

**PREVENTING ACCESS TO TERRITORY THROUGH DETENTION OR
OTHER MEANS OF DEPRIVATION OF LIBERTY OF ASYLUM-
SEEKERS FROM THE PERSPECTIVE OF HUNGARY AND ITALY**

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I would like to express my greatest respect and admiration for all those people who at a certain point of their lives became refugees and whom I had had the privilege to work with over the last decade. Seeking for asylum is not a crime and it should never be penalized.

In memory of M., whose life started in a refugee camp, and who, after surviving a perilous journey to Europe and being detained several times in different European countries, decided to take his own life in a Hungarian prison cell.

ABSTRACT

Asylum-seekers are systematically detained worldwide, and Europe is not an exception. Instead of being provided by safety and assistance, they often face hostile environment and harsh detention conditions. Countries such as Hungary and Italy, have created a series of legislative and policy measures in order to prevent asylum-seekers' access to their territory by the use of detention. Deprivation of liberty should be a measure of last resort in the field of migration management. The principles of necessity and proportionality, the existence of less coercive measures and the requirement of individual assessment should be the leading motives while deciding on detention. This Capstone Thesis analyzes these aspects through the case studies of Hungary and Italy. It also advocates for the increased use of alternatives to detention as they are capable of upholding human rights.

Keywords: asylum-seekers, deprivation of liberty, human rights, Hungary, Italy

ABBREVIATIONS

AIDA	Asylum Information Database
APD	Asylum Procedures Directive (recast)
ATD	Alternatives to Detention
CIE	<i>Centri di Identificazione ed Espulsione</i> (formerly: Return Detention Center)
CJEU	Court of Justice of the European Union
COE	Council of Europe
CPR	<i>Centri di Permanenza per i Rimpatri</i> (Return Detention Center)
CPT	Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSPA	<i>Centro di Soccorso e Prima Accoglienza</i> (Early Reception and Aid Center)
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Union Agency for Law Enforcement Cooperation
Frontex	European Border and Coast Guard Agency
GDP	Global Detention Project
ICCPR	International Covenant on Civil and Political Rights
NDGAP	National Directorate-General for Aliens Policing
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIN	Office of Immigration and Nationality
RCD	Reception Conditions Directive (recast)

RD	Return Directive
UAM	Unaccompanied minors
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees, the UN Refugee Agency
UNWGAD	United Nations Working Group on Arbitrary Detention

GLOSSARY

ALTERNATIVES TO DETENTION

According to the International Detention Coalition’s research paper on “There are alternatives”, alternatives to detention can be identified as “any law, policy or practice by which persons are not detained for reasons relating to their migration status.”¹ The Recast Reception Conditions Directive defines ATD as “regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place” that Member States must transpose into their national law.”² By applying ATD before or instead of coercive measures, states could avoid unnecessary detention and uphold their human rights obligations.³ The European ATD Network considers case management as an effective tool within the engagement-based ATD (see Annex).

ASYLUM-SEEKER

A person who claims to be a refugee or otherwise entitled to international protection and whose recognition as such has not been rejected yet with a decision against which no ordinary remedy is available.

DETENTION

According to the UNHCR Detention Guidelines, detention refers to

(...) the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.⁴

This definition is reflected in the CJEU’s recent judgment on the classification of the placement of asylum-seekers in the Röske transit zone at the Hungarian-Serbian border as detention.⁵

¹ There are alternatives – A handbook for preventing unnecessary immigration detention (revised edition). International Detention Coalition, 2015. p. 7. <https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf>

² 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 (recast). Official Journal of the European Union, 29 June 2013. Article 8 § 4. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

³ For further information please visit the website of the European ATD Network: <https://www.atdnetwork.org/>

⁴ Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention. UNHCR, 2012. p. 9. <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

⁵ The placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röske transit zone at the Serbian-Hungarian border must be classified as ‘detention’. Press Release, Court of Justice of the European Union, Luxembourg, 14 May 2020. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200060en.pdf>

It ruled that the conditions in the transit facility amounted to deprivation of liberty partly because of the people confined there were not able to lawfully leave the zone in neither direction.

DISTINCTION BETWEEN RESTRICTION AND DEPRIVATION OF LIBERTY

Under the ECtHR jurisdiction, ascertaining whether a person is restricted or deprived of liberty in airport transit zones or reception facilities for the registration and identification of migrants, the following elements are examined by the Court.⁶ (1) The applicants' individual circumstances and their choices; (2) the applicable legal regime of the respective country and its purpose; (3) duration with regard to the purpose and the procedural guarantees that the applicants can rely on; (4) the nature and degree of the actual restrictions imposed on or experienced by the applicants. In the case of *Ilias and Ahmed v. Hungary*, the ECtHR Grand Chamber took these factors into consideration.⁷ In the case of *Khlaifia and Others v. Italy*, the Court found that even measures aimed to assist and ensure the safety of a person can be considered deprivation of liberty.⁸

DUBLIN III REGULATION

The Dublin III Regulation establishes which Member State is in charge of the examination of the asylum application.⁹ Currently EU Member States and Iceland, Norway, Switzerland and Lichtenstein are associated with the regulation.

NON-REFOULEMENT

The concept of *non-refoulement* lies in the heart of the global refugee protection that is laid down in international human rights law, stipulated in Article 33 (1) of the Geneva Convention.¹⁰

⁶ Guide on Article 5 of the European Convention on Human Rights. Right to liberty and security. COE - ECtHR, updated on 30 April 2020. pp. 8-9. https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

⁷ Case of *Ilias and Ahmed v. Hungary*. Application no. 47287/15, ECtHR, Grand Chamber Judgment, Strasbourg, 21 November 2019. Paragraph 217. <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%22ilias%20and%20ahmed%22%2C%22documentcollectionid%22%3A%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%22001-198760%22%7D>

⁸ Case of *Khlaifia and Others v. Italy*, Application no. 16483/12. ECtHR, Grand Chamber Judgment, Strasbourg, 15 December 2016. Paragraph 71. <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%22khlaifia%22%2C%22documentcollectionid%22%3A%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%22001-170054%22%7D>

⁹ Country responsible for asylum application (Dublin), Migration and Home Affairs, European Commission. https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en

¹⁰ Convention and Protocol relating to the Status of Refugees. UNHCR, 1951. Article 33. <https://www.unhcr.org/3b66c2aa10>

Accordingly, State parties are not allowed to

(...) expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹¹

This provision refers to a double prohibition of expelling asylum-seekers or refugees to a country where they would face a risk of persecution or serious harm (direct *refoulement*) or removing someone to a state where the person would be subjected to further (chain) expulsion (indirect *refoulement*).¹²

REFUGEE

The well-established and most widely used term is set out in Article 1 § A (2) of the 1951 Convention and Protocol relating to the Status of Refugees (hereinafter: Geneva Convention) that identifies a person as a refugee if he or she is

(...) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹³

SAFE THIRD COUNTRY

In order to apply the safe third country concept, the competent authorities of the given Member State shall be satisfied that the person seeking for international protection will be treated in line with the following principles in the third country as set out in Article 38 of the Recast Asylum Procedures Directive.¹⁴ (1) Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (2) there is no risk of serious harm; (3) the principle of *non-refoulement* is respected; (4) the prohibition of removal, in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; (5) there is a possibility to seek for refugee status and to receive real protection in accordance with the Geneva Convention.¹⁵

¹¹ *Ibid.*

¹² Scope of the principle of non-refoulement in contemporary border management: evolving areas of law. European Union Agency for Fundamental Rights, 2016. p. 14.

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-scope-non-refoulement-0_en.pdf

¹³ Convention and Protocol relating to the Status of Refugees. UNHCR, 1951. Article 1 § A (2). <https://www.unhcr.org/3b66c2aa10>

¹⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Official Journal of the European Union, 29 June 2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

¹⁵ *Ibid.* Article 38. § 1 (a) – (f)

UNACCOMPANIED MINORS

An unaccompanied minor is a non-EU national below the age of 18 who arrives on the territory of the EU Member States unaccompanied by an adult responsible for him or her, and until he or she is not effectively taken into care of such a person.¹⁶ The term also refers to minors how are left unaccompanied upon entry to the bloc.

¹⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). Official Journal of the European Union. 20 December 2011. Article 2 (l). <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>

1. INTRODUCTION

“Immigration detention should be a measure of last resort” is a statement frequently cited by human rights bodies and advocacy organizations working in the field of asylum and immigration.¹⁷ It raises the central issue of this Capstone Project by implying that the deprivation of liberty of asylum-seekers should take place exceptionally and only if less coercive migration management techniques have already been exhausted.

