

Reception or Detention Centres? The detention of migrants and the EU ‘Hotspot’ Approach in the light of the European Convention on Human Rights*

Summary

Although the treatment of aliens by state authorities has been consistently under the scrutiny of the *European Court of Human Rights*, the detention of irregular migrants in reception centres has only recently been examined by the *Court*. Given the current refugee and migration crisis in Europe and the policies implemented by states and the *European Union* to address the crisis, it is surprising how little attention this case law has received.

In this article, I analyse the obligations of European states concerning the reception centres of migrants and asylum seekers under the *European Convention on Human Rights* and I review how these obligations were interpreted by the *Strasbourg Court*. Accordingly, the article first analyses the applicable legal framework of the Convention and then proceeds by classifying the case law on the issue of detaining aliens. Two main legal issues arise respectively: First, the criteria for the establishment of reception centres where migrants can be detained and the legal basis for the detention of aliens therein. As many states detain aliens in an attempt to deal with the ongoing migration crisis, I argue that administrative practices alone, without a statutory provision or established case law, are insufficient legal bases for the detention of people at reception centres. Second, whether the exceptional character of the current crisis may play a role when adjudicating cases of detention of aliens. The case law suggests that although the *Court* takes into consideration the multiple challenges that states confront, the latter cannot deviate from their obligations under the convention, using these challenges as an excuse.

During the analysis, I address the distinction between the right to liberty under Article 5 of the Convention and the right to liberty of movement, enshrined in Protocol 4, with the aim of investigating whether the latter may be applicable in cases of detention of aliens. I argue that under certain conditions the right to liberty of movement may be applicable in cases of detention of people who enter a member state irregularly. Finally, the article reviews the EU ‘Hotspot’ approach adopted in 2015 by the *European Commission* to address emergencies at the European borders. Although this new policy has yet to be fully implemented, it poses interesting legal questions regarding the responsibility of *European Union* member states in the light of the *European Convention on Human Rights*. Despite the coordinating efforts of the EU to address the crisis, the responsibility for the conditions at reception centres still lies with the member states.

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I. Introduction

The way in which European states have handled emergency situations at their borders has had a considerable toll on the respect of human rights in *Europe*. The unprecedented flow of migrants and refugees towards *Europe* obliged states to establish extemporeneous facilities, reception centres and other installations in an attempt to contain the flow and to institute procedures for the determination of their status. The extraordinary character of the crisis, however, cannot serve as an excuse for European states to establish informal detention practices for migrants in contravention of the *European Convention on Human Rights* (Convention or ECHR). This was confirmed by the *European Court of Human Rights* (Court, Strasbourg Court or ECtHR) in the case *Khlaifia v. Italy*, concerning informal detention centres in *Lampedusa, Italy*.¹ This case is now pending before the Grand Chamber and, given the current events, it is surprising how little attention the case law on irregular migrants' detention has received.²

The article uses the *European Court of Human Rights* case law to examine the obligations of states regarding the detention of migrants at reception centres under the *European Convention on Human Rights*. The first part focuses on the legal framework of the Convention applicable specifically to the issue of the detention of migrants at reception centres, while the second part analyses the relevant case law. The classification of the case law on the general question of the detention of aliens is based on the HUDOC database and the *Court's* own classification. As the questions of the reception centres and the EU 'Hotspot' approach are very topical, I used mainly primary sources – the judgments of the *Strasbourg Court* – and official documents. During the analysis, I employ the term 'alien' to designate every person who is not national of the member state and the term 'irregular', instead of 'illegal', to define the persons who arrive in a member state either without documents or through irregular means.³

Two main issues drive the analysis. First, what constitutes a sufficient legal basis for the detention of migrants in reception centres and second, the current migration crisis before the ECtHR. I argue that national administrative practices solely, in the absence of clear statutory provisions or established case law, cannot serve as a legal basis for depriving people of their liberty if they enter European territory irregularly. The case law of the *Strasbourg Court* confirms that despite the challenges, states must abide by their obligations under the Convention and specifically respect the guarantees of the right to liberty, and, under certain caveats, the right to liberty of movement. I conclude that this recent case law, by invoking the concept of human dignity, promotes a dynamic interpretation of the Convention as a living instrument, whose guarantees on liberty of person apply to all, irrespective of their nationality, refugee status and residence status. Third country nationals can seek out the *Court* for a more comprehensive protection, even when they are not in need of international protection.

1 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015).

2 See also *L.M. and Others v. Russia* App. nos. 40081/14, 40088/14 and 40127/1415 (ECtHR, 15 October 2015), which is also referred to the Grand Chamber.

3 For an analysis on the terminology in the immigration context, see Stephan Scheel and Vicki Squire, 'Forced Migrants as 'Illegal' Migrants' in Elena Fiddian – Qasmiyah, Gil Loescher, Katy Long and Nando Sigona (eds), *Refugee and Forced Migration Studies* (Oxford University Press 2014) 188.

II. Detaining migrants in reception centres

Migration in *Europe* is framed by public international law,⁴ European Union (EU) law⁵ but also by the *European Convention on Human Rights*. Considering that in many European states the right to an individual petition to an international tribunal exists only under the Convention, the *Court* has an important role to play in safeguarding the rights of both citizens and aliens.⁶ When it comes to arresting or detaining aliens who attempt to enter European territory irregularly, European states need to abide by the requirements laid down in Article 5 of the Convention.

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

The corresponding article in the EU *Charter of Fundamental Rights* (Charter) is Article 6, which is identical in wording: ‘Everyone has the right to liberty and security of person’. In the light of Article 53 of the Charter, which provides that all EU institutions and Member States are obliged to interpret the Charter in light of existing jurisprudence of the ECtHR, only the latter will be the focus of my analysis.⁷ Both articles provide for the right to liberty and security.⁸ The deprivation of liberty under Article 5 contains an objective and a subjective element. The objective element refers to a person’s confinement in a restricted space and for a certain period, while the subjective element corresponds to that person’s lack of consent for the confinement in question.⁹

The guarantees of Article 5 of the Convention are threefold. The article provides for a general right, it lays down the conditions for a permissible deprivation of liberty in exceptional cases and it prescribes certain procedural safeguards.

