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Beyond *SAADI v UK*:

The “Necessity” Requirement for Administrative Detention of Asylum Seekers  
in the EU

by Violeta Moreno Lax

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# BEYOND SAADI v UK: THE “NECESSITY” REQUIREMENT FOR ADMINISTRATIVE DETENTION OF ASYLUM SEEKERS IN THE EU

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‘Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights’.<sup>1</sup>

## 1. Introduction: Is ‘unnecessary’ detention allowed under EU law?

Although the EU has gained competence to regulate access to Community territory,<sup>2</sup> Member States have shown great reluctance to lose command over this key aspect of their authority. Linked to entry, lying at the heart of State sovereignty, ‘[t]he issue of freedom of movement has proved to be one of the most difficult issues to find an agreement upon during the discussions [...] on reception conditions for applicants for asylum’.<sup>3</sup>

Recourse to asylum detention has been steadily growing throughout the Union in recent years,<sup>4</sup> to the point that it may be becoming the unavoidable appendix of a decision on entry for the purpose of international protection. The range of reasons, modalities and duration of detention are varied. A plethora of policy grounds are adduced by governments to justify detention, from security issues to reasons of mere administrative convenience. Despite the principle of proportionality being one of the general tenets of the EU legal order, emanating directly from the rule of law,<sup>5</sup> the end result of such practices is that detention of asylum seekers is progressively becoming routine. The Strasbourg Court has admitted further discretion in its interpretation of article 5(1)(f) ECHR. Based on the ‘undeniable sovereign right [of States] to control aliens’ entry into and residence in their territory,’ *Saadi v UK* has established that there is no requirement inbuilt into that provision ‘that the detention [for the purpose of preventing an unauthorised entry] be reasonably considered necessary’.<sup>6</sup> Apparently, ‘given the difficult administrative problems’ the management of an asylum system may entail,<sup>7</sup> non-arbitrariness and proportionality can be disentangled, and the necessity requirement entirely dispensed with. In this light, the risk of trivialization of detention of asylum seekers in Europe cannot be underestimated.<sup>8</sup> On this basis, and taking account of the existing regulation on asylum detention in EU law, this contribution intends to delineate the legal difficulties that may ensue from the proposed provisions of the Reception

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<sup>1</sup> *Case Concerning United States Diplomatic and Consular Staff in Teheran (USA v Iran)* (Judgement) [1980] ICJ Rep. 42, para. 91.

<sup>2</sup> ECJ 25.07.2008, *Metock* [2008] ERC I-6241, paras. 65-68: ‘[T]he interpretation [...] that the Member States retain exclusive competence [...] to regulate first access to the Community territory [...] must be rejected’.

<sup>3</sup> Explanatory Memorandum, Proposal for a Council Directive laying down minimum standards for the reception of asylum seekers, COM(2001) 181, 03.04.2001 [*Reception Conditions Directive Proposal* hereinafter], p. 11.

<sup>4</sup> Migreurop keeps track of the proliferation of detention camps in Europe. For a map go to: <http://www.migreurop.org/IMG/pdf/carte-en.pdf>.

<sup>5</sup> ECJ 28.03.1974, *Nold* [1974] ECR 491.

<sup>6</sup> ECtHR, *Saadi v UK*, Appl. No. 13229/03, 29.01.2008, § 61-80.

<sup>7</sup> *Ibid.*, § 80.

<sup>8</sup> JRS-Europe, *Becoming Vulnerable in Detention*, June 2010, available at: [http://www.jrsmalta.org/JRS-Europe/Becoming%20Vulnerable%20In%20Detention\\_June%202010\\_PUBLIC.pdf](http://www.jrsmalta.org/JRS-Europe/Becoming%20Vulnerable%20In%20Detention_June%202010_PUBLIC.pdf); Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper(2010)1, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1579605&Site=CommDH>; CPT, *19<sup>th</sup> General Report on the CPT’s Activities* 37-44 (Strasbourg: Council of Europe, 2008-2009), available at: <http://www.cpt.coe.int/en/annual/rep-19.pdf>.

Conditions Directive recast on the matter,<sup>9</sup> if they were to be adopted by the EU legislator. Having regard to the different human rights instruments with an impact on the interpretation of the right to liberty in EU law, the purpose is to identify the parameters within which asylum detention may take place in the Union. A review of the International Covenant on Civil and Political Rights alongside the 1951 Refugee Convention precede the analysis of the right to liberty contained in article 6 of the Union Charter of Fundamental Rights. The implications of each of these instruments will lead to a final conclusion on the implications of the ‘necessity’ requirement for administrative detention of asylum seekers in the EU.

## 2. Asylum detention in the EU: An uncertain standard of ‘necessity’

As it was reflected in its first proposal, the European Commission originally intended to provide a ‘minimum framework’ for the detention of asylum seekers in the Procedures Directive.<sup>10</sup> The Reception Conditions Directive would have simply cross-referenced that instrument.<sup>11</sup> Accordingly, the text of article 11(1) of the first Procedures Directive proposal established the general principle that Member States ‘shall not hold an applicant for asylum in detention for the sole reason that his application for asylum needs to be examined’ and then proceeded to enumerate a range of exceptions thereto. Detention, pursuant to a procedure provided by law, could indeed be considered *necessary* to ascertain identity or nationality; to determine the elements on which the asylum application was based; or for the purpose of a separate preliminary procedure to decide on the right of the asylum seeker to enter the territory of the Member State concerned. On the other hand, the provision did not attempt to exhaust the grounds for asylum detention. It was not supposed to interfere with national policies on deprivation of liberty of aliens for other reasons, which the proposal left unaffected.<sup>12</sup> Paragraph 2 introduced some basic legal safeguards, requiring Member States to provide in their national law for the ‘possibility of an initial review and subsequent regular reviews of the order for detention’.

The European Parliament could not accept the suggested scheme. In its report on the first Procedures Directive proposal, considering that the grounds warranting detention the Commission had identified were ‘too general’ and insufficient to justify deprivation of liberty in every individual case, it sought to rewrite them. Drawing faithfully on UNHCR EXCOM Conclusion 44,<sup>13</sup> the Parliament explained that detention ‘should normally be avoided’ and that it should only be resorted to ‘on grounds prescribed by law to verify identity; to determine the elements on which the claim is based; to deal with cases where refugees or asylum-seekers have destroyed documents or have used fraudulent documents; [or] to protect national security or public order’.<sup>14</sup> A comprehensive code of legal guarantees and judicial remedies was equally proposed.

After a series of unpublished exchanges with the Parliament and the Council, the Commission issued a revised proposal, taking ‘a different angle’.<sup>15</sup> Instead of drawing a detailed list of grounds for detention, faltering an agreement on this point, it focused on the definition of an overall purpose of custodial measures. It suggested that Member States should only be authorised to detain when ‘objectively necessary for an efficient examination of the application or where, on the basis of the personal conduct of the applicant, there [was] a strong likelihood of his absconding’.<sup>16</sup> Unhelpfully, however, paragraph 2 of what became draft article 17 further specified that Member States could also detain an applicant ‘if there [were] grounds for believing that

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<sup>9</sup> Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815 final, 03.12.2008 [*Reception Conditions Directive Recast Proposal* hereinafter].

<sup>10</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13 [*Procedures Directive* hereinafter].

<sup>11</sup> Draft art. 7(2), Reception Conditions Directive Proposal, p. 33.

<sup>12</sup> Explanatory Memorandum, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2000) 578, 20.09.2000 [*1<sup>st</sup> Procedures Directive Proposal* hereinafter], p. 16.

<sup>13</sup> UNHCR, EXCOM Conclusion No. 44 (XXXVII), *Detention of Refugees and Asylum Seekers*, 13.10.1986, para. b.

<sup>14</sup> Report on the proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, A5-29/2001, 31.08.2001, amendment 40, p. 23.

<sup>15</sup> Explanatory Memorandum, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326, 03.07.2002 [*2<sup>nd</sup> Procedures Directive Proposal* hereinafter], p. 11.

<sup>16</sup> Draft art. 17, 2<sup>nd</sup> Procedures Directive Proposal.

the restriction on his freedom of movement [was] necessary for a quick decision to be made'. In addition, proposed article 18 provided for detention in the context of Dublin transfers<sup>17</sup> for a maximum period of one month, 'to prevent [the applicant] from absconding or effecting an unauthorised stay'.

The outcome of negotiations at the Council was rather meagre. The Member States refused any substantive limitations to their power to detain.<sup>18</sup> The European Parliament made a second attempt at restraining Member States' discretion in its report on the revised Commission proposal. Backing the position of several NGOs, it proposed to reinforce minimum guarantees by adding that '[a]lternatives to detention and non-custodial measures must always be considered before resorting to detention'.<sup>19</sup> However, the end result in the final text of the Procedures Directive reflects the marginal influence the Assembly managed to exert. Current article 18(1) solely establishes the minimum standard that 'Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum', while article 18(2) requires Member States to guarantee 'a possibility of speedy judicial review'.

As a consequence, article 7 of the Reception Conditions Directive became the only substantial provision in EU law regulating asylum detention.<sup>20</sup> In this framework, although the default position is supposed to be that asylum seekers 'may move freely within the territory of the host Member State',<sup>21</sup> large latitude is allowed for the Member States to 'confine an applicant to a particular place in accordance with their national law', whenever 'it proves necessary, for example for legal reasons or reasons of public order'.<sup>22</sup> In addition, Member States may equally decide on a particular place of residence for the asylum seeker.<sup>23</sup> Material reception conditions may be made conditional to effective stay in such a place. Temporary permission to leave the assigned location may be granted at the discretion of the authorities. In such cases, '[d]ecisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative'.<sup>24</sup> Negative decisions under article 7 'may be the subject of an appeal' in national law and the 'possibility' of judicial review must be guaranteed at least in the last instance.<sup>25</sup>

Under these broad terms, administrative detention of asylum seekers in the European Union is widespread and does not follow a uniform regime. Comparative surveys show that there is confusion regarding the meaning of the applicable provisions.<sup>26</sup> There is no common definition of grounds, conditions, length, and legal guarantees for asylum detention. In practice, according to the evaluation of the Reception Conditions Directive undertaken by the Commission, '[d]etention is foreseen by all Member States on numerous grounds', ranging 'from exceptional circumstances [...] to the general practice of detention of all asylum seekers illegally entering the Member State [...]',<sup>27</sup> and for very different periods of time. Custodial measures have also been

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<sup>17</sup> The notion of 'Dublin transfers' refers to transfers allowed under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1 [*Dublin Regulation* hereinafter].

<sup>18</sup> JHA Council, 5-6 June 2003, Council doc. 9845/03 (Presse 150), p. 8.

<sup>19</sup> Report on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, A6-222/2005, 29.06.2005, amendment 99, p. 45.

<sup>20</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] OJ L 31/18 [*Reception Conditions Directive* hereinafter].

<sup>21</sup> Art. 7(1) Reception Conditions Directive.

<sup>22</sup> Art. 7(3) Reception Conditions Directive. According to art. 2(k) "detention" shall mean confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'.

<sup>23</sup> Art. 7(2) Reception Conditions Directive.

<sup>24</sup> Art. 7(5) Reception Conditions Directive.

<sup>25</sup> Art. 21(1) Reception Conditions Directive.

<sup>26</sup> Odysseus academic network, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States*, European Commission, October 2006, available at: [http://ec.europa.eu/justice\\_home/doc\\_centre/asylum/studies/docs/odysseus\\_synthesis\\_report\\_2007\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/odysseus_synthesis_report_2007_en.pdf).

