanation, deprivation of liberty under the second limb of sub-paragraph (f) is justified when there is action being taken with a view to deportation and this remains valid for as long as "deportation proceedings are in progress"[283]. As such, it held there was no need to expressly consider whether the detention was necessary. Furthermore, proportionality within such context only implies "that detention should not continue for an unreasonable length of time"[284]. Subsequently, the ECtHR's reasoning from the *Chahal* case was extended to the first limb of Article 5 (1) (f) in *Saadi*. The Grand Chamber considered that for detention to not be arbitrary under the first limb, the same approach must be followed as applied under the second limb; that the detention need not be considered necessary. It stated that it would be "artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation"[285] and again made reference to the State's right to control aliens entry and residence in the territory. However, this analysis is flawed because it merges two opposite-ends (pre-determination and post-determination) of the asylum procedure into one. This is incorrect because deportation measures should in its ordinary course be employed when an asylum-seeker does not meet the criteria for refugee status as established by the Refugee Convention, and therefore receives a negative decision on their asylum claim. Accordingly, it can be argued that the individual has effectively lost the status of asylum-seeker and instead is deemed as an irregular migrant. As a result of this, the detention of an irregular migrant who does not have a lawful claim to be on State territory, and thereby subjected to deportation proceedings, can *de facto* be considered necessary. Thus, a necessity criterion could be seen as an already "built-in consideration of the ground"[286]; second limb of Article 5 (1) (f).

For the above reasons, detention under the second limb must critically be distinguished from detention under the first limb. Pre-determination procedures entail the

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[282] *Chahal v. The United Kingdom*, Council of Europe: European Court of Human Rights, Application No. 22414/93, 15 November 1996.
[283] Ibid, para. 113.
[284] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page 180, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[285] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 73.
[286] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 31, https://www.refworld.org/docid/4dc935fd2.html

examination of an asylum claim made by an asylum-seeker who has entered State territory (even if illegally) as per their right to asylum. These persons should essentially be considered as having a lawful reason to be on State territory contrasted against irregular migrants who do not. Thus, any detention measures on asylum-seekers under the first limb of Article 5 (1) (f) must require additional circumstances, in order to demonstrate necessity. Following the principle of non-penalisation established by Article 31 the Refugee Convention, there must be more reasons to impose restrictions on the liberty of an asylum-seeker, than simply on account of their illegal entry[287]. Ultimately, the extension of the reasoning from *Chahal* not requiring necessity to that of *Saadi* (cases that occupy two different ends of the asylum procedure and sit within the different limbs of Article 5 (1) (f)) once more highlights the ECtHR's failure to maintain the required distinction between asylum-seeker and migrant. Thus, it fails recognise the importance of the right to asylum which consequently leads to a lower protection of the right to liberty for asylum-seekers.

As a final point, the decision to disregard necessity from asylum detention under the first limb of Article 5 (1) (f) produces an incoherent result. Instead of requiring the necessity principle, the ECtHR stated that "to avoid being branded as arbitrary…detention…must be closely connected to the purpose of preventing unauthorised entry"[288]. But Edwards states that "if the detention is not necessary, how can it achieve or be related to its purpose? The purpose would not therefore exist" [289]. Wolfe suggests that the ECtHR applies necessity to the immigration system rather than to the individual[290]. Detention is interpreted as a necessary tool "to achieve the purpose of an effective system of immigration control" in order to provide "a more efficient system of determining large numbers of asylum claims"[291]. While it is reasonable to have States adopt a flexible approach in response to an increase in uncontrolled migration, this must not be done at the expense of ensuring the individual's fundamental right to liberty. The ECtHR in this regard, should function to protect liberty rather than justify

[287] Article 31, *Convention Relating to the Status of Refugees*, 28 July 1951.
[288] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 74.
[289] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 31, https://www.refworld.org/docid/4dc935fd2.html
[290] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 20,https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[291] *Saadi v. United Kingdom,* Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 80.

deprivation solely on the basis of practicality and administrative convenience for the purposes of efficient immigration control.

In conclusion, the decision in *Saadi* demonstrates that there is a real threat to the right to liberty of asylum-seekers under the ECHR scope. The ECtHR‘s interpretation of unauthorised entry as encompassing all asylum-seekers fails to consider the required distinction between persons exercising their right to asylum and irregular migrants. This means detention measures can automatically be applied to asylum-seekers without further individual considerations. Such is in direct conflict with the international Article 9 (1) ICCPR right to liberty standards and also the Article 31 non-penalisation of the Refugee Convention. Furthermore, the ECtHR‘s interpretation of non-arbitrariness (the core guarantee of right to liberty) as not requiring necessity under Article 5 (1) (f) asylum detention, means deprivation of liberty can be justified for mere administrative convenience and practicality. This again, is in direct contradiction of international standards and undermines the right to liberty. These reasons cannot be deemed as necessary and proportional to justify deprivation of asylum-seeker liberty. Thus, the ECtHR‘s decision defies the overall general international rules of consistent interpretation to ensure the most effective protection of fundamental human rights. The ECtHR should strongly consider amending its restrictive approach in potentially similar future cases, so that its decisions are more consistent with the international human right and refugee principles, in order to provide effective protection to the right to liberty of asylum-seekers.

6. THE RIGHT TO LIBERTY STANDARDS OF THE ASYLUM-SEEKER WITHIN THE EU SCOPE

The above analysis of asylum-seeker right to liberty standards within the ECHR scope demonstrates the inadequate protection that is afforded to such individuals. The only way such can be rectified is if the ECtHR applies a more liberal approach consistent with international standards. Such cannot take place quickly and is highly dependent on the particular circumstances of specific cases that come before it. Therefore, the EU seems to be in considerably better position to improve the right to liberty standards of asylum-seekers within some of the European territories. This is due to the capability of the CEAS "effecting systemic legal change"[292]. Its legislative acts have potential direct effect within Member States and are subject to the interpretation and enforcement by the CJEU, whose decisions are directly binding across all Member States[293]. The Treaty of Lisbon in 2009 extended EU competence within the asylum context by allowing for uniform standards to be implemented[294]. As such, there is a real possibility of ensuring sufficient protection of the right to liberty of asylum-seekers within EU States through the codification of substantive safeguards against arbitrary detention.

There are several EU Directives part of the CEAS, each detailing conditions and procedures within a certain area of the asylum context. For the focus of this thesis research problems, the RCD[295] is the most relevant as it applies to the detention of asylum-seekers prior to final determination of their claim; again focus is maintained on detention measures imposed during the first two Guild stages. The RCD regulates the circumstances under which asylum-seekers can be detained and aims to provide higher procedural safeguards by replacing the earlier 2003 Reception Conditions Directive[296]. For the first time in EU asylum law, the reasons as to when asylum-seekers can be detained are established in the RCD which sets down an exhaustive list of grounds in Article 8 (3)[297]. These grounds establish the basis on which asylum-seekers can be detained, provided such detention is necessary and proportional, in that

[292] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 23, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[293] EUROPA, "Court of Justice of the European Union (CJEU)", Accessed 20 March 2020, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en
[294] Article 78, *Consolidated version of the Treaty on the Functioning of the European Union,* 26 October 2012
[295] *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013.
[296] *Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers,* 27 January 2001.
[297] Article 8 (3), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013.

less coercive measures cannot be applied[298]. The revised RCD is definitely a step in the right direction in adequately protecting the liberty of asylum-seekers. However, "whilst certain improvements have been made with the recast, the standards therein are still open to interpretation"[299]. This discretion as to interpretation of liberty standards is problematic within the EU legal order where a complex interplay exists of EU, ECHR and international law. The lack of specific and uniform obligations on reporting of detention makes to difficult to provide "any comprehensive overview of detention practices in EU Member States" [300]. Nevertheless, the briefing provided by the European Council on Refugees and Exiles on statistics of detention measures imposed within Member States in 2016, concludes that there is a "significant scale of detention and *de facto* detention practices documented in some countries"[301]. Therefore, the prominent use of detention measures in some EU Member States suggests that interpretation of the liberty standards of asylum-seekers, is closer to the restrictive approach adopted by the ECtHR within the ECHR scope. Should this be the case, the lower standards endorsed by the ECtHR (as analysed above) would subsequently be applied within the EU sphere meaning asylum-seekers are equally afforded lower protection of their liberty within EU Member States. This is a particularly contradicting legal issue because the EU law requires conformity with not only the standards of the ECtHR, but also the international human right and refugee norms. Thus, this should essentially require the effective adoption of the international necessity and proportionality principles within the CEAS, but this is not the case.

