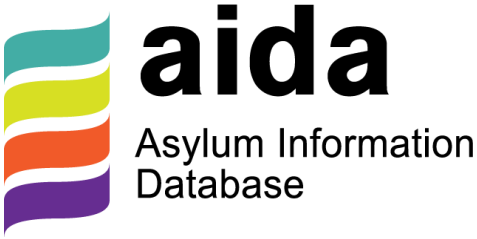

Boundaries of liberty

Asylum and *de facto* detention in Europe

ACKNOWLEDGEMENTS

This report was written by Minos Mouzourakis and Kris Pollet at ECRE, with contributions from Catherine Woollard at ECRE and the following national experts:

Austria	Asylkoordination Österreich
Belgium	Vluchtelingenwerk Vlaanderen
Bulgaria	Bulgarian Helsinki Committee
Cyprus	Cyprus Refugee Council
Germany	Informationsverbund Asyl und Migration
Spain	Accem
France	Forum réfugiés – Cosi
Greece	Greek Council for Refugees
Croatia	Croatian Law Centre
Hungary	Hungarian Helsinki Committee
Ireland	Irish Refugee Council
Italy	ASGI
Malta	aditus foundation and JRS Malta
Netherlands	Dutch Council for Refugees
Poland	Helsinki Foundation for Human Rights
Portugal	Portuguese Refugee Council
Romania	Felicia Nica
Sweden	Michael Williams, FARR and Lisa Hallstedt
Slovenia	PIC
UK	British Refugee Council
Switzerland	Swiss Refugee Council
Serbia	Belgrade Centre for Human Rights
Turkey	Independent consultant

The information contained in this report is up-to-date as at 31 December 2017, unless otherwise stated.

THE ASYLUM INFORMATION DATABASE (AIDA)

The Asylum Information Database is a database containing information on asylum procedures, reception conditions, detention and content of international protection across 23 European countries. This includes 20 European Union (EU) Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, Spain, France, Greece, Croatia, Hungary, Ireland, Italy, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, United Kingdom) and 3 non-EU countries (Switzerland, Serbia, Turkey).

The overall goal of the database is to contribute to the improvement of asylum policies and practices in Europe and the situation of asylum seekers by providing all relevant actors with appropriate tools and information to support their advocacy and litigation efforts, both at the national and European level. These objectives are carried out by AIDA through the following activities:

- **Country reports**
  AIDA contains national reports documenting asylum procedures, reception conditions, detention and content of international protection in 23 countries.

- **Comparative reports**
  Comparative reports provide a thorough comparative analysis of practice relating to the implementation of asylum standards across the countries covered by the database, in addition to an overview of statistical asylum trends and a discussion of key developments in asylum and migration policies in Europe. AIDA comparative reports are published in the form of thematic updates, focusing on the individual themes covered by the database. Thematic reports published so far have explored topics including reception, admissibility procedures, content of protection and vulnerability.

- **Comparator**
  The Comparator allows users to compare legal frameworks and practice between the countries covered by the database in relation to the core themes covered: asylum procedure, reception, detention, and content of protection. The different sections of the Comparator define key concepts of the EU asylum *acquis* and outline their implementation in practice.

- **Fact-finding visits**
  AIDA includes the development of fact-finding visits to further investigate important protection gaps established through the country reports, and a methodological framework for such missions. Fact-finding visits have been conducted in Greece, Hungary, Austria and Croatia.

- **Legal briefings**
  Legal briefings aim to bridge AIDA research with evidence-based legal reasoning and advocacy. Briefings have been published so far, covering legality of detention of asylum seekers under the Dublin Regulation; key problems in the collection and provision of asylum statistics in the EU, the concept of "safe country of origin"; the way the examination of asylum claims in detention impacts on procedural rights; age assessment of unaccompanied children; duration and review of international protection; length of asylum procedures; travel documents; accelerated procedures; and detention expansion. In addition, statistical updates on the Dublin system have been published for 2016 and the first half of 2017.

AIDA is funded by the European Programme for Integration and Migration (EPIM), a collaborative initiative by the Network of European Foundations, the European Union's Asylum, Migration and Integration Fund (AMIF) and Horizon 2020 research and innovation programme (grant agreement No 770037), the Calouste Gulbenkian Foundation and the Portuguese High Commission for Migration (ACM).

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Glossary

Acquis	Accumulated legislation and jurisprudence constituting the body of European Union law.
Asylum seeker(s) or applicant(s)	Person(s) seeking international protection, whether recognition as a refugee, subsidiary protection beneficiary or other protection status on humanitarian grounds.
Dublin system	System establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application, set out in Regulation (EU) No 604/2013.
(recast) Reception Conditions Directive	Directive 2013/33/EU laying down standards for the reception of asylum seekers.

List of abbreviations

AIDA	Asylum Information Database
Anafé	National Association for Assistance at Borders for Foreigners | Association nationale d'assistance aux frontières pour les étrangers (France)
ASGI	Association for Legal Studies on Immigration | Associazione per gli Studi Giuridici sull'Immigrazione (Italy)
CEAS	Common European Asylum System
Ceseda	Code on the entry and residence of foreigners and the right to asylum | Code de l'entrée et du séjour des étrangers et du droit d'asile (France)
CETI	Migrant Temporary Stay Centre | Centro de estancia temporal para inmigrantes (Spain)
CIE	Detention Centre for Foreigners | Centro de Internamiento de Extranjeros (Spain)
CJEU	Court of Justice of the European Union
CPR	Pre-removal centre | Centro di permanenza per i rimpatri (Italy)
EAST	Initial reception centre | Erstaufnahmestelle (Austria)
EBTL	Extra Guidance and Supervision Locations | Extra begeleiding en toezichtlocaties (Netherlands)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EPIM	European Programme for Integration and Migration
EU	European Union
Eurodac	European fingerprint database for asylum seekers and irregular migrants
FARR	Swedish Network of Refugee Support Groups | Flyktinggruppernas Riksråd (Sweden)
IRC	Initial Reception Centre (Malta)
JRS	Jesuit Refugee Service
NGO(s)	Non-governmental organisation(s)
OFPRA	French Office for the Protection of Refugees and Stateless Persons | Office français de protection des réfugiés et apatrides (France)
PIC	Legal-Informational Centre for non-governmental organisations (Slovenia)
UNHCR	United Nations High Commissioner for Refugees
WGAD	United Nations Working Group on Arbitrary Detention

Introduction

The detention of persons seeking protection is a frequent component of asylum systems, despite well-established evidence of its damaging effects on individuals and limited efficiency in regulating the movement of people. More critically, however, it remains a highly opaque phenomenon. Places of confinement are underpinned by varying and creative terminology from one country to another, while data on the scale of detention remain scarce, complex and in constant need of qualification and explanation.