The right to personal liberty and security is one of the most fundamental human rights enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights that is a prerequisite for the enjoyment of other rights.¹⁸ According to the UN Working Group on Arbitrary Detention, migrants shall be deprived of their liberty only under specific circumstances for as short as possible and only if the measure serves a legitimate goal.¹⁹

The Geneva Convention, the cornerstone of the global refugee protection regime, claims that the unauthorized entry of a refugee to the territory shall not be penalized by States, and that stricter law enforcement measures such as the restriction of movement shall be implemented only in case of necessity and until status regularization.²⁰ Nevertheless, asylum-seekers are routinely detained worldwide including Europe as well.²¹

Despite the requirements of necessity and proportionality (the existence of less coercive measures) in the use of immigration detention laid down in the EU asylum *acquis*, countries

¹⁷ Further references can be found at: Migrant detention must be “last resort”, UN rights group underlines in its Revised Deliberation No. 5. on deprivation of liberty of migrants. UNWGAD, OHCHR, 7 February 2018. https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf; Ending & Limiting Unnecessary Immigration Detention. International Detention Coalition. <https://idcoalition.org/ending-detention-2/>; Alternatives to Detention – Factsheet on international and regional law and practice related to States’ obligations with respect to alternatives to detention. UNHCR, date of issuance is unknown. <https://www.refworld.org/pdfid/5bfd3f6a16.pdf>

¹⁸ Universal Declaration of Human Rights. United Nations, 1948. Article 3. https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf; International Covenant on Civil and Political Rights. OHCHR, 1966. Article 9. <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

¹⁹ Revised Deliberation No. 5. on deprivation of liberty of migrants. UNWGAD, OHCHR, 7 February 2018. Paragraph 12. https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf

²⁰ Convention and Protocol relating to the Status of Refugees. UNHCR, 1951. Article 31. <https://www.unhcr.org/3b66c2aa10>

²¹ The difficulties of having access to asylum detention statistics are further elaborated in Chapter 2.

like Hungary and Italy notoriously use detention as a tool to prevent asylum-seekers to enter their territory.²²

This Capstone Thesis, as the written component of the Capstone Project, analyzes the issue of deprivation of liberty of asylum applicants by reviewing the relevant international human rights documents as well as the legal framework of the EU providing for the grounds of asylum detention. It critically examines the way how Hungary and Italy increased the use of deprivation of liberty of asylum-seekers in order to prevent their access to their territory. The Capstone Thesis also reflects on how the Hungarian and Italian governments abolish the right to liberty of asylum-seekers in order to strengthen their political power. It also examines and compares the Hungarian and Italian asylum detention systems with a focus on detention conditions.

The practical component of the Capstone Project is an advocacy statement related to the promotion of the use of alternatives to detention addressing the upcoming EU Pact on Migration and Asylum. It can be found in the Annex.

²² 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 (recast). Official Journal of the European Union, 29 June 2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

2. TRENDS IN ASYLUM DETENTION AND THE ISSUES OF DATA COLLECTION

The annual global data released by the UNHCR evidence the robustness of the issue of asylum-seekers and refugees, which is unlikely to disappear anytime soon. According to the UN Refugee Agency's Global Trends on Forced Displacement brochure, the number of people who were forced to leave their home or habitual residence due to being persecuted or as a result of conflict, generalized violence or human rights abuses, had crossed an international border and had been qualified as refugees grew from 15.2 million in 2009 to 25.9 million by 2018.²³ In the case of asylum-seekers, the numbers climbed up from 983 000 to 3.5 million, respectively.

The so-called "refugee crisis" in 2015 saw dramatic figures with a peak of 1.2 million first instance asylum applications in the EU-28 countries and the associated Dublin countries, an approximately sevenfold rise in comparison with 2009 (164 935 applications), that had slimmed down to 612 685 by 2019.²⁴

In the context of asylum detention, there are wide-scale variances in the regional and national legislations, reporting requirements of public authorities and private entities responsible for running detention facilities. Differences emerge also in relation to political atmosphere as well as the language used for describing places of detention, as people can be detained

(...) at land and sea borders, in the "international zones" at airports, on islands, on boats, as well as in closed refugee camps, in one's own house (house arrest) and even extraterritorially.²⁵

Due to these differences, global data on asylum detention is not available. As the absence of reliable statistics hinders monitoring of detention conditions and advocacy efforts, UNHCR had paid special attention to the promotion of data collection and information sharing in its 5-year Global Strategy on ending asylum detention.²⁶ The GDP Annual Report 2019 claims that the lack of transparency on official figures is linked to governments'

²³ 2009 Global Trends – Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons. UNHCR, 15 June 2010. p. 1. <https://www.unhcr.org/statistics/country/4c11f0be9/2009-global-trends-refugees-asylum-seekers-returnees-internally-displaced.html>; Global Trends Forced Displacement in 2018. UNHCR, 2019. p. 2. <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>

²⁴ Number of asylum applicants (non-EU-citizens), EU-27, 2008-2019. Eurostat, Asylum statistics. https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics

²⁵ Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention. UNHCR, 2012. p. 9. <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

²⁶ Beyond Detention 2014 - 2019 – A Global Strategy to support governments to end the detention of asylum-seekers and refugees. UNHCR, 2014. p. 14. <https://www.unhcr.org/53aa929f6>

(...) attempt to disguise their immigration detention practices because they run counter to norms that are at the heart of modern liberal democracies – in particular, the right to liberty.²⁷

ECRE asserts that as a result of the lack of data collection obligations of Member States stated in the Reception Conditions Directive (recast), precise numbers on asylum detention in the EU are non-existent.²⁸ Even though the magnitude of the problem can be estimated from the figures accessible in certain countries, ECRE calls on regular publication of asylum detention statistics in order to develop a more accurate understanding of the issue.²⁹

According to GDP's recent book on "Immigration Detention in the European Union", the surge in the number of submitted asylum claims during the so-called "refugee crisis" reversed the pre-2015 trend regarding the shrinking volume of immigration and asylum detention in the region.³⁰ Countries across the EU began to increasingly rely on detention as a method of controlling the inflow of migrants to the bloc that eventually resulted in the

(...) trivialisation and normalisation of the use of detention, which has become a convenient off-the-shelf measure that states employ without careful consideration of its ramifications or usefulness.³¹

The securitization of the issue of irregular migration has become an organic part of the migration policy in numerous Member States and the transposition of the European asylum *acquis* into national legislations has resulted in fragmented policy landscapes.³² The disparity of legal provisions and migration management practices served as a momentum for the systemic containment of asylum-seekers across Europe.³³ As Cornelisse argues, the desire of states to deter people to migrate to and to effectively remove those being already on their territory is specifically reflected in the increase of the accelerated procedures and the Dublin transfers.

²⁷ Global Detention Project – Annual Report 2019. p. 8. <https://www.globaldetentionproject.org/wp-content/uploads/2020/03/Global-Detention-Project-Annual-Report-2019-Online.pdf>

²⁸ The detention of asylum-seekers in Europe – Constructed on shaky ground? AIDA-ECRE, June 2017. pp. 1-2. https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf

²⁹ *Ibid.* p.2.; Making Asylum Number Count. ECRE's Analysis of Gaps and Needs for Reform in Data Collection on the Common European Asylum System. Policy Note 10. ECRE, 2018. p. 4. <https://www.ecre.org/wp-content/uploads/2018/01/Policy-Note-10.pdf>

³⁰ Majcher, I. – Flynn, M. – Grange, M.: Immigration Detention in the European Union – In the Shadow of the "Crisis". Springer, 2020. pp. 1-2. https://books.google.hu/books?id=uIjUDwAAQBAJ&pg=PA333&lpg=PA333&dq=jesuit+detention&source=bl&ots=bIcvmCsSM8&sig=ACfU3U1xXgz_UhTnpdQzwh7NWYCWCGsVUw&hl=hu&sa=X&ved=2ahUKEwj_k0v264crpAhUjxoUKHVKnC5MQ6AEwAnoECAkQAQ#v=onepage&q&f=false

³¹ *Ibid.* p. 1.

³² The detention of asylum-seekers in Europe – Constructed on shaky ground? AIDA-ECRE, June 2017. p. 1. https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf

³³ *Ibid.*

According to the publicly available statistics of the NDGAP (prior to 2019: OIN), the law enforcement agency responsible for asylum and immigration matters under the Ministry of Interior in Hungary, there has been a sharp downward trend in the number of first instance asylum applications since 2016.³⁴ The official figures also display a declining tendency in relation to people placed in asylum detention (Table 1.).