Despite the reform of the RCD, there is still divergent and restrictive practices across the EU Member States regarding detention of asylum-seekers[302]. There is difficulty in implementing a harmonised approach on the common standards of detention[303] when an interpretation gap arises due to the interplay of the different legal standards required under the CEAS. As such, the result of the RCD (due to its ambiguity as will be discussed below) appears to have legitimised the systematic detention of applicants for international protection in some Member States[304] instead of providing a substantive guarantee against such measures. This is

[298] Ibid, Article 8(2).
[299] European Council on Refugees and Exiles, "Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU", 16 March 2015, page. 6.
[300] Ibid, page. 12.
[301] Ibid.
[302] European Council on Refugee and Exiles, "The detention of asylum seekers in Europe Constructed on shaky ground?", June 2017, page. 1.
[303]European Law Institute (ELI), "Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards", 2015, page. 5.
[304] European Council on Refugee and Exiles, "The detention of asylum seekers in Europe Constructed on shaky ground?", June 2017, page. 2.

because the standards of necessity and proportionality remain substantially open to interpretation within the RCD. Therefore, the conflict within the EU asylum law is how these principles are to be effectively determined in order to identify the sufficient "parameters within which asylum detention may take place in the EU"[305]. This is an important issue because detention of asylum-seekers concerns the deprivation of liberty of persons who have not committed any crime. Thereby, asylum-seekers must be sufficiently entitled to the intended protection from international human rights and refugee law. Apart from the potential human rights violations, the negative psychological and physical effects of detention on asylum-seekers are also well documented[306]. That is why it is an "inherently undesirable"[307] measure.

6.1. the Problematic Interplay of Legal Standards

As briefly mentioned above, EU law requires conformity with the ECHR and international law. Article 6 (2) of the Treaty of the European Union ('TEU') established that the EU shall accede to the ECHR[308]. As a result of this, the right to liberty contained in Article 6 of the EUCFR is derived directly from the Article 5 ECHR. The CJEU has stated that the ECHR is regarded as a source of the general principles of EU law[309]. Consequently, Article 52 (3) of the EUCFR aims to ensure consistency with the ECHR provisions by stating that the meaning and scope of articles within the EUCFR that correspond to those of the ECHR, shall be given the same interpretation. Such interpretation is to be determined by the text of the ECHR and accordingly the ECtHR interpretations. The Article 52 (3) EUCFR provision establishes that the CJEU should follow the ECtHR to the extent that it offers *at least* (emphasis added) the same level of protection. The CJEU in *Pupino*[310] explained that the judgments of the ECtHR must be taken into account, as the EUCFR contains the fundamental rights as the ECHR. Therefore, the limitations on the right to liberty of asylum-seekers may not exceed those which are permitted from the Article 5 (1) (f) ECHR. However, the second sentence of Article 52 (3) EUCFR clearly establishes that this does not preclude the granting of a wider scope of protection in the EU than that applied by the ECHR. Such was confirmed by the CJEU

[305] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 169, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[306] Ibid, page. 167.
[307] *Saadi v. United Kingdom*, Council of Europe: European Court of Human Rights, Application no. 13229/03, 29 January 2008, para. 35.
[308] Article 6 (2), *Consolidated version of the Treaty on European Union*, 13 December 2007.
[309] *Johnston v. Chief Constable*, CJEU Reference for preliminary ruling, Case 222/84, 15 May 1986, para.18.
[310] *Pupino v. United Kingdom*, CJEU Reference for preliminary ruling, Case 105/03, 16 June 2005, para. 59.

in the case of *DEB v. Germany*[311]. This is an essential point to remember. As previously considered, the ECtHR's approach towards the right to liberty of asylum-seekers within Article 5 (1) (f) ECHR detention cases has been considerably insufficient and overall provides a lower level of protection compared to what is guaranteed under international norms. Thus, the EU law only requires that the ECtHR's interpretation from the perspective of limitations on liberty is met, but nothing prohibits the EU establishing higher protection standards. This higher standards approach should be adopted, given the recognised importance of the right to liberty.

The Treaty on the Functioning of the European Union ('TFEU') in Article 78 expressly requires that the EU asylum policy should be applied in line with the standards of the Refugee Convention and other relevant international treaties[312]. It has been held by the CJEU that the ICCPR is considered a relevant treaty, and therefore is similarly a source of general principles[313]. This requirement of ensuring the EU asylum *acquis* (the body of common rights and obligations that are binding on all EU Members)[314] is consistent with international standards, seems evident from the Article 8 paragraphs established in the RCD. Foremost, the scope of the RCD only applies to third country nationals that have made a claim for asylum in line with the Refugee Convention. Article 8 (1) then provides that "Member States shall not hold a person in detention for the sole reason that he or she is an applicant [for international protection]"[315]. This follows the core principle of non-penalisation provided in Article 31 of the Refugee Convention. Therefore, it appears the RCD acknowledges that the seeking of asylum is a genuine human right and the circumstances that might entail in exercising such right. It should be noted that the right to asylum is specifically established in Article 18 of the EUCFR[316]. Paragraph (2) of Article 8 RCD further establishes that detention measures should only be used "when it proves necessary and on the basis of an individual assessment of each case" and only "if other less coercive alternative measures cannot be applied effectively"[317]. The provision clearly includes a necessity and proportionality consideration, which is consistent with the soft law interpretations provided by the HRC and UNHCR on non-arbitrariness within the scope of Article 9 (1) ICCPR. Article 8 (4) RCD specifically mentions

[311] *DEB v. Germany*, CJEU Reference for preliminary ruling, Case 279/09, 22 December 2010, para 35.
[312] Article 78, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012
[313] *European Parliament v. Council of the European*, Case 540/03, 27 June 2006, para. 37.
[314] "Glossary of summaries, Acquis", EUR-LEX, Accessed 20 March 2020, available at: https://eur-lex.europa.eu/summary/glossary/acquis.html
[315] Article 8 (1), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013.
[316] Article 18, *Charter of Fundamental Rights of the European Union*, 26 October 2012.
[317] Article 8 (2), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013.

alternatives to detention "such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay in an assigned place" which must be "laid down in national law" [318]. Lastly, paragraph (3) of Article 8 RCD provides an exhaustive list of grounds under which an individual can be detained[319]. Overall, on first glance Article 8 of the RCD does appear consistent with the international human rights and refugee standards on the right to liberty of asylum-seekers.

However, there is no certainty in the Article 8 RCD provision as to what constitutes 'necessary' in the context of asylum detention. The phrase of "when it proves necessary" within Article 8 (2) remains ambiguous[320] potentially giving States a wider margin of discretion for detaining asylum applicants, even on reasons administrative convenience. For that reason, there remains an issue within the EU paradigm of the right to liberty standards. This is further complicated due to the interplay of the EU law, mentioned above. When the interpretation of asylum-seeker liberty standards is left to the discretion of Member States, it appears the restrictive approach of the ECtHR is adopted, given the widespread use of administrative detention in the EU[321]. This contradicts the international standards and therefore goes against the interpretation requirements of the EUCFR and TFEU to ensure effective conformity with international principles. Taking into account only the ECtHR's approach, means that detention of an asylum-seeker does not need to be "necessary in all the circumstances"[322], unlike interpretively required within international non-arbitrariness standards. Furthermore, adoption of ECtHR standards would also contradict the Refugee Convention standards. This subsequently would violate the EU's own requirement of ensuring the CEAS is applied in direct conformity with the Refugee Convention, as expressly stated in Article 78 of the TFEU[323]. Non-penalisation established in Article 31 of the Refugee Convention directly relates to liberty restrictions imposed on asylum-seekers. As explained previously, this provision imports the guarantees of necessity and proportionality similarly as the Article 9 (1) ICCPR right to liberty.