Practices which allow states to circumvent their international and European Union (EU) law duties stem from ambiguities in legal frameworks, often driven by deliberate policy choices. States may have different reasons for maintaining the obfuscation between reception and detention. They may seek to circumvent the prescriptive standards stemming from refugee and human rights law when depriving those seeking asylum of their liberty to expose them to particularly precarious situations, or for reasons of simple administrative convenience. States may also see an interest in downplaying the scale of coercive measures in their asylum systems through inaccuracy or misrepresentation in statistics (see Annex I).

This report seeks to clarify the instances and spaces where states resort to deprivation of liberty in the asylum context, whether formally designated as such or occurring *de facto*. It first demarcates the scope of detention through an analysis of the interpretation of the European Convention on Human Rights (ECHR) and EU law, and examines the permissible reasons for interfering with the right to liberty and the necessary safeguards attached thereto. The report then looks at the ambiguous regimes of detention applied by states in practice, through a comparative analysis of national legal frameworks and practice in the 23 European countries covered by the Asylum Information Database (AIDA).

It draws primarily upon European and national case law, AIDA Country Reports containing statistics and information on national legal provisions and practice, as well as other sources including national monitoring bodies.

The report is structured in two chapters:

- **Chapter I** discusses the boundary between reception, movement restrictions and detention in Strasbourg jurisprudence and EU law;

- **Chapter II** focuses on the treatment of asylum seekers upon arrival and beyond, documenting practices of formal detention, *de facto* detention and open reception, as well as related questions of conditions and access to places of detention;

A final part draws conclusions and puts forward recommendations to European countries and EU institutions, including in the context of the reform of the Reception Conditions Directive.

Despite the presumption against detention of asylum seekers that can be derived from international refugee and human rights law, European states increasingly deprive persons fleeing conflict and severe human rights violations of their liberty during the examination of their request for international protection. Automatic detention practices at the land and air borders of the EU in particular are well-documented, including in AIDA country reports, in clear dereliction of states' obligations to refrain from arbitrary detention[1] and from penalisation of refugees for irregular entry.[2] In recent years, European countries have increasingly placed applicants for international protection, whether at the point of arrival or on the territory, under legal regimes which may amount to detention in practice even if not defined as such in the national legal framework.

The use of detention in the asylum process, whether *de jure* or *de facto*, is subject to strict legal constraints and safeguards. Authoritative guidance is provided by the case law of the European Court of Human Rights (ECtHR) on the right to liberty and the right to freedom of movement,[3] as well as jurisprudence of the Court of Justice of the European Union (CJEU) on detention provisions in the Dublin III Regulation.[4] Since the entry into force of the recast Reception Conditions Directive in 2013,[5] EU law draws a legal distinction between detention and reception, yet at the same times blurs those divisions when regulating areas where both notions come into play. Current discussions on the reform of the recast Reception Conditions Directive fail to address those gaps in the EU legal framework as it stands. Rather, additional confusion may be introduced in the reform of the Directive through the inclusion of a new provision on the organisation of states' reception systems, which allows for a number of obligations to be imposed on applicants in reception which may amount to restrictions of their freedom of movement.[6]

This chapter delineates the scope of detention of asylum seekers and the factual situations falling therein through an analysis of Strasbourg case law on deprivation of liberty and restrictions on freedom of movement, as well as the legal ambiguities brought about by the recast Reception Conditions Directive in this regard. It then refers to the standards governing detention and restrictions on freedom of movement under the ECHR and EU law, namely in relation to the permissible grounds and available procedural safeguards.

1. What constitutes detention?

Under the ECHR, the right of non-nationals to move freely on the territory of the host state may be limited either through restrictions on freedom of movement or through deprivation of liberty. However, the boundary differentiating detention from mere restrictions on liberty is not conclusively defined in the respective provisions of the ECHR or in the case law of the Strasbourg Court.

1 Article 5 European Convention on Human Rights (ECHR); Article 6 Charter of Fundamental Rights of the European Union ("Charter").
2 Article 31 United Nations Convention Relating to the Status of Refugees, Geneva, 28 July 1951 ("Refugee Convention").
3 Article 5 ECHR; Article 2 Protocol 4 ECHR.
4 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *OJ* 2013 L180/31.
5 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), *OJ* 2013 L180/96.
6 European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465, 13 July 2016.

The same question arises from the definition of "detention" in EU law, where the recast Reception Conditions Directive defines detention as "confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement".[7] The Directive stops short of clarifying under what circumstances an applicant is effectively deprived of his or her liberty.

The difference between restriction and deprivation of liberty is consistently explained by the ECtHR as one of degree and not of substance,[8] meaning that the two notions are to be distinguished in terms of the severity of their interference with a person's liberty. At the same time, however, restrictions of freedom of movement and detention can only be imposed for a specific set of respective purposes, which are further discussed in Section 2.

Determining whether a person is detained or is subject to mere movement or residence restrictions requires first and foremost a factual assessment of the concrete situation of the individual concerned. As observed by commentators, the starting point is the position of the individual, while a range of factors need to be taken into account such as the type, duration, effects and manner of implementation of the restrictive measures in question.[9] The assessment of detention raises an objective element of deprivation of liberty, as well as a subjective element pointing to the individual's understanding that his or her freedom is taken away.

The objective element: Prohibition on leaving a place

*Formal (*de iure*) detention v* de facto *detention*

Instances of detention are straightforwardly established where domestic legislation expressly refers to detention to classify the confinement of asylum seekers in a specific place which they are not allowed to leave without permission. This form of detention follows the issuance of a formal detention order and usually takes place in specialised detention facilities as a rule, in line with the requirements of the recast Reception Conditions Directive.[10]

On the other hand, asylum seekers may be confronted with situations of *de facto* detention, in which they are confined in a place they cannot leave, without being issued a detention order and without their placement being classified as detention by national law.

De facto detention is detention: the irrelevance of official qualifications in law or practice

In the eyes of the ECtHR, the law draws no distinction between formal and *de facto* detention: the official designation of a measure by the state is immaterial to the assessment of deprivation of liberty.[11]

States' transparent attempts to qualify places of detention as something else – reception centres, transit zones, camps and so forth – in order to circumvent their obligations to avoid arbitrary deprivation of liberty have been consistently struck down by the Strasbourg Court. In *Khlaifia v Italy*,

7 Article 2(h) recast Reception Conditions Directive. Note that the definition combines wording from Article 31 of the Refugee Convention – restrictions on movements of refugees – with terms from Article 5 ECHR – deprivation of liberty, and therefore potentially confusing.