Table 1.: Number of asylum-seekers arriving to Hungary, asylum detention orders and recognition rates (2014-2019)

Year	Asylum-seekers arriving to Hungary	Detention ordered by the Asylum Authority		Recognition as refugee	Recognition as beneficiary of subsidiary protection
2014	42 777	4 829		240	236
2015	177 135	2 393		146	356
2016	29 432	2 621		154	271
2017	3 397	Asylum detention	Transit zones	106	1 110
		391	2 107*		
2018	671	7	558*	68	281
2019	468*	40*	433*	22*	31*

Source: Website of the National Directorate-General for Aliens Policing³⁵ and Asylum Information Database by ECRE³⁶

However, the numbers indicated in the annual AIDA country reports show a different scale of asylum detention than it is presented by the above depicted official figures. In fact, data on the transit zones and asylum detention referring to 2019 can only be found in these reports. There is no reference to them in the NDGAP databases (starred in Table 1.).³⁷

³⁴ The National Directorate-General for Aliens Policing has been operating since 1 July 2019 as the successor of the former Office of Immigration and Nationality, but under the Police Act. Further information about the statistics can be found here:

http://bevandorlas.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en

³⁵ Annual statistics from the website of the National Directorate-General for Aliens Policing, Hungary.

http://bevandorlas.hu/index.php?option=com_k2&view=item&layout=item&id=177&Itemid=1232&lang=hu;

http://bevandorlas.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en

³⁶ Country Report: Hungary, 2017 Update. AIDA, ECRE, February 2018. p. 76.; Country Report: Hungary, 2018 Update. AIDA, ECRE, March 2019. p. 67.; Country Report: Hungary, 2019 Update. AIDA, ECRE, 29 March 2020. p. 83. <https://www.asylumineurope.org/reports/country/hungary>

³⁷ The 2019 figures on asylum applications and people in asylum detention are based on data requested by AIDA (ECRE) from NDGAP (3 February 2020). In: Country Report: Hungary, 2019 Update. AIDA, ECRE, 29 March 2020. pp. 7., 83. <https://www.asylumineurope.org/reports/country/hungary>

The discrepancy between the two datasets is related to the consistent rejection by the Hungarian government to consider the transit zones as places of *de facto* detention.³⁸ Their narrative is based on the presumption that asylum-seekers could freely leave the facility towards Serbia.³⁹

However, in its Revised Deliberation No. 5 on deprivation of liberty of migrants, the UNWGAD clarifies that the decision whether a place qualifies as *de facto* detention

(...) depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled “shelters”, “guest houses”, “transit centres”, “migrant stations” or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.⁴⁰

Since 2016, the AIDA reports on Italy have used the statistics on asylum applications and recognitions issued by the Department of Civil Liberties and Immigration that belongs to the Ministry of Interior.⁴¹ Similarly to Hungary, that is the competent authority concerning the asylum and migration-related legislations and policies.⁴²

As Table 2. indicates, data on the total number of people in asylum detention are not or are only partially available in the period between 2014 and 2019. Like in the case of Hungary, this raises a transparency issue in accessing public data.

³⁸ The transit zone is classified as a reception facility on the NDGAP website.

http://bevandorlas.hu/index.php?option=com_k2&view=item&layout=item&id=1220&Itemid=1791&lang=en

³⁹ For further references: Szigorították a jogi határzárát. [The border closure has been tightened.] Website of the Hungarian Government, 7 March 2017. <https://www.kormany.hu/hu/hirek/szigoritottak-a-jogi-hatarzarat>; A magyar szabályozás és gyakorlat megfelel az uniós jognak. [The Hungarian legislation and practice are in line with EU law]. Website of the Hungarian Government, 23 April 2020. <https://www.kormany.hu/hu/igazsagugyi-miniszterium/hirek/varga-judit-a-magyar-szabalyozas-es-gyakorlat-megfelel-az-unios-jognak>

⁴⁰ Revised Deliberation No. 5. on deprivation of liberty of migrants. UNWGAD, OHCHR, 7 February 2018. Paragraph 45.

https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf

⁴¹ Country Report: Italy, 2020 Update. AIDA, ECRE, 27 May 2020. p. 8.

<https://www.asylumineurope.org/reports/country/italy>

⁴² Organisation of Migration and Asylum System in Italy – Overview. European Commission, DG Home and Migration, July 2019. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/asylum-migration/14_italy_factsheet_institutional_chart_en.pdf

Table 2.: Number of asylum-seekers arriving to Italy, detained asylum-seekers and recognition rates (2014-2019)

Year	Asylum applicants in Italy	Total number of asylum-seekers detained		Recognition as refugee	Recognition as beneficiary of subsidiary protection
2014	64 886	not available		3 649	8 121
2015	59 165	not available		2 480	6 975
2016	123 370	1 968 ⁴³		4 800	12 090
2017	130 119	417 ⁴⁴		6 827	6 880
2018	53 596	CPR	Hotspots	7 096	4 319
		4 092	13 777		
2019	43 783	591 ⁴⁵	78 ⁴⁶	10 711	6 935

Source: Asylum Information Database⁴⁷

Both the Hungarian and Italian datasets indicate a similar tendency related to the number of asylum applicants and those in detention. Despite the six-fold decrease in the asylum claims from 2015 to 2016 (177 135 and 29 432 respectively) in Hungary, there were more people detained than at the peak of the so-called “refugee crisis.” The data clearly shows that detention became mainstream by 2018 (see in Table 1.).

Despite the shrinking volume of asylum requests in Italy, the scale of asylum detention expanded significantly by 2018. The 2019 data on the number of people detained in the CPRs and hotspots does not pertain to the full year, therefore they are not precise indicators.

⁴³ In CIE between 1 January -15 September 2016.

⁴⁴ In CPR at the end of 2017 (not total number).

⁴⁵ As of 21 October 2019.

⁴⁶ This number only refers to the data at the end of the year.

⁴⁷ Country Report: Italy, Third Update 2014. AIDA, ECRE, January 2015. p. 6.; Country Report: Italy, Fourth Update 2015. AIDA, ECRE, December 2015. p. 6.; Country Report: Italy, 2016 Update. AIDA, ECRE, February 2017. p. 7.; Country Report: Italy, 2017 Update. AIDA, ECRE, March 2018. p. 7.; Country Report: Italy, 2018 Update. AIDA, ECRE, April 2019. p. 8.; Country Report: Italy, 2019 Update. AIDA, ECRE, June 2020. p. 8. <https://www.asylumineurope.org/reports/country/italy>

3. GENERAL LEGAL FRAMEWORK AND GROUNDS FOR ASYLUM DETENTION

3.1. International and EU legal framework for detaining asylum-seekers

The right to liberty and security is of the highest importance in a democratic society. It is enshrined in the core international human rights documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as in the European Convention on Human Rights and in the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter) at the regional level.⁴⁸ According to Article 9 § 1 of the ICCPR

[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.⁴⁹

However, the right to liberty is not an absolute right and derogation is possible in the context of immigration control. Furthermore, the Geneva Convention does not exclude the possibility of detaining asylum-seekers by State parties.⁵⁰ Article 31 § (1) calls for the non-penalization of refugees entering or residing in the receiving country without being authorized to do so if they fully cooperate with the authorities and “show good cause for their illegal entry or presence.”⁵¹ According to paragraph 2, States should only impose necessary restrictions in regard to the movement of refugees until they are able to acquire the right to stay in the host country or until they can further move to another country in a regularized way.⁵²

The right to liberty and security of a person is provided by Article 5 of the ECHR and by Article 6 of the EU Charter.⁵³ Article 5 § 1 of the Convention articulates that

⁴⁸ Universal Declaration of Human Rights. United Nations, 1948. Article 3. https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf; International Covenant on Civil and Political Rights. OHCHR, 1966. Article 9 § 1. <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>; European Convention on Human Rights. Council of Europe, 1953. Article 5. https://www.echr.coe.int/Documents/Convention_ENG.pdf; Charter of Fundamental Rights of the European Union. European Parliament, 2000. Article 6. https://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁴⁹ International Covenant on Civil and Political Rights. OHCHR, 1966. Article 9 § 1. <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

⁵⁰ Convention and Protocol relating to the Status of Refugees. UNHCR, 1951. <https://www.unhcr.org/3b66c2aa10>

⁵¹ *Ibid.* Article 31. § 1.

⁵² *Ibid.* Article 31. § 2.