<sup>27</sup> Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM(2007) 745, 26.11.2007, p. 7.

frequently resorted to to secure Dublin transfers.<sup>28</sup> In these circumstances, it is uncertain that the principle of necessity enshrined in article 7 of the Reception Conditions Directive is being upheld.

Responding to concern expressed by NGOs<sup>29</sup> and the UNHCR<sup>30</sup> in this regard, the European Commission has proposed to clarify the rules on detention and to address the issue ‘in a holistic way’ in the revised version of the Reception Conditions Directive.<sup>31</sup> Drawing inspiration from the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers<sup>32</sup> and from UNHCR’s Guidelines on the issue,<sup>33</sup> the proposal seeks to ensure that detention be allowed only on exceptional grounds prescribed under the Directive, ‘in line with the principle of necessity and proportionality’, and after an individual assessment of each particular case.<sup>34</sup>

Draft articles 8 to 11 establish a particular regime, stipulating the reasons, guarantees and conditions applicable to detention of asylum seekers in the EU. The principle proclaimed in article 18 of the Procedures Directive that Member States shall not detain asylum seekers for the sole reason of having applied for international protection is reiterated at the outset in proposed article 8(1). Paragraph 2 specifies four grounds on which exceptional measures of detention may be considered necessary when ‘other less coercive measures cannot be applied effectively’. Indeed, as established in article 8(3), alternatives to detention shall be laid down in national legislation and, according to article 8(1), must be considered first. Member States may have recourse to detention only as a last resort. The legal guarantees related to detention are established in article 9, whereas the conditions of detention are detailed in articles 10 and 11. Detention shall normally be ordered in writing by judicial authorities for the shortest period possible. When, in urgent cases, administrative bodies order custodial measures, a judge shall validate the decision within 72 hours, after which, the applicant shall be released if the judicial validation has not intervened. The detention order shall state the reasons for the deprivation of liberty of the applicant, indicate available remedies, and specify a maximum period of detention. Continued detention shall be reviewed by a judge at periodic intervals, either *ex officio* or upon the request of the person concerned.

The grounds justifying detention in the recast proposal are large and remain subject to interpretation. Detention may be ordered (a) to determine identity or nationality; (b) to establish the elements on which the asylum application is based ‘which in other circumstances could be lost’; (c) in the framework of a preliminary procedure to decide on the right to enter the territory of the Member State concerned; and (d) when public order or national security so requires. Although article 8 of the Reception Conditions recast proposal was intended to replace the vague terms of former article 7(3), the Parliament, apparently by mistake,<sup>35</sup> has called for its reintroduction.<sup>36</sup> The Council, in turn, has proposed to introduce the existence of a ‘risk of absconding’ as an additional ground for detention,<sup>37</sup> but without articulating any definition thereof.

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<sup>28</sup> Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007)299, 06.06.2007, p. 8. See also UNHCR, ‘The Dublin II Regulation: A UNHCR Discussion Paper’, April 2006, pp. 52-53, available at: <http://www.unhcr.org/refworld/docid/4445fe344.html>.

<sup>29</sup> ECRE, Submission from the European Council of Refugees and Exiles in response to the Commission’s Green Paper on the Future Common European Asylum System, September 2007, pp. 15-17, available at: <http://www.ecre.org/files/ECRE%20Green%20paper%20response%20final%20-%20Read%20only.pdf>.

<sup>30</sup> UNHCR, Response to the European Commission’s Green Paper on the Future Common European Asylum System, pp. 21-23, available at: <http://www.unhcr.org/refworld/pdfid/46e159f82.pdf>.

<sup>31</sup> Reception Conditions Directive Recast Proposal, *supra* note 9.

<sup>32</sup> Committee of Ministers of the Council of Europe, Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, 16.04.2003 [*Recommendation Rec(2003)5* hereinafter], available at: <https://wcd.coe.int/ViewDoc.jsp?id=2121&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

<sup>33</sup> UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers [*UNHCR’s Guidelines* hereinafter], February 1999, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

<sup>34</sup> Explanatory Memorandum, Reception Conditions Directive Recast Proposal, p. 6 and 8 and Recital 16.

<sup>35</sup> Discussion with EU official.

<sup>36</sup> Report on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), A6-285/2009, 29.04.2009, amendment 12, p. 10.

<sup>37</sup> Council doc. 15195/09, p. 19.

Parallel to article 8, recast article 7(2), as did the original provision in the Reception Conditions Directive, leaves it for the Member States 'to decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application'. In such cases, 'temporary permission to leave the place of residence' may only be granted on a case-by-case basis<sup>38</sup> and the provision of material reception conditions may be subordinated to actual residence in the designated place.<sup>39</sup> Applicants under restricted residence conditions, instead of enjoying the guarantees reserved to detained refugees under article 9, will only be entitled to a generic right to appeal before a judicial body in 'procedures laid down in the national law'.<sup>40</sup>

Together with the general regime proposed in the recast of the Reception Conditions Directive, the proposal for a revision of the Dublin Regulation specifies the rules applicable to detention for the purpose of securing a transfer.<sup>41</sup> Draft article 27(2) stipulates that 'when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, Member States may detain an asylum seeker' on account of 'a significant risk of absconding'. Although detention in these cases should be for the minimum duration possible, paragraph 4 allows it to go from the moment a decision of transfer has been notified to the person concerned until the transfer to the responsible Member State takes place, which, in practice, may last several months.<sup>42</sup>

The proposal for a Procedures Directive Recast<sup>43</sup> maintains a *lex specialis* that has an impact on detention in the framework of border procedures. Former article 35(4) – draft article 37(2) in the recast proposal – stipulates that when a decision has not been taken within four weeks on the outcome of a border procedure, the applicant shall be granted entry to the territory of the Member State concerned for the purpose of having his application processed within the ordinary status-determination procedure. The provision thereby establishes an implicit time limit for custodial measures taken at the frontier, departing from the general regime foreseen in article 8 of the Reception Conditions Directive recast that it be a judicial authority to specify the maximum period of detention in every particular case. Although the formulation of an absolute time limit for detention in border procedures may constitute a positive development contributing to legal certainty, it also involves the risk that detention be mechanically imposed during that period.

'Member States' discretion over detention would appear to be largely intact from consideration of these texts'.<sup>44</sup> Taken together, a strict reading of the recast provisions in the different instruments at hand, if they were adopted by the EU legislator as they stand, may give rise to parallel regimes for the restriction of liberty of asylum seekers with differing degrees of legal protection. Articles 7 and 8 of the Reception Conditions

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<sup>38</sup> Article 7(4) Reception Conditions Directive Recast Proposal.

<sup>39</sup> Article 7(3) Reception Conditions Directive Recast Proposal.

<sup>40</sup> Article 25(1) Reception Conditions Directive Recast Proposal.

<sup>41</sup> Proposal for a Regulation of the European Parliament and of the Council 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), COM(2008) 820, 03.12.2008 [*Dublin Regulation Recast Proposal* hereinafter].

<sup>42</sup> See the rules in current Chapter V of Dublin Regulation for the formulation of take charge/take back requests, the periods permitted to the Member State concerned to reply to such requests. To this it should be added the 6 months that are allowed for the physical transfer to take place, after the Member State responsible has agreed to the request, excluding the time taken for a decision by a Court on an appeal to the transfer according to ECJ 29.01.2009, *Petrosian* [2009] ECR I-00495. Currently, take charge requests can be formulated within three months from an application for asylum being lodged and there is no time limit for the formulation of take back requests. Replies to take charge requests shall be given within two months, and within one month for take back requests, unless based on EURODAC evidence, in which case the period allowed for the latter is only 15 days. The Recast Proposal, albeit introducing in draft art. 23(2) a limit of two or three months to formulate take back requests, depending on the type of evidence on which it is based, leaves the other time limits untouched.

<sup>43</sup> Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554, 21.10.2009 [*Procedures Directive Recast Proposal* hereinafter].

<sup>44</sup> D. Wilsher, 'Immigration Detention and the Common European Asylum Policy', in: A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice?* 418 (Oxford: Hart Publishing, 2007), referring to the current provisions in the Procedures Directive and in the Reception Conditions Directive.

Directive recast as well as draft article 27 of the revised Dublin Regulation appear, in addition, to leave an excessive margin of discretion to the EU Member States, raising the risk of arbitrariness and producing legal uncertainty. Furthermore, the principle of necessity underpinning each of the provisions does not seem to bear an univocal meaning. Whereas for instances of detention falling within the remit of article 8 of the Reception Conditions Directive recast and draft article 27 of the reviewed Dublin Regulation *necessity* appears to impose a relationship of appropriateness and *in concreto* proportionality between the objective to the attained and detention as its suitable means, article 7 of the revised Reception Conditions Directive allows for restrictions to free movement ‘when necessary, for the swift processing and effective monitoring of his or her application’, thereby sanctioning limitations on liberty for reasons of mere administrative convenience. The legislative history of the term as well as the wording of the provision in which it is inscribed suggests a wide margin of discretion reserved to the Member States.<sup>45</sup> Conformity with human rights, in light of which the EU asylum *acquis* is to be construed, may require a narrower definition of the exceptions to the rule of liberty than the one provided by the recast provisions. Otherwise, the necessity requirement inbuilt in those provisions risks being devoid of its fundamental content. A review of the relevant international standards is carried out in the next section, so that an informed conclusion on the requirements of the principle of necessity in EU law and its implications for the recast provisions can be articulated at the end.

### 3. The ‘necessity’ requirement for asylum detention in human rights instruments:

#### 3.1. *The position of the European Court of Human Rights: beyond Saadi v UK*

Article 5 ECHR proclaims the right of everyone to liberty and security. The term ‘liberty’ refers to the physical liberty of the person, which the European Court of Human Rights considers ‘of paramount importance [...] in a democratic society’.<sup>46</sup> The notion of ‘security of person’ relates, in turn, to the overall purpose of article 5 to guarantee that no one is disposed of his liberty in an ‘arbitrary fashion’<sup>47</sup> and to the related legal safeguards in the absence of which there could be a subversion of the rule of law.<sup>48</sup> The principle of legality, the prohibition of arbitrariness, rights of information,<sup>49</sup> *habeas corpus*<sup>50</sup> and compensation<sup>51</sup> are guarantees concomitant to the right to liberty. The default position is a presumption of liberty and, therefore, that no one should be deprived of it save in the exceptional circumstances stipulated in article 5(1).<sup>52</sup> Any loss of liberty requires a legal basis in national law in accordance with the exhaustive list of grounds set out in paragraphs (a) to (f), which are interpreted restrictively by the Court.<sup>53</sup> Article 18 ECHR, establishing that restrictions ‘shall not be applied for any purpose other than those for which they have been prescribed’, warrants such interpretation.<sup>54</sup>

The first element to establish is whether the matter at hand constitutes a case of arrest or detention. A deprivation of liberty may ‘take numerous [...] forms’.<sup>55</sup> ‘The difference between deprivation of and restriction

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<sup>45</sup> For a similar conclusion on the similarly worded art. 7 of the current Reception Conditions Directive see: K. Hailbronner, ‘Detention of Asylum Seekers’, 9 *EJML* 159-172 (2007).

<sup>46</sup> ECtHR 18.06.1971, *De Wilde, Ooms and Versyppe v Belgium* (Appl. Nos. 2832/66, 2835/66 and 2899/66), para. 65; ECtHR 24.10.1979, *Winterwerp v The Netherlands* (Appl. No. 6301/73), para. 37.

<sup>47</sup> ECtHR 08.06.1976, *Engel e.a. v The Netherlands* (Appl. No. 5100/71), para. 58.

<sup>48</sup> ECtHR 25.05.1998, *Kurt v Turkey* (App. No. 24276/94), para. 123: ‘[...] the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. [...] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection’.