8 See e.g. ECtHR, *Khlaifia and others v. Italy* (Grand Chamber), Application No 16483/12, Judgment of 15 December 2016, para 64.

9 ECtHR, *Khlaifia v. Italy*, para 64; Lilian Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' (2016) 35 Refugee Survey Quarterly 11.

10 Article 10(1) recast Reception Conditions Directive.

11 See also United Nations Working Group on Arbitrary Detention (WGAD), Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, available at: http://bit.ly/2GteYrN, para 45.

for example, the Court dismissed the government's plea that the applicants, who had been rescued at sea and brought to Lampedusa and subsequently shipped to Sicily, had not been deprived of their liberty on the ground that they had been received in a *Centro di soccorso e prima accoglienza* (CPSA) which was designed not for detention but for "first aid and assistance". As the applicants were not allowed to leave the centre, the Court found that they were "being held there involuntarily",[12] while the permanent surveillance of the centre, the inability to communicate with the outside world and the prolonged confinement practiced in such centres all pointed to the conclusion that the applicants were, in effect, deprived of their liberty. Importantly, "the classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures imposed upon them." Even where the applicants were confined in order to receive assistance and safety, this cannot exclude the applicability of Article 5 ECHR as "even measures intended for protection or taken in the interest of the person concerned maybe be regarded as deprivation of liberty."[13]

The prohibition on leaving a place is a strong, albeit not absolute indicator of detention. In relation to the borders and in *airport transit zones*, further discussed in Chapter II, the ECtHR has found that holding foreigners in a transit zone is "not in every respect comparable to that which obtains in detention centres". Rather, it is the assessment of the factual circumstances of the applicants in the area concerned that is decisive to the existence or not of detention. In the case of *Amuur v. France*,[14] the Court dismissed the French government's argument that holding asylum seekers upon arrival for 20 days in the international transit zone and a nearby hotel under constant police surveillance constituted a restriction on freedom of movement and not deprivation of liberty on the ground that they could at any time leave the transit zone to any other country willing to admit them. In *Riad and Idiab v. Belgium*, as the applicants were confined in the transit zone more than one month after their arrival and their confinement had been ordered for an indefinite period and eventually lasted fifteen and eleven days respectively, the Court concluded that the applicants' "confinement in the transit zone of the airport amounted to a *de facto* deprivation of liberty."[15] Here too, the Court found that "the mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty".[16] The Court has also found detention in cases where an applicant has been locked up in a holding cell at the airport for nine hours,[17] or where applicants are placed in the transit zone for 14 days which they are not allowed to leave and where they are under permanent surveillance.[18]

Beyond airport transit zones, which have been consistently ruled as places of detention, the Strasbourg Court has also sanctioned the restriction of applicants within *transit zones at the land border* as *de facto* detention. In the recent case of *Ilias and Ahmed v. Hungary*, the Court found that the two applicants had been detained in the transit zone at the land border with Serbia, as they were held in a guarded compound for three weeks which was not accessible from the outside, even by their lawyer.[19] Here too, the Court found that "the applicants' detention apparently occurred *de facto*, that is, as a matter of practical arrangement" and was effected without any formal decision on their deprivation of liberty and solely "by virtue of an elastically interpreted general provision of the law".[20] Hence it concluded that the applicants had been subjected to unlawful detention in the transit zone, irrespective of its characterisation in domestic law.[21] The case is now pending before the Grand Chamber of the Court.

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12 ECtHR, *Khlaifia v. Italy*, para 68.
13 *Ibid,* para 71.
14 ECtHR, *Amuur v. France*, Application No 19776/92, Judgment of 25 June 1996, para 52.
15 ECtHR, *Riad and Idiab v. Belgium*, Application Nos 29787/03 and 29810/03, Judgment of 24 January 2008, para 68.
16 ECtHR, *Riad and Idiab v. Belgium,* para 68.
17 ECtHR, *Nolan and K. v. Russia*, Application No, Judgment of 12 May 2009, para 96.
18 ECtHR, *Shamsa v. Poland*, Application Nos 45355/99 and 45357/99, Judgment of 22 February 2004, paras 46-47.
19 ECtHR, *Ilias and Ahmed v. Hungary*, Application No 47287/15, Judgment of 14 March 2017.
20 *Ibid*, para 67.
21 *Ibid*, para 66.

Finally, the prohibition on leaving a place is not a necessary precondition for detention. The absence of such an element does not automatically lead to the conclusion that the individual is not detained and only faces a restriction of freedom of movement. According to the ECtHR in *Stanev v. Bulgaria*, "the question whether the building was locked [was] not decisive" as the applicant had "to ask permission to go to the nearest village" and "the time he spent away from the home and the places where he could go were always subject to controls and restrictions."[22]

Restriction of freedom of movement or (de facto) detention? Duration and degree of restrictions

As already mentioned, according to the Strasbourg case law, the difference between restrictions on freedom of movement and detention is one of degree and not of substance. Distinguishing between the two notions requires an essentially factual approach, based on an assessment of all aspects of the regime applied to the individual rather than focussing on one particular aspect. The Court's case law in "borderline cases" attaches particular importance to the duration and degree of restrictions on the individual as relevant factors to determine whether a measure amounts to detention or a restriction on freedom of movement. In the case of *Guzzardi v. Italy*, which concerned an individual charged with criminal offences, the applicant was held on an small island of Sardinia under strict supervision and curfew. While not being imprisoned, he was required to report to the authorities twice a day; was not allowed to leave the island; and could only contact the outside world under supervision. The Court held that the applicant had been subjected to unlawful deprivation of liberty in violation of Article 5 ECHR.[23] On the other hand, in the case of *Raimundo v. Italy*, special supervision by police entailing that the person could not leave his own home without informing the police, reporting obligations on certain days and an obligation to stay at home between 21:00 and 07:00 was not considered as deprivation of liberty but as a restriction of freedom of movement.[24]

The subjective element

As mentioned above, the assessment of a measure as constituting detention also requires a subjective element, meaning whether or not the individual has validly consented to relinquishing his or her liberty. In its case law concerning legally incapacitated persons, the ECtHR has held that the right to liberty is too important in a democratic society for a person to lose the benefit of protection for the sole reason that he or she may have given him or herself up to be taken into detention. Detention may indeed violate Article 5 ECHR, even if the person concerned has agreed to it.[25]