⁵³ European Convention on Human Rights. Council of Europe, 1953. Article 5.; Charter of Fundamental Rights of the European Union. European Parliament, 2000. Article 6.

[e]veryone 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: (...) ⁵⁴

As it is stated in *Khlaifia and Others v. Italy*, subparagraphs (a) to (f) of Article 5 § 1 indicate

(...) an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. ⁵⁵

The ECtHR allows a narrow interpretation in the case law. Deprivation of liberty shall be regarded unlawful if it does not fall within the grounds under Article 5 § 1. ⁵⁶

For this Capstone Thesis, the most relevant subparagraph is Article 5 § 1 (f) that permits

(...) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. ⁵⁷

Under the ECtHR jurisdiction, an entry is unauthorized until the national authorities provide an official authorization. ⁵⁸ It is reaffirmed by the Court in the case of *Saadi v. the United Kingdom* where the Grand Chamber held 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 and who needs but does not yet have authorisation to do so can be, without any distortion of language, to “prevent his effecting an unauthorised entry.” ⁵⁹

Even though Article 5 § 1 (f) allows the detention of asylum-seekers if not being authorized to enter the territory of the State, the ECtHR also stated in the case of *Saadi v. the UK* that detention of asylum-seekers shall comply with the general aim of Article 5 of the Convention in order to uphold guarantees of the right to liberty and to avoid arbitrariness. ⁶⁰

https://www.europarl.europa.eu/charter/pdf/text_en.pdfhttps://www.echr.coe.int/Documents/Convention_ENG.pdf

⁵⁴ European Convention on Human Rights. Council of Europe, 1953. Article 5 § (1)

https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁵⁵ Case of *Khlaifia and Others v. Italy*, Application no. 16483/12. ECtHR, Grand Chamber Judgment, Strasbourg, 15 December 2016. Paragraph 88.

[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22khlaifia%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-170054%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22khlaifia%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-170054%22]})

⁵⁶ Guide on Article 5 of the European Convention on Human Rights. Right to liberty and security. COE - ECtHR, updated on 30 April 2020. p. 11. https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

⁵⁷ European Convention on Human Rights. Council of Europe. Article 5 § (1) (f)

https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁵⁸ Handbook on European law relating to asylum, borders and immigration. European Union Agency for Fundamental Rights – Council of Europe, 2014. p. 44.

⁵⁹ Case of *Saadi v. the United Kingdom*, Application no. 13229/03. ECtHR, Grand Chamber Judgment, Strasbourg, 29 January 2008. Paragraph 65.

[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22saadi%20v.%20the%20united%20kingdom%22\],%22languageisocode%22:\[%22ENG%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-84709%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22saadi%20v.%20the%20united%20kingdom%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-84709%22]})

⁶⁰ *Ibid.* Paragraph 66.

In the case of *Lokpo and Touré v. Hungary*, the Court emphasized the principles of arbitrariness and stated that

(...) to avoid being branded as arbitrary, (...) detention [under Article 5 § 1 (f)] must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind 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 the length of the detention should not exceed that reasonably required for the purpose pursued.⁶¹

The Recast Reception Conditions Directive and the Recast Asylum Procedures Directive are the core legal instruments that lay down standard regulations for asylum detention in the EU.⁶²

Article 8 § 3 of the RCD (recast) provides an exhaustive list of the six grounds on which an asylum applicant may be detained.⁶³ (a) Detention is permitted in order to determine or verify the applicant's identity or nationality; (b) an asylum-seeker can be detained in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant; (c) detention is permitted in order to decide, in the context of a procedure, on the applicant's right to enter the territory; (d) when the applicant is detained subject to a return procedure under the Return Directive and there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision; (e) when protection of national security or public order so requires; (f) in accordance with the Dublin Regulation.

Article 26 § 1 of the Recast APD states that it is not possible for Member States to detain an asylum-seeker solely on the ground of being an asylum applicant.⁶⁴ It also emphasizes that the conditions and procedural guarantees of detention should be in line with the provisions of the Recast RCD.

⁶¹ Case of *Lokpo and Touré v. Hungary*, Application no. 10816/10. ECtHR, Chamber Judgment, Strasbourg, 20 September 2011. Paragraph 22.
[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22%22CASE%20OF%20LOKPO%20AND%20TOURE%20v.%20HUNGARY%22%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-106272%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22%22CASE%20OF%20LOKPO%20AND%20TOURE%20v.%20HUNGARY%22%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-106272%22]})

⁶² *Ibid.* p. 3.

⁶³ 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 (recast). Official Journal of the European Union, 29 June 2013. Article 8. § 3 (a) – (f) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

⁶⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Official Journal of the European Union, 29 June 2013. Article 26 § 1. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

From the perspective of this Capstone Thesis, the common denominators between the two Directives are the application of the principles of necessity and proportionality (the existence of less coercive measures) in the use of immigration detention measures. Cornelisse argues that the requirement of individual assessment of the necessity of immigration detention, the automatic judicial review and the reasoned decision-making are core elements of the EU law.⁶⁵ However, as Harta notes, the examination of these aspects are not mandatory under the ECtHR jurisdiction.⁶⁶ Stoyanova claims that the absence of this obligation weakens the protection of asylum-seekers provided by Article 5 § 1 (f) under the Convention.⁶⁷

⁶⁵ Cornelisse, G. (2016). The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights. Global Detention Project Working Paper No. 15. p. 13. <https://www.globaldetentionproject.org/constitutionalisation-immigration-detention-eu-law-european-convention-human-rights>

⁶⁶ Harta, L.: We Only Do What's Necessary: Detention of Asylum Seekers in European Law. Common Law Review, 15., 2018. p. 47.

⁶⁷ Stoyanova, V.: The Grand Chamber Judgment in Ilias and Ahmed v. Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode. Strasbourg Observers, 23 December 2019. <https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/>

3.2. Policy framework in Hungary and Italy

The so-called “refugee crisis” fueled the anti-refugee and anti-migrant rhetoric even further and resulted in the rapid proliferation of restrictive-punitive state measures in Hungary. Between 2015 and 2020 the Hungarian government excelled in the creation of a massively hostile societal and policy environment and scapegoating asylum-seekers and irregular migrants has become a crucial element of its narrative.

Meanwhile Italy’s Matteo Salvini, former Minister of Interior and leader of the right-wing League party, ordered the effective shutdown of Italy’s seaports in order to obstruct the safe arrivals of sea rescue ships carrying migrants on board. Similarly to Hungary, Italy has also implemented exceptionally harsh anti-migrant and anti-refugee measures.⁶⁸

⁶⁸ Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019. p. 7. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

3.2.1. Forms of deprivation of liberty

In Hungary, the legislative changes that entered into force on 15 September 2015 marked a turning point in the history of the country's asylum system that radically changed the policy landscape and obstructed asylum-seekers' access to its territory. A state of crisis due to mass immigration was declared in two southern counties and the 175-km long barbed-wire fence on the Hungarian-Serbian border was completed, followed by sealing off the border with Croatia one month later. As components of the border fence, two transit zones were created as the only designated places for requesting asylum.

In 2016, the state of crisis was extended to the whole country. Until September 2020, it was prolonged seven times despite the fact that none of the criteria of crisis had been fulfilled since the very beginning.⁶⁹ However, specific rules are applicable to irregular migrants and asylum-seekers allowing their push-back to Serbia by the Hungarian police.⁷⁰

As a result of restrictions on the Act LXXX of 2007 on Asylum in March 2017, asylum-seekers were confined to the transit zones without any prior assessment of their individual circumstances, consideration of alternatives to detention, judicial review, maximum time limit, or the possibility to leave the zone towards Serbia in a regularized way. The mechanism through which the Hungarian authorities deprived them of their liberty was punitive in nature as they had been detained solely on the basis that they had sought for international protection.