<sup>49</sup> Art. 5(2) ECHR.

<sup>50</sup> Art. 5(4) ECHR.

<sup>51</sup> Art. 5(5) ECHR.

<sup>52</sup> M. Macovei, *The Right to Liberty and Security of the Person*, Human rights handbooks No. 5, 8 (Strasbourg: Council of Europe, 2002).

<sup>53</sup> ECtHR 03.10.2006, *McKay v UK* (Appl. No. 543/03), para. 30.

<sup>54</sup> ECtHR 19.05.2004, *Gusinskiy v Russia* (Appl. No. 70276/01).

<sup>55</sup> ECtHR 06.11.1980, *Guzzardi v Italy* (Appl. No. 7367/76), para. 95.

upon liberty is merely one of degree or intensity, and not one of nature or substance'.<sup>56</sup> When determining the degree or intensity of a loss of liberty, the starting point must be the concrete situation of the person concerned. Regard must be had 'of a whole range of criteria such as type, duration, effects and manner of implementation of the measure in question'.<sup>57</sup> Detention is a factual reality, independent of normative definitions in national law. What counts is the existence of compulsion and the absence of valid consent by the detainee to the confinement in question.<sup>58</sup> Even where the authorities might not be literally detaining, the Court may conclude to the existence of *de facto* detention where the individual is not free to leave at will.<sup>59</sup> Loss of liberty cannot be justified on account of a general duty of obedience to the law. Detention must be executed 'in accordance with a procedure prescribed by law'. The principle of legality requires any deprivation of liberty to satisfy two standards. On the one hand, detention must have a basis in domestic law. On the other hand, domestic law must be in conformity with the Convention and with the overall purpose of article 5 'of protecting the individual against arbitrariness'.<sup>60</sup> The notion of 'lawfulness' requires the test of 'quality of the law' to be fulfilled. The general principles embodied in the Convention and, in particular, the tenets of 'legal certainty' and 'the rule of law' must be satisfied.<sup>61</sup> Domestic law must be sufficiently accessible, clear, and precise to allow any person concerned to foresee the conditions of its application.<sup>62</sup> For the measure to be considered 'lawful', domestic provisions must unambiguously provide for the legal procedure for ordering and extending detention and for the time-limits of such detention.<sup>63</sup>

The legal basis in national law must be subsumable into one of the exceptions listed in sub-paragraphs (a) to (f) of article 5(1). Although the Court has not produced a comprehensive definition of 'arbitrariness', some elements are common to all the sub-paragraphs. Yet, higher standards of non-arbitrariness have been applied depending on the sub-paragraph in issue. For sub-paragraphs (b), (d), and (e), that is, detention to secure the fulfilment of an obligation prescribed by law, detention of minors, and detention of persons of unsound mind, alcoholics, drug addicts or vagrants, the principle is that deprivation of liberty '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'.<sup>64</sup> Detention in these cases must be necessary and proportionate, in view of the particular circumstances of the case. By contrast, no such approach has been adopted under sub-paragraph (f).

With regard to deportation cases, without any explicit elaboration on the principles underlying its reasoning, the Court established in *Chahal* that the wording of article 5(1)(f) does not demand that detention 'be reasonably considered necessary', for example to prevent the commission of an offence or the flight of the person concerned. All that the provision requires, in the Court's opinion, is 'that action is being taken with a view to deportation'. Any deprivation of liberty under this sub-paragraph may hence be considered justified 'for as long as [deportation] proceedings are in progress', if these are prosecuted 'with due diligence', and without

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<sup>56</sup> ECtHR 20.05.1996, *Amuur v France* (Appl. No. 19776/92), para. 42.

<sup>57</sup> *Ibid.*

<sup>58</sup> D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley (eds), *Law of the European Convention on Human Rights XXX* (Oxford: Oxford University Press, 2<sup>nd</sup> Ed., 2009).

<sup>59</sup> For cases of holding in the international zone of an airport with a theoretical possibility to leave the country at will see: ECtHR 20.05.1996, *Amuur v France* (Appl. No. 19776/92); ECtHR 27.11.2003, *Shamsa v Poland* (Appl. No. 45355/99 and 45357/99); ECtHR 12.10.2006, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (Appl. No. 13178/03); ECtHR 26.04.2007, *Gebre-medhin v France* (Appl. No. 25389/05); ECtHR 24.01.2008, *Riad and Idiab v Belgium* (Appl. No. 29787/03 and 29810/03); ECtHR 19.01.2010, *Muskhadzhiev e.a. v Belgium* (Appl. No. 41442/07). Although cases of residence assignment do generally not entail a full deprivation of liberty, the Court considered, in view of the particular circumstances of the case, that the restrictions imposed upon freedom of movement amounted to detention in the case of *Lavents v Latvia*, ECtHR 28.11.2002 (Appl. No. 58442/00).

<sup>60</sup> ECtHR 04.04.2000, *Witold Litwa v Poland* (Appl. No. 26629/95), paras. 78.

<sup>61</sup> ECtHR 02.09.1998, *Erkalo v The Netherlands* (Appl. No. 23807/94), paras. 52.

<sup>62</sup> ECtHR 23.09.1998, *Steel e.a. v UK* (Appl. No. 24838/94), para. 54.

<sup>63</sup> ECtHR 22.09.2009, *Abdolkani and Karimnia v Turkey* (Appl. No. 30471/08), para. 135.

<sup>64</sup> ECtHR XXX, *Hilda Hafsteinsdottir v Iceland* (Appl. No. XXX), para. 51; ECtHR XXX, *Enhorn v Sweden* (Appl. No. XXX), para. 44; ECtHR XXX, *Varbanov v Bulgaria* (Appl. No. XXX), para. 46; ECtHR XXX, *Ashingdane v UK* (Appl. No. XXX), para. 42.

their duration being excessive. Proportionality in this context applies only to the extent that detention should not continue for an unreasonable length of time. Otherwise, a test of 'due diligence' substitutes for the more stringent test of necessity of detention in the individual case.<sup>65</sup> On the other hand, as the Convention is intended to guarantee 'rights that are not theoretical or illusory, but practical and effective',<sup>66</sup> the existence of 'sufficient guarantees against arbitrariness'<sup>67</sup> and both the legal and material 'accessibility of a remedy' are factors falling within the remit of article 5(1)(f).<sup>68</sup>

This logic has been extended by the Grand Chamber to the first limb of sub-paragraph (f) in *Saadi v UK*. The case concerned a Kurdish doctor fleeing Iraq, who upon arrival at Heathrow airport claimed asylum and was granted temporary admission to the UK with an obligation to report each day to the authorities. After three days at liberty, Dr. Saadi was taken to Oakington, where he was detained for seven days for the fast-track processing of his application. The Court, by a narrow majority, held that Dr. Saadi's detention was lawful. Granting great deference to the State's 'undeniable sovereign right to control aliens' entry', it established that a necessary adjunct of this prerogative was the right of States 'to detain would-be migrants who have applied for permission to enter, whether by way of asylum or not'.<sup>69</sup> The Court, in an apparent reversal of the presumption in favour of liberty, also considered that 'until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry [...] can be [...] to "prevent his effecting an unauthorised entry"'. Instead of privileging a narrow interpretation of sub-paragraph (f), the Court established that '[t]o interpret the first limb of article 5(1)(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and to the power of the State to exercise its undeniable right of control'.<sup>70</sup> In this way, the Court conflated exclusion with detention, so that the absence of a right of entry could justify deprivation of liberty by the State.<sup>71</sup> Against this background, the Court deduced that the same limited proportionality rule applicable to the second limb of article 5(1)(f) applied in this context too.<sup>72</sup> Instead of a full necessity test, the Court identified four principles that would translate non-arbitrariness in this framework: (1) detention should be carried out in good faith; (2) it must be closely connected to the purpose of preventing unauthorised entry; (3) the place and conditions of implementation should be appropriate, having regard to the fact that 'the measure is applicable not to those who have committed criminal offences but to aliens, who, often fearing for their lives, have fled from their own country'; and (4) the duration should not exceed what is reasonably required for the goal to be attained.<sup>73</sup> On this account, the Court determined that the fast-track Oakington regime was conducted in good faith, as it was 'generally to benefit asylum seekers'. It deemed that detention was closely connected to the purpose of preventing illegal entry, notwithstanding the initial provisional admission of Dr. Saadi to the UK. It established that the place and conditions were 'specifically adapted' to asylum seekers and that the length of seven days was not to be considered 'unreasonable'. The Court concluded that 'given the difficult administrative problems with which the United Kingdom was confronted during the period in question [...] it was not incompatible with article 5(1)(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim of asylum to be processed speedily'. What is more, the Court considered that it was thanks to 'a more efficient system of determining large numbers of asylum claims' that recourse to a broader and more extensive use of detention powers was 'rendered unnecessary'.<sup>74</sup>

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<sup>65</sup> ECtHR 25.10.1996, *Chahal v UK* (Appl. No. 22414/93), paras. 112-123.

<sup>66</sup> ECtHR 13.05.1980, *Artico v Italy* (Appl. No. 6694/74), para. 33.

<sup>67</sup> ECtHR 25.10.1996, *Chahal v UK* (Appl. No. 22414/93), paras. 119-123.

<sup>68</sup> ECtHR 05.02.2002, *Conka v Belgium* (Appl. No. 51564/99), para. 46.

<sup>69</sup> ECtHR 29.01.2008, *Saadi v UK* (Appl. No. 13229/03), para. 64.

<sup>70</sup> *Ibid.*, para. 65.

<sup>71</sup> On this issue see: D. Wilsher, 'The Administrative Detention of Non-Nationals pursuant to Immigration Control: International and Constitutional Law Perspectives' 53 *ICLQ* 897-934 (2004).

<sup>72</sup> ECtHR 29.01.2008, *Saadi v UK* (Appl. No. 13229/03), para. 73.

<sup>73</sup> *Ibid.*, para. 74.

<sup>74</sup> *Ibid.*, para. 80.

A vocal minority disagreed with the approach taken by the majority of the Court. In their opinion, several key concerns were raised by the decision adopted. First, the position of asylum seekers was assimilated to that of other migrants, without any consideration to their special position. The Court endorsed a paradox whereby a person's entry could simultaneously be lawful and, yet, unauthorised.<sup>75</sup> Whereas Dr. Saadi had gained lawful temporary admission, he was subsequently detained 'to prevent his effecting an unauthorised entry'. His right to liberty was thereby subordinated to an autonomous notion of 'authorised entry', which requirements went beyond his presentation to the immigration authorities and his lodging of an asylum request in accordance with domestic law. This seems to depart from the concept of 'lawful presence' elaborated in the realm of article 2 of Protocol 4 ECHR. According to that provision 'everyone lawfully within the territory of a State' has a right to freedom of movement. The now disappeared European Commission of Human Rights held the opinion that the notion refers back to national law.<sup>76</sup> Hence, the provision has consistently been considered inapplicable where the person in question did not have a visa or a residence permit, or from the moment in which his asylum application had been finally rejected.<sup>77</sup> Read *a contrario*, a person whose asylum application is pending should be considered 'lawfully within' the State in issue for the purposes of this provision. Extrapolating this finding to the characterisation of 'authorised entry' in article 5(1)(f), a refugee who willingly complies with all the legal formalities in national law to apply for asylum should be considered to perform an 'authorised entry' as an asylum seeker until his application has been definitively refused. The principle of legal certainty comes in support of this construction. Otherwise, the right to liberty would be deprived of its separate substance and be made entirely subordinate to the qualification by the State in question of entry being 'authorised' in the particular case. Such a right, the enjoyment of which would completely depend on the discretion of the authorities, would not be a right, 'but only a favour'.<sup>78</sup> However, the position of the Court is not definite and legal commentators are divided on this point.<sup>79</sup>

With regard to the question of good faith, the dissenting minority dismissed that detention could be imposed 'in the interest of the person concerned'. Such contention engendered a risk of reification not only of the asylum seeker concerned but also of 'those increasingly in the queue' to whom the Court had referred. The purpose of detention was also a matter of dispute. Although the Court had declared that in the case of Dr. Saadi a custodial measure was justified to prevent his unauthorised entry, the dissenting minority, in view of the facts of the case, deemed that his detention pursued, in reality, 'a purely bureaucratic and administrative goal', which lacked a basis in article 5(1). Most importantly, the Court, departing from other relevant international standards, had entirely disregarded the application of a full necessity test that would satisfy *in concreto* the principle of proportionality. The dissenting minority claimed that the requirements of necessity and proportionality 'must be encompassed in the notion of arbitrariness'. In line with the dissenting judges, several authors similarly maintain that such separation led to 'a false dichotomy',<sup>80</sup> as necessity and proportionality should be considered intrinsic to an assessment on arbitrariness.<sup>81</sup> Proportionality is indeed a general principle

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<sup>75</sup> H. O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience', 10 *EJML* 174 (2008).