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[318] Ibid, Article 8 (4).
[319] Ibid, Article 8 (3).
[320] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 26, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[321] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 173, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[322] Ibid.
[323] Article 78, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012.

In conclusion, there evidently exists a complex interplay of standards concerning the right to liberty within the EU asylum context. An adequate construction of Member State obligations within this context, should require the adoption of standards that are not only consistent with the insufficient approach maintained by the ECtHR within the EHCR scope, but also consistent with the higher standards stemming from the "international obligations common to the Member States that the Charter [EUCFR] reaffirms"[324]. As such, this requires express consideration of the Article 9 (1) ICCPR and Article 31 Refugee Convention right to liberty standards applicable to asylum-seekers. Overall then, it could be said that the EU law demands that relevant human right and refugee instruments be read cumulatively so that the liberty of asylum-seekers is effectively protected. But this is something that remains shunned.

6.2. Requirement of Consistent Interpretation with the ICCPR and the Refugee Convention

The RCD (as well as the other CEAS legal acts) are required to be read in accordance with the rights and principles established within the EUCFR, as stated within their respective preambles[325]. The CJEU in *Abdulla* stated that "those provisions must…be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter"[326]. The right to liberty in Article 6 of the EUCFR is indispensably relevant within asylum detention. This provision directly corresponds to the Article 5 of the ECHR. As such, the first sentence of Article 52 (3) of the EUCFR explains that limitations on the right to liberty shall not exceed those permitted by the ECHR. However, the second sentence of Article 52 (3) clearly provides that the EU law can establish "more extensive protection"[327]. Paragraph (1) of the Article 52 also provides that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they

[324] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 169, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

[325] Recital 35, *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013; Recital 39, *Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast),* 26 June 2013 ; Recital 60, *Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast),* 26 June 2013.

[326] *Salahadin Abdulla and Others v. Bundesrepublik,* CJEU joined Case 175/08; C-176/08; C-178/08; C-179/08, 2 March 2020, para. 54.

[327] Article 52 (3), *Charter of Fundamental Rights of the European Union*, 26 October 2012.

are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"[328]. Moreno-Lax, researcher and lecturer in law at the University of Oxford, proposes that these paragraphs should be applied simultaneously, in particular taking account of the second sentence of Article 52 (3)[329]. To ensure this consistency, would effectively require the adoption of a "higher standards approach"[330]. This is because the core aim of paragraph 3 is to ensure harmonious interpretation within the EU legal order, without restricting the possibility of furthering the level of protection of the fundamental rights that the EUCFR contains. Such directly requires express regard to the "international obligations common to the Member States"[331]. As such, it could be argued that the EUCFR demands the adoption of higher standards. This higher standards approach necessarily requires application of the Article 9 (1) ICCPR and Article 31 Refugee Convention standards, so that the fundamental right to liberty is effectively protected within the asylum scope.

6.2.1. the ICCPR in EU Asylum

The CJEU has consistently held that human rights are an integral part of the general principles of EU law and that respect for such rights "is a condition of the lawfulness of Community acts"[332]. It has held that specifically the ICCPR is "one of the international instruments for the protection of human rights of which [the Court] takes account in applying the fundamental principles of Community law"[333]. Article 53 of the EUCFR recognises the importance of human rights and the international instruments protecting them by stating "nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law…"[334]. This provision, taken together with the Article 52, enshrines a principle of non-regression[335], whereby, if a provision of international law provides a greater

[328] Ibid, Article 52 (1).
[329] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 196, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[330] Ibid, page. 196-197.
[331] Preamble para. 5, *Charter of Fundamental Rights of the European Union*, 26 October 2012.
[332] *Kadi*, CJEU joined Case 402/05; C-415/05, 3 September 2008, paras 283–284.
[333] *European Parliament v. Council of the European*, CJEU Case 540/03, 27 June 2006, para.37.
[334] Article 53, *Charter of Fundamental Rights of the European Union*, 26 October 2012.
[335] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 200, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

standard of protection, such standard should effectively be applied to the corresponding right contained in the EUCFR[336]; not standards which are restrictive or lower. Therefore, the articulation of the right to liberty in Article 6 of the EUCFR should favour the adoption of the higher standards of the Article 9 (1) ICCPR guarantees as interpreted by the HRC specifically in the asylum detention context.

The above analysis demonstrates, that the ICCPR constitutes as a relevant treaty to be taken into consideration within the EU's development of the common policy on refugee protection (the CEAS in other words)[337]. Accordingly, the interpretation and application of detention clauses should require conformity with Article 9 (1) ICCPR, because it establishes effective guarantees against arbitrary deprivation of liberty. The primary interpreter of such guarantees is the HRC, whose interpretations should be considered in good faith. It has explained the standard of non-arbitrariness to be applied in detention. Not only must the measure be lawful but also strictly "necessary in all the circumstances in the individual case"[338]. The HRC explains that "each State party must ensure the rights in the Covenant to all individuals within its territory and subject to its jurisdiction…without discrimination between citizens and aliens"[339]. Therefore, contrary to the position maintained by the ECtHR, detention can be considered arbitrary when necessity is not effectively considered. The HRC also adds, that within the notion of necessity, proportionality is required. This importantly obliges States to *demonstrate* (emphasis added) that it is not possible to use less restrictive means of achieving the same objectives, in light of the specific circumstances[340]. Such interpretation of non-arbitrariness is notably higher than that of the ECtHR, and arguably provides higher protection against arbitrary detention. As such, these more effective standards should be applied within the EU asylum detention.

Thus, the EUCFR does warrant, and arguably demands, the application of higher standards of the right to liberty of asylum-seekers. Therefore, lower standards should be "set

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[336] Ibid.
[337] Article 78 (1), *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012.
[338] *Van Alphen v. The Netherlands*, UN Human Righs Committee (HRC), Communication no. 305/1988, 23 July 1990, para. 5.8.
[339] UN Human Rights (HRC), "CCPR General Comment No.15: The Position of Aliens Under the Covenant", 11 April 1986, paras 1 and 2.
[340] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 189, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

aside"[341] following the construction of Articles 52 and 53 EUCFR, in favour of higher ones for the effective protection of the right to liberty. Not only does this require consistent interpretation with international standards, but also effective application of them within the asylum context. Article 78 of the TFEU specifically states that the CEAS standards must be in conformity with relevant international treaties, particularly the Refugee Convention.

6.2.2. the Refugee Convention in EU Asylum

The argument for applying the higher standards for the purpose of consistent interpretation and effective guarantee of asylum-seeker liberty, is even more apparent with regard to the Refugee Convention[342]. Article 78 (1) of the TFEU clearly states that the CEAS "must be in accordance with the [Refugee Convention]"[343]. As such, together with the ECHR and ICCPR, there is a legal requirement to consider the Refugee Convention within the application of standards in asylum detention. It is stated that the CEAS is "based on the full and inclusive application of the [Refugee Convention]"[344] which is regarded as the "cornerstone of the international legal regime for the protection of refugees"[345]. Thus, it appears there is a solid legal obligation to conform to the Refugee Convention standards. Of specific importance within the right to liberty and asylum detention context, is Article 31 of the Refugee Convention. Paragraph (1) of the provision establishes that States must not impose detention measures on asylum-seekers for the sole reason that they have entered illegally into State territory, reaffirming the right to asylum[346]. The second paragraph then provides that States cannot apply restrictions upon the movement of asylum-seekers other than those which are necessary and only until asylum-seeker status becomes regularised or they obtain admission into another country[347]. Referring to the drafting of Article 31, the intention was that Contracting Parties still reserve the right to apply "necessary police measures regarding their

[341] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 200, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[342] Ibid, page. 202.
[343] Article 78 (1), *Consolidated version of the Treaty on the Functioning of the European Union,* 26 October 2012.
[344] Recital (3), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013.
[345] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 191, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[346] Article 31 (1), *Convention Relating to the Status of Refugees*, 28 July 1951.
[347] Ibid, Article 31 (2).