From January 2018, on an average one (and sometimes zero) person was admitted to the transit zones on a daily basis.⁷¹

Italy is one of the main destination countries for migrants and asylum-seekers in the EU. Until 2018, there were three types of detention of migrants upon arrival.⁷² *De facto* detention in the

⁶⁹ Magyarország biztonsága érdekében a kormány meghosszabbítja a tömeges bevándorlás okozta válsághelyzetet. [The government extends the state of crisis due to mass migration because of the interest of Hungary]. Website of the Hungarian Government, 5 March 2020. <https://www.kormany.hu/hu/miniszterelnoki-kabinetiroda/hirek/magyarorszag-biztonsaga-erdekeben-a-kormany-meghosszabbitja-a-tomeges-bevandorlas-okozta-valsaghelyzetet>; Nagy, B.: A magyar menekültügy harminc éve – Sírbeszéd. [Thirty years of the Hungarian asylum system – An Obituary]. In: ÉS, Vol. LXIII., Issue 26., 28 June 2019. <http://www.nagyboldizsar.hu/menekuumllyumlgy-migraacutecioacute.html>

⁷⁰ Nagy, B.: Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation. German Law Journal, Vol. 17., No. 6., 2016. p. 1050. http://www.nagyboldizsar.hu/uploads/2/6/7/7/26778773/b_nagy_securitisation_instead_of_loyal_cooperation_gl_j_2016_6.pdf

⁷¹ Country Report: Hungary – 2017 Update. AIDA, ECRE. February 2018. pp. 76-77. <https://www.asylumineurope.org/reports/country/hungary>

⁷² Matevžič, G.: Crossing a Red Line – How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary, and Italy. Hungarian Helsinki Committee, 2019. pp. 22-23. https://www.helsinki.hu/wp-content/uploads/crossing_a_red_line.pdf

hotspots, *de facto* detention on boats and administrative detention in the CPRs pending deportation of irregular migrants (including asylum-seekers).

The hotspots such as the transit zones in Hungary were created as a response to the 2015 so-called “refugee crisis” in Italy (and Greece).⁷³ They are dedicated places where, in cooperation with local authorities, EASO, Frontex, Europol and Eurojust, facilitate the identification, registration and fingerprinting of newly arrived migrants. Asylum applications are also processed here. Differently from Hungary, the “Hotspot approach” was developed under the European Commission’s European Agenda in Migration in order to provide emergency assistance to Member States at the external borders of the bloc.⁷⁴ Hotspots are supposed to channel people into different institutional regimes according to their intention to seek for international protection.⁷⁵ Asylum applicants are placed in reception centers, others in the pre-removal facilities (CPRs). However, asylum-seekers arriving via the Mediterranean are regularly detained in the hotspots surpassing the 48-hour timeframe permitted without judicial order.⁷⁶ As the numbers of new sea arrivals have been decreasing since 2016, *de facto* detention of asylum applicants in the hotspots seem to lack justifiable rationales.⁷⁷ This is similar to the Hungarian settings.

Boats can also be places of *de facto* detention. In 2018 a Coast Guard ship called Ubaldo Diciotti, carrying 177 migrants was not allowed to dock for six days, and people were prohibited to leave the vessel for almost another week.⁷⁸ In 2019, Salvini prohibited the disembarkation of the Gregoretti Coast Guard ship that could only reach port after almost a week.⁷⁹ Despite the new coalition government, the anti-asylum and anti-rescue decrees and practices, introduced by the previous one, are still in place.⁸⁰

⁷³ The Hotspot Approach to Managing Exceptional Migratory Flows. European Commission, 11 September 2015. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf

⁷⁴ Matevžič, G.: Crossing a Red Line – How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary, and Italy. Hungarian Helsinki Committee, 2019. pp. 22-23. https://www.helsinki.hu/wp-content/uploads/crossing_a_red_line.pdf

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019. p. 7. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

⁷⁹ Country Report: Italy, 2020 Update. AIDA, ECRE, 27 May 2020. p. 123. <https://www.asylumineurope.org/reports/country/italy>

⁸⁰ Italy: Revoke Abusive Anti-Asylum Decree. Draconian Migration Measures Put Lives, Rights at Risk. Human Rights Watch, 31 January 2020. <https://www.hrw.org/news/2020/01/31/italy-revoke-abusive-anti-asylum-decrees>

3.2.2. Grounds for asylum detention

The Hungarian government vehemently and repeatedly contested that the transit zones could be considered as places of *de facto* detention by claiming that asylum-seekers were free to leave the premises towards Serbia.⁸¹ In fact, as the transit zones are not official border check points between the two countries, and Serbia shall only readmit third-country nationals fulfilling specific legal conditions stated in the EU-Serbia Readmission Agreement, it would qualify as irregular border crossing.⁸²

On 14 May 2020, the CJEU clarified in the context of an urgent preliminary ruling procedure that the conditions under which people are kept isolated in the Röszke transit zone amount to a deprivation of liberty.⁸³ It ruled that the placement of asylum-seekers in the transit zone shall be classified as detention that could only last for four weeks.

A few days later, as a response to the CJEU's judgment by the government, 280 people were released from the transit zone and had been transferred to an open reception center and a semi-open community shelter.⁸⁴ The Minister of the Prime Minister's Office, Gergely Gulyás announced that

(...) the Hungarian government disagrees with this judgment and considers it hazardous and harmful to the safety of Europe. Nevertheless, as a Member State of the European Union we must comply with all seminal judgments and we are going to comply with it. Therefore, the government has decided to shut down the transit zones.⁸⁵

According to the Italian Legislative Decree no. 142/2015 transposing the Recast Reception Conditions Directive and the Recast Asylum Procedures detaining asylum-seekers solely on the

⁸¹ My personal experience also confirms this statement. In 2016, I visited both the Röszke and Tompa transit zones in an official capacity in order to distribute relief items for people waiting to be admitted to the site on the Serbian side of the border. Me and my colleagues were instructed by the policemen who opened the gate not to move further from an approximately one-meter wide area that marked the invisible state border, otherwise we would step onto Serbian territory in an irregular manner. If someone having a Hungarian citizenship is not allowed to freely leave the zone, asylum-seekers are certainly not in the position to do so either.

⁸² Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, 2007/819/EC. Official Journal of the European Union, 19 December 2007. EUR-Lex. Article 3. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007D0819>

⁸³ The placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-Hungarian border must be classified as 'detention'. Press Release, Court of Justice of the European Union, Luxembourg, 14 May 2020. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200060en.pdf?fbclid=IwAR09TGIBdUZng4y3zSkwRJB1Lr7jqpkLRhKDs3mmHoIMmWdw5ou_SIyjQCI

⁸⁴ Tweet of the Hungarian Helsinki Committee. Twitter, 21 May 2020. https://twitter.com/hhc_helsinki/status/1263395213474779136

⁸⁵ Európa egyik legsikeresebb védekezése volt a magyar. [The Hungarian defense was one of the most successful in Europe]. Translation from the second video. Website of the Hungarian Government, 21 May 2020. <https://www.kormany.hu/hu/miniszterelnokseg/hirek/europa-egyik-legsikeresebb-vedekezese-volt-a-magyar>

ground of assessing their asylum claim was not allowed. But the Identification and Expulsion Centers (CIE), that were already shut down, were opened again by a regulation of the Ministry of Interior and were subsequently renamed to Removal Detention Centers (CPR) in 2017.⁸⁶

The scope of the assessment criteria of the risk of absconding was widened and the appeal to the first instance court rejection of asylum applications was abolished by a new law in 2017.⁸⁷ Deprivation of liberty in hotspots as well as in CPRs became eventually possible by Decree Law 113/2018 in order to establish asylum-seekers' nationality or identity.⁸⁸ Moreover, the 2018 changes to the legislation increased the length of asylum detention from 90 to 180 days.

Even though the 2019 numbers on newly arrived asylum-seekers dropped to one-third of the 2017 figures, there was an increase in the number of CPR from five in 2017 to nine in 2019.⁸⁹

Asylum-seekers can now be detained under the following circumstances.⁹⁰ First, if the exclusion clause of the Geneva Convention is applicable. Second, if someone

(...) is issued an expulsion order on the basis that he or she constitutes a danger to public order or state security, or as suspected of being affiliated to a mafia-related organisation, has conducted or financed terrorist activities, has cooperated in selling or smuggling weapons or habitually conducts any form of criminal activity, including with the intention of committing acts of terrorism.⁹¹

Third, if someone is present a danger for the public order and security. Lastly, if there is a risk of absconding.

⁸⁶ The detention of asylum-seekers in Europe – Constructed on shaky ground? AIDA, ECRE, June 2017. p. 6. https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf

⁸⁷ Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019. p. 8. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

⁸⁸ Country Report: Italy, 2020 Update. AIDA, ECRE, 27 May 2020. p. 123. <https://www.asylumineurope.org/reports/country/italy>

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* pp. 124-125.

⁹¹ *Ibid.* p. 124.

4. ASYLUM DETENTION CONDITIONS

According to Article 18 of the Recast RCD, full respect for human dignity shall prevail in the treatment of asylum-seekers who are placed in detention, and the reception conditions shall be specifically designed to meet their needs.⁹² In this chapter some examples on detention conditions will be shown from the Hungarian transit zones and from the Italian CPRs and hotspots.