<sup>76</sup> Backing this interpretation see the *Explanatory Reports on the Second to Fifth Protocols on the European Convention for the Protection of Human Rights and Fundamental Freedoms*, submitted by the Committee of Experts to the Committee of Ministers, H(71)11 (1971), para. 7.

<sup>77</sup> ECommHR 8.02.1993, *S.T. v France* (Appl. No. 20649/92), 'En Droit' para. 2; EcommHR 13.01.1993, *Voulofitch e.a. v Sweden* (Appl. No. 19373/92), 'The Law' para. 3; ECtHR 14.03.2002, *Sulejmanovic and Sultanovic v Italy* (Appl. No. 57574/00), para. 8.

<sup>78</sup> P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention of Human Rights* 941 (Antwerpen/Oxford: Intersentia, 4th Ed., 2006).

<sup>79</sup> While Mole considers that 'it is arguable that those who have made an asylum application are lawfully on the territory until such time as that application has been definitively rejected' in: N. Mole and C. Harby, *Immigration, Asylum and Detention* 12-13 (The Aire Centre, June 2004), available at: [http://www.ecre.org/files/detention\\_June04.pdf](http://www.ecre.org/files/detention_June04.pdf); Carlier opines that 'tout réfugié ou candidat réfugié n'est ni automatiquement en séjour régulier, ni nécessairement en séjour irrégulier' in: J.-Y. Carlier, 'L'accès au territoire et la détention de l'étranger demandeur d'asile', 79 *RTDH* 801 (2009).

<sup>80</sup> H. O'Nions, *supra* note 75, p. 173.

<sup>81</sup> G. Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?', 6

of the ECHR. The search for a 'fair balance' between the requirements of the public interest and the protection of the individual's rights inheres the entire Convention.<sup>82</sup> General assumptions on proportionality cannot replace a test of necessity in each individual case. Under other sub-paragraphs of article 5(1), worded in similar terms, detention is not permitted simply on account of the person's condition as a minor, as a person of unsound mind, or as a vagrant. Although no necessity provision is literally required in the text of article 5(1), besides in sub-paragraph (c), the Court has invariably considered it implicit in the notion of non-arbitrariness enshrined in sub-paragraphs (b), (d), and (e). Accordingly, under those sub-paragraphs, detention must pursue a legitimate aim of those listed in article 5(1); it must be appropriate to achieve the aim pursued; and it must be necessary in the particular case. Hence, where other less intrusive measures can be adopted to secure the aim pursued, these must be considered first. Legally speaking, nothing prevents the extension of this reasoning to sub-paragraph (f).<sup>83</sup> On the contrary, it would 'promote internal consistency and harmony between [the] various provisions' of article 5(1).<sup>84</sup>

In fact, some case law pre-dating *Saadi* has alluded to these criteria. The former European Commission on Human Rights, held in *Caprino* that detention under article 5(1)(f) is subject to 'principles of necessity and proportionality'.<sup>85</sup> In *Bozano*, the Court considered that depriving the applicant of his liberty for the purpose of expulsion to Switzerland amounted to a disguised form of extradition to Italy designed to circumvent the negative decision of a domestic Court prohibiting it, and not 'to detention *necessary* in the ordinary course of "action ... taken with a view to deportation"'.<sup>86</sup> In an *obiter dictum* the Strasbourg judges, in *Amuur*, noted that 'neither the length nor the *necessity* of the confinement [of the applicants in the international area of Orly airport] were reviewed by a court'.<sup>87</sup> Judge Velaers, in his partially concurring opinion in *Conka*, where the Belgium authorities had made use of a ruse to deprive several roma families of asylum seekers of their liberty in view of their expulsion, wrote that '[p]olice methods and tactics may only be regarded as proper and fair if they are proportionate to the aims which the authorities seek to achieve, for the principle of proportionality is a general principle of the Convention [...] and must be regarded as part of the article 5 requirement that persons are only to be deprived of their liberty "in accordance with a procedure prescribed by law"'.<sup>88</sup> In the case of *Shamsa*, concerning two Libyan nationals subject to expulsion in Poland, the Court deduced a general safeguard to have a prolonged period of detention validated by a judge from the letter of article 5 'taken as a whole'.<sup>89</sup> Finally, in the case of *Mubilanzila*, regarding the confinement of a five-year old child in a closed

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EJML 96 (2004). J.-Y. Carlier, *supra* note 79, pp. 802-807.

<sup>82</sup> ECtHR 07.07.1989, *Soering v UK* (Appl. No. 14038/88), para. 89; ECtHR 27.09.1990, *Cossey v UK* (Appl. No. 10843/84), para. 37. See also K. Starmer, *European Human Rights Law* 169 (London: Legal Action Group, 1999), stating that 'the principle of proportionality is the defining characteristic of the Strasbourg approach to the protection of human rights'.

<sup>83</sup> O. Field and A. Edwards, *Alternatives to detention of asylum seekers and refugees*, UNHCR Legal and Protection Policy Research Series, POLAS/206/03 April 2006, available at: <http://www.unhcr.org/4474140a2.pdf>; UNHCR's Guidelines, Guideline 3, p. 3; UNHCR, 'Detention of Asylum Seekers in Europe', 1(4) *European Series* (1995); ECRE, *Position Paper on the Detention of Asylum Seekers*, November 2001, available at: <http://www.ulb.ac.be/assoc/odysseus/CEAS/ECRE.NOV.2001.pdf>; ECRE, *Research Paper on Alternatives to Detention*, September 1997, available at: <http://www.ecre.org/files/alterns.pdf>; European Parliament, Resolution of 5 February 2009 on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008, A924/2009, para. 31: 'detention must be a measure of last resort, proportionate, for the shortest period possible and only in cases where other less coercive measures cannot be applied'; Parliamentary Assembly of the Council of Europe, The detention of asylum seekers and irregular migrants in Europe, Resolution 1707(2010), para. 8: '[d]etention should be used only if less intrusive measures have been tried and found insufficient [...] priority should be given to alternatives'; Committee of Ministers of the Council of Europe, Recommendation Rec(2003)5, para. 6: '[a]lternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention'.

<sup>84</sup> ECtHR XXX, *Stec e.a. v UK* (Appl. No. 65731/01 and 65900/01), para. 48; ECtHR 29.01.2008, *Saadi v Uk* (Appl. No. 13229/03), para. 62.

<sup>85</sup> ECommHR 17.07.1980, *Caprino v Italy* (Appl. No. XXX), para. XXX. (p. 13).

<sup>86</sup> ECtHR 18.12.1986, *Bozano v France* (Appl. No. 9120/80), para. 60 (emphasis added).

<sup>87</sup> ECtHR 20.05.1996, *Amuur v France* (Appl. No. 19776/92), para. 45 (emphasis added).

<sup>88</sup> ECtHR 05.02.2002, *Conka v Belgium* (Appl. No. 51564/99), para. 3.

<sup>89</sup> ECtHR 27.11.2003, *Shamsa v Poland* (Appl. No. 45355/99 and 45357/99), para. 59 ('pris dans sa globalité' in the original).

centre for adults prior to her *refoulement*, the Court made the important observation that the Belgium State 'had an array of means at its disposal' other than the placement of the applicant in detention.<sup>90</sup>

In the majority of the cases subsequent to *Saadi*, and according to its precepts, States have been condemned for the lack of a sufficient legal basis in national law warranting the deprivation of liberty,<sup>91</sup> for the absence of effective remedies to contest the confinement in issue,<sup>92</sup> and on account of the inadequacy of the conditions of detention.<sup>93</sup> But some decisions appear, in addition, to indicate an incipient departure from the rule that article 5(1)(f) does not demand that detention be considered necessary in every particular case. In *A v UK*, the Court adopted a strict interpretation of 'a person against whom action is being taken with a view to deportation'. As A's expulsion would have violated article 3 ECHR, his detention for the purpose of deportation did not have a basis in the Convention.<sup>94</sup> The Court rejected the Government's argument that article 5 permitted a balance between the individual's right to liberty and the State's interest in protecting its population from the terrorist threat. The Court concluded that '[i]f detention does not fit within the confines of [article 5], it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee'.<sup>95</sup> Then, in a case concerning the detention of an asylum seeker for several months in appalling conditions, the Court considered that the Greek authorities did not have sufficient regard to the particular position of the applicant.<sup>96</sup> It established that the Government's argument on the necessity to ensure the efficacy of immigration controls and to avoid the abuse of the asylum procedure did not exonerate the authorities from justifying, 'after having considered each particular case', how an asylum seeker at liberty would pose a danger to national security or public order.<sup>97</sup> Finally, in its decision on *Raza*, regarding deportation proceedings to Pakistan and the previous prolonged detention of the applicant, the Court condemned the Bulgarian authorities for lack of due diligence. The Court noted in this context that after the applicant's release on 15 July 2008 he was placed under an obligation to report to the local police at regular intervals, which 'show[ed] that the authorities had at their disposal measures other than the applicant's protracted detention to secure the enforcement of the order for his expulsion'.<sup>98</sup>

From this review, it ensues that the Court's rejection of a necessity test being incorporated in article 5(1)(f) might be losing strength. In any event, the ECHR does not apply in a vacuum, but in conjunction with

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<sup>90</sup> ECtHR 12.10.2006, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (Appl. No. 13178/03), para. 58.

<sup>91</sup> ECtHR 23.10.2008, *Soldatenko v Ukraine* (Appl. No. 2440/07), para. 114; ECtHR 22.09.2009, *Abdolkhani and Karimnia v Turkey* (Appl. No. 30471/08), paras. 133-135; ECtHR 19.11.2009, *Kaboulov v Ukraine* (Appl. No. 41015/04), para. 136; ECtHR 13.04.2010, *Charahili v Turkey* (Appl. No. 46605/07), para. 66. See also, prior to *Saadi*, ECtHR 06.03.2001, *Dougoz v Greece* (Appl. No. 40907/98), para. 57; ECtHR 27.11.2003, *Shamsa v Poland* (Appl. No. 45355/99 and 45357/99), para. 57; ECtHR 27.04.2006, *Mohd v Greece* (Appl. No. 11919/03), para. 24; ECtHR 10.05.2007, *John v Greece* (Appl. No. 199/05), para. 33-37; ECtHR 24.01.2008, *Riad and Idiab v Belgium* (Appl. No. 29787/03 and 29810/03), para. 78-80.