The general provision protects everyone’s right to personal liberty and security. It does not provide for a right of entry, a right not to be expelled or a general right to asylum to persons whose safety is threatened in their country of origin. The key word in the

4 For a comprehensive analysis see Vincent Chetail, ‘The Human Rights of Migrants in General International Law: from Minimum Standards to Fundamental Rights’ [2013 -2014] 28 Georgetown Immigration Law Journal 1, 225.

5 See particularly Directive 2013/33/EU of The European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection. Particularly Articles 8,9,10 and 11. *OJL 180*, 29.6.2013, p. 96–116.

6 As rightly pointed out by Laurie Berg, ‘structurally international or regional courts are better placed as international treaty law, to articulate international standards that are responsive to the protection needs of migrants’. Laurie Berg, ‘At the Border and Between the Cracks; The Precarious Position of Irregular Migrant Workers Under International Human Rights Law’ 8 Melbourne Journal of International Law 19, 20.

7 Article 53, EU Charter of Fundamental Rights: ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.’

8 See also Articles 3 and 9 of the Universal Declaration of Human Rights.

9 *Storck v. Germany* ECHR 2005 – v. 111, para 74.

general part of the article is ‘everyone’, which entails that all natural persons enjoy the right to liberty, independently to their nationality, age and status. The substantive content of the right to liberty refers to the right of all people, falling within the jurisdiction of a member state, to determine their location and change their physical whereabouts freely. The *Court* has not given any clear indication on the distinction between liberty and security.¹⁰ According to the *Council of Europe*, the word ‘security’ refers to the prohibition of an arbitrary deprivation of liberty.¹¹

The article imposes a positive obligation on states not only to refrain from active infringements of the right to liberty, but also to take appropriate steps to provide protection against any unlawful interference with this right to everyone falling within their jurisdiction.¹² Any deprivation of liberty is automatically unlawful if not covered by the specific reasons provided in the six subparagraphs (a-f) of Article 5§ 1. The starting point for determining whether circumstances amount to an unlawful deprivation of liberty is the first paragraph of Article 5, which lays down the conditions for such deprivation. A procedure prescribed by law must be in place in national jurisdictions, allowing for an arrest or detention only in specific cases. An exhaustive list of exceptions to the prohibition of the deprivation of liberty is provided in the second paragraph, which must be interpreted strictly. The state must justify that the detention relies on one of these six grounds.

Article 5§2-5 provide for procedural rights to any person whose liberty has been deprived, such as the right to be promptly informed, to take proceedings before a court, which must decide speedily upon the lawfulness of the detention, and the right to be compensated for any violation of this article.¹³ These rights are autonomous in that they need to be granted and observed independently to the lawfulness of the arrest or detention. Specifically, the right to be promptly informed on the reasons for the arrest has an autonomous concept under the Convention and exceeds that of a criminal law framework. The detainee must be provided with information relating to the purpose and the justification of the detention, and the applicable national law authorising the detention. Moreover, simply providing information about the legal status of a migrant does not meet the requirements of Article 5§ 2 of the Convention. The legal and factual grounds for the deprivation of freedom must be communicated to the person concerned in a simple language that he understands.¹⁴ Finally, this information must be provided promptly, upon the commencement of the detention and not right before the return, deportation or expulsion.

10 In *Bozano v. France* the Court found that there was a breach of both liberty and security without however explaining the distinction. *Bozano v. France* (1986) Series A no 111, para 54. See also William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 228.

11 Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2010) 143.

12 *El-Masri v. the Former Yugoslav Republic of Macedonia* [GC] 2012 VI 263, para. 239.

13 Article 5§ 3 provides for the right to be brought promptly before a judicial authority specifically in the context of criminal law.

14 *Fox, Campbell and Hartley v. the United Kingdom* App. nos. 12244/86 12245/86 12383/86 (ECtHR, 30 August 1990).

The right to have the detention speedily reviewed by a court and to be compensated for any violation are *lex specialis* to the general right to an effective remedy under Article 13.¹⁵ The legality of the detention is reviewed according not only to domestic law but also to the Convention. The judicial review is limited in controlling the legality of the detention, by an authority, which possess the competence to judge upon this issue. Furthermore, this review must take place speedily, which is a stricter condition than that of ‘reasonable time’, prescribed in Article 6 of the Convention. The judicial review under article 5 (4) touches upon issues of liberty of person, and, thus, it requires a particular standard of diligence.¹⁶

1. Legal basis for the detention of aliens as a border control technique

Regarding the detention of migrants as a border control tool, the exception provided in Article 5, paragraph f is relevant:

The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

This exception rests on two limbs, as it provides two grounds for the detention of aliens. Arrest or detention is permitted either in order to prevent an unauthorized entry into the country or when action is being taken in order to deport or extradite a person. Regarding the first limb, until a state has authorized entry into the country, by granting, for example, a residence permit or accepting an application for asylum, any entry is considered unauthorized for the purposes of Article 5.¹⁷ Such a detention must be carried out in good faith and must be closely connected to the purpose of preventing unauthorised entry. The *Court* noted that its case-law does not provide specific guidelines as to when detention in an immigration context ceases to be covered by the first limb of Article 5 § 1.¹⁸ The second limb is two-pronged, as it introduces the distinction between deportation and extradition. Deportation is the expulsion of a person or group of persons from a place or a country, while extradition is the transfer of criminals or suspects between countries.

Unlike the other grounds listed in Article 5, there is no requirement that the detention is justified as necessary for detaining aliens to prevent their entry or for their expulsion and deportation.¹⁹ That is why the lawfulness of the underlying decision of the depor-

15 *Garabayev v. Russia* App. no. 38411/02 (ECtHR, 30 January 2008) para 108.