Whereas asylum seekers would rarely consent to their detention, the situation in **Greece** may qualify as a situation where applicants live in detention-like conditions given the obligation to reside in the Reception and Identification Centres on the islands, despite the fact that they are free to leave the centre, but not the island.[26] Asylum seekers in Ceuta and Melilla in **Spain** are in a comparable situation insofar as they are not free to leave the enclaves and stay in the overcrowded Migrant Temporary Stay Centres (CETI).[27]

At the same time, in the immigration context, the subjective element of deprivation of liberty arguably requires the individual's full understanding of the measures imposed upon him or her to be taken into account. It follows from the ECtHR's jurisprudence that asylum seekers' perceptions of the places where they are held, often seen as prison- or detention-type facilities, should be given weight when assessing the lawfulness of states' practices. This is of particular relevance in situations of *de facto*

22 ECtHR, *Stanev v. Bulgaria*, Application No 36760/06, Judgment of 17 January 2012, para 124.
23 ECtHR, *Guzzardi v. Italy*, Application No 7367/76, Judgment of 6 November 1980.
24 ECtHR, *Raimondo v. Italy*, Application No 12954/87, Judgment of 22 February 1994.
25 ECtHR, *Kasparov v. Russia*, Application No 53659/07, Judgment of 11 October 2016, para 36.
26 AIDA, Country Report Greece, 2017 Update, March 2018, available at: https://bit.ly/2G5vKP2, 120-121.
27 AIDA, Country Report Spain, 2017 Update, March 2018, available at: https://bit.ly/2plANDI, 53.

detention, which are often characterised by insufficient information provision and lack of access to legal assistance providers.

2. The constraints on interference with the right to liberty

Whether imposed in accordance with the law or *de facto*, detention constitutes deprivation of liberty according to the case law of the ECtHR. The main distinction in practice between formal and *de facto* detention relates to the enforceability of legal standards and procedural safeguards to protect applicants against arbitrary detention, which becomes much more challenging when detention is carried out *de facto*.

Grounds and safeguards for detention

Detention of asylum seekers is governed by the precepts of Article 5 ECHR as interpreted by the ECtHR. It must meet strict requirements in order to be lawful and non-arbitrary as it constitutes a severe interference with the human right to liberty. Beyond the fact that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", which entails an assessment of the quality of the law and legal certainty provided by domestic legislation, the lawfulness of detention of asylum seekers is assessed against various factors including its duration, the possibility to apply less coercive measures, access to an effective remedy, detention conditions and whether it serves a lawful purpose.[28]

Article 5(1) ECHR sets out an exhaustive list of grounds on the basis of which an individual may be deprived of their liberty, to be narrowly interpreted in order to protect the individual from arbitrariness. In this regard, the detention of non-nationals, including those applying for asylum, is most commonly justified by states and assessed by the Strasbourg Court under Article 5(1)(f) ECHR, permitting deprivation of liberty in order to "prevent unauthorised entry" or to effect removal from the territory, or Article 5(1)(b) ECHR, allowing states to detain in order to secure the fulfilment of any obligation prescribed by law.[29]

Since the adoption of the recast Reception Conditions Directive and the Dublin III Regulation, the detention of asylum seekers is also regulated by EU law. Dedicated provisions in the recast Reception Conditions Directive establish: (1) an exhaustive set of six grounds for detention;[30] (2) procedural guarantees and remedies;[31] (3) the required level of detention conditions;[32] and (4) rules on treatment of vulnerable persons and applicants with special reception needs.[33] States should ensure that detention of asylum seekers only occurs "under clearly defined exceptional circumstances and subject to the principle of necessity and proportionality".[34] Importantly, both the recast Reception Conditions and Asylum Procedures Directive[35] incorporate the principle that a "person should not be held in detention for the sole reason that he or she is seeking international protection",[36] while the

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28 For an overview and analysis, see Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe, 2010.

29 See for instance, ECtHR, *O.M. v. Hungary*, Application No 9912/15, Judgment of 5 July 2016.

30 Article 8 recast Reception Conditions Directive.

31 Article 9 recast Reception Conditions Directive.

32 Article 10 recast Reception Conditions Directive.

33 Article 11 recast Reception Conditions Directive.

34 Recast Reception Conditions Directive, recital 15.

35 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), *OJ* 2013 L180/60.

36 Article 8(1) recast Reception Conditions Directive, while Recital 15 expressly refers to Member States international obligations and Article 31 of the Refugee Convention; Article 26(1) recast Asylum Procedures Directive.

Dublin Regulation establishes the same principle with regard to the application of the Dublin procedure.[37]

In *Al Chodor*,[38] the CJEU found that Articles 2(n) and 28(2) of the Dublin III Regulation "provide for a limitation on the exercise of the fundamental right to liberty enshrined in Article 6 of the Charter". According to Article 52(3) of the Charter the meaning and scope of its provisions which correspond to rights guaranteed by the ECHR must be the same as those laid down by that Convention. Consequently, the Court held that for the purpose of interpreting Article 6 of the Charter, account must be taken of Article 5 ECHR as the "minimum threshold of protection",[39] while it considered detention of asylum seekers to constitute a "serious interference with those applicants' right to liberty".[40] The same approach was taken by the CJEU in the cases of *J.N.*[41] and *K.*,[42] where it examined the validity of two detention grounds laid down in Article 8(3) recast Reception Conditions Directive in the light of Article 6 of the Charter.

In order to protect individuals from unlawful detention, a range of guarantees must be observed by states. The principle of legal certainty, meaning that conditions for detention under domestic law are clearly defined and that the law is foreseeable in its application so that it meets the standard of "lawfulness" under the ECHR, is of particular importance. National legislation must allow the person to foresee the consequences of a particular measure or state action. Where States resort to *de facto* detention this is by definition not fulfilled, yet sanctioned by the Court. This was the case, for instance, in the case of *Khlaifia v. Italy* where the Court found that the applicants had been subjected to *de facto* detention as "the provisions applying to the detention of irregular migrants were lacking in precision".[43]

Access to an effective remedy against detention is also an integral part of the assessment of the lawfulness of detention. According to the Strasbourg case law, this entails a right for the individual to be told in a simple, non-technical language that he or she can understand, the essential legal and factual grounds for his or her detention, enabling him or her to challenge the detention measure before a court in accordance with the standards laid down in Article 5(4) ECHR. This means that the domestic court concerned must be able to render a speedy judicial review, wide enough to cover those elements that are essential for the lawful detention according to Article 5(1), and competent to order release if unlawful. Where a person is not properly informed of the reasons of detention, the right to appeal the deprivation is "deprived of all effective substance" as the individual concerned would by definition be unable to challenge what has not been communicated.[44] The right to a speedy judicial review will by definition be breached where asylum seekers are subject to a legal fiction of non-detention where they are in reality deprived of their liberty.