[asylum-seekers] accommodation, residence and movement in the territory until such time as it is possible to take a decision regarding their legal admission to the country of reception or their admission to another country"[348]. Regularisation within the provision does not mean a positive decision on the asylum claim recognising the individual as a refugee or otherwise acceptance for permanent residence on State territory[349]. Rather it is when the asylum-seeker has satisfied national requirements to have their asylum claim evaluated[350]. As such, States must only use detention measures when strictly necessary as per the Article 31. This requires consideration of individual circumstances, not just the fact that an asylum-seeker has entered illegally.

Referring back to the Guild stages, when an asylum-seeker has submitted their asylum claim, they essentially enter the 2nd stage of the determination procedure. As mentioned, any detention past the 1st (initial) stage of identity checks, must strictly conform to the standards of non-arbitrariness. Article 31 of the Refugee Convention aims to provide guarantees against arbitrariness in such circumstances. The Refugee Convention acknowledges the risks of having unknown persons entering State territory. Therefore provisional detention may be required to obtain information about the individual but importantly must still be "demonstrably necessary"[351]. It should be pointed out that the term necessary within this framework does not equate to meaning "reasonable or convenient"[352]. Instead, it is a notion that should compel action to show that detention is vital or indispensable for the pursuance of the objective it is being used for[353]. Such mandatorily also requires consideration of proportionality; whether less restrictive measures can be used to achieve said objective. Overall, it appears that Article 31 of the Refugee Convention is characterised with exceptionality. Thus, detention as a deprivation of asylum-seeker liberty can only be justified under exceptional circumstances.

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[348] Belgian-American draft of Article 31, 2 February 1950, quoted in Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 193, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[349] Ibid.
[350] James C. Hathaway, "The Rights of Refugees under International Law", *Human Rights Law Review,* 7 (2), (2007), page. 417.
[351] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 194, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[352] A. Grahl-Madsen, "The Status of Refugees in International Law", quoted in Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page.194, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[353] Ibid.

Henceforth, following the analysis above, it is established that the Article 9 (1) of the ICCPR and the Article 31 of the Refugee Convention establishing asylum-seeker right to liberty standards, must be applied within EU asylum detention. This is to ensure that the highest standards of protection are established for this fundamental human right, specifically within the CEAS context. That is not to say that the ECtHR interpretations should be wholly disregarded. Rather, as demonstrated, the EUCFR provides that only the limitations on the right to liberty must not exceed what is provided by the ECHR. However, the application of higher protections for this right are permitted and arguably required. As such, the requirements for consistent interpretation and effective guarantee of the right to liberty, mean that the higher standards under the relevant international law must be applied. In spite of that, such higher standards remain eluded within the EU asylum *acquis*[354].

6.3. EU's Failure to Adopt Higher Standards of Asylum-Seeker Liberty

The previous chapters demonstrate the requirement of EU law to adopt higher asylum-seeker right to liberty standards as endorsed by the ICCPR and Refugee Convention. However, it appears that the lower and restrictive standards maintained by the ECtHR are preferred, whilst international ones remain pushed aside. This preference towards the ECtHR was demonstrated in the case of *Grant*, where a conflict of standards occurred between the ECtHR and the HRC. The CJEU dismissed the HRC standards and adopted the ECtHR's position[355]. As such, it could be argued that the CJEU may equally be dismissive of the UNHCR (primary interpreter of the Refugee Convention provisions) non-binding guidelines[356]. As such, the CJEU may "only be concerned with the core text of the Refugee Convention as opposed to the non-binding opinions of the supervisory bodies"[357]. This is discernibly problematic. It means that Article 31 of the Refugee Convention, could be subjected to a much lower standard of interpretation than the higher one currently established by the UNHCR interpretations. With CJEU preference leaning towards the ECtHR, a considerably restrictive interpretation may be

[354] European Council on Refugee and Exiles, "The detention of asylum seekers in Europe Constructed on shaky ground?", June 2017, page. 1: "As is the case with all other aspects of the EU asylum acquis, the transposition of the detention provisions has generated very divergent legal frameworks and practice across the EU Member States. Whereas it has inspired and legitimised systematic detention of applicants for international protection in some Member States, it has not significantly affected pre-existing practice in others.".
[355] *Grant v. United Kingdom*, CJEU Reference for preliminary ruling, Case 249/96, 17 February 1998.
[356] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 25, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[357] Ibid.

adopted. In other cases, where the ECHR standard of protection is on the same level as the ICCPR, the CJEU attempts to ensure compliance with both of the human rights instruments[358]. However, in *Grant*, the instruments offered differing degrees of protection, and the CJEU adopted the ECHR standard. This orientation towards the ECHR and by connection to the ECtHR, is clearly contradicting considering the lower liberty standards that have been established in asylum detention by the ECtHR. The previous analysis of *Saadi*, demonstrates that the ECtHR fails to maintain a distinction between asylum-seekers and irregular migrants, and fails to adequately import the required principles of necessity and proportionality within the right to liberty. The increasing use of administrative detention and extensive policy grounds established to justify detention, "from security issues to reasons of mere administrative convenience"[359], suggests that the ECtHR's approach is indeed adopted within the CEAS. This may well be the reason why asylum detention has "become the unavoidable appendix of a decision on entry for the purpose of adjudicating a claim to international protection"[360].

The reason why the EU fails to effectively adopt higher standards is because of the ambiguity of the RCD, which by analogy warrants the above preference towards the lower ECtHR standards. During the proposals for the revision of the 2003 Reception Conditions Directive, the European Commission sought "inspiration from the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum-seekers and from UNHCR's Guidelines on the issue"[361]. The intention of this appears to be that the detention provisions of the RCD ensure that such measure is imposed as an exception following the principles of necessity and proportionality. However, the Article 8 of the RCD directly establishing detention conditions leaves "an excessive margin of discretion to the EU Member States"[362]. This explains why detention measures still remain prominent[363]. The reference of necessity contained in Article 8 (2) appears to hold no definite meaning appearing to "impose a relationship of appropriateness"[364] between the detention and objective. This means that detention solely for attaining administrative practicality could potentially be deemed as

[358] *Orkem v. Commission of the European Communities*, CJEU Case 374/87, 18 October 1989, summary para. 3, paras. 30-31; *Massam Dzodzi v. Belgian State*, CJEU joined Cases 297/88; C-197/89, 18 October 1990, para. 68.
[359] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 167, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[360] Ibid.
[361] Ibid, page. 174.
[362] Ibid, page. 177.
[363] European Council on Refugees and Exiles, "Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU", 16 March 2015, page. 6
[364] Ibid.

necessary within scope of the provision. Such justification for the deprivation of asylum-seeker liberty, evidently deviates from the international standards as it raises the risk of arbitrariness[365]. Article 9 (1) of the ICCPR and Article 31 of the Refugee Convention do not warrant detention for reasons of administrative convenience as it is not the least restrictive measure to achieve this objective. However, this higher international standard of necessity is deprived much of its fundamental meaning within the Article 8 (2) of the RCD as it remains open to interpretation (problematic given the orientation towards the ECtHR standards as explained above). This ambiguity is noticeable throughout the other paragraphs of Article 8 also.