16 *Hutchison Reid v. the United Kingdom* ECHR 2003-IV 1, para 79. *Moisseiev c. Russie* App. no 62936/00 (ECtHR, 9 octobre 2008) para 160. *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 94.

17 *Saadi v. the United Kingdom* [GC] ECHR 2008-I 31. *Suso Musa v. Malta* App. no 42337/12 (ECtHR, 23 July 2013). See also Schengen Borders Code, Article 13.

18 *Suso Musa v. Malta* App. no 42337/12 (ECtHR, 23 July 2013), para 97.

19 *Chahal v. the United Kingdom* App. no 22414/93 (ECtHR, 15 November 1996). See contrary Article 9 of the ICCPR, which requires that any deprivation of liberty must be lawful, necessary and proportionate. William Schabas connects the necessity test for the detention of aliens with the assessment of its arbitrariness. William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 243.

tation or extradition is not relevant, neither is the nature of the detention, be it administrative or criminal.²⁰ The provision requires solely the existence of such an order. There is, however, a caveat to the non-application of the necessity test in this paragraph: when national law prescribes that the detention order must be justified as necessary, the *Court* will apply the necessity test to the detention under Article 5 1 f.²¹ The principle of due diligence must also be observed during the proceedings for the removal of aliens.²² Consequently, a deprivation of liberty under Article 5§ 1(f) is justified for as long as deportation proceedings are in progress and are conducted with due diligence.

Article 5 permits states to arrest and detain people when three general requirements are met cumulatively. First, there must be a legal basis in domestic law, authorising the deprivation of liberty. Second, the arrest and detention must comply with a procedure prescribed in national law. Third, state authorities must not act arbitrarily and national law must provide adequate safeguards protecting the detainees from arbitrariness.²³

The principle of legal certainty is paramount when assessing the legal basis for the detention of migrants. Either statutory legislation or established case law authorising the deprivation of liberty must be in place.²⁴ Administrative practices solely, without being based on legal provision or judicial practice, do not constitute a sufficient legal basis.²⁵ The existence of a legal basis does not suffice however. This legal basis must be sufficiently precise to enable individuals to foresee the consequences of a given action. This holds particularly true for diplomatic notes or international treaties between European states and third countries, based on which irregular migrants are returned to these third countries. When there is confusion among the national authorities as to the application of the national provisions, then the latter fall short of the standard under Article 5.²⁶ Therefore, a lack of clarity of the national rules regulating the substantive conditions for a deprivation of liberty violates article 5.

Second, the detention must comply with a procedure prescribed by law. Specifically, the detention must be compatible with national law, EU law and the ECHR. National law must lay down substantive and procedural rules prescribing the conditions for the detention. No gross and obvious irregularities are permitted in the course of issuing a detention order.²⁷ In cases of detention of aliens who await their deportation or extradition, states are required to apply the principle of proportionality and the detention should not last for an unreasonable length of time. The length of the detention is rea-

20 *Nolan and K v. Russia* App. no 2512/04 (ECtHR, 12 February 2009) para 96. See also Article 1 of Protocol 7 of the Convention, which regulates the requirements for a lawful expulsion of aliens.

21 *Rusu v. Austria* App. no 34082/02 (ECtHR, 2 October 2008) para 54.

22 *Quinn v. France* pp no 18580/91 (ECtHR, 22 March 1995). *Singh v. the Czech Republic* [GC] App. no 60538/00 (ECtHR, 25 January 2005). *M. and Others v. Bulgaria* App. no 41416/08 (ECtHR, 26 July 2011) paras. 75 and 76.

23 *Muminov v. Russia* App. no 42502/06 (ECtHR, 11 December 2008).

24 *H.L. v. the United Kingdom* App. no 45508/99 (ECtHR, 5 October 2004) paras 116 et seq. *Laumont v. France* App. no 43626/98 (ECtHR, 8 November 2001) para 51. *A. and Others v. Bulgaria* App. no 51776/08 (ECtHR, 29 November 2011) para 68.

25 *Baranowski v. Poland* ECHR 2000-III 241, paras 54-56.

26 *Nasrulloyev v. Russia* App. no 656/06 (ECtHR, 11 October 2007).

27 Such as when the court issuing the detention order is not competent, or the detainee was not provided a hearing.

sonable when it does not exceed the time required for pursuing its purpose. A detention is also unlawful when there is lack of recording the details of the detention and of the detainees.²⁸

Third, a deprivation of liberty is arbitrary where there has been an element of bad faith or deception on the part of the authorities. This holds particularly true when the national provision is not accessible or foreseeable.²⁹ The notion of arbitrariness, albeit not defined, extends beyond the unlawfulness of the detention under national law. A deprivation of liberty may be in conformity with domestic law, and still be unlawful under the Convention, because it is arbitrary.³⁰ A variety of factors may render the detention arbitrary. Lack of good faith,³¹ of due diligence,³² of a realistic prospect of removal,³³ no provision of a maximum period of detention³⁴ have been considered by the *Court* as rendering the detention arbitrariness.

In the light of the aforementioned, the core principles that apply to any deprivation of liberty under Article 5 may be summarised as follows: the principle of the rule of law, accompanied by the principle of legal certainty which refer to the legal basis of the detention; the principle of due diligence, which refers to the procedure of detention; the principle of proportionality, which refers to the measure in question; and the principle of protection against arbitrariness, which refers to all the legal standards under Article 5 and goes at the heart of the right of liberty.

2. Applying the right to liberty to border control management

In an attempt to contain the migration and refugee flows towards *Europe*, states have adopted the practice of detaining people arriving in their territories irregularly. These practices were the practical response of state authorities, who were unable to face the challenges of the crisis and to keep it under their control. In some instances member states were found unprepared to process the sheer number of arrivals, other cases reflect systemic problems of migration policies in Europe or the effects of the financial crisis. The refugee and migration crisis gave the opportunity to the *Court* to adjudicate upon the protection that member states are obliged to grant not only to refugees and people in need of international protection but also to economic migrants.