Also under EU law, asylum seekers are entitled to challenge their detention,[45] and must receive information on how to mount such a challenge.[46] Access to legal aid for the purpose of judicial review against detention is also required by the recast Reception Conditions Directive and relevant rules

37 Article 28(1) Dublin III Regulation.
38 CJEU, Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*, Judgment of 15 March 2017.
39 *Ibid*, para 36.
40 *Ibid*, para 40.
41 CJEU, Case C- 601/15 PPU *J.N. v. Staatssecretaris van Veiligheid en Justitie*, Judgment of 15 February 2016. See also European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law*, 2017, available at: http://bit.ly/2EEt4KK, 260-261.
42 Case 18/16 *K. v. Staatssecretaris van Veiligheid en Justitie*, Judgment of 14 September 2017.
43 ECtHR, *Khlaifia v. Italy*, para 106.
44 *Ibid*, para 133.
45 Article 9(3) recast Reception Conditions Directive.
46 Article 9(4) recast Reception Conditions Directive.

must be laid down in domestic law,[47] given their crucial role in guaranteeing the accessibility of remedies.[48]

Conditions of detention are also governed by specific safeguards. Deplorable conditions may amount to inhuman and degrading treatment under Article 3 ECHR where the individual is subjected to "distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention."[49] In addition to sufficient personal space of at least $3m^2$ for each detained persons, a variety of factors are taken into account when assessing compliance of physical conditions of detention. These include access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private and basis sanitary and hygienic requirements.[50] The recast Reception Conditions Directive codifies a number of these standards, including access to open air spaces,[51] and access of family members, lawyers, NGOs and UNHCR.[52]

Grounds and safeguards in restrictions on freedom of movement

Restrictions on freedom of movement of asylum seekers must comply with Article 2 Protocol 4 ECHR which in principle guarantees that "everyone lawfully within the territory of a State shall, within the territory of that State, have the right of liberty of movement and the freedom to choose his residence". As it is the case for detention, restrictions on freedom of movement and the right to choose one's residence can only be imposed for a limited number of reasons, namely: maintenance of public order; the prevention of crime; the protection of public health or morals; the protection of rights and freedoms of others, where they are in accordance with the law and are necessary in a democratic society in the interests of national security or public safety.

In addition, Article 2(4) Protocol 4 ECHR also allows states to subject the exercise of the right to free movement and choice of residence in "particular areas" to restrictions, provided they are in accordance with the law and justified by the public interest in a democratic society.

From the perspective of EU law, "restriction on freedom of movement" on the territory of Member States pending the examination of an asylum application may take the form of allocation within an area or designation of residence in a specific place.[53] Such a restriction may be imposed for reasons of: public interest; public order; or where necessary for the swift processing and effective monitoring of the asylum procedure.[54]

Within those boundaries the recast Reception Conditions Directive provides states with considerable flexibility. No further guidance is provided as regards the minimum size of such an assigned area within the territory of the Member State other than the requirement that it "shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the Directive."[55] In theory, any area as large as the territory of a German federal state or as small as a village could qualify, provided that applicants have access to all entitlements under the Directive without exception. The potentially severe restrictions on applicants' freedom of movement within the territory can never be absolute, however. States are required to provide for a

47 Article 9(6)-(10) recast Reception Conditions Directive.
48 ECtHR, *Suso Musa v. Malta*, Application No 42337/12, Judgment of 23 July 2013, para 61.
49 ECtHR, *M.S.S. v. Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 221.
50 ECtHR, *Aden Ahmed v. Malta*, Application No 55352/12, Judgment of 23 July 2013, para 88.
51 Article 10(2) recast Reception Conditions Directive.
52 Article 10(3)-(4) recast Reception Conditions Directive.
53 Article 7(1) recast Reception Conditions Directive.
54 Article 7(2) recast Reception Conditions Directive.
55 Article 7(1) recast Reception Conditions Directive.

possibility to grant applicants permission to leave the place of residence or assigned area through an individual, objective and impartial reasoned decision.[56]

As raised by ECRE elsewhere,[57] restrictions on freedom of movement of asylum seekers, who are presumptive refugees, to an area of the territory or to a place of residence must comply with states' obligations under the Refugee Convention and the Charter.[58] Whereas Article 26 of the Refugee Convention, which grants lawfully staying refugees the right to choose their place of residence and to move freely within the territory of the state of refuge, only allows for restrictions applicable to foreigners generally in the same circumstances, Article 31(2) requires such restrictions to be necessary. This implies that such restrictions need to be objectively justified in terms of their necessity and proportionality, even though this is not expressly required under Article 7 of the recast Reception Conditions Directive. On the other hand, as discussed in Section 1, the power to decide on the residence of an applicant for reasons of public interest may amount to detention if the applicant is not allowed to freely leave that place or where this is subject to disproportionately onerous reporting obligations or surveillance measures.

Whereas, according to the Directive, requests for permission to leave the assigned area or designated place of residence must be subject to an individual decision by the authorities, this is not the case for the initial assignment to a specific area. The majority of European countries which operate dispersal schemes allocate asylum seekers across their territory on the basis of informal, non-appealable decisions.[59] Given the far-reaching consequences of such restrictions for the applicant's access in practice to the range of reception conditions they are entitled to, this undermines legal certainty for the asylum seeker and constitutes a potential protection gap. While such restrictions may serve both objectives of administrative efficiency and control, the absence of an individualised decision *de facto* leaves the applicant without an effective opportunity to challenge the imposed restriction.

Open reception as default position under EU law

As the exceptional nature of detention is clearly established in the recast Reception Conditions Directive, freedom of movement of applicants has been described as "the conceptual starting point of EU law",[60] meaning the housing of asylum seekers in "open" facilities which they can freely enter and exit constitutes the default position of reception under the EU *acquis*.[61]

However, the combination of certain provisions on and permitted derogations from the required level of reception conditions seems to open up to the option that housing is nonetheless provided in detention. Article 18(1)(a) of the Directive allows housing in kind to be provided not only in accommodation centres and private houses, flats and hotels but also in "premises used for the

56 Article 7(4) recast Reception Conditions Directive.

57 ECRE, *Comments on the Commission proposal to recast the Reception Conditions Directive*, October 2016, available at: http://bit.ly/2sJZ32k, 10.