Paragraph (3) of the Article 8 RCD establishes the grounds under which asylum detention can be carried out: (a) to determine or verify identity or nationality[366]; (b) to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant[367]; (c) to decide, in the context of a procedure, on the applicant's right to enter the territory[368]; (d) in accordance with the Returns Directive[369]; (e) for protection of national security or public order[370]; or (f) in accordance with the Dublin III Regulation[371]. Overall, these grounds are ambiguous and remain considerably open to interpretation. Ground (a) does not appear problematic, but must still be subject to a narrow construction so as to avoid unnecessary and excessive use of detention. UNHCR guidelines remind that any extension of detention within the first initial phase (for identity verification), must only be imposed when it is established that there is an "absence of good faith on the part of the applicant to comply with the verification of identity process"[372]. It should be demonstrated by the detaining authorities that there is an intention to mislead or refusal to cooperate[373] so that detention can be justified as necessary. Such higher standard is not apparent from the ground (a), meaning a lower one may be adopted. Ground (b) could be interpreted as allowing detention for the entire period of

[365] Ibid.
[366] Article 8 (3) (a), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013.
[367] Ibid, Article 8 (3) (b).
[368] Ibid, Article 8 (3) (c).
[369] Ibid, Article 8 (3) (d).
[370] Ibid, Article 8 (3) (e).
[371] Ibid, Article 8 (3) (f).
[372] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, para. 24.
[373] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 204, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

the asylum determination process if a restrictive approach is used. The inclusion of "which could not be obtained in the absence of detention" and the reference to "risk of absconding" appear to imply principles of necessity and proportionality. However, these should be expressly mentioned so that the ground confidently provides a sufficient guarantee against systematic deprivation of liberty. Ground (c) could be regarded as the most ambiguous within Article 8 (3), as "it leaves unpronounced the situations that it intends to address"[374]. It gives a considerably wide margin of discretion as to how the provision is to be interpreted, in order to justify a detention measure. As such, it could potentially allow detention for purely administrative procedures for ensuring an efficient immigration system. Such was exactly the emphasis maintained by the ECtHR in *Saadi* which gave more consideration towards allowing States to control their immigration systems than to the right to liberty of asylum-seekers. Therefore, even the "stringent safeguards set out [in Article 8 RCD] are in part undone by the inclusion of Article 8 (3) (c)"[375]. Grounds (d) and (f) refer to the other directives part of the CEAS established for different procedures of the asylum system, and are therefore not within the focus of this thesis. Lastly, ground (e) allowing detention for the protection of national security or public order, is a legitimate and reasonable ground. Nonetheless, it should also be applied only when demonstrably necessary within individual circumstances. This is to avoid the use of automatic detention by categorising whole groups of persons (for instance coming from a particular territory) as a national security threat, thereby justifying the use of a "blanket policy to detain"[376]. UNHCR guidelines expressly state that decisions to detain on national security[377] or public order grounds[378], must be taken only in individual cases after due consideration of individual circumstances. Finally, paragraph (4) of Article 8 RCD should also be pointed out. The provision states that "Member States shall ensure that the 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, are laid down in national law"[379]. This is a good attempt at establishing obligations to consider ATD as part of the asylum procedure.

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[374] Ibid.
[375] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 28, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[376] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 12, https://www.refworld.org/docid/4dc935fd2.html
[377] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, para. 35.
[378] Ibid, paras 22-28.
[379] Article 8 (4), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013.

Consideration of alternative measures is regarded as the main requirement of proportionality within international soft law[380]. Nonetheless, the provision provides no clear obligation or requirement upon authorities to have to effectively consider or demonstrate that they have considered, ATD before resorting to detention measures. It is only established that these measures are to be laid down in national law. Thus, proportionality, as part of the notion of necessity, is also not sufficiently guaranteed within the RCD.

Overall, it is evident that the standards established under Article 8 of the RCD are to a large extent ambiguous and remain significantly open to interpretation within EU asylum detention procedures. This discretion has arguably allowed the EU asylum law to manifest dependency towards the minimal standards of the ECtHR. Consequently, a lesser standard of non-arbitrariness within the right to liberty of asylum-seekers has been adopted. This has meant that detention is becoming routine rather than an exception and measure of last resort[381]. The reason as to why such discretion was allowed within the RCD, appears to come down to the apparent tension that exists between State sovereignty and individual rights.

6.4. State Sovereignty and Individual Rights Dilemma

The tension between the States sovereign right to control immigration and individual human rights of the asylum-seeker, appears to be evident within the EU law. Analysis from above, demonstrates that the right to liberty of asylum-seekers remains deferred, whilst the need to ensure effective immigration control is prioritised. This conflict is clearly seen from the intended dual purpose of the RCD; "to address possible abuses of their [Member State] reception systems" whilst "maintaining high standards of treatment in line with fundamental rights"[382]. It is further illustrated by closely examining the Article 8 provisions within the RCD, which specifically provide the conditions for asylum detention. As discussed above, these conditions are ambiguous, offering a wide margin of discretion as to their interpretations. This is to the benefit of the State. On the other hand, the inclusion of the notion of necessity and

[380] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 161, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

[381] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse*, 5, (2011), page. 167, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent

[382] European Commission, "Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast)", 2011, page. 3.

"less coercive alternative measures"[383] does imply that there is acknowledgement of the need to maintain substantive safeguards for asylum liberty, reaffirming the importance that the right to liberty holds. However, whilst it is true that the EU has gained more competence towards regulating asylum with the entry into force of the Lisbon Treaty, "Member States have shown great reluctance to lose command over this key aspect of their authority"[384]. As a result of this, the RCD appears to concede the codification of the higher international liberty standards, by leaving provisions open to liberal interpretation, so as to not diminish State sovereign rights related to immigration control. In consequence of this, provisions remain "resolved in favour of the State and to the detriment of the goal to harmonise EU asylum law"[385] which requires the adoption of higher international right to liberty standards within the asylum context (as explained previously). Thus, asylum-seekers continue to have lesser right to liberty guarantees.

In conclusion, the particular interplay of EU law with that of the ECHR and international law has led to a significant protection gap for the liberty of asylum-seekers. There is also an apparent conflict in maintaining a balance between sovereign rights and individual rights. As a consequence, the RCD's provisions remain ambiguous and open to interpretation in favour of State sovereignty. Such, coupled with the legal interplay, has resulted in the adoption of lower right to liberty standards seemingly following the restrictive interpretations of the ECtHR. Therefore, the guarantees against arbitrariness under Article 9 (1) ICCPR and non-penalisation under Article 31 Refugee Convention have no meaningful basis within the EU asylum *acquis*. This ultimately goes against the requirements of the EUCFR and TFEU to ensure harmonious and effective application of the international human rights and refugee protections in the EU law, specifically within the CEAS.

Nevertheless, it must be acknowledged that the RCD is a significant step towards providing the higher standards of international law in relation to the right to liberty of asylum-seekers. It demonstrates that "with the correct political will, it [the EU regime] is capable of delivering high standards for the protection of the right to liberty of the asylum-seeker consistent"[386] with international human rights law. Currently however, there remains prominent use of detention measures on asylum-seekers. Only when the higher standards of

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[383] Article 8 (2), *Directive 2013/33/EU of the European Parliamnet and Council laying down standards for the reception of applicants for international protection (recast),* 29 June 2013.
[384] Violeta Moreno-Lax, "Beyond Saadi v UK: Why the Unncessary Detention of Asylum Seekers is Inadmissible under EU Law", *Human Rights & International Legal Discourse,* 5, (2011), page. 170, https://www.academia.edu/4572564/Beyond_Saadi_v_UK_Why_the_Unnecessary_Detent
[385] Tara Wolfe, "The Detention of Asylum Seekers in Europe", (dissertation, University of Bristol, 2012), page. 24, https://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf
[386] Ibid, page. 30.

necessity and proportionality interpreted under the international law are effectively applied, can the CEAS concretely guarantee a sufficient level of protection for the right to liberty of asylum-seekers.

7. ALTERNATIVES TO DETENTION AS A VIABLE SOLUTION TO CONFLICTING RIGHT TO LIBERTY STANDARDS

Establishing better application of international right to liberty and refugee protection standards is a remarkably challenging task. Within Europe, regional instruments have dedicated enforcement courts mandated to interpret and apply the legal norms therein. It could be irrational to challenge these courts to apply standards beyond their constitutional regional instruments, even if international treaties should have equal binding force upon States. The HRC (primary interpreter of the ICCPR) and the UNHCR (primary interpreter of the Refugee Convention) have no legal binding force in their guidelines. Thus, even though their interpretations of the provisional standards contained in the human right and refugee instruments should be considered in good faith, they remain only as effective as States and courts apply them[387]. These interpretations remain part of international soft law. Consequently, the higher standards of non-arbitrariness within the scope of liberty of asylum-seekers provided by these organisations, have no practical effect within the European legal sphere as evidenced in the previous chapters analysis.