According to the *Strasbourg Court*'s established case law, states have the right to control the entry, residence and expulsion of aliens.³⁵ Detention is complimentary to that right.³⁶ The Convention or its Protocols do not provide for the right to asylum. The

28 *Shchebet v. Russia* App. no 16074/07 (ECtHR, 12 June 2008). *Kurt v. Turkey* App. no 24276/94 (ECtHR, 25 May 1998) para 125.

29 *Nolan and K v. Russia* App. no 2512/04 (ECtHR, 12 February 2009).

30 *A. and others v. the United Kingdom* [GC] ECHR 2009 II 137.

31 *Longa Yonkeu v. Latvia* App. no 57229/09 (ECtHR, 15 November 2011).

32 *Singh v. the Czech Republic* [GC] App. no 60538/00 (ECtHR, 25 January 2005).

33 *Mikolenko v. Estonia* App. no 10664/05 (ECtHR, 8 October 2009).

34 *Auad v. Bulgaria* App. no 46930/10 (ECtHR, 11 October 2011) para.128. *Mathloom v. Greece* App. no 48883/07 (ECtHR, 24 April 2012).

35 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 119.

36 Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2010) 136.

treatment, however, of aliens by state authorities may give rise to a series of violations of the Convention. Specifically, regarding the detention of aliens, the *Court's* case law may be classified in four categories: a) migrants detained in transit zones b) violations regarding their detention conditions c) violations of migrants' rights with specific needs, such as children and d) violations regarding the procedural safeguards for challenging the lawfulness of their detention.³⁷

The *Court* takes specific notice of the cumulative effects and the specific allegations of the people concerned, that is the length of their detention, the conditions, the lack of space, access to natural light and open air, private bathroom facilities.³⁸ Accordingly, holding people in transit zones constitutes a deprivation of liberty, falling under the ambit of Article 5.³⁹ Such is the case when the detention at an airport for more than 10 days amounts to inhuman and degrading treatment.⁴⁰ Regarding the detention conditions, they must be appropriate.⁴¹ Police stations were considered to be inappropriate premises for the detention of persons who await the application of administrative measures.⁴² Detaining children in an adult detention centre, even when accompanied by their mothers amounts to a violation of Article 3 of the Convention.⁴³ The deprivation of liberty is unlawful when national courts do not review the conditions under which aliens are held.⁴⁴ Furthermore, if national laws do not lay down a maximum period for the detention of persons whose expulsion had been ordered by the courts, then the right to liberty of person, guaranteed by Article 5 is contravened.

Regarding the detention of aliens as a border control technique, the informal detention of migrants in reception centres may violate several articles of the Convention. The *Court* had the opportunity to determine the lawfulness of the reception centres in the case *Khlaifia v. Italy*. The case, currently pending before the Grand Chamber, originated in an application by Tunisian nationals, who were intercepted at sea by the Italian authorities without possessing the necessary documents, and were transferred to Lampedusa. Initially, the applicants were placed at a reception and accommodation centre – Centro di Soccorso e Prima Accoglienza -, specifically reserved for Tunisian adults. The centre was under permanent surveillance, and the applicants were not allowed to leave the centre or have any contact with the exterior. According to the Amnesty International reports, referred to by the *Court*, the conditions of their detention were appalling, including severe overcrowding, lack of sleeping accommodations and filthy sanitary facilities.⁴⁵ After a fire and a violent riot between migrants took place at the centre, the applicants were transferred to a sports park, from which they managed to escape, only to be subsequently arrested in the village of Lampedusa during protests. After their

37 http://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf.

38 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 123.

39 *Amuur v. France* App. no 19776/92 (ECtHR, 25 June 1996).

40 *Riad and Idiab v. Belgium* App. nos 29787/03 29810/03 (ECtHR, 24 January 2008).

41 *Dougoz v. Greece* App. no 40907/98 (ECtHR, 6 March 2001).

42 *Dougoz v. Greece* App. no 40907/98 (ECtHR, 6 March 2001).

43 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* ECHR 2006 XI.

44 *Garabayev v. Russia* App. no. 38411/02 (ECtHR, 30 January 2008).

45 Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo. *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 35.

placement at the reception centre, then at the airport, they were finally transferred to the port of *Palermo* and placed on moored ships. The applicants were not allowed to leave the ships, while the conditions of their detention thereof were equally appalling. Around 14 days after their first arrival in *Italy*, the applicants were finally returned to *Tunisia*, by virtue of an ad hoc agreement *Italy* had concluded with *Tunisia*.

This case raises two interesting legal issues: a) what constitutes a valid legal basis for the detention of aliens in reception centres, and b) is the crisis that exceptional to allow deviations from state obligations under Article 5?

Italy claimed that the facilities in question were not detention but reception centres, where state authorities provided first aid and basic shelter to irregular migrants and asylum seekers. Indeed, the centres, where the applicants were initially placed in Lampedusa, were called 'initial reception and accommodation centres'.⁴⁶ However, national law provided only for the establishment of 'centres of identification and expulsion', where the detainees were provided with the right to have the legality of their detention reviewed by a *Court*. Consequently, only the detention of aliens in the 'centres of identification and expulsion' had a legal basis under *Italian* law. According to the defendant state, the placement of the irregular migrants in these reception centres was temporary and in their benefit, until their transfer to 'centres for identification and expulsion'. However, a *de facto* transformation of the reception centres into detention centres, without providing people with the right to access a court and the procedural rights of Article 5, led to a violation of the Convention.

In the *Khlaifia* case the *Court* unanimously found a violation of the migrants' right to liberty, and of all its procedural facets under Article 5: the applicants' right to be promptly informed about their detention, their right to have the lawfulness of their arrest and detention reviewed by a court and their right to compensation. The *Court*, by majority, also found a violation of article 3, since the conditions of their detention amounted to a degrading and inhuman treatment, a violation of the prohibition of collective expulsion and violation of the applicants' right to an effective remedy. The state was condemned because the *Italian* authorities had detained the applicants in different places without a legal basis in domestic law. Specifically, the *Court* determined that a) the detention was illegal since there was no domestic legal basis b) the reasons for the detention were not clearly explained to the detainees and c) the detainees were not provided with an avenue through which they could dispute their detention.