Table 3.: Number of asylum detention facilities and their capacity in Hungary and Italy (2019)

Country	Name	Number	Location	Capacity
Hungary	Asylum detention center	1	Nyírbátor ⁹³	105
	Transit zone	2	Röszke, Tompa	700
Italy	CPR	9	Bari-Palese, Basilicata, Brindisi-Restinco, Caltanissetta-Pian del Lago, Gradisca d'Isonzo-Gorizia, Macomer-Cagliari, Roma-Ponte Galeria, Trapani-Milo, Turin, Palazzo San Gervasio-Potenza ⁹⁴	1 380
	Hotspots	4	Pozzallo, Lampedusa, Messina, Taranto	not available ⁹⁵

Source: Asylum Information Database⁹⁶

4.1. Hungary

The Röszke and Tompa transit zones along the Hungarian-Serbian border, located approximately 50 kilometers from each other, started to operate on 15 September 2015 and functioned until 21 May 2020. These sites consist of shipping containers surrounded by razor wire fence, equipped by massive surveillance systems and guarded by law enforcement personnel.

⁹² 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 (recast). Official Journal of the European Union, 29 June 2013. Article 18. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

⁹³ According to the 2019 AIDA report on Hungary, the asylum detention facilities in Kiskunhalas and Békéscsaba are closed. Asylum-seekers pending deportation can also be held in Győr immigration detention center. There are also immigration detention centers in Nyírbátor and at the Budapest Airport Police Directorate. In: Country Report: Hungary, 2019 Update. AIDA, ECRE, 29 March 2020. p. 83. <https://www.asylumineurope.org/reports/country/hungary>

⁹⁴ The 2019 AIDA report on Italy mentions that there are nine CPRs in the country, but it then names ten. Different reports use confusingly different names for the facilities. The names indicated in this thesis are supposed to be the full ones.

⁹⁵ Both the GDP and the AIDA reports from 2019 mention that the capacity of the hotspots is unknown.

⁹⁶ Country Report: Hungary, 2019 Update. AIDA, ECRE, 29 March 2020. p. 83. <https://www.asylumineurope.org/reports/country/hungary>; Country Report: Italy, 2020 Update. AIDA, ECRE, 27 May 2020. p. 123. <https://www.asylumineurope.org/reports/country/italy>

Complex trauma and mental health issues, such as post-traumatic stress disorder, are highly prevalent among refugee populations that can be exacerbated by the exceedingly securitized and dehumanizing environment.⁹⁷ The Cordelia Foundation reported that due to the harsh conditions and extreme isolation in the transit zones, traumatic symptoms became more severe in many cases.⁹⁸ Nevertheless, NGOs providing psycho-social or legal assistance for asylum-seekers were denied access to the facility.⁹⁹ Only basic material conditions, such as accommodation in containers measured 13 m² equipped with beds, hygiene kits, basic medical services and food were provided. However, 24 cases were formally documented, when food provision for subsequent asylum applicants had been only resumed upon interim measures ruled by the ECtHR.¹⁰⁰

The latest report of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) related to its October 2017 visit in the transit zones, acknowledged the efforts made by the Hungarian authorities to provide proper material conditions, including access to natural light and heating in the containers, dining room, laundry and communal space, but noted that "the overall design of the transit zones is far too carceral."¹⁰¹ Overcrowding, overheating of the containers and the lack of activities had been identified as shortcomings. The delegation was highly concerned about the case of unaccompanied minors and recommended their immediate release.¹⁰² It also emphasized that

⁹⁷ Herlihy, J.: Evidentiary Assessment and Psychological Difficulties. In: Noll, G. (ed.): Proof, Evidentiary Assessment and Credibility in Asylum Procedures. Series: The Raoul Wallenberg Human Rights Library Leiden/Boston: Martinus Nijhoff Publishers. 2005. p. 129. <http://cse1.org.uk/assets/images/resources/herlihy-2005-noll/Herlihy-Evidentiary-Assessmt.pdf>

⁹⁸ Report on the mental health conditions of beneficiaries of international protection and asylum seekers in Hungary. Cordelia Foundation for the Rehabilitation of Torture Victims. Budapest, Hungary, 2018. p. 5. <https://cdn-5c8d0253f911c90ff40d8f40.closte.com/en/wp-content/uploads/sites/2/2019/03/Report-on-the-mental-health-conditions-of-beneficiaries-of-international-protection-and-asylum-seekers-in-Hungary.pdf>

⁹⁹ *Ibid.*

¹⁰⁰ Report to the Hungarian government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 October 2017. Council of Europe, Strasbourg, 18 September 2018. <https://rm.coe.int/16808d6f12>; Cases of interim measures issued under Rule 39 by the ECtHR to the Government of Hungary, to ensure that migrants detained in the Hungarian transit zones are not deprived of food. Database of the Hungarian Helsinki Committee, 3 April 2020 (last update).

https://docs.google.com/spreadsheets/d/10V84xAVREKSScFwz4ME_2kfpBRV_CPqCr7SUKitE2o8/edit?usp=s_haring; Hungary Continued Starvation Tactics Continued Interim Measures. ECRE, 14 February 2020. <https://www.ecre.org/hungary-continued-starvation-tactics-continued-interim-measures/>

¹⁰¹ Report to the Hungarian government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 October 2017. Council of Europe, Strasbourg, 18 September 2018. p. 4. <https://rm.coe.int/16808d6f12>

¹⁰² An unaccompanied minor is a non-EU national below the age of 18 who arrives on the territory of the EU Member States unaccompanied by an adult responsible for him or her, and until he or she is not effectively taken into care of such a person. The term also refers to minors how are left unaccompanied upon entry to the territory of the EU Member States. For further information please visit: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/uam/uam_infographic_a4_en.pdf

children with their families should only be held in the closed facilities for the shortest period of time. The recommendations included a complete overhaul of the legislation related to the transit zones.¹⁰³

Due to the re-traumatizing effects of the carceral conditions in the premises many people decided to leave the facility.¹⁰⁴ The hostile nature itself was sufficient enough to prevent people from applying for international protection or waiting for the decision.

¹⁰³ Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 October 2017. Council of Europe, Strasbourg, 18 September 2018. p. 25. <https://rm.coe.int/16808d6f12>

¹⁰⁴ *Ibid.* p. 9.

4.2. Italy

In Italy, only seven Return Detention Centers (CPRs, previously: CIEs) are among the officially acknowledged detention facilities.¹⁰⁵ Foreigners pending deportation are administratively detained. According to GDP's 2019 report on the Italian immigration detention system, *de facto* detention of people is regular in the hotspots (see also chapter 3.2.1.).¹⁰⁶

Detention conditions are very different in each CPR, but their carceral design and the lack of recreational activities are similar to the features of the Hungarian transit zones. In general, places of worship are missing. The lack of communal spaces and leisure activities in Brindisi, Bari, Potenza and Roma Ponte Galeria CPRs were specifically mentioned in the GDP 2019 report.¹⁰⁷ There were very poor hygienic conditions in Caltanissetta CPR and the lack of sufficient number of showers or toilets were identified regarding Potenza CPR and Caltanissetta CPR. In many aspects, the conditions in Caltanissetta CPR were very poor and that was already indicated by the 2017 CPT delegation.¹⁰⁸ A lack of adequate furniture, overcrowding as well as dirty beddings were also mentioned by the GDP report.¹⁰⁹ A cockroach infestation in Potenza CPR and poor sleeping conditions in Bari CPR were also reported. The overall conditions of Roma Ponte Galeria (which is the only facility for women) imposed health threats to detainees and staff as well. People are detained in this facility without taking into consideration whether they are asylum-seekers or not. Fights, protests against the removal procedure and the conditions as well as fire incidents caused by detainees were indicated regarding Bari CPR, Caltanissetta CPR and Torino CPR. Another worrisome aspect is that unaccompanied minors had sometimes been detained in many CPRs.¹¹⁰ The CPT report already called for their placement in proper accommodation already in 2017.¹¹¹ The fact that one person committed suicide in Brindisi CPR is also alarming.

¹⁰⁵ Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019. p. 25. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* pp. 27-30.

¹⁰⁸ Executive Summary related to the Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017. Council of Europe, Strasbourg, 10 April 2018. p. 1. <https://rm.coe.int/16807b7144>

¹⁰⁹ Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019. pp. 27-30. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

¹¹⁰ *Ibid.*

¹¹¹ Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017. Strasbourg, 10 April 2018. <https://rm.coe.int/16807b6d56>

However, an open-door policy within specific sectors was identified in Torino CPR, Caltanissetta and Roma Ponte Galeria CPR. According to the CPT report, the health care services were good in the latter one.¹¹² The GDP reported high-quality medical services in Caltanissetta CPR.