Equally challenging, would be establishing a solution to resolve the tension that exists between sovereign rights and human rights, specifically the State‘s right to control immigration and the persons right to liberty and asylum. This appears to be an overarching issue as seen from the analysis of ECtHR case law and EU asylum law. The State‘s right to control immigration and the human right to liberty, are distinct spheres of international law, that evidently conflict with each other within the asylum detention context. Given their respective importance, there should be a fair balance between such rights. However, the examination of the ECtHR and EU asylum standards, reveal that focus is favourably maintained towards the State‘s right to control immigration and consequently to the detriment of the liberty of asylum-seekers, which also has a direct negative effect on the principles of the Refugee Convention.

Thus, in an attempt to establish a fairer balance between the State‘s right to control immigration and the asylum-seekers right to liberty and asylum, this chapter aims to propose the adoption of concrete legal obligations regarding ATD measures. These measures may be the solution that can effectively maintain the fair balance, and ensure international human right standards are effectively applied within the European sphere. Specifically, this solution is aimed for the EU asylum law. This is because the adoption of effective ATD measures within

[387] Ibid, page. 11.

law, seems particularly feasible within the CEAS. The EU has already attempted such with the revised RCD, and its legislative acts have the potential of direct effect within Member States. Thus, there appears to be an intention from the EU to establish higher standards regarding the right to liberty of asylum-seekers, and also a strong possibility of achieving such within the law.

7.1. Overview of ATD and Human Right Considerations

There are a wide range of ATD measures that have already been established and operating within countries as detailed in the research conducted by Edwards[388]. The various ATD measures can be grouped based on common elements under these general categories: reporting or residency requirements; guarantees, sureties or bail; community supervision or case management; electronic monitoring; and home curfew[389]. Edwards provides a detailed explanation of each category and particular type of ATD measure[390]. This chapter however, will focus mainly on the overall legal viability of the ATD in relation to the above identified problems. The adoption of an EU ATD directive is proposed as the solution that is able to effectively establish the higher international standards of the right to liberty within the asylum detention context whilst maintaining a State‘s right to effective immigration control.

Whilst the aim of ATD is to operate as the least restrictive measures that do not amount to a full deprivation of liberty like detention measures, many alternatives in practice do still restrict movement or deprive liberty in varying levels of degree[391]. Due to this, ATD measures are still subject to human rights guarantees, unless measures of release without conditions are employed; these are without any restrictions and seen as the ultimate ATD[392]. But most ATD measures do still need to be governed by the relevant international human right standards “in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement“[393]. Article 12 of the ICCPR and similarly Article 26 of the Refugee Convention, Article 2 of

[388] Alice Edwards, “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention‘ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants“, April 2011, page. 51, https://www.refworld.org/docid/4dc935fd2.html
[389] Ibid, page. 4.
[390] Ibid, page. 51.
[391] UN General Assembly, “Report of the Special Rapporteur on the human rights of migrants, François Crépeau“, 2 April 2012, para. 53.
[392] Alice Edwards, “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention‘ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants“, April 2011, page. 53, https://www.refworld.org/docid/4dc935fd2.html
[393] UN High Commissioner for Refugees (UNHCR), “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention“, 2012, para. 36.

Protocol 4 to the ECHR, and Article 45 of the EUCFR establish the right to freedom of movement, which is particularly applicable to ATD measures. The standards under such right require consideration of the same necessity and proportionality principles, as under the international right to liberty standards under Article 9 (1) of the ICCPR. Furthermore, an ATD measure can fall within the remits of Article 9 (1) right to liberty because "some non-custodial measures may be so restrictive, either by themselves or in combination with other measures, that they amount to alternative forms of detention, instead of alternatives to detention"[394]. Therefore, the higher international right to liberty standards are equally applicable within ATD measures. Such standards demand that ATD measures "must only be imposed where they are necessary and proportionate to the objectives in question"[395]. In order to satisfy necessity and proportionality, the least intrusive measure possible in the individual case should be applied. This requires States to fully consider individual circumstances. Then according to the individual case, the least intrusive and restrictive measure should be employed as per the proportionality aspect[396]. Lastly, States are reminded that the "cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed"[397] in order to sufficiently guarantee that the ATD measure is not in fact an alternative form of detention. Ultimately, these standards serve to guarantee that detention measures are not disguised by having the label of ATD, as human right standards continue to apply.

7.2. why can ATD be the Solution

The reason why ATD are the potential solution to the identified conflicts within this thesis, is because the higher standards of necessity and proportionality under international right to liberty norms can effectively be guaranteed. If a specific directive establishing and detailing the ATD requirements are established within the EU, then Member States would be obliged to undertake the mandatory consideration of individual circumstances in order to assess which alternative measure is applicable. Even if an alternative measure is not viable due to a particularly serious reason meaning the State must resort to detention, the actual consideration

[394] UN General Assembly, "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", 2 April 2012, para. 53.
[395] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 4, https://www.refworld.org/docid/4dc935fd2.html
[396] UN General Assembly, "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", 2 April 2012, para. 53.
[397] Ibid.

undertaken demonstrating why alternatives were not sufficient, shows that necessity is still respected. This would guarantee that detention is a measure of last resort. To effectively ensure this, the legal provisions within an EU ATD directive should be strict and detailed; not ambiguous and open to interpretation as the current provisions of the RCD.

The report of the special rapporteur on the human rights of migrants presented to the UN General Assembly, has suggested that a "sliding scale of measures from least to most restrictive"[398] should be firmly established within legislation. The UNHCR guidelines also propose such sliding scale as shown in figure.1 below.

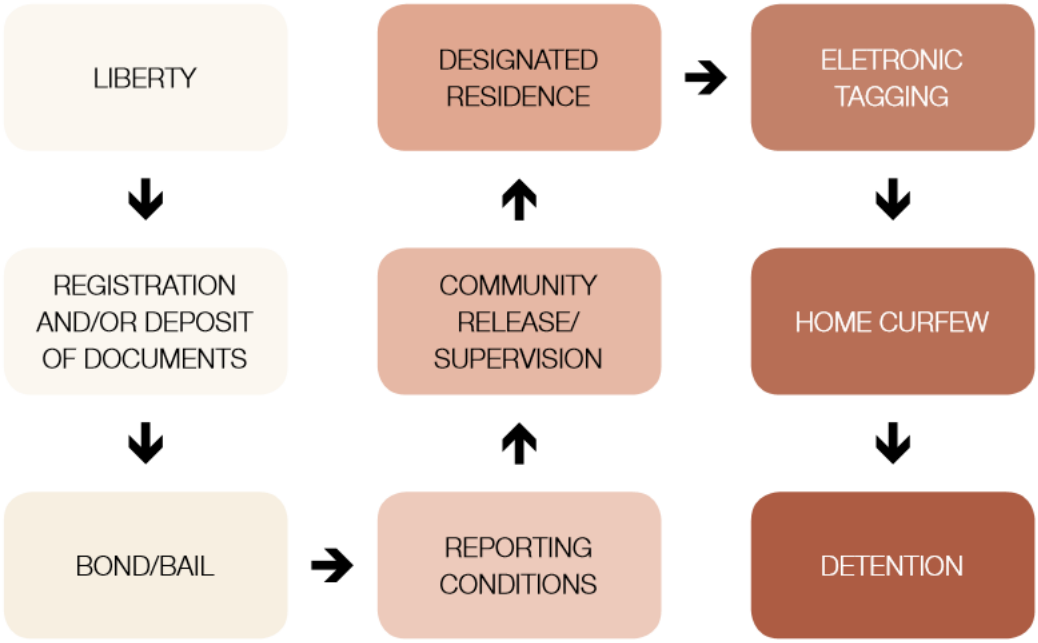

figure 1: UNHCR alternative measures from least restrictive to most restrictive[399]

Figure 1 outlines the types of alternative measures from the least restrictive on individual movement, up to the most restrictive amounting to full deprivation of liberty, which is detention. The codification of such a sliding scale within an EU ATD directive could concretely ensure that Member States are obliged to carry out assessments in conformity with necessity and proportionality. Furthermore this scale could be accompanied with provisions establishing circumstances or criteria that deem an asylum applicant to be suitable for a particular type of ATD. This again would better guarantee the higher standards whilst also providing clarity of which type of ATD measure should be employed within a particular case,

[398] Ibid.
[399] UN High Commissioner for Refugees (UNHCR), "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, page. 23.

thereby lessening the administrative burden. Thus, the consideration of ATD measures is also beneficial for the State, showing that a fair balance between the right to control immigration and liberty can be maintained.