To summarize, national law must provide for the possibility of detaining migrants in reception centres. Furthermore, the legal basis for the detention of migrants must be precise and foreseeable. An international treaty between a member state and a third state on the basis of which irregular migrants are arrested and returned to that third state, does not serve as a valid legal basis for the purposes of the Convention, if the content of the treaty is not public, precise and foreseeable. The *Court* found specifically that the international treaty between Italy and Tunisia did not constitute a sufficient legal basis, because the content of the treaty was not public and not foreseeable for the applicants. Additionally, national law must prescribe specifically the establishment of reception centres. The *Court* determined that even when national law provides for the establishment of reception centres, this does not necessarily mean that *in concreto* the aliens are

46 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 7.

not deprived of their liberty unlawfully. Irrespective of the nature or the name of the place where irregular migrants are detained by virtue of domestic law, their deprivation of liberty may be still found unlawful. The detention of each specific individual in these centres must follow a formal decision, and must be subject to a judicial review. In *Khlaifia*, the detention was unlawful because no formal decision placing each individual in detention was taken. In the absence of these requirements, the ‘reception’ of irregular migrants amounts to a *de facto* detention and an unlawful deprivation of liberty. Briefly, the *de facto* detention of aliens at reception centres without a specific and precise domestic legal basis and without a prescribed procedure in law is arbitrary and contravenes Article 5 of the Convention.⁴⁷

Regarding the procedural rights of detained migrants under Article 5§ 2-5, the detention for a period of several days, which has not be ordered by a court or other competent authority with judicial power, cannot be considered lawful under Article 5.⁴⁸ Moreover, any formal order for detention must refer to the factual and legal grounds of the detention, it must provide clear instructions for a judicial review of the legality of the detention, and this information must be provided promptly, upon the commencement of the detention. Furthermore, the detainees must be informed of the specific legal basis that authorises their detention. Finally, the detained migrants need to be able to exercise the procedural rights while they are still in the member state. Therefore, this information cannot be provided to detainees just before their expulsion, deportation.⁴⁹ Accessible and effective remedy constitutes the substance of the procedural safeguards of Article 5§ 2-5.

III. Human dignity as a response to the crisis

Regarding the difficulties that states face handling the migration crisis, it is noteworthy that Italy had declared a state of emergency according to domestic law – *stato di necessita* – at the island of *Lampedusa* due to the specific events that took place at the island at that time. Because of this state of emergency, the placement of the applicants on-board ships at *Palermo* Port, took place without any formal order. The centres of identification and expulsion had reached their maximum capacity, while the repatriation of the *Tunisian* migrants was imminent by virtue of the international agreement between the *Italy* and *Tunisia*. In addition, Italy invoked the security of local population to demonstrate that state authorities would strike a balance between the security of migrants and Italian nationals. The wave of migrants and refugees created severe logistical problems and issues of public order at the island.⁵⁰

Italy, however, never invoked Article 15 of the Convention nor did it claim before the *Court* that the state was facing a public emergency threatening the life of the nation.⁵¹ But even if Italy had declared a state of emergency pursuant to Article 15, no derogation

47 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) paras 71-72.

48 *Shamsa v. Poland* App. no 45355/99 45357/99 (ECtHR, 27 November 2003).

49 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 97.

50 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 125.

51 The concurring judge Keller underlined this omission.

from Article 3 could have been lawful, given that the detention conditions of the migrants at the reception centres amounted to degrading and inhuman treatment.⁵²

The *Court* recognised the tremendous problems and challenges that states confront with the current unprecedented migration and refugee flows in *Europe*. The *Court* acknowledged the multitude of obligations that weigh upon European states because of the crisis. Nevertheless, it was firm in asserting that no exceptional factor absolves states from their obligation to apply the guarantees of the convention regarding the right to liberty. Interestingly, the *Court* connected the detention conditions of irregular migrants with the concept of human dignity. Providing basic living conditions to people who are deprived of their liberty is a core requirement for the protection of their human dignity.⁵³

Ces facteurs ne peuvent cependant pas exonérer l'État défendeur de son obligation de garantir que toute personne qui, comme les requérants, vient à être privée de sa liberté puisse jouir de conditions compatibles avec le respect de sa dignité humaine.

Human dignity encompasses the fundamental axiom that human rights originated from the inherent dignity of every human being.⁵⁴ This concept proves to be a useful tool for the *Court* to stress that the Convention protects human beings and not citizens, specifically not nationals of member states.⁵⁵ Although there is no reference to human dignity in the Convention, the *Court* has invoked human dignity specifically in cases of deprivation of liberty. The *Court* asserts that the Convention requires the respect of human dignity of people who have lost their autonomy and are deprived of their liberty. In the case *Kudla v. Poland*, the Grand Chamber accepted that detention as a measure inherently and unavoidably contains a certain degree of suffering and that states must ensure that the detention circumstances and conditions do not exceed that degree.⁵⁶ Although this unavoidable level of suffering *per se* may not infringe Article 3, states must nevertheless ensure that all prisoners are detained in conditions which are compatible with respect for their human dignity.⁵⁷ Furthermore, states violate the detainees' human dignity by transferring people to reception centres which are already over capacity.⁵⁸ It is particularly the overcrowded conditions in reception centres which have a negative impact on the human dignity of the detainees.

52 See the partly dissenting opinion of the judges Sajó et Vučinić, who argued that the detention conditions of the applicants did not amount to a violation of Article 3 of the Convention.

53 *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 128.

54 Jane Mcadam, 'Human Rights and Forced Migration' in Elena Fiddian – Qasmiyah, Gil Loescher, Katy Long and Nando Sigona (eds), *Refugee and Forced Migration Studies*, (Oxford University Press 2014) 203.