58 Article 45(2) Charter.

59 One exception is **Belgium**, where a formal "Code 207" decision is taken to allocate the asylum seeker to a reception centre: AIDA, Country Report Belgium, 2017 Update, March 2018, available at: https://bit.ly/2Gz4w68, 70.

60 Lilian Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' (2016) 35 Refugee Survey Quarterly 11.

61 It should be noted that the recast Reception Conditions Directive does not explicitly mention the possibility for the applicant to leave the place of accommodation at his or her free will as a distinguishing feature of material reception conditions defined as including "housing, food and clothing provided in kind, or as financial allowance or vouchers, or a combination of the three, and a daily expenses allowance". As confinement of asylum seekers in a specific place, i.e. detention, is to be used only in exceptional circumstances according to Article 8(3) of the Directive, it follows *a contrario* that provision of material reception conditions in the form of housing, must in principle occur without such confinement.

purpose of housing applicants during the examination of an application made at the border or in transit zones" or "other premises adapted for housing applicants".[62]

Other provisions of the Directive refer to derogations from certain conditions in cases where "the applicant is detained at a border post or in a transit zone."[63] This combination of provisions creates a loophole or an ambiguity in the law which allows Member States to "legally" detain asylum seekers at the borders. It is unclear whether under the terms of the Directive an asylum seeker in a transit zone is accommodated, detained, or both.

Regrettably, the current reform of the Directive has not modified these provisions to resolve this apparent contradiction, whereby some provisions render detention an exceptional measure and other provisions allow its use in a wide range of circumstances.[64] The ambivalent nature of such premises is a potential source of legal uncertainty and leaves considerable flexibility to Member States as to the applicable legal regime and procedural safeguards to protect applicants from arbitrary detention. In practice, however, while the EU asylum a*cquis* does not *per se* impose an obligation on Member States to detain persons applying for international protection at the border or in transit zones, they do so without exception.

The measures imposed on asylum seekers upon arrival in European countries, whether at borders, transit zones or elsewhere, are illustrative of the ambiguous boundaries discussed above, which give rise to legal uncertainty and arbitrariness.

62 Article 18(1)(a) recast Reception Conditions Directive.

63 Articles 10(5) and 11(6) recast Reception Conditions Directive. The same provisions refer to some derogations not being applicable to border posts and transit zones where border procedures are conducted. This implies that those derogations may be applied where Member States process asylum seekers detained at the border or in a transit zone in another type of procedure. However, with the exception of **Hungary** as explained in Chapter II, Section 2, it seems unlikely that Member States detain asylum seekers at borders or in transit zones without examining their claims under the border procedure.

64 European Commission, *Proposal for a recast Reception Conditions Directive*, COM(2016) 465, 13 July 2016.

In many countries, detention is built into the state apparatus' measures of first contact with the asylum seeker. Border controls pursue a range of objectives for states in regulating the entry of non-nationals: identification of the entrant, verification of the validity of his or her claim to enter, and screening for public policy, security or health reasons are some of the stated purposes of border control.[65] The conditions of lawful entry are of course lifted vis-à-vis refugees due to the circumstances of their arrival, according to rules of international law.[66] Yet in most European countries, refugees arriving at an air or land border-crossing point are subject to detention and control measures, whether or not formally designated as such. Policies of systematic deprivation of liberty upon arrival, applied in spite of international prohibitions on penalising irregular entry of refugees, connote additional, unofficial objectives such as deterrence of those seeking protection from finding safe haven in Europe.

These tactics cannot be pursued overtly without revealing violations of states' basic protection obligations. That is why processes of arrival and control of refugees at borders are shrouded in complexity and opacity in both law and practice. The ambiguity of the legal regime in which people are held in their attempt to enter a country in search of protection stems from two fictions in particular: the extra-territoriality of those spaces, on the one hand, and the absence of interference with the individual's liberty, on the other.

1. The fiction of non-entry

The idea of a line separating what is *within* from what is *beyond* a border is perceived as self-evident for states in their dealings with their citizens, but the same is not necessarily true in their dealings with non-national entrants. As Costello explains:

> "The border is not just a line on the map, crossed in a moment. Rather it entails a set of institutions, with multiple and prolonged processes. By looking at both migration and asylum as legal processes in which institutionalized interactions between members, strangers, and the state occur, we can understand the respective rights and duties that ought to be respected."[67]

Nevertheless, the legal framework governing the detention of asylum seekers in Europe embodies a static conception of the border. As stated in Chapter I, Section 1, the ECHR permits detention of a migrant, *inter alia*, "to prevent his effecting an unauthorised entry into the country".[68] In the ordinary meaning of those terms, the prevention of an "entry into the country" should imply a state measure taken against a person before his or her physical entry into the territory of the country. When interpreting the provision in *Saadi v. United Kingdom*, the ECtHR held that it "is a necessary adjunct to [their sovereign right to control aliens' entry and residence in their territory] that States are permitted to detain would-be immigrants who have not applied for permission to enter, whether by way of asylum or not."[69] The conclusion in *Saadi* was that "until a State has 'authorised' entry into the

65 See Article 6(1) Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2016 L77/1.
66 Article 31 Refugee Convention. See also Article 6(5)(c) Schengen Borders Code.
67 Cathryn Costello, 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68 Current Legal Problems 143, 172.
68 Article 5(1)(f) ECHR.
69 ECtHR, *Saadi v. United Kingdom*, Application No 13229/03, Judgment of 29 January 2008, para 64.

country, any entry is 'unauthorised'" and detention is permissible on the ground of preventing an unauthorised entry.[70]

Saadi makes a problematic reading of the Convention with regard to the scope of state powers to detain for immigration purposes, which has been discussed and critiqued in detail.[71] Yet it fails to address the limitations of an artificial understanding of territoriality. The appellant in *Saadi* had been transferred from Heathrow Airport to the – now closed down – Oakington Reception Centre outside Cambridge, where he was detained.[72] Factually, he "was already in, not only physically present in the UK, but participating in the asylum process."[73] In the eyes of the Strasbourg Court, however, the state was still preventing him from effecting an unauthorised entry into the country.

EU law appears to take equally unclear an approach. The recast Reception Conditions Directive extends its scope to asylum seekers who seek protection "on the territory, including at the border, in the territorial waters or in the transit zones of a Member State…"[74] This formulation construes the 'territory' of a country as encompassing the border and transit zones. It seems to be contradicted, however, by a different passage in the Directive which permits states to detain an asylum seeker "in order to decide, in the context of a procedure, on the applicant's right to enter the territory".[75] Article 8(3)(c) would naturally suggest that state authorities decide on an asylum seeker's right to enter the territory *before* he or she physically effects such an entry. Yet the Directive cannot be applicable unless the person has *already* entered and is present at the territory, at the border, or in territorial waters or transit zones.