7.3. the Benefits of ATD

The effective implementation and consideration of ATD measures through a codified legislative act, is not solely in favour for individual rights. There are benefits for the State also. As demonstrated in some of the other chapters of this thesis, States strongly want to maintain their right to control who enters and are admitted into its territory as per its sovereignty. Reluctance to lose control over such right is evidenced by the ambiguity of the EU RCD and that overall there is no right to be granted asylum conferred upon individuals. Nevertheless, the right to control immigration must not mean that asylum-seeker human rights are violated, or afforded lesser standards than intended under international law. Specifically there appears to be an unjustified reliance on detention as a means to achieve effective immigration control. Edwards states that "except in specific individual cases, detention is largely an extremely blunt instrument to counter irregular migration"[400] as "threats to life or freedom in an individual's country of origin are likely to be a greater push factor for a refugee than any disincentive created by detention policies"[401]. This coupled with the "deleterious effects of detention on the health and well-being of detainees, such as psychological damage"[402] really "calls into question the purpose and effectiveness of detention as a policy aimed at deterring irregular migration, preventing absconding, or ensuring persons are available for removal"[403]. Indeed Edward's study found that "asylum seekers very rarely need to be detained, or indeed restricted in their movements, prior to a final rejection of their claim"[404] because there is a significantly higher compliance rate than the absconding rate. The empirical research found that "less than 10 per cent of asylum applicants abscond when released to proper supervision and facilities (or in other words, up to 90 per cent comply with the conditions of their release)"[405]. This demonstrates that detention as a measure is considerably ineffective in migration control and

[400] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 3, https://www.refworld.org/docid/4dc935fd2.html
[401] Ibid.
[402] Ibid.
[403] Ibid, page. 82.
[404] Ibid.
[405] Ibid, page. 3.

when implemented without the required high standards (as found within the ECtHR and EU) can be considered arbitrary under international law. Thus, there is a real practical and legal need to establish ATD. Edward's research also demonstrates that there is practical effectiveness of considering ATD measures instead of detention as a method of immigration control because of the high compliance rates. Another benefit for the State in favour of adopting ATD, is that these measures have "proved to be considerably less expensive than detention, not only in direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services, integration problems and other social challenges"[406]. Lastly, Edward's research on the use of alternatives in several countries found that "properly-functioning A2D's [ATD] can lead to knock-on improvements in asylum, reception and migration management systems"[407].

All of the above factors, demonstrate that the adoption of ATD measures has practical benefits for States in maintaining effective immigration control, whilst also providing lesser restrictions on liberty and establishing higher international law right to liberty guarantees with regard to necessity and proportionality. O'Nions agrees with this view stating that alternative measures "present a less challenging environment for the potential detainee"[408]. Drawing on the empirical research from Edwards, O'Nions notes that the Toronto bail programme appears particularly effective in maintaining a fair balance between the rights of the State and the individual[409]. The Toronto bail programme operates as a state-funded bail system allowing those persons who do not have community ties to raise bail monies. Edwards notes that this alternative measure has "achieved considerable success in terms of its compliance rates"[410]. This example demonstrates that there can be the simultaneous protection of State rights and individual rights. Firstly, such alternative measure is "only offered following an assessment and interview to ascertain the client's credibility"[411]. Not only does this allow the State to

[406] UN General Assembly, "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", 2 April 2012, para. 48.
[407] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 5, https://www.refworld.org/docid/4dc935fd2.html
[408] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 180, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html
[409] Ibid.
[410] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page.57, https://www.refworld.org/docid/4dc935fd2.html
[411] Helen O'Nions, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience", *European Journal of Migration and Law*, 10 (2), 149-185, 1 September 2008, page. 180, https://www.bailii.org/uk/other/journals/WebJCLI/2006/issue2/onions2.html

maintain effective control over immigration concerns, it follows the higher standards of necessity and proportionality. This is because an individual assessment allows the State to determine if there are any security or absconding risks, which could justify detention. But at the same time, such assessment demonstrates that there has been effective consideration of individual circumstances and whether alternative measures that do not deprive liberty can be used. Thereby, conforming to the necessity and proportionality principles. The programme further implements regular reporting measures on those applicants who quality, alongside offering legal advice and support. This again ensures that a fair balance between State control and individual rights is maintained.

It must be noted that alternative measures "will need to be tailored to each country situation and its particular legal, socio-economic and political context"[412]. Nevertheless, "there are increasing examples of ATDs that could be replicated extended and/or tailored to other contexts"[413]. Thus, what an EU ATD directive must establish, is the categories that ATD measures can be classified under, as provided in Figure 1. Member States are then able to tailor specific measures if required. However, it is important that the directive firmly places an obligation upon Member States to implement alternatives, by taking consideration of the sliding scale in order to ensure individual assessments are made and the least restrictive measures are employed.

7.4. Potential Influence on the Council of Europe

It has been noted that the ECHR and therefore the ECtHR, has direct influence on the EU given that the right to liberty in the EUCFR follows that of the ECHR. This also has a direct influence on the EU asylum context, as there remains an unbalanced preference towards State sovereignty within asylum detention, as endorsed by the ECtHR. If the EU adopts an ATD directive then it would effectively establish higher right to liberty standards as permitted and arguably required (as analysed in chapter 6.2). What if this adoption of higher standards within the EU also favourably influences ECtHR practice? This is a wholly hypothetical question. Juncker mentions that "the Council and the Union are both necessary, different and unique

[412] Alice Edwards, "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants", April 2011, page. 52, https://www.refworld.org/docid/4dc935fd2.html
[413] Ibid.

bodies“[414]. Yet “there is no room for rivalry on essentials between the two organisations. In what they do and in what they have done, they complement each other closely“[415]. This is indeed seen from the EU side which regards the ECHR as a source of the general principles for the fundamental human rights[416]. However, there is nothing to the contrary that would prohibit the EU influencing the standards of the Council of Europe. Juncker does appear to signal at this, stating that there should be “improved co-operation between them – a genuinely aware, calm and structured partnership, a partnership working towards a single Europe on a human scale“. As such, if the EU effectively adopts higher right to liberty standards for asylum-seekers by way of an ATD directive, then the ECtHR may take influence and overtime amend its restrictive approach when considering Article 5 (1) (f) ECHR asylum detention cases. Clearly this is a completely theoretical analysis. Nonetheless it warrants an interesting exploration of the potential positive effects of implementing ATD measures instead of detention within Europe.

In conclusion, there is a real possibility within the EU law of implementing a directive regulating ATD with high standards and clear obligations. Such in turn would guarantee higher standards of liberty for asylum-seekers, as necessity and proportionality under international norms are effectively considered. Furthermore, the successful implementation of alternative measures instead of detention, has real practical benefits for States in maintaining migration control. Thus, ATD can maintain a fair balance between sovereign rights and human rights.

[414] Jean-Claude Juncker, “Council of Europe – European Union: A sole ambition for the European continent”, 11 April 2006, page. 2, https://rm.coe.int/16804e3d96
[415] Ibid.
[416] *Johnston v. Chief Constable*, CJEU Reference for preliminary ruling, Case 222/84, 15 May 1986, para.18.