In Lampedusa Hotspot, poor hygienic conditions, lack of adequate space, communal areas and leisure activities are identified by the GDP report.¹¹³ One person committed suicide in the facility in 2018, and there were also incidents related to fire and protests. Overcrowding and very poor conditions regarding lighting, ventilation and safety were identified in Messina Hotspot. In general, the 2017 CPT delegation was concerned about the legal safeguards related to the deprivation of liberty of people kept in the hotspots and recommended an increased access to legal aid, adequate information on rights and processes as well as judicial review.¹¹⁴

The overall conditions in the Pozzallo and Trapani Hotspots were considered adequate by the 2017 CPT delegation.¹¹⁵ In Taranto Hotspot, an earlier report cited by the GDP mentioned good overall conditions regarding hygiene, but the placement of unaccompanied minors with adults and difficulty in contacting the outside world were also mentioned.¹¹⁶

¹¹² *Ibid.*; Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019, pp. 27-30. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

¹¹³ Country Report – Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? Global Detention Project, 15 October 2019, pp. 30-33. <https://www.globaldetentionproject.org/italy-complicit-in-grave-human-rights-abuse>

¹¹⁴ Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017. Strasbourg, 10 April 2018. <https://rm.coe.int/16807b6d56>

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

5. ANALYSIS OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

5.1. Case of Ilias and Ahmed v. Hungary

The Chamber judgment concerns two Bangladeshi nationals who transited through Serbia and lodged an asylum application in the Röszke transit zone upon arrival in September 2015.¹¹⁷ After 23 days, their application was rejected on the same day of their asylum interview as inadmissible based on the Government Decree that listed Serbia as a safe third country. Along with the negative decision, that was reaffirmed on appeal, the applicants received an expulsion order and were transferred back to Serbia by the OIN.¹¹⁸

The ECtHR rejected the government's claims that confining people to the transit zone does not amount to deprivation of liberty and people are free to exit the facility towards Serbia.¹¹⁹ The Court previously regarded placing foreigners in international zones as restricting their liberty and stated that such coercive measures must be accompanied with procedural safeguards and be strictly limited in time. Without having safety measures and being time-bound, restrictions would be considered as deprivation of liberty. The applicants' individual circumstances should have been taken into consideration in order to state whether they were deprived of their liberty under Article 5 of the Convention.

As it was already mentioned in sub-chapter 3.1, Article 8 § 3 of the Recast Reception Conditions Directive lists the permitted grounds of lawfully conducted detention.¹²⁰ The Court noted that in this case none of the sub-categories could be applied as there was no individual assessment of their circumstances by the Hungarian authorities and the use of detention was neither necessary, nor proportionate. Alternatives to detention had not been considered either.

¹¹⁷ Case of Ilias and Ahmed v. Hungary. Application no. 47287/15, ECtHR, Chamber Judgment, Strasbourg, 14 March 2017.

[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22ilias%20and%20ahmed%22\],%22documentcollectionid%22:\[%22CHAMBER%22\],%22itemid%22:\[%22001-172091%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22ilias%20and%20ahmed%22],%22documentcollectionid%22:[%22CHAMBER%22],%22itemid%22:[%22001-172091%22]})

¹¹⁸ Currently: National Directorate-General for Aliens Policing

¹¹⁹ Nagy, B.: Hungary in front of her judges. In: Minderhoud, P. – Mantu, S. - Zwaan, K. (eds): Caught in between Borders: Citizens, Migrants and Humans. Liber Amicorum in honour of prof. Elspeth Guild. Wolf Publishers, Tilburg, 251 – 260., 2019. p. 255.

http://www.nagyboldizsar.hu/uploads/2/6/7/7/26778773/hungary_in_front_of_her_judges_20190909.pdf

¹²⁰ 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 (recast). Official Journal of the European Union, 29 June 2013. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

The Court reiterated that detention must be in line with the aim of Article 5 in order to protect the right to liberty. The Court also emphasized that in order to avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be implemented in good faith; it must be closely linked to the aim of deterring the individual's entry to the territory who is not authorized to do so; the conditions of the place of detention shall be adequate,

(...) bearing in mind 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.

Lastly, the length of the detention should not surmount the time that is "reasonably required for the purpose pursued."¹²¹

The Court also ruled that asylum-seekers should not be kept in detention facilities just because they had applied for international protection. In *Ilias and Ahmed*, it concluded that the applicants' detention for 23 days in the transit zone amounted to *de facto* deprivation of liberty that cannot be regarded lawful under Article 5 § 1 of the Convention. Therefore, it found a breach of Article 5 § 1 of the Convention.¹²²

However, the Grand Chamber overruled the Chamber judgment and found no violation under Article 5 of the Convention. As already mentioned in the glossary, there are several factors for the Court to differentiate between the restriction and deprivation of liberty in the context of the confinement of a person to an airport transit zone or reception center for the registration or identification of migrants.

The Grand Chamber applied the following principles for the present case. First, it considered the applicants' individual situation and choices. It noted that the applicants crossed the border from Serbia and entered the transit facility upon their own free will and not because of a direct or immediate danger for their life. Second, the Grand Chamber noted that the rationale and purpose of the Hungarian legislation concerning the transit zone was to create a waiting area where asylum-seekers could stay while the Hungarian authorities formally admit them to the territory of Hungary. In reality, people arriving from Serbia are only able to enter the transit zone when the authorities open the gate and admit them to the territory. Therefore, they are already admitted to the territory. The Court argued that the applicants stayed in the transit zone

¹²¹ Case of *Ilias and Ahmed v. Hungary*. Application no. 47287/15, ECtHR, Chamber Judgment, Strasbourg, 14 March 2017. Paragraph 64.

[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22ilias%20and%20ahmed%22\],%22documentcollectionid%22:\[%22CHAMBER%22\],%22itemid%22:\[%22001-172091%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22ilias%20and%20ahmed%22],%22documentcollectionid%22:[%22CHAMBER%22],%22itemid%22:[%22001-172091%22]})

¹²² The Court also found a violation of Article 5 § 4 and Article 13 taken together with Article 3.

due to their appeal, and not because the authorities wanted to deprive them of their liberty. It also noted that procedural guarantees concerning the asylum procedure and the maximum length of the stay in the transit zone were in place. The applicants stayed in the premises for 23 days until their applications were assessed that is a relevant factor in relation to the purpose of the authorities. According to the Court, the length of the restriction on movement is a relevant factor to decide whether the circumstances amount to deprivation liberty and that is also connected to the purpose of the national authorities. As this timeframe cannot be considered excessive regarding the asylum procedure, it is not decisive in the decision-making. The Grand Chamber considered the actions of the authorities as necessary.

Third, the Court examined the restrictions from the perspective of the applicants' experience and whether their stay in the transit facility could had the effect of *de facto* deprivation of liberty. It noted that their freedom of movement within the facility was restricted only to the extent that was necessary for the asylum procedure. The Grand Chamber argued that due to the Readmission Agreement between Serbia and the EU, the possibility of leaving the transit zone towards the Balkan country was not only theoretic, but practical. It also pointed to the fact that many other people left the facility at the material time. The Court rejected the validity of the fears of direct threat to their life or health upon return to Serbia. It stated that such fears were more likely related to the ill-functioning Serbian reception system and a potential subsequent chain *refoulement*. The concerns were not sufficient enough to invoke Article 5 claims. The Grand Chamber judgment did not find a violation under Article 5 of the Convention.

Stoyanova argues that the Grand Chamber judgment in the case of Ilias and Ahmed v. Hungary reflects on the approach that ECtHR takes in relation to immigration detention that is different from the general standards pertinent to deprivation of liberty.¹²³ The Court systematically fails to examine the necessity of deprivation of liberty under Article 5 § 1 (f) of the Convention. She alleges that this judgment further abolishes the rights of asylum-seekers under the ECtHR jurisdiction.

¹²³ Stoyanova, V.: The Grand Chamber Judgment in Ilias and Ahmed v. Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode. Strasbourg Observers, 23 December 2019. <https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/>

5.2. Case of Khlaifia and Others v. Italy

The Grand Chamber judgment concerns three Tunisian nationals whose vessel was blocked by the Italian coast guard while it was heading towards Italy during the Arab Spring in 2011.¹²⁴ They were confined to the Early Reception and Aid Center (CSPA), a reception center for irregular migrants upon arrival to Lampedusa. After a violent riot outbreak, the applicants were transferred to another accommodation in Palermo. They were able to leave the police guarded facility and joined a large-scale protest with other migrants, but subsequently they were transferred and confined to ships by the police. They also alleged that they were ill-treated by the police. This situation lasted for a few days, before they were taken to the airport pending removal to Tunisia.