This contradiction has serious implications on the legality of deprivation of liberty. Given that the Directive must comply with the precepts of human rights law, detention under EU law cannot exceed the boundaries set by the ECHR.[76] That means that asylum seekers can be detained pursuant to the Directive where they attempt to effect an "unauthorised entry". Can they still be considered to be effecting an "unauthorised entry" if they are already on the territory, and they have a right to remain there as soon as they express the wish to apply for asylum?[77] The CJEU has shied away from squarely addressing the inconsistency between the ECHR and the recast Reception Conditions Directive so far, rather grounding detention of asylum seekers on an autonomous, though objectionable reading of EU law.[78]

In practice, asylum seekers suffer the effects of the legal fiction of non-entry in several European countries. Countries such as **Austria**, **Belgium**, **France**, **Germany**, **Spain**, **Greece**, **Hungary**, **Portugal**, **Switzerland** consider persons who apply for asylum at their borders or transit zones not to have formally entered their territory. This interpretation is often supported by domestic case law. The Belgian Council of State, for example, has dismissed arguments suggesting that migrants actually enter the territory even without the necessary documents for legal entry, given that the airport transit zones form part of the Belgian territory.[79] For its part, the Swiss Federal Administrative Court has

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70 *Ibid*.

71 See e.g. Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2014), 287 et seq; Violeta Moreno-Lax, 'Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5 Human Rights and International Legal Discourse 166.

72 Global Detention Project, *Oakington Immigration Removal Centre*, available at: http://bit.ly/2EFOdRh.

73 Cathryn Costello, 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68 Current Legal Problems 143, 172.

74 Article 3(1) recast Reception Conditions Directive.

75 Article 8(3)(c) recast Reception Conditions Directive.

76 See also Articles 6 and 52(3) EU Charter of Fundamental Rights.

77 Article 3(1) recast Reception Conditions Directive.

78 CJEU, Case C-601/15 PPU *J.N.*, Judgment of 15 February 2016; Case C-18/16 *K.*, Judgment of 14 September 2017. None of the rulings dealt with the ground for detention in Article 8(3)(c), however.

79 Belgian Council of State, Decision 102.722, 21 January 2002, available in French at: http://bit.ly/2FJ4pRm.

ruled it possible to carry out an arrest to prevent illegal entry even within a certain time and space *after* the border has effectively been crossed, thereby confirming the fiction discussed above.[80]

The proliferation of push backs within Europe in recent years has exacerbated this phenomenon. In **France**, the fiction of non-entry has been extended beyond the boundaries of the 13 officially designated transit zones across the territory. In the context of ongoing systematic controls on the Italian border throughout 2017, the French border police has detained newly arrived asylum seekers without formal order in a "temporary detention zone" (*zone de rétention provisoire*) made up of prefabricated containers in the premises of the Menton Border Police, and established following an informal decision of the Prefect of Alpes-Maritimes.[81] Detention is applied for the purpose of examining the situation of entrants and for issuing refusals of entry, thereby signalling that their "entry into the territory" has not yet taken place. The French Council of State has upheld this form of detention as lawful during the period necessary for the examination of the situation of persons crossing the border.[82] **Greece** also resorts to detention without any legal basis in the context of push backs at the Evros land border. As it emerges from an increasing number of allegations, the authorities arbitrarily arrest persons seeking to enter the country and informally detain them in police stations close to the border before returning them to Turkey.[83]

The paradox is stretched even further in countries where the fiction of non-entry is inconsistently applied. **Spain** is an illustrative example of a selective approach to entry into the territory due to its geographical peculiarity. When they are accommodated in the Migrant Temporary Stay Centres (CETI) located in the enclaves of Ceuta and Melilla close to the Moroccan border, asylum seekers are considered to have formally entered the Spanish territory and follow the regular procedure.[84] However, if they arrive in Spain by boat and are detained in a Detention Centre for Foreigners (CIE), as systematically practiced in Almería, Tarifa, Motril and Algeciras following the rise in arrivals by sea in 2017, they are deemed not to have formally entered Spain and follow the border procedure.[85]

Conversely, the arrival of asylum seekers in some countries is decoupled from the fiction of non-entry into the territory. This not only true for **Malta** and **Italy**, where people arriving by sea and disembarking at ports are deemed to have entered the national territory, but also for countries such as **Bulgaria**, **Slovenia**, **Croatia**, **Sweden** and **Serbia**, which do not apply a border procedure. In the case of Slovenia and Croatia, the border procedure is instituted in law but has not been implemented in practice.[86]

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80 Swiss Federal Administrative Court, Decision D-6502/2010, 16 September 2010, available in German at: http://bit.ly/2BdN1Fl.

81 AIDA, Country Report France, 2017 Update, February 2018, available at: http://bit.ly/2BsOFmB, 96.

82 French Council of State, Order No 411575, 5 July 2017, available in French at: http://bit.ly/2nThvEm.

83 AIDA, Country Report Greece, 153. See also Greek Council for Refugees, Greek Council for Refugees, *Reports of systematic pushbacks in the Evros region,* 20 February 2018, available at: http://bit.ly/2FndTBN.

84 Spanish Audiencia Nacional, Decision SAN 1780/2017, 24 April 2017, available in Spanish at: http://bit.ly/2E8XTmt.

85 AIDA, Country Report Spain, 19-20 and 62.

86 AIDA, Country Report Slovenia, March 2018, available at: https://bit.ly/2tZwe6P, 29; AIDA, Country Report Croatia, 2017 Update, March 2018, available at: https://bit.ly/2Hb4hvE.

2. The fiction of no interference with the right to liberty

The second source of ambiguity in the present debate concerns the degree, if any, of interference with the right to liberty in the way states handle asylum seekers arriving at their borders and on their territory. European countries have devised diverging terminology to designate the regime applicable to entrants upon arrival: an asylum seeker is: "held in waiting zone" in **France**;[87] "accommodated in… a contained environment" in **Malta**;[88] "required to stay in a designated place in the **Netherlands**;[89] "placed or retained in Temporary Installation Centres" in **Portugal**;[90] "supervised" in the airport or staying "under a regime of restriction of movement within the [Reception and Identification] centre" in **Greece**.[91] As stated in Chapter I, Section 1, the official designation of a measure is immaterial to deprivation of liberty.