55 A HUDOC search for judgments containing the words 'human dignity' combined with Article 5 § 1 f produced 17 results as of February 2016. The words 'dignité humaine' yielded 22 judgments.

56 *Kudla v. Poland* [GC] ECHR 2000-XI 197, paras 92-94. *A. and Others v. The United Kingdom*, para 128. *Kim v. Russia* App. no 44260/13 (ECtHR, 17 July 2014) para 34, *Alim v. Russia* App. no 39417/07 (ECtHR, 27 September 2011) para 40.

57 *Riad and Idiab v. Belgium* App. nos. 29787/03 and 29810/03 (ECtHR, 24 January 2008) paras 99 and 107.

58 *Rashed c République Tchèque* App. no 298/07 (ECtHR 27 November 2008) para 61.

Concerning the confinement of foreign minors, the *Court* ruled that when the conditions of a minor's detention are very poor, they undermined the very essence of human dignity.⁵⁹ In the case of *Aden Ahmed v. Malta*, the *Court* elaborated on the concept of human dignity of a detained immigrant. Whereas the detention provokes feelings of anguish and inferiority, capable of humiliating and debasing the person and of breaking his moral and physical resistance, his human dignity is diminished in breach of the Convention.⁶⁰ The concept of human dignity is also found in *Saadi* case. Six dissenting judges found that 'no human being may be used as a means towards an end'. This statement encapsulates the essence of the concept of human dignity.⁶¹ Finally, according to the *Court*'s established case law, the detention conditions are compatible with respect for human dignity when the detainee's health and well-being are adequately secured.⁶²

The recent case law on the detention of irregular migrants in reception centres is interesting, as the *Court* employs the concept of human dignity in order to dismiss the crisis as a justification for their detention conditions. The exceptional character of the crisis cannot justify states deviating from their obligations under the Convention, especially when these go against the human dignity of any person.

IV. Liberty and Freedom of movement

There is no doubt about the applicability of the right to liberty to aliens who enter the territory of member states and who are subsequently detained. The right to liberty of movement, however, is more complex regarding its applicability to aliens. The relationship between the right to liberty and the right to liberty of movement under Article 2 of Protocol 4 is interesting in this respect.

The right to liberty of movement is enshrined in Article 2 of Protocol 4 to the Convention.

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

59 *Rahimi v. Greece* App. no. 8687/08 (ECtHR 5 April 2011) para 85-86.

60 *Aden Ahmed v. Malta* App. no. 55352/12 (ECtHR, 23 July 2013) para 99.

61 Such an idea is pertinent to the 'natural perspective of human rights, 'whereby human rights are conceived as given entitlements due to every human being qua human being' in Marie-Benedicte Dembour, *When Humans Become Migrants, Study of the European Court with an Inter-American counterpoint* (Oxford University Press 2015), 4.

62 *Yefimova v. Russia* App. no 39786/09 (ECtHR 19 February 2013) para 234.

This provision draws directly from Article 12 of the *International Covenant on Civil and Political Rights*.⁶³ The freedom of movement is combined with the right of people to choose freely their place of residence within the territory of the state. The scope of the right to liberty of movement is limited both territorially and regarding the quality of the right holder. The scope of this right is limited territorially, as it can only be enjoyed within the specific territory of that state. Moreover, the freedom of movement is guaranteed only to everyone lawfully present at a member state.⁶⁴ The lawfulness of the presence is judged according to domestic law.

The right to liberty and security of person under Article 5 is much wider in scope. It is guaranteed for everyone, irrespective of the lawfulness of his or her presence in a member state and independently to residence status. The right holders of the two provisions, therefore, are different. Equally different are also the bearers of the obligations imposed by the two provisions. Article 5 is binding upon all member states, while Protocol 4 is binding to a certain number of states which ratified it.⁶⁵ A paradox ensues from the legal requirements of the two provisions. The right to freedom of movement is a qualified right. Under Article 2§ 3 of Protocol 4, a restriction of freedom of movement must be justified as necessary in a democratic society.⁶⁶ The necessity of the detention measure, however, is not required for the more severe deprivation of liberty under Article 5§ 1 f. In other words, while a restriction of freedom of movement must be necessary in a democratic society under Article 2§ 3 of Protocol 4, the more severe deprivation of liberty under Article 5§ 1 f does not have to be.

The nature and the substance of both rights, however, is qualitatively the same. The general right to liberty under Article 5 secures essentially the same substantive elements to people as the right to liberty of movement.⁶⁷ There is, however, a difference of degree and severity between the two rights.⁶⁸ The *Court* has found that both Article 5 of the

63 *Article 12*

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

64 See Article 45 of the Charter of Fundamental Rights of the European Union, which provides for the right to freedom of movement only for EU citizens.

65 The total number of ratifications/accessions to Protocol 4 is 43, as at 9 February 2016. The *United Kingdom, Greece, Turkey, Switzerland* are not member states to this Protocol.

66 ‘3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

67 In the *Khlaifia* case, the Italian Senate in its report on the human rights of migrants at the reception centres had criticized the lack of freedom of movement, which was imposed without a judicial or administrative order. *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 31.

68 *Guzzardi v. Italy* App. no 7367/76 (ECtHR, 6 November 1980).

Convention and Article 2 of Protocol 4 protect essentially the same right and differ only in degree.

In order for the *Court* to establish whether there is a violation of Article 5 of the Convention or Article 2 of Protocol 4, the concrete situation of the individual must be taken into account.⁶⁹ The *Court* undertakes an autonomous assessment of the situation and it is not bound by the legal characterization of the domestic courts.⁷⁰ In principle, a restriction order imposing the obligation to reside at a specific place and/or reporting to an authority may be a restriction of freedom but does not amount to a deprivation of liberty under Article 5.⁷¹ When an interference with a person's freedom contains elements of coercion, elements of isolation or is of significant duration, then the measure in question is considered a deprivation of liberty and not a violation of freedom of movement. In the context of detention of migrants, in *Amuur v. France*, the *Court* found that holding aliens in transit zones constitutes a restriction of their liberty of movement, which is not comparable to the one occurring in detention centres for aliens awaiting deportation.⁷² Although there was theoretically the possibility of the applicants' to leave the airport to seek refugee to another country, the *Court* found that his detention in the transit zone amounted to a deprivation of liberty, because practically they did not have the possibility to go to another country.