<sup>92</sup> ECtHR 11.06.2009, *S.D. v Greece* (Appl. No. 53541/07), para. 70-77; ECtHR 19.11.2009, *Kaboulov v Ukraine* (Appl. No. 41015/04), para. 153; ECtHR 26.11.2009, *Tabesh v Greece* (Appl. No. 8256/07), para. 63; ECtHR 17.12.2009, *Dzhurayev v Russia* (Appl. No. 38124/07), para. 63. See also, prior to *Saadi*, ECtHR 06.03.2001, *Dougoz v Greece* (Appl. No. 40907/98), para. 61-63; ECtHR 05.02.2002, *Conka v Belgium* (Appl. No. 51564/99), para. 55.

<sup>93</sup> ECtHR 11.06.2009, *S.D. v Greece* (Appl. No. 53541/07), para. 53; ECtHR 26.11.2009, *Tabesh v Greece* (Appl. No. 8256/07), para. 44; ECtHR 19.01.2010, *Muskhadzhiyeva e.a. v Belgium* (Appl. No. 41442/07), paras. 55-58; ECtHR 13.04.2010, *Charahili v Turkey* (Appl. No. 46605/07), para. 77-78. See also, prior to *Saadi*, ECtHR 06.03.2001, *Dougoz v Greece* (Appl. No. 40907/98), para. 48; ECtHR 27.07.2006, *Kaja v Greece* (Appl. No. 32927/03), para. 49-50; ECtHR 24.01.2008, *Riad and Idiab v Belgium* (Appl. No. 29787/03 and 29810/03), para. 104-110.

<sup>94</sup> Compare this approach with the position taken by the Court in *Chahal*, where it stated that it was 'immaterial for the purposes of article 5(1)(f) whether the underlying decision to expel can be justified under national or Convention law'.<sup>1</sup> Here, the invalidity of the underlying decision to expel, derived from article 3 ECHR, was taken into account.

<sup>95</sup> ECtHR 19.02.2009, *A a.o. v UK* (Appl. No. 3455/05), para. 171.

<sup>96</sup> ECtHR 11.06.2009, *S.D. v Greece* (Appl. No. 53541/07), para. 65.

<sup>97</sup> *Ibid.*, para. 66: 'La Cour a eu égard à l'argument du Gouvernement selon lequel la nécessité d'assurer l'efficacité du contrôle de ceux qui entrent illégalement sur le territoire et d'éviter que certains d'entre eux n'abusent des avantages liés à la reconnaissance du statut de réfugié. Ceci ne saurait dispenser les autorités de préciser, après avoir examiné chaque cas particulier, en quoi la mise en liberté du demandeur d'asile constituerait un danger pour l'ordre public ou la sécurité nationale'.

<sup>98</sup> ECtHR 11.02.2010, *Raza v Bulgaria* (Appl. No. 31465/08), para. 74. The same principle was enounced in ECtHR 08.10.2009, *Mikolenko v Estonia* (Appl. No. 10664/05), para. 67.

other international instruments for the protection of human rights. In light of article 31(3)(c) of the Vienna Convention on the law of treaties,<sup>99</sup> in an effort of consistent interpretation, the Court in *Saadi* should have taken better account of other 'relevant rules and principles of international law applicable in relations between the Contracting Parties'.<sup>100</sup> Article 9 of the International Covenant on Civil and Political Rights (ICCPR) together with article 31 of the Geneva Convention on Refugees (GC) deserved particular attention.

### 3.2. The case law of the Human Rights Committee: 'Arbitrariness' as injustice

According to article 9 ICCPR, everyone has the right to liberty and security of person and may be deprived of his liberty only on such grounds and in accordance with such procedure as are established by law. Arbitrary arrest or detention are prohibited. As with article 5 ECHR, 'liberty' denotes the freedom of bodily movement in the narrowest sense. By contrast, the right to 'security' of person has been given an independent meaning as a right to protection requiring Signatory States to take appropriate measures against interferences with personal integrity.<sup>101</sup> 'Arrest' and 'detention' have been construed broadly, to cover 'all deprivations of liberty',<sup>102</sup> including instances of abduction, house arrest, placement in educative institutions, periods of banishment, and detention prior to expulsion.<sup>103</sup>

Unlike article 5 ECHR, article 9 ICCPR does not contain an exhaustive list of permissible grounds of detention. During the negotiations of the Covenant, despite an initial British proposal to establish such a list, an agreement was impossible to reach. The current wording of article 9 is the result of an Australian motion to introduce a requirement of non-arbitrariness and a supplementary proposal by India, subsequently amended by the Philippines, on the lawfulness of detention.<sup>104</sup> Thus, deprivation of liberty under the Covenant is allowed only when it transpires 'on such grounds and in accordance with such procedure as are established by law'. According to the principle of legality, both the grounds warranting detention and the procedure to adopt it must be clearly established in domestic law.<sup>105</sup> National law, in turn, shall be in accordance with the principle of non-arbitrariness enshrined in article 9 ICCPR. The Human Rights Committee has interpreted the notion in wide terms, as including 'elements of inappropriateness, injustice and lack of predictability'. Non-arbitrariness encompasses not only the lawfulness and reasonability of detention, but requires that it be 'necessary' in all the circumstances of the case.<sup>106</sup> The existence of an effective remedy is included in the notion of non-arbitrariness as well. A breach of the ancillary procedural guarantees enshrined in paragraphs 2 to 5 of article 9, containing the rights to information, *habeas corpus* and compensation, may equally induce to a finding of 'unlawfulness' within the remit of article 9(1).<sup>107</sup>

'[E]ach 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'.<sup>108</sup> Although the Covenant

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<sup>99</sup> According to art. 31(3)(c) VCLT, when interpreting a treaty, '[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties'. In this connection, it is worth noticing that art. 53 ECHR establishes, in addition, that '[n]othing 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'.

<sup>100</sup> ECtHR 29.01.2008, *Saadi v Uk* (Appl. No. 13229/03), para. 62; ECtHR XXX, *Al-Adsani v UK* (Appl. No. XXX), para. 55; ECtHR XXX, *Bosphorus Hava v Ireland* (Appl. No. 45036/98), para. 150.

<sup>101</sup> HRC 12.07.1990, *Delgado Paez v Colombia* (Comm. No. 195/1985).

<sup>102</sup> HRC 30.06.1982, General Comment No. 8, para. 1.

<sup>103</sup> HRC XXX, *Hammel v Madagascar* (Comm. No. 155/1983).

<sup>104</sup> M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* 216 (Kehl am Rhein: Engel, 2<sup>nd</sup> Ed., 2005).

<sup>105</sup> HRC XXX, *Bolaños v Ecuador* (Comm. No. 238/1987), para. 9; HRC XXX, *Domukovsky e.a. v Georgia* (Comm. Nos. 623, 624, 626, 627/1995), para. 18.2.

<sup>106</sup> HRC 23.07.1990, *van Alpen v The Netherlands* (Comm. No. 305/1988), para. 5.8.

<sup>107</sup> HRC 03.04.1997, *A v Australia* (Comm. No. 560/1993), para. 9.5. See also Individual Opinion of N. Rodley in HRC 28.10.2002, *C v Australia* (Comm. No. 900/1999), stressing that 'the absence of the possibility of a judicial challenge to the detention forms part of the Committee's reasoning in finding a violation of art. 9(1)'.

<sup>108</sup> HRC 11.04.1986, General Comment No. 15, paras. 1 and 2.

'does not recognize the right of aliens to enter or reside in the territory of a State party', they have 'the full right to liberty and security of person'.<sup>109</sup> Therefore, contrary to the approach adopted by the European Court of Human Rights in *Chahal* and *Saadi*, the general principles governing article 9 ICCPR have been extended to instances of immigration detention without special qualification. In *A v Australia*, the Human Rights Committee, considering that the detention of asylum seekers could not be deemed arbitrary *per se*, established nonetheless that the principle of proportionality was equally relevant to their case. Unless remand in custody could be shown to be 'necessary in all the circumstances', the Committee determined that it should be considered arbitrary, 'even if entry was illegal'. In such instances, the State was liable to provide an adequate justification of detention 'particular to the author's case'.<sup>110</sup>

This understanding has been further elaborated in succeeding jurisprudence. The Human Rights Committee has consistently refused to accept general policy arguments based on the integrity of immigration policies, past experience of absconding, the swift processing of asylum claims, or the facilitation of prospective removal, as grounds sufficient to justify detention in an individual case.<sup>111</sup> For a conclusion of non-arbitrariness, 'the determining factor is [...] whether the grounds for the detention are reasonable, necessary, proportionate, appropriate and justifiable in the particular case'.<sup>112</sup> The State party has to *demonstrate* that, in light of the specific circumstances, 'there [are] not less invasive means of achieving the same ends'. Indeed, compliance with the State's immigration policies may be ensured through 'the imposition of reporting obligations, sureties or other conditions'.<sup>113</sup> Therefore, the possibility to challenge the legality and proportionality of detention is key.<sup>114</sup> Judicial review in this context 'must include the possibility of ordering release' and not be limited to 'mere formal compliance of the detention with domestic law'.<sup>115</sup>

Article 9 ICCPR introduces a duty of minimum interference with personal liberty. As a result, asylum seekers must not be detained 'beyond the period for which the State can provide appropriate justification'.<sup>116</sup> With regard to cases of continued detention, '[w]hatever justification there may have been for an initial detention', its prolongation 'for length of time' shall also be met with appropriate reasons.<sup>117</sup>

The conditions of detention must also be adjusted to the circumstances of the case. Inadequate conditions may amount to inhuman or degrading treatment, in breach of article 7 of the Covenant.<sup>118</sup> Article 10 ICCPR provides a specific obligation in this regard, requiring that all detained persons 'be treated with humanity and with respect for the inherent dignity of the human person'. Beyond the avoidance of mistreatment under article 7 ICCPR, article 10 enshrines a 'positive obligation' of care, with which compliance is obligatory independently from 'the material resources available in the State party'.<sup>119</sup> Detention without provision for essential needs, without a possibility to contact family or counsel, or without provision for adequate medical attention, has been found in breach of this obligation.<sup>120</sup>

Although the Human Rights Committee, unlike the Strasbourg Court, has developed a test applicable to asylum detention providing detailed guidance as for what the requirement of 'necessity' generally entails, the case law fails to specify particular grounds that may be deemed legitimate to justify custodial measures in an individual case. Automatic detention, being in itself non-amenable to compliance with the 'necessity'

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<sup>109</sup> *Ibid.*, paras. 5 and 7.

<sup>110</sup> HRC 03.04.1997, *A v Australia* (Comm. No. 560/1993), paras. 9.2. to 9.4.

<sup>111</sup> In the case of Jalloh, the Human Rights Committee accepted the lawfulness of detention, 'because [the applicant] had [himself] evaded expulsion before'. See HRC 15.04.2002, *Samba Jalloh v The Netherlands* (Comm. No. 794/1998), para. 8.2.

<sup>112</sup> HRC 28.10.2002, *C v Australia* (Comm. No. 900/1999), para. 4.23.

<sup>113</sup> *Ibid.*, para. 8.2.

<sup>114</sup> HRC 06.08.2003, *Baban v Australia* (Comm. No. 1014/2001), para. 7.2.

<sup>115</sup> HRC 13.11.2006, *Danyal Shafiq v Australia* (Comm. No. 1324/2004), para. 7.4.

<sup>116</sup> HRC 03.04.1997, *A v Australia* (Comm. No. 560/1993), para. 9.4.