CONCLUSIONS AND RECOMMENDATIONS

In pursuance of this research thesis objectives, the following conclusions and recommendations can decisively be made:

1) The right to liberty is seen as a fundamental human right established throughout international and regional law. Under international law, this right is guaranteed in Article 9 (1) of the ICCPR. Within the European sphere, this right is embedded in Article 5 of the ECHR and then further within the EU in Article 6 of the EUCFR, on the same terms as the ECHR. The right to liberty is particularly important for persons exercising their right to asylum, which is also recognised as a human right, and comprehensively guaranteed by the Refugee Convention. Article 31 therein is specifically relevant to the liberty of asylum-seekers, as it establishes the principle of non-penalisation. This provides, that asylum-seekers liberty should not be deprived by detention measures, solely on account of illegal entry and the seeking of asylum. Thus, the provision could seen as guaranteeing the right to liberty and right to asylum simultaneously.

2) Article 5 (1) of the ECHR establishes specific grounds under which detention may be imposed. Within the immigration context, ground (f) expressly permits detention for the prevention of unauthorised entry or for deportation procedures. These grounds are directly transferred into Article 6 of the EUCFR. Article 9 (1) of the ICCPR on the other hand does not contain such grounds but rather serves as a substantive guarantee against arbitrariness. The HRC is mandated to be the primary interpreter of the ICCPR, and provides that non-arbitrariness essentially requires consideration of necessity, which includes proportionality. Necessity requires assessment of individual circumstances to demonstrate that detention measures are completely required within those circumstances. Then proportionality requires the consideration of whether less restrictive measures can be employed to achieve the same objective. These principles are also the standards endorsed by the UNHCR within the interpretation of Article 31 of the Refugee Convention.

3) The ECtHR is the enforcement court of the ECHR, interpreting and ensuring application of the rights therein. However, even though it appears to share the same emphasise as the HRC and UNHCR on the importance of the right to liberty and the need to ensure restrictions are narrowly construed, it has adopted considerably lower standards of liberty for asylum-seekers. This was evident in the case of *Saadi v. UK*. Firstly, the ECtHR concluded that asylum-seekers are unauthorised for the purposes of detention under Article 5 (1) (f), which endorses systematic detention of asylum-seekers without further considerations. Such

completely fails to provide a distinction between asylum-seekers and migrants thereby disregarding the right to asylum. This directly goes against HRC and UNHCR interpretations that asylum-seekers must be distinguished and be regarded as lawfully present for the purpose of exercising the right to asylum. The ECtHR further held that necessity is not required to guarantee against arbitrariness, which is in direct contradiction of international standards. As such, it is recommended that the ECtHR amends its restrictive approach in similar future cases, so that its decisions are more consistent with higher international standards thereby providing more effective protection of asylum-seeker right to liberty.

Within the EU sphere, asylum-seekers are also afforded a lesser standard of their right to liberty. This is due to the interplay of the ECHR law and international law, which has allowed reliance more towards the restrictive approach of the ECtHR. EU law warrants and demands the adoption of higher right to liberty standards as under the international law. But the ambiguous provisions of the RCD have given excessive discretion as to the interpretation of standards contained therein. As such, there is leniency towards the lesser liberty standards maintained by ECtHR in unbalanced favour of State rights, and to the overall detriment of asylum-seeker right to liberty. It is recommended that the EU adopts a specific ATD directive establishing concrete obligations in order to ensure higher liberty standards are guaranteed whilst also maintaining effective State immigration control.

4) The EU is in a considerably better position to adopt higher standards of the right to liberty for asylum-seekers and appears to have the intention to do so. As mentioned in the previous paragraph, the EU should adopt a specific ATD directive to achieve such. This directive should concretely embed requirements to effectively consider and apply ATD following a sliding scale of measures. The directive should expressly include an obligation of individual assessments to ensure the international standards of necessity and proportionality are effectively applied. These principles should be mentioned to ensure that ATD are not disguised as alternative forms of detention having the same restrictive force on asylum-seeker liberty. This would maintain that ATD remain within the international human rights paradigm and thus must adhere to the right to liberty guarantees. Lastly, the directive should include criteria and circumstances that deem an asylum applicant as suitable for a particular type of ATD. This again should be based on a clearly defined sliding scale of measures, from least restrictive to most restrictive options. ATD would not only ensure higher liberty standards, but also have practical benefits for the State in maintaining effective immigration control. Thus, a fair balance between State‘s rights and individual rights is maintained.

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ABSTRACT

The right to liberty is a fundamental human right that must be protected for everyone regardless of immigration status and is established under international and regional European law. Another recognised human right is the right to asylum which is comprehensively protected by the Refugee Convention. These two human rights apply simultaneously within asylum detention, a measure fully depriving liberty. It is a measure that is widely imposed within the European asylum context.

This thesis aims to analyse the asylum-seekers right to liberty standards under the international law and the Council of Europe and European Union law. It found that there is disparity between such standards, with the Council of Europe and European Union establishing considerably lesser right to liberty guarantees for asylum-seekers. This in direct conflict with the international standards. The overarching issue of this conflict appears to be the tension between the States sovereign right to control immigration and the individual‘s right to liberty as well as asylum. In an attempt to solve these conflicts, the adoption of ATD are proposed.

Keywords: Right to Liberty; Right to Asylum; Council of Europe Asylum Detention; European Union Asylum Detention; Alternatives to Detention

SUMMARY

This thesis analyses the ‘The Right to Liberty in the Context of Migration‘. Specifically, the international and European (divided into the Council of Europe and European Union) right to liberty standards were examined within the asylum detention context. The aim and objectives of the thesis is to critically evaluate the asylum liberty standards maintained in the European sphere and compare those to the international standards.

The thesis is divided into two main parts: general and specific. The general part consists of four chapters and are descriptive in nature, aiming to provide a comprehensive overview of the necessary legal norms relevant to this thesis. In particular, the right to liberty and right to asylum are provided within the context of asylum detention.

The second part of the thesis is analytical in nature, consisting of three chapters and ending with conclusions and recommendations. The aim of the first two chapters are to establish, evaluate and analyse the current right to liberty standards for asylum-seekers: firstly within the ECHR scope through the ECtHR jurisprudence; and secondly within the EU scope through the CEAS and specifically the RCD contained therein, which provides the conditions for asylum detention. From the critical analysis undertaken within these areas, it is established that asylum-seekers are inadequately guaranteed their right to liberty by the standards currently adopted. This ineffective protection correlates to the prominent use of detention measures. These low standards are in direct conflict with the international human rights and refugee standards which apply higher right to liberty guarantees for asylum-seekers. Specifically, the lower ECtHR and EU standards contradict the Article 9 (1) ICCPR right to liberty and Article 31 of the Refugee Convention establishing non-penalisation. These international provisions provide that detention on asylum-seekers must only be imposed in exceptional circumstances strictly conforming to the principles of necessity and proportionality. Such principles however, are ineffectively applied within the ECtHR and EU (in the RCD within the CEAS) scope. The reason for this, is the apparent tension that exists in maintaining a fair balance between the State‘s sovereign right to control immigration and the individual human rights of the asylum-seeker.

The last chapter of the specific part proposes the adoption of ATD as a solution for the above identified conflicts. Specifically, it is proposes such takes the form of an EU ATD Directive that effectively provides the higher right to liberty standards for asylum-seekers while also maintaining immigration control as per the State‘s rights.

HONESTY DECLARATION

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I, Kipras Adomaitis, student of
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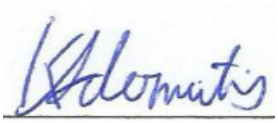

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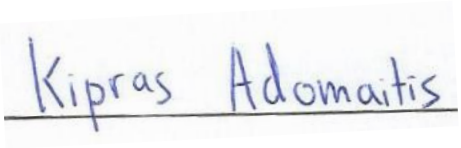

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