A qualification, however, is necessary regarding the applicability of Article 2, Protocol 4, to aliens. Since the right to freedom of movement is guaranteed only to people who are lawfully present in a state, this provision, in principle, is not applicable to people entering the territory of a member state irregularly. Therefore, it can be argued that this right is not applicable to irregular migrants, asylum seekers and refugees, who are detained after their arrival. However, 'lawfully within the territory of a state' does not mean 'lawfully residing' in that state. Regarding asylum seekers and refugees, the situation may differ and article 2, Protocol 4 may be applicable to them as well. A person does not become a refugee because of recognition, but he is recognized as such because he is a refugee. In the case of *Hirsi Jamaa v. Italy*, the *Strasbourg Court* accepted that Article 3 applies to those who have not yet had their status declared (asylum seekers) and even to those who have not expressed their wish to be protected and to file an application for asylum.⁷³ Neither the absence of an explicit request for asylum nor the lack of evidence may absolve the State of the non-refoulement obligation regarding any alien in need of international protection. As the determination of refugee status is merely declaratory, during the time that refugees, having entered irregularly a member state, await for the determination of their status, there is some validity in the argument that they may be considered lawfully within the territory of the member state.

69 See the case *Guzzardi v. Italy*, where the Court asserted a violation of Article 5 – and not of Article 2 of Protocol 4-, because it considered all the aspects of the concrete case of detention cumulatively.

70 *H.L. v. the United Kingdom* App. no 45508/99 (ECtHR, 5 October 2004) para 90.

71 In cases of house arrest where the detainee is not permitted to leave, the determining factor for assessing whether there is a restriction of freedom or a deprivation of liberty is whether the detainee is obliged to ask for permission to leave from the authorities or to simply report his absence.

72 *Amuur v. France* App. no 19776/92 (ECtHR, 25 June 1996).

73 *Hirsi Jamaa v. Italy* [GC] ECHR 2012 II 97.

By parity of reasoning, Article 2, Protocol 4 may be applicable to people who await the determination of their status, because their lawful presence as refugees within the territory of a state may already exist. Furthermore, regarding EU member states, Article 7 of the EU Procedures Directive imposes on them the obligation to consider every person having filed an application for asylum as lawfully residing within their territory.⁷⁴ On the other hand, the revised Reception conditions Directive (2013/33/EU) allows the detention of asylum seeker when this is necessary under Article 8§ 3 c. The Strasbourg *Court*, however, found that as soon as asylum seekers surrender to state authorities, they effectively seek to have their entry ‘authorized’ and their detention, therefore, may not be justified under the first limb of Article 5§ 1(f).⁷⁵

In conclusion, international and European law restricts the possibility of depriving refugees and asylum seekers of their liberty and imposing restrictions on the freedom of movement. Regarding the *European Court on Human Rights*, Article 2 of Protocol 4 may be applicable to refugees and asylum seekers, as explained in this chapter. There is, however, a gap of protection for irregular migrants, who are unlawfully within the territory of a member state and their freedom does not amount to a deprivation of liberty under Article 5. Neither a violation of Article 5 nor a violation of article 2, Protocol 4 can be established, in cases of irregular migrants, whose freedom is restricted, but does not reach the threshold of Article 5. By underlining the distinction between the two rights, the *Court* in *Khlaifia* case, may have indicated a solution to overcome this gap. According to the *Court*:⁷⁶

Entre privation de liberté et restrictions à la liberté de circuler qui obéissent à l'article 2 du Protocole no 4, il n'y a qu'une différence de degré ou d'intensité, non de nature ou d'essence. Le classement dans l'une ou l'autre de ces catégories se révèle parfois ardu, car dans certains cas marginaux il s'agit d'une pure affaire d'appréciation, mais la Cour ne saurait éluder un choix dont dépendent l'applicabilité ou l'inapplicabilité de l'article 5 de la Convention.

V. The EU ‘Hotspot’ approach in the light of the European Convention on Human Rights

Due to the flow of refugees and migrants to *Europe*, states have to provide accelerated procedures for the return of people who are not in need of international protection. In order to address the issue, the *European Union* developed the idea of ‘hotspots’, where new arrivals in frontline states are to be registered and fingerprinted. Specifically, the *European Commission* took on the responsibility to draft a roadmap, after having been appointed this task by the *European Council* in June 2015.

According to the *European Commission*’s explanatory note, this approach is destined to provide a platform for four EU agencies – *Frontex*, *EASO*, *Europol* and *Eurojust* –

⁷⁴ See opposite the old case *Paramanathan v. Germany*, and *Omwenyeke v. Germany*, where the Court held that people whose asylum claim has not been yet determined, can be detained to prevent ‘unauthorised entry’.

⁷⁵ *Saadi v. the United Kingdom* [GC] App. no 13229/03 (ECtHR, 29 January 2008) para. 65.

⁷⁶ *Khlaifia et Autres c Italie* App. no 16483/12 (ECtHR, 1 September 2015) para 45.

to intervene rapidly and in an integrated manner in frontline member states. Hotspots are developed when there is a crisis due to specific and disproportionate migratory pressure at European external borders. It is essentially a coordinating mechanism, which provides operational assistance to EU member states. This assistance may take multiple forms: registration, screening and debriefing of people, forensic support, asylum support, coordination of the return of migrants who do not have the right to stay in Europe. These EU agencies have already the mandate to provide member states with assistance under the existing mechanisms. What the 'Hotspot' approach aspires to bring, is the coordination between European agencies and, allegedly, a more efficient merging of efforts.