<sup>117</sup> HRC 29.10.2003, *Bakhtiyari v Australia* (Comm. No. 1069/2002), para. 9.3.

<sup>118</sup> HRC 28.10.2002, *C v Australia* (Comm. No. 900/1999), para. 8.4.

<sup>119</sup> HRC 12.05.2004, General Comment No. 21, paras. 3 and 4.

<sup>120</sup> HRC 26.07.2004, *Madafferi v Australia* (Comm. No. 1011/2001) (detention against medical opinion); HRC 21.07.1983, *Luyeye v Zaire* (Comm. No. 90/1981) (obligation to sleep on the floor in a small cell with no permission for family contact); HRC 22.03.1991, *Parkanyi v Hungary* (Comm. No. 410/1990) (very reduced daily time for personal hygiene and outdoor exercise).

requirement, has been rejected. But it is unclear which specific grounds may warrant detention in a non-mandatory regime. The Committee seems to allow a certain flexibility to Contracting Parties in this regard.<sup>121</sup> Arguably, however, the principle of non-arbitrariness also demands that grounds be clearly and narrowly defined so that the individual concerned can predict the concrete application of the law.<sup>122</sup>

### 3.3. Article 31 of the 1951 Geneva Convention: 'Necessary' does not mean 'convenient'

Aware of the fact that a refugee's departure from his own country 'is usually a flight', the drafters of the Geneva Convention understood that he 'is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge'.<sup>123</sup> Today, '[t]he combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents'.<sup>124</sup> Against this background, article 31 of the Geneva Convention (GC) exonerates from penalties a particular category of refugees who enter unlawfully the country of refuge. Not all refugees can benefit from article 31, only those who fulfil a number of conditions. Coming directly from a territory where their life or freedom is threatened, those who make themselves known to the authorities within a reasonable time upon arrival and show good cause for their illegal entry shall be free from penalization. The others may be liable to prosecution on the same basis as other illegal entrants.<sup>125</sup>

Without requiring any particular level of attachment to the asylum State, the provision concerns not only recognised refugees, but also 'presumptive refugees'<sup>126</sup> or asylum seekers.<sup>127</sup> The goal of this clause is, precisely, to provide an incentive to the regularization of their status.<sup>128</sup> For that purpose, the conditions required should not be interpreted too rigidly. 'Without delay' should not be construed as imposing an obligation on refugees to report to the authorities immediately on entry. Fix deadlines for the introduction of an asylum claim are contrary to this provision.<sup>129</sup> Similarly, 'good cause' should be interpreted broadly. Having a well-founded fear of persecution is generally accepted as a good cause.<sup>130</sup> Fear of *refoulement* at the border has also been deemed a sufficient reason.<sup>131</sup> The more contentious condition is that of 'coming directly'. After a meticulous analysis of the *travaux préparatoires* on this aspect, Hathaway concludes that there was an agreement among the drafters that, alongside those strictly 'coming directly' from a country of persecution, two categories of refugees would equally be covered: those transiting through or spending short periods of time in

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<sup>121</sup> In the case of *D and E*, the Human Rights Committee seemed to accept that an initial period of detention could be validly justified 'for instance for purposes of ascertaining identity and other issues'. See HRC 09.08.2006, *D and E and their two children v Australia* (Comm. No. 1050/2002), para. 7.2.

<sup>122</sup> See again HRC 23.07.1990, *van Alpen v The Netherlands* (Comm. No. 305/1988), para. 5.8: "arbitrariness" [...] must be interpreted [...] to include elements of inappropriateness, injustice and *lack of predictability*' (emphasis added).

<sup>123</sup> Draft Report of the *Ad Hoc* Committee on Refugees and Stateless Persons (E/AC.32.L.43.), 24.08.1950, p. 9.

<sup>124</sup> *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765; [2001] Q.B. 667, per Simon Brown LJ.

<sup>125</sup> Art. 31(1) GC: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

<sup>126</sup> *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765; [2001] Q.B. 667, per Simon Brown LJ.

<sup>127</sup> This interpretation is necessary to take account of the declaratory nature of refugee status. In this regard, see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1999), para. 28: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee'.

<sup>128</sup> UN Department of Social Affairs, *A Study of Statelessness* (E/1112), 01.02.1949, p. 20: 'In actual fact, the [refugee], since he cannot enter the territory of a State lawfully, often does so clandestinely. He will then lead an illegal existence, avoiding all contact with the authorities and living under the constant threat of discovery and expulsion. The disadvantages of this state of affairs, both to himself and for the country on whose territory he happens to be, are obvious'.

<sup>129</sup> Turkey was condemned for the introduction of a 3-day period to seek asylum in domestic law as running counter 'the protection of the fundamental values embodied in article 3 [ECHR]' in ECtHR 11.07.2000, *Jabari v Turkey* (Appl. No. XXX).

<sup>130</sup> Statement by Mr Hoare (A/CONF.2/SR.14), 10.07.1951, para. 7.

<sup>131</sup> Swiss Federal Court 17.03.1999 (Dec. 6S.737/198/bue, ASYL 9/2).

other countries before arrival as well as those compelled to flee a country of first asylum because of a threat of persecution.<sup>132</sup> Goodwin-Gill similarly contends that the drafting history of this provision illustrates that the notion '[was] not intended to deny protection to persons in analogous situations. On the contrary, [it] shows clearly only a small move from an "open" provision on immunity [...], to one of slightly more limited scope, incorporating references to refugees "coming directly from a territory where their life or freedom was threatened"'.<sup>133</sup> The clause was introduced to meet a punctual concern by France that those who had already 'found asylum' should not be allowed 'to move freely from one country to another without having to comply with frontier formalities'.<sup>134</sup>

With regard to 'such refugees', Contracting Parties reserve the right to apply 'necessary police measures regarding their 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'.<sup>135</sup> Under the final wording of article 31(2) GC, States may not apply restrictions to their movements other than those which are rigorously 'necessary'. States may accordingly have recourse to provisional detention only on an exceptional basis, until the status of refugees fulfilling article 31(1) criteria is 'regularized' in the country of asylum or until they obtain admission into another country. 'Regularization' in this context does not relate to the final recognition as a refugee or to acceptance for permanent settlement. It occurs 'when a refugee has met the host State's requirements to have his or her entitlement to protection evaluated'.<sup>136</sup> Otherwise, there would be a conflict between this clause and article 26 GC, granting a right to freedom of movement to refugees 'lawfully in' the country of asylum. Hathaway's argument that this interpretation is required if 'lawfully in' is to be differentiated from the higher level of attachment to the country of asylum denoted by the term 'lawfully staying' in other articles of the Refugee Convention is persuasive.<sup>137</sup>

The drafters envisioned that 'such refugees', being 'completely unknown persons unattached to any territory', could be detained 'for a few days, to obtain information on them'.<sup>138</sup> It was argued that Governments should be allowed to resort to 'provisional detention that might be necessary to investigate the circumstances in which a refugee had entered a country'.<sup>139</sup> But it was clear that detention, as any other restriction of movement under article 31(2) GC, had to be demonstrably 'necessary'. In the original draft Convention submitted by the UN Secretary General to the *Ad Hoc* Committee for discussion, it was advanced that a State Party be authorized to apply such restrictions 'as it may deem necessary'.<sup>140</sup> After negotiations, however, the final text of article 31(2) GC only authorizes restrictions 'which are necessary'. And 'necessary' in this framework does not mean 'reasonable' or 'convenient', as Grahl-Madsen observed.<sup>141</sup> That an action is 'necessary' entails that 'it is essential or indispensable' to the purpose pursued.<sup>142</sup> Detention was considered exceptional by the drafters. Thus, the provision is 'couched in terms of exceptionality'.<sup>143</sup> Consequently, only strict circumstances justify such an interference with an asylum seeker's right to liberty.

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<sup>132</sup> J. C. Hathaway, *The Rights of Refugees under International Law* 393-399 (Cambridge: CUP, 2005).

<sup>133</sup> G. S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in: E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 189 (Cambridge: CUP, 2003).

<sup>134</sup> Statement by Mr Colemar (A/CONF.2/SR.13), 10.07.1951, para. 13.

<sup>135</sup> Belgian-American draft of art. 31 (E/AC.32/L.25), 02.02.1950.

<sup>136</sup> J. C. Hathaway, *supra* note 132, p. 417.

<sup>137</sup> Note in this framework the statement by Mr. Rain of France (E/AC.32/SR.15), 27.01.1950, para. 17 that: '[a]ny person in possession of a residence permit was in a regular position. In fact, the same was true of a person who was not yet in possession of a residence permit but who had applied for it and had the receipt for that application. *Only those persons who had not applied, or whose applications had been refused, were in an irregular position*' (emphasis added).

<sup>138</sup> Statement by Mr. Rochefort of France (A/CONF.2/SR.35), 25.07.1951, para. 11.

<sup>139</sup> Statement by Mr. Hoare of the UK (A/CONF.2/SR.35), 25.07.1951, para. 12.

<sup>140</sup> UN Secretary General, Memorandum (E/AC.32/2), 03.01.1950, para. 45.

<sup>141</sup> A. Grahl-Madsen, *The Status of Refugees in International Law* Vol. II 418 (Leiden: Sijthoff, 1972).

<sup>142</sup> J. Hughes and F. Liebaut, *Detention of Asylum seekers in Europe: Analysis and Perspectives* 151 (The Hague: Kluwer Law International, 1998).

<sup>143</sup> *Ibid.*, p. 148.

However, the Convention does not define what constitutes a necessary restriction to the movement of article 31(1) refugees. 'Article 31 does not provide a list of policy reasons that are "necessary", nor does it provide any criteria for that term'.<sup>144</sup> This reflects a certain margin of appreciation which is left to State Parties in this connection. Yet, it has been posited that the notion of necessity 'limits both the extent of any restrictions imposed and the reasons for such restrictions'.<sup>145</sup> Therefore, too open-ended grounds for detention would run counter the rationale of article 31 GC. UNHCR EXCOM Conclusion 44 provides for detention to verify identity, to determine the elements on which the asylum claim is based, in case of destruction of documentation or use of false papers with intent to mislead, or to protect national security or public order.<sup>146</sup> In light of subsequent State practice, found regularly at variance with proportionality standards,<sup>147</sup> it is not obvious that these grounds are narrow enough to prevent arbitrary practices of automatic detention from arising, which is precisely what article 31 GC seeks to avoid.

'Necessity' requires a focus not only on grounds but also on the nature of restrictions. If the presumptive right of asylum seekers to liberty is to be honoured, and if only such restrictions as are truly necessary may be imposed, a strict proportionality rule shall govern in every particular case. Under these conditions, recourse to detention to foreclose illegal immigration should be had only as a last resort, where less intrusive means reveal inappropriate. 'Every restriction thus requires a precise balancing between the right to freedom of movement and those interests to be protected by the restriction. Consequently, a restriction is "necessary" when [both] its severity and intensity are proportional'.<sup>148</sup> Under the terms of article 31 GC, taking account of the object and purpose of the Geneva Convention, possible alternatives to detention shall be considered first. UNHCR suggests residence requirements, provision of a guarantor or surety, release on bail, and accommodation in open centres, as viable substitutes for detention that Contracting Parties should implement if article 31 GC is to be observed in good faith.<sup>149</sup>

### 3.4. Article 6 of the EU Charter of Fundamental Rights: The need of consistent interpretation

Article 6 of the EU Charter of Fundamental Rights (EUCFR) establishes that 'everyone has the right to liberty and security of person'. At face value, there is no provision for immigration detention. However, according to the Presidium's explanations,<sup>150</sup> guiding the interpretation of the Charter,<sup>151</sup> the rights that article 6 EUCFR guarantees correspond to those enshrined in article 5 ECHR, including paragraph 1(f).