The Grand Chamber emphasized that in the case of deprivation of liberty, the principle of legal certainty shall prevail.¹²⁵ Therefore, the conditions under which it is carried out shall be clearly set out in domestic legislation. National laws shall be precise and predictable in order to be considered lawful. The Court noted that the bilateral agreement between Italy and Tunisia, that was not made publicly available, cannot serve as a legitimate legal basis for the deprivation of liberty of asylum applicants in Lampedusa.

Most importantly the Grand Chamber found that

(...) legislative ambiguity has given rise to numerous situations of *de facto* deprivation of liberty and the fact that placement in a CSPA is not subject to judicial supervision cannot, even in the context of a migration crisis, be compatible with the aim of Article 5 of the Convention: to ensure that no one should be deprived of his or her liberty in an arbitrary fashion.¹²⁶

The Grand Chamber found a violation of Article 5 § 1 of the Convention.

¹²⁴ Case of Khlaifia and Others v. Italy, Application no. 16483/12. ECtHR, Grand Chamber Judgment, Strasbourg, 15 December 2016.

[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22khlaifia%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-170054%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22khlaifia%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-170054%22]})

¹²⁵ *Ibid.* Paragraph 92.

¹²⁶ *Ibid.* Paragraph 106.

6. CONCLUSIONS

The abundance of international human rights law, EU directives and their diverse transposition into national legislations as well as specific domestic provisions make asylum detention regimes very heterogenous in the bloc. Additionally, the language used by the governments to describe places of detention also hinders the analysis of how these facilities operate. On the website of the Hungarian authority responsible for asylum matters, the transit zones are still categorized as reception facilities. The Italian authorities call migrant detention as administrative holding. The possibility of creatively stretching the language on detention largely facilitates the mass deprivation of liberty of people seeking for international protection.

Despite all the variances, an obligation for regular reporting on asylum detention practices of the Member States and standardized data collection would be essential. Additionally, access to public data on the use of deprivation of liberty of asylum-seekers would be pivotal to better monitor the conditions and to compare statistics. NGO and CPT reports are invaluable sources of understanding the issue. However, their different interpretations on data and categorization of irregular migrants often make the information contradictory to each other.

The ECtHR judgment in the case of *Ilias and Ahmed v. Hungary* refers to the border procedure that was in place in 2015.¹²⁷ The Grand Chamber did not take into consideration the changes in the asylum detention legislation in 2017 that allowed unlimited detention in the transit zones. It ruled on a situation that lasted for four weeks. However, the border procedure is not applicable anymore. Regarding the classification of the placement of asylum-seekers in the Röszke transit zone at the Hungarian-Serbian border as detention the CJEU decision is the authoritative ruling.

The role of both the ECtHR and the CJEU in upholding human rights is immeasurable. However, during the years between the mass violation of the right to liberty and the final judgment of either court, often hundreds or thousands of asylum-seekers suffer.

The promotion of alternatives to detention measures could be a way to effectively promote more just migration regimes. This option will be reflected by the Advocacy Statement in the Annex.

¹²⁷ This paragraph is based on the comments of Professor Boldizsar Nagy.

7. ANNEX



JOINT STATEMENT ON THE USE OF ALTERNATIVES TO DETENTION DURING AND BEYOND THE COVID-19 CRISIS

by the NGO Alliance for the Alternatives to Detention¹²⁸

A new EU Pact on Migration and Asylum will be adopted in the coming months under the fifth priority “Promoting our European Way of Life” of the European Commission’s new work program.¹²⁹ The reform aims to open the door to a new era of migration management with a holistic view to the complexity of immigration and promises commitment to a “more humane and more effective” migration and asylum regime.

After the 2015 so-called “refugee crisis”, Europe is once again facing large-scale challenges. Like a magnifying glass, the COVID-19 pandemic highlighted the need for urgent steps to be taken to protect people, especially those in a vulnerable situation.

¹²⁸ This is a fictitious umbrella organization.

¹²⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2020 – A Union that strives for more. COM/2020/37 final. Brussels, 29 January 2020. p. 8. https://eur-lex.europa.eu/resource.html?uri=cellar:7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF; Annexes 1 to 5. p. 3. https://eur-lex.europa.eu/resource.html?uri=cellar:7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_2&format=PDF

RELEASE PEOPLE FROM IMMIGRATION AND ASYLUM DETENTION

Detention facilities often lack sufficient space for practicing social distancing that is exacerbated by the lack of proper hygienic measures and access to adequate medical services that could help the spread of the virus.¹³⁰ Considering such risks, in response to the COVID-19 crisis, Spain was the first country to release almost all people from immigration detention.¹³¹ Spain was followed by several countries, such as Belgium, the Netherlands and the UK, where a significant number of immigration detainees have also been released.¹³² Even beyond the public health emergency, immigration and asylum detention are harmful, costly and in many cases interfere with human rights.¹³³

The NGO Alliance for the Alternatives to Detention joins the Commissioner for Human Rights in demand for immediate release of people from immigration and asylum detention.¹³⁴

USE DETENTION ONLY AS A LAST RESORT MEASURE

Immigration detention should only be used in exceptional cases and after alternatives to detention measures have already been exhausted. In the EU, more than 100,000 people are

¹³⁰ Migration: Key Fundamental Rights Concerned. Quarterly Bulletin, 1 January – 31 March 2020. European Union Agency for Fundamental Rights, 7 April 2020. p. 5.

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-migration-bulletin-2_en.pdf

¹³¹ Commissioner calls for release of immigration detainees while Covid-19 crisis continues. Statement, Council of Europe, Commissioner for Human Rights. Strasbourg, 26 March 2020. <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues>; Country Report – Immigration Detention in Spain: A Rapid Response to COVID-19. Global Detention Project. 15 May 2020. p. 6. <https://www.globaldetentionproject.org/immigration-detention-in-spain-a-rapid-response-to-covid-19>

¹³² Statement on the Upcoming EU Pact on Asylum and Migration. PICUM, 12 May 2020. <https://picum.org/wp-content/uploads/2020/05/PICUM-Statement-May-2020-on-EU-Pact.pdf>

¹³³ There are alternatives – A handbook for preventing unnecessary immigration detention (revised edition). International Detention Coalition, 2015. p. III. <https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf>

¹³⁴ Commissioner calls for release of immigration detainees while Covid-19 crisis continues. Statement, Council of Europe, Commissioner for Human Rights. Strasbourg, 26 March 2020. <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues>

detained every year for reasons related to their migration status, often unlawfully and arbitrarily.¹³⁵

We urge to shift the focus at the regional level from relying on custodial measures to a policy-making strategy that promotes alternatives to detention during and beyond the COVID-19 crisis. The use of non-custodial, engagement and community-based alternatives to detention should be emphasized by the upcoming EU Pact on Migration and Asylum.

PROMOTE CASE MANAGEMENT WITHIN THE ENGAGEMENT-BASED ALTERNATIVES TO DETENTION

Case management is a social work-based approach that is able to provide an individualized response to someone's needs. Case management acknowledges and promotes the individual's strengths, vulnerabilities and goals. As intermediary actors, case managers facilitate access to welfare services and legal aid. The European ATD Network considers case management within the engagement-based alternatives to detention measures a successful tool to help the individual migrant to stay engaged with immigration procedures and significantly lower the risk of absconding.¹³⁶ Three pilot projects of the Network provided individualized case management for people in immigration detention in Bulgaria, Cyprus and Poland. The 2018 interim evaluation demonstrated that 97% of the migrants remained engaged with their immigration procedures through these engagement-based alternatives to detention projects.¹³⁷

We call for mainstreaming case management within the engagement-based alternatives to detention as an effective tool for keeping detention as it should be – a measure of last resort.

NGO Alliance for the Alternatives to Detention

¹³⁵ Statement on the Upcoming EU Pact on Asylum and Migration. PICUM, 12 May 2020. <https://picum.org/wp-content/uploads/2020/05/PICUM-Statement-May-2020-on-EU-Pact.pdf>

¹³⁶ European ATD Network. <https://www.atdnetwork.org/>

¹³⁷ Ohtani, E.: Alternatives to detention from theory to practice. Evaluation of three engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland. Report. EPIM, July 2018. p. 3. https://www.epim.info/wp-content/uploads/2018/10/ATD-Evaluation-Report_FINAL.pdf

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