One conclusion seems to follow from the wording of the *Commission's* explanatory note. The responsibility for the detention, for the detention conditions and for the treatment of migrants and refugees in the reception centres at these EU Hotspots still lies with member states. First, the mechanism is triggered upon the request of the member state and lasts for a limited period of time and for as long as the emergency persists. Second, the EU 'Hotspot' policy does not provide reception facilities to its host member state but builds upon their existence and functioning. Furthermore, it is stated that the existence of national reception facilities and 'pre-removal' centres are necessary for the successful implementation of the 'Hotspot' approach. Finally, according to the 'Hotspot' approach flowchart, the EU member state is responsible for the possible detention of aliens in these centres. Consequently, one could assume that member states will be accountable for any violation of human rights taking place at these centres.

The issue, of course, remains since the establishment of the 'Hotspot' centres should still be compatible with the guarantees of the Convention and with the requirements laid down in Article 5. The 'fast track' character of the 'Hotspot' approach is especially problematic, in light of the *Court's* standing in the *Saadi* case, where the Grand Chamber found a violation of the right to be promptly informed under Article 5§ 2, when the applicant's detention was the result of administrative convenience for processing fast track claims of asylum. A clearly identifiable legal regime should be in place for the detention of people at these 'Hotspot' centres, along with respect to the all aforementioned criteria for a lawful deprivation of the liberty under Article 5 § 1 f.

VI. The court's role revisited

The ECtHR recent case law on detaining irregular migrants in reception centres is important for a number of reasons. First, the *Court* was clear on the protection that states need to grant to aliens entering their territory, independently to their status and whether they are irregular migrants, asylum seekers or refugees. Particularly the *Khlaifia* case is extraordinary, because it dealt with the human rights of economic migrants, who attempted to enter Italy irregularly. The *Court* was firm in criticising the detention of irregular migrants at the reception centres in Italy. The applicants were finally returned to a relatively safe country, they were not asylum seekers nor were they in need of international protection and there was no problem with the principle of non-refoulement. Although Italy raised the issue that the applicants never filed an asylum request and

were not refugees, the *Court* asserted that article 5 of the Convention is applicable and that the deprivation of their liberty was accordingly unlawful.

On the other hand however, the *Court's* insistence to commence the analysis in most cases concerning the detention of aliens in the context of immigration by underlining the rights of states to control their immigration policy is peculiar.⁷⁷ It appears that the *Court* seeks to reassure the states on their competence in this domain. This observation led scholars to argue that in the eyes of the *Court* migrants are first aliens, subject to states' control, rather than simply human beings.⁷⁸ Invoking human dignity in migrants' cases may be a way to reverse this.

Second, the *Court's* response to detention conditions of reception centres proves the necessity of interpreting the Convention as a living instrument. This judgment came at a crucial moment when European states face one of the worst migrant crisis and with the challenge to provide quickly decent provisional installations. The *Court* used human dignity as a tool to demonstrate the focus on protecting primarily human beings. As the UN Special Rapporteur on the Human Rights of migrants underlined in 2013, states have the right to regulate the entry and return of migrants, but during the exercise of this right, they are obliged to respect the human rights of all migrants. Informal, *de facto* detention of migrants, in the absence of a clear legal basis and of procedural guarantees, violates their right to liberty and contravenes the Convention. The Strasbourg *Court* was clear on that the current crisis cannot absolve states from their obligations under the Convention.

The detention of irregular migrants is lawful only for the specific purposes of Article 5 § 1 (f), not as a general border management technique. Brutal reality proves that the detention of migrants as a security tool for border control does not prevent the flow of irregular migrant towards Europe.⁷⁹ Furthermore, EU law requires that detention must be the last resort and all alternatives must be exhausted.⁸⁰ In *Mikolenko v. Estonia*, the *Court* found that the states are obliged to examine alternatives to detention.⁸¹ The *European Migration Network* study on the use of detention in the context of migration found that the majority of EU member states had developed alternatives to detention, including obligations to report, electronic monitoring, and residence requirements.⁸² These alternatives to detention, however, may still restrict the refugees' right of freedom and must comply with Article 2, Protocol 4, when this is applicable.

77 See, however, the Tabitha case, where the Court regarded the applicant as a child rather than as illegal migrant, and it countenanced the idea that states are entitled to control the entry of aliens into their territory only with regards to Article 8. Para 74.

78 Marie-Benedicte Dembour, *When Humans Become Migrants, Study of the European Court with an Inter-American counterpoint* (Oxford University Press, 2015), 5.

79 A list of possible non-detention measures has been provided by the UN Special Rapporteur on the Human Rights of migrants.

80 Reception Conditions Directive (2013/33/EU) Article 8(2), Dublin Regulation Article 18 (2) and Return Directive (2008/115/EC) Article 15 (1).

81 See also Return Directive (2008/115/EC), Article 15 (1) and Reception Conditions Directive (2013/33/EU), Article 8 (2).

82 European Migration network, 'Synthesis Report – The use of detention and alternatives to detention in the context of immigration policies, 2014', available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf.

Interpreting the Convention as living instrument allows for the *Court's* role to evolve over time and to respond to contemporary challenges. As understandings of human rights evolve, such a progressive interpretation of the Convention may grant larger protection to irregular migrants in the future.⁸³ Although regulating immigration lies still in states' core competence exercising their sovereignty, human rights law plays an important role in regulating the circumstances for the detention of aliens, irrespective of their status – irregular migrants, refugees and asylum seekers. Holding them in detention per se may be allowed in the immigration context, the conditions and the circumstances for doing so however, are under the scrutiny of the *Court*.

83 Jane Mcadam, 'Human Rights and Forced Migration' in Elena Fiddian – Qasmiyah, Gil Loescher, Katy Long and Nando Sigona (eds) *Refugee and Forced Migration Studies*, (Oxford University Press, 2014) 204.