With regard to limitations, in accordance with article 52(3) EUCFR, article 6 EUCFR shall be construed as having the same meaning and scope of article 5 ECHR. What article 52(3) does not permit is that the limitations that may be imposed on article 6 EUCFR 'exceed those permitted by the ECHR'.<sup>152</sup> But it leaves a margin for the provision of 'more extensive protection' in EU law.

Together with this specific rule, aimed primarily at ensuring the necessary consistency between the Charter and the ECHR,<sup>153</sup> article 52 EUCFR contains other paragraphs which equally govern the 'scope and interpretation' of the rights contained in the Charter. Paragraph 1 is particularly relevant for our purposes. It establishes 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*

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<sup>144</sup> A. T. Naumik, 'International Law and Detention of US Asylum Seekers: Contrasting *Matter of D-J-* with the United Nations Refugee Convention', 19 *IJRL* 687(2008).

<sup>145</sup> *Attorney General v Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, 16.04.2003), para. 259.

<sup>146</sup> UNHCR, EXCOM Conclusion No. 44 (XXXVII), *Detention of Refugees and Asylum Seekers*, 13.10.1986, para. b. Note that the UN General Assembly has endorsed it in Resolution 44/137 (A/RES/44/137), 15.12.1989, para. 5.

<sup>147</sup> See case law of the European Court of Human Rights and the Human Rights Committee above.

<sup>148</sup> G. S. Goodwin-Gill, *supra* note 133, p. 223 (references omitted).

<sup>149</sup> UNHCR's Guidelines, Guideline 4, pp. 5-6.

<sup>150</sup> Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 [*EUCFR Explanations* hereinafter].

<sup>151</sup> Recital 5 of the Preamble, art. 52(7) EUCFR and art. 6(1) Treaty on European Union, [2010] OJ C 83/13.

<sup>152</sup> EUCFR Explanations, p. 19.

<sup>153</sup> *Ibid.*, p. 33.

*proportionality*, limitations may be made only if they are *necessary* and genuinely meet objectives of general interests recognised by the Union or the need to protect the rights and freedoms of others'.<sup>154</sup>

The Charter does not establish any hierarchy among the different paragraphs of article 52. Yet, some authors consider that for the rights in the Charter that are equivalent to an ECHR entitlement, paragraph 3 should take precedence as a sort of *lex specialis*.<sup>155</sup> A better approach, however, is one that ensures compliance with both paragraphs simultaneously, taking account of the last proviso of paragraph 3 that EU law may provide more extensive protection than the ECHR.<sup>156</sup> After all, the point of paragraph 3 is to avoid divergences in the interpretation of equivalent rights while safeguarding compliance with autonomous requirements in EU law,<sup>157</sup> not to preclude a progression in the level of protection. The only appropriate way in which both provisions can be taken into account is through a 'higher standards' approach.<sup>158</sup> Thus, for the purposes of asylum detention, not only the *Saadi* standards of non-arbitrariness should apply, pursuant to article 52(3) EUCFR, but also the 'necessity' and 'proportionality' conditions required by article 52(1) EUCFR. Any other interpretation would put at risk compliance with these general tenets of EU law.<sup>159</sup>

The principle of proportionality is well-established in the case law of the Luxembourg Courts.<sup>160</sup> It derives directly from the rule of law,<sup>161</sup> which in turn constitutes one of the foundational values of the Union.<sup>162</sup> As the principle fulfils a number of different functions, being used as a ground of review of EU rules, as a standard of revision of national measures, and as a norm governing the delimitation of EU competences, the ECJ has adopted a flexible approach in its regard. Depending on the function it fulfils, the principle entails varying degrees of scrutiny. Although the approach of the Court has not always been consistent,<sup>163</sup> as a measure of review of Community acts with an impact on fundamental rights, the principle generally requires that 'the individual should not have his freedom of action limited beyond the degree necessary in the public interest'.<sup>164</sup> Proportionality in this context involves a dual measure: a suitability requirement and a necessity test. Consequently, the means employed by the Community measure at hand have to be appropriate to achieve the legitimate objective it pursues. At the same time, the chosen means must be the least restrictive possible. If less onerous alternatives are available, those must be preferred. '[R]estrictions may be imposed on the exercise of fundamental rights [...] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights'.<sup>165</sup>

The 'higher standards' approach has been endorsed by the Grand Chamber of the ECJ in *Kadzoev*.<sup>166</sup> The case concerns the first reference for a preliminary ruling on the interpretation of article 15 of the Return

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<sup>154</sup> Emphasis added.

<sup>155</sup> R. Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union' 8 *ELJ* 496 (2002); P. Lemmens, 'The Relation Between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights: Substantive Aspects' 8 *Maastricht Journal of Eur. and Comp. L* 54-55 (2001).

<sup>156</sup> K. Lenaerts and E. de Smijter, 'The Charter and the Role of the European Courts', 8 *Maastricht Journal of Eur. and Comp. L* 98 (2001) and 'A Bill of Rights for the European Union', 28 *CMLRev* 292-293 (2001).

<sup>157</sup> L. Burgorgue-Larsen, 'Article II-112 – Portée et interprétation des droits et des principes', in : L. Burgorgue-Larsen, A. Levade and F. Picod (eds.), *Traité établissant une Constitution pour l'Europe* Partie II 674-678 (Bruxelles : Bruylant, 2005). See also G. Braibant, *La Charte des droits fondamentaux de l'Union européenne* 261-262 (Paris : Seuil, 2001).

<sup>158</sup> S. Peers, 'Taking Rights Away? Limitations and Derogations', in: A. Ward and S. Peers (eds.), *The European Union Charter of Fundamental Rights* 164-171 (Oxford: Hart Publishing, 2004).

<sup>159</sup> Art. 6(3) TEU.

<sup>160</sup> For a review see: T. Tridimas, *The General Principles of EC Law* 89-123 (Oxford: OUP, 1999); F. G. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law', in: E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* 1-21 (Oxford: OUP, 1999).

<sup>161</sup> ECJ 28.03.1974, *Nold* [1974] ECR 491.

<sup>162</sup> Art. 2 TEU.

<sup>163</sup> For a detailed review of 'the Community approach to limiting rights', as opposed to the ECHR technique in arts. 8-11, see S. Peers, *supra* note 158, pp. 142-152.

<sup>164</sup> ECJ 17.12.1970, *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>165</sup> ECJ 13.04.2000, *Karlsson* [2000] ECR I-02737, para. 45.

<sup>166</sup> ECJ 30.11.2009, *Kadzoev* C-357/09 PPU (not yet reported).

Directive.<sup>167</sup> Article 15 of the Directive regulates immigration detention prior to removal. In accordance with the principle of proportionality enshrined in recital 16 of the Preamble,<sup>168</sup> paragraph 1 establishes that detention may be resorted to only where no less coercive measures can be applied effectively, in order to prepare the return, when there is a risk of absconding or a lack of cooperation of the third-country national concerned. Detention, in those circumstances, must be for the shortest period possible and may only be maintained as long as removal proceedings are in progress and are being executed with due diligence. Against this background, and considering that article 15 of the Directive ‘serve[s] the purpose of limiting the deprivation of a person’s liberty’,<sup>169</sup> the Court observes that ‘the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is *necessary* to ensure successful removal’.<sup>170</sup> Taking the ECHR as a basis, the provision is interpreted as going, however, beyond what *Chahal* or *Saadi* strictly require.<sup>171</sup>

In the same vein, the Court interpreted strictly the limitations to liberty allowed by article 15 of the Return Directive. According to paragraph 4, the lack of a reasonable prospect of removal shall prompt immediate release, as detention in such a case would no longer be justified. Pursuant to paragraphs 5 and 6, detention can only be maintained for as long as the conditions established in paragraph 1 are fulfilled and it may never exceed a total of 18 months. The ECJ hold the view that ‘[a]rticle 15(6) of Directive 2008/115 in no case authorises the maximum period defined in that provision to be exceeded’.<sup>172</sup> The grounds adduced by the government for that purpose could not be taken into account. The Court established very clearly that, in the absence of explicit provision thereof, ‘[t]he possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of [these] circumstances [...] can therefore constitute in itself a ground for detention under the provisions of that directive’.<sup>173</sup>

The same strict approach towards limitations has been maintained in *Chakroun*. The Court took support in the principle of effectiveness to establish that the margin of manoeuvre authorised to Member States by the Family Reunification Directive<sup>174</sup> ‘must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification and the effectiveness thereof’.<sup>175</sup>

When interpreting its provisions, besides favouring a harmonious construction between ECHR standards and the autonomous requirements of Union law, the Charter invites both the EU institutions and the Member States when implementing EU rules<sup>176</sup> to take account of the ‘international obligations common to the Member States’.<sup>177</sup> Article 53 EUCFR stipulates that ‘nothing’ in the Charter should 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’. This clause enshrines a principle of non-regression. According to Braibant, its impact, when a provision of international law affords a higher standard of protection,

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<sup>167</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

<sup>168</sup> Recital 16 of the Preamble to the Directive establishes that: ‘The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient’.

<sup>169</sup> ECJ 30.11.2009, *Kadzoev* C-357/09 PPU, para. 56.

<sup>170</sup> *Ibid.*, para. 64 (emphasis added).

<sup>171</sup> Art. 52(4) EUCFR offers an additional implicit example of the ‘higher standards’ approach. The clause provides that ‘in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions’. According to the Explanations, under this provision, ‘rather than following a rigid approach of “lowest common denominator”, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union’.

<sup>172</sup> ECJ 30.11.2009, *Kadzoev* C-357/09 PPU, para. 69.

<sup>173</sup> *Ibid.*, para. 70.

<sup>174</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

<sup>175</sup> ECJ 04.03.2010, *Chakroun* C-578/08 (not yet reported), para. 43. See also paras. 47 and 64.

<sup>176</sup> Art. 51 EUCFR: ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are implementing Union law’.

<sup>177</sup> Recital 5 of the Preamble to EUCFR.

translates in the application of that provision over the Charter in the case concerned.<sup>178</sup> This interpretation takes article 53 EUCFR as a 'règle de conflit'. The truth, however, is that in the field of human rights protection, more than being in opposition, EU law and international standards overlap. This is why approaching article 53 as a rule of consistent interpretation seems more adequate.<sup>179</sup> This reading conforms better with the idea expressed in the Preamble that the Charter 'reaffirms' human rights 'as they result, in particular, from the constitutional traditions and international obligations common to the Member States'<sup>180</sup> and pays due attention to the relevant norms of interpretation contained in the Vienna Convention on the law of treaties.<sup>181</sup> In addition, as the ECJ has consistently upheld, together with the principle of proportionality, human rights 'form an integral part of the general principles of [EU] law'. As a result, 'respect for human rights is a *condition of the lawfulness of Community acts*'.<sup>182</sup> Therefore, integrating the requirements of international instruments of human rights protection in the reading of the Charter provisions reinforces their legitimacy.<sup>183</sup>

The ECJ recognises that the International Covenant on Civil and Political Rights 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'.<sup>184</sup> However, its attitude towards that instrument has been ambivalent thus far. In cases in which the ECHR standard of protection follows the one contained in the Covenant, the Court has sought to ensure compliance with both instruments.<sup>185</sup> But in cases of differing degrees of protection the Court has preferred to endorse the ECHR standard.<sup>186</sup> With the EU Charter of Fundamental Rights in force, and in light of the foregoing considerations on articles 52(1) and 53 EUCFR, today the articulation between article 6 EUCFR and the Covenant should privilege the adoption of a 'higher standards' approach. The guarantees concomitant to article 9 ICCPR identified by the Human Rights Committee in its jurisprudence on asylum detention should be taken into account when delimiting the scope of permissible limitations to the right to liberty enshrined in article 6 EUCFR.

With regard to the Geneva Convention, the case for consistent interpretation following a 'higher standards' rule is even stronger. It is the Treaty on the Functioning of the EU itself that requires the development of a common policy on asylum to 'be in accordance with the Geneva Convention'.<sup>187</sup> In case of a conflict of standards, the Vienna Convention on the law of treaties establishes that 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.<sup>188</sup> Respect for the rules of the Geneva Convention should not be confined to article 18 EUCFR on the right to asylum, though. The interpretation of other rights in the Charter must also conform to the Geneva Convention when they apply to refugees. Therefore, as applied to refugees and asylum seekers, article 6 EUCFR on the right to liberty shall be read in conjunction with the requirements of article 31 GC.

#### 4. Conclusions: The implications of the 'necessity' requirement for asylum detention in the EU

The combined effect of article 5 ECHR, article 9 ICCPR, article 31 of the Geneva Convention, and article 6 of the EU Charter of Fundamental Rights requires that the regulation of asylum detention in the EU

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<sup>178</sup> G. Braibant, *supra* note 157, p. 267-269.

<sup>179</sup> This argument is put forward by L. Azoulay in 'Article II-113 – Niveau de protection', in : L. Burgogues-Larsen, A. Levade and F. Picod (eds.), *Traité établissant une Constitution pour l'Europe* Partie II 689-714 (Bruxelles : Bruylant, 2005).

<sup>180</sup> Recital 5 of the Preamble to EUCFR.

<sup>181</sup> According to art. 31(3)(c) VCLT, when interpreting a treaty, '[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties'.

<sup>182</sup> ECJ 03.09.2008, *Kadi* [2008] ECR I-06351, paras. 283-284 (emphasis added).

<sup>183</sup> On this point see: L. F. M. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *CMLRev* 629 (1998).

<sup>184</sup> ECJ 27.06.2006 *European Parliament v Council* [2006] ECR I-5769, para. 37. See also ECJ 14.02.2008, *Dynamic Medien* [2008] ECR I-505, para. 39.

<sup>185</sup> ECJ 18.10.1989 *Orkem* [1989] ECR 3283; ECJ 18.10.1990 *Dzodzi* [1990] ECR I-3763.

<sup>186</sup> ECJ 17.02.1998 *Grant* [1998] ECR I-621.

<sup>187</sup> Art. 78(1) Treaty on the Functioning of the European Union, [2008] OJ C 83/47.

<sup>188</sup> Art. 30(2) VCLT.

accommodates the requirements of legality, necessity, predictability, and proportionality. General policy arguments of administrative convenience should be rejected, as grounds insufficient to warrant detention in a particular case. When limiting the right to liberty of refugees, upon an individual examination, the least onerous alternative should always be preferred. Limitations, in turn, should be interpreted restrictively, so that the essence of the right to liberty remains untouched. Grounds, procedures and time-limits of detention should be provided by law. Access to adequate procedural guarantees and effective judicial review should also be ensured.

The default position should be a presumption of liberty, independent of a right of entry. 'Even if entry [is] illegal',<sup>189</sup> a right to liberty should be predicated of every individual. On the basis of article 31 GC, those refugees who enter illegally, arriving directly from peril on account of a well-founded fear of persecution, and who submit an application for asylum in accordance with domestic and EU law within a reasonable period of time after arrival, should not be subject but to limitations of free movement which are strictly necessary. Therefore, as established under current provisions of EU law, 'a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force'.<sup>190</sup> And in accordance with article 18 of the Procedures Directive, 'Member States shall not hold a person person in detention for the sole reason that he is an applicant for asylum'. This is why, the delimitation of permissible grounds on which asylum seekers may be deprived of their liberty have to be narrowly defined.

However, under article 8 of the proposed Reception Conditions Directive recast, detention may be ordered on a wide variety of grounds: (a) to determine identity or nationality; (b) to establish the elements on which the asylum application is based 'which in other circumstances could be lost'; (c) in the framework of a preliminary procedure to decide on the right to enter the territory of the Member State concerned; and (d) when public order or national security so requires.

At face value, ground (a) looks uncontroversial, but it should make the object of a narrow construction to avoid an excessive use of detention in any particular case. Considering that Schengen norms do not provide refugees and asylum seekers with specific legal channels to access international protection in the EU and that they are generally in no position to comply with normal entry requirements,<sup>191</sup> it has been estimated that in 90% of the cases access is gained irregularly.<sup>192</sup> In those cases, where recourse is frequently made to false documents, identity and nationality may automatically be in dispute. Thus, the risk ensues that in a very high number of instances detention be claimed to be necessary to verify identity, giving rise to practices of *de facto* systematic asylum detention. UNHCR's Guidelines propose, therefore, that in cases in which asylum seekers have destroyed their papers or have made use of forged documents, '[w]hat must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process'.<sup>193</sup> It should be the intention to mislead, or the refusal to cooperate with the authorities what should warrant detention in those cases. However, this does not emerge straightforwardly from the proposed wording of ground (a). Equally, grounds (b) and (c) may create an additional risk of systematic deprivation of liberty. Ground (b), if left unqualified, could be interpreted as justifying detention for the whole duration of the asylum process, running counter the notion of 'regularization' enshrined in article 31(2) of the Geneva Convention. This is why it has been posited that the words 'within the context of a preliminary interview' be inserted in the

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<sup>189</sup> HRC 03.04.1997, *A v Australia* (Comm. No. 560/1993), paras. 9.2. to 9.4.

<sup>190</sup> Recital 9, Return Directive.

<sup>191</sup> See generally art. 5 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1.

<sup>192</sup> ECRE, 'Broken Promises – Forgotten Principles: ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999 – Brussels 2004', June 2004, p. 17, available at: [http://www.ecre.org/resources/policy\\_papers/228](http://www.ecre.org/resources/policy_papers/228).

<sup>193</sup> UNHCR's Guidelines, Guideline 3, p. 4.

text of ground (b),<sup>194</sup> in conformity with UNHCR's Guidelines.<sup>195</sup> The absolute end-point of detention should be a decision on the admissibility of the claim. On the other hand, ground (c) leaves unpronounced the situations that it intends to address, whether at the border or within the territory of the Member State concerned. A systematic interpretation may lead us to conclude that only situations in which border procedures apply are envisaged. This conclusion is plausible. Recital 16 of the Procedures Directive – 26 in the recast proposal – notes, in this connection, that 'many asylum applications are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant'. Without further specification, the letter of ground (c) could result in the automatic detention of all applicants channelled through border procedures. In addition, it may create the impression that, beyond status determination proceedings, asylum seekers arriving at the border with insufficient documentation, but fulfilling the requirements of article 31(2) GC, have to undergo a separate process to prove an autonomous right of entry independent from refugee status. Finally, ground (d), authorising detention 'when protection of national security and public order so requires', if interpreted in larger terms than those permitted by the different paragraphs of article 5(1) ECHR may well amount to a frontal violation thereof. Preventive detention without criminal charges on account of undefined public order constrictions has already been deemed in breach of the Convention.<sup>196</sup>

If, as proposed by the Council, the 'risk of absconding' is added to the list of permissible grounds for detention, either in general terms or limited to securing Dublin transfers, a clear definition based on objective and measurable criteria of such a concept should be introduced to ensure predictability. Proposed article 2(l) of the revised Dublin Regulation, referring back to national law, establishes simply that "'risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant [...] subject to a transfer decision may abscond'. If such a solution would be maintained, it will not be possible to avoid the risk of proliferation of 27 different concepts of 'risk of absconding' with the emergence of a concomitant lack of legal certainty. A joint effort should be made at the stage of negotiations to define in the Directive itself the determining criteria of an individual 'risk of absconding'.

Article 7(2) of the Reception Conditions Directive, which remains unaffected by the recast proposal, leaves it for the Member States 'to decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application'. Permission to leave the assigned place of residence in such cases may be *temporary* and granted only on a case-by-case basis.<sup>197</sup> In light of the Strasbourg jurisprudence, these arrangements may give rise to a regime of *de facto* detention on insufficiently determinate grounds. Administrative convenience should not warrant detention. The provision should be profoundly revised so that agreement with the principle of lawfulness can be guaranteed. In addition, instead of submitting these restrictions on liberty to the general review regime provided for in article 9 of the recast proposal, article 25 reserves an unspecified right of appeal in procedures laid down in national law. However, on account of articles 3 and 31 GC,<sup>198</sup> there is no apparent good reason to grant a less favourable treatment to refugees under restricted residence conditions.

Regarding the duration of custodial measures, it is worth recalling that the principle of legality requires the presence not only of 'clear legal provisions establishing the procedure for ordering and extending detention

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<sup>194</sup> ECRE, Comments on the European Commission Proposal to recast the Reception Conditions Directive, April 2009, p. 7, available at: [http://www.ecre.org/resources/Policy\\_papers/1344](http://www.ecre.org/resources/Policy_papers/1344). See also UNHCR, Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008), March 2009, p. 5, available at: <http://www.unhcr.org/refworld/docid/49ba8a192.html>.

<sup>195</sup> UNHCR's Guidelines, Guideline 3, p. 4.

<sup>196</sup> ECtHR 19.02.2009, *A e.a. v UK* (Appl. No. 3455/05). It is worth to recall here what the ECtHR established in *S.D.*: 'La Cour a eu égard à l'argument du Gouvernement selon lequel la nécessité d'assurer l'efficacité du contrôle de ceux qui entrent illégalement sur le territoire et d'éviter que certains d'entre eux n'abusent des avantages liés à la reconnaissance du statut de réfugié. Ceci ne saurait dispenser les autorités de préciser, après avoir examiné chaque cas particulier, en quoi la mise en liberté du demandeur d'asile constituerait un danger pour l'ordre public ou la sécurité nationale' (in ECtHR 11.06.2009, *S.D. v Greece* (Appl. No. 53541/07), para. 66).

<sup>197</sup> Article 7(4) Reception Conditions Directive Recast Proposal.

<sup>198</sup> Art. 3 GC establishes a general principle of non-discrimination between refugees.

[...]', but also the 'setting [of] time-limits for such detention'.<sup>199</sup> Therefore, if it may be accepted that particular deadlines be established on a case-by-case basis by the judicial authority, as article 9 of the Reception Conditions Directive recast proposal foresees, taking article 15(6) of the Return Directive as a model, it would be advisable that an absolute upper limit of asylum detention be introduced. Also, to minimize the risk of automatic detention, a solid link to article 9 of the Reception Conditions recast proposal should be established in the framework of Dublin detention as well as in the context of custodial measures adopted in border procedures. Otherwise, detention may run unrevised from the moment a decision of transfer is notified to a Dublin applicant until the transfer actually takes place as provided for in article 27(4) of the revised Dublin proposal, or for the entire period of four weeks allowed in article 37(2) of the Procedures Directive recast regulating the border procedure.

From this scrutiny it ensues that the proposed provisions constitute a significant step in the right direction that should be welcome. However, in light of human rights and EU law requirements, non-arbitrariness demands from the EU legislator a stronger effort of justice. A further attempt at the concrete definition of these clauses in full agreement with those requirements has to be undertaken, so that the regime of asylum detention in the EU may be removed from the limbo of uncertainty in which it currently lies.

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<sup>199</sup> ECtHR 22.9.2009, *Abdolkhani and Karimnia v Turkey* (Appl. No. 30471/08), para. 135.