More specifically in the context of procedures at the border, the ECtHR has consistently dismissed the argument put forward by governments that stay in an international transit zone does not qualify as deprivation of liberty. Since *Amuur v. France*, it has held that where an applicant's sole possibility of leaving a transit zone is to voluntarily leave the country, such an option does not rule out deprivation of liberty, especially if it entails the abandonment of his or her asylum application.[92] In spite of clear standards laid down by Strasbourg jurisprudence, practice continues to vary significantly across the continent. This is partly due to varying degrees of compliance with Strasbourg case law. The Swiss Federal Court follows *Amuur* and states that asylum seekers' stay in airport transit zones amounts to an uncontested deprivation of liberty.[93] The German courts have consistently disagreed.[94]

EU law also fails to take a consistent approach to the regime applicable in transit zones, as highlighted in Chapter I, Section 2.

Due to these disparities, asylum seekers arriving at the borders of a country in search of protection may find themselves detained in accordance with the law, *de facto* detained without legal basis, or not deprived of their liberty at all depending on where in Europe they seek protection.

Formal detention upon arrival

Several countries (**Belgium**, **Bulgaria**, the **Netherlands**, **Portugal**, **Switzerland**) acknowledge that the regime applicable to asylum seekers at the border falls within the remit of detention.[95] This means that asylum seekers held upon arrival are served with a formal detention order.

87 Article L.221-1 French Code of entry and stay of foreigners and the right to asylum (Ceseda), available in French at: http://bit.ly/2FPgN22: "maintenu en zone d'attente".

88 Maltese Ministry for Home Affairs and National Security, *Strategy for the reception of asylum seekers and irregular migrants*, December 2015, available at: http://bit.ly/2kPVl3A, 10. Note that the Maltese Initial Reception Centre is no longer a closed centre.

89 Article 6(1) Dutch Aliens Act, available in Dutch at: http://bit.ly/2FPwTc6: "kan worden verplicht zich op te houden in een aangewezen ruimte of plaats".

90 Article L.221-1 French Code of entry and stay of foreigners and the right to asylum (Ceseda), available in French at: http://bit.ly/2FPgN22: "maintenu en zone d'attente".

91 Information provided by the Portuguese Refugee Council, March 2018: "Colocação ou manutenção em centro de instalação temporária".

92 ECtHR, *Amuur v. France*, Application No 19776/92, Judgment of 25 June 1996, para 48; *Ilias and Ahmed v. Hungary*, Application No 47287/15, Judgment of 14 March 2017, para 55.

93 Swiss Federal Court, Decision BGE 129 II 193, 27 May 1997, available in German at: http://bit.ly/2BJ0I00, para 4.

94 German Federal Constitutional Court, Decision 2 BvR 1516/93, 14 May 1996; German Federal Court, Decision V ZB 170/16, 16 March 2017, available in German at: http://bit.ly/2oRx9B4.

95 AIDA, Country Report Belgium, 85; Country Report Netherlands, 2017 Update, March 2018, available at: https://bit.ly/2G7z6Eo, 68; Country Report Portugal, 2017 Update, https://bit.ly/2IxQFtN; Country Report Switzerland, 2017 Update, February 2018, available at: http://bit.ly/2FoL9tg, 86.

Even though detention is formally acknowledged in those countries, in most cases it falls far short of complying with the requirements of an individualised assessment, necessity, proportionality and prior consideration of less coercive alternatives.[96] Legislation transposing the recast Reception Conditions Directive in **Belgium**, **Hungary**, the **Netherlands** and **Portugal** lays down detention as an automatic, unqualified consequence of applying for asylum at the airport,[97] without confining it to cases where it is strictly necessary and proportionate and where alternatives to detention cannot effectively be applied. In that respect, the provisions of the Directive are not only disregarded in practice but also incorrectly transposed in domestic law.

The situation in **Bulgaria** is different. The transposition of the Directive into domestic law has not incorporated the border detention ground into the Law on Asylum and Refugees.[98] Accordingly, newly arrived asylum seekers apprehended at the border are not detained pursuant to asylum detention provisions. They are instead systematically issued removal orders and held in pre-removal detention centres under immigration law provisions, which foresee detention for the purposes of executing a person's removal from the country,[99] and apply for asylum while in those centres. Although the State Agency for Refugees is forbidden from conducting asylum procedures in pre-removal detention, such a practice emerged in the course of 2017 specifically for certain nationalities as a method of deterrence. In principle, this affected nationalities from certain countries such as Afghanistan, Algeria, Bangladesh, Pakistan, Sri Lanka, Turkey and Ukraine which are treated as manifestly unfounded in Bulgaria.[100]

Analogies may be drawn between the Bulgarian practice and the proliferation of detention in **Greece**. Under a "pilot project" implemented on Lesvos in 2017, newly arrived persons belonging to particular nationalities with low recognition rates are immediately served removal orders and placed in pre-removal detention upon arrival and remain there for their entire asylum procedure. While the project initially focused on nationals of Pakistan, Bangladesh, Egypt, Tunisia, Algeria and Morocco, the list of countries was expanded to 28 in March 2017 and the pilot project was rebranded as the "low-profile scheme".[101]

Spain has applied a similar policy to asylum seekers arriving in the ports of Andalucía. The rise in arrivals by sea in 2017 has led to automatic pre-removal detention of newly entrants at police stations in Almería, Tarifa, Motril and Algeciras. Where people have sought asylum, they have been transferred to Foreigner Detention Centres (CIE) and channelled in the border procedure, although some have been transferred to the regular procedure due to overcrowding in CIE.[102]

***De facto* detention upon arrival**

On the other hand, a number of countries deprive asylum seekers of their liberty upon arrival without formally applying a detention measure. In **Slovenia**, for example, an initial period of *de facto* detention is part and parcel of the asylum procedure. New asylum seekers are held in the reception area of the Asylum Home in Ljubljana without free access to its other areas. The Slovenian Migration Office began a practice of locking up this area of the Asylum Home in 2014, due to a high number of people absconding from the procedure prior to lodging applications and giving fingerprints for the Eurodac

96 Article 8(2) recast Reception Conditions Directive.
97 Article 74/1 Belgian Aliens Act, available in French at: http://bit.ly/2cmfb3k; Section 31/A(1) Hungarian Asylum Act, available in Hungarian at: http://bit.ly/1IFdMk2; Article 6(1) Dutch Aliens Act; Article 26(1) Portuguese Asylum Act, available in Portuguese at: http://bit.ly/2osmagN.
98 Article 45b(1) Bulgarian Law on Asylum and Refugees, available in Bulgarian at: http://bit.ly/1RklHor.
99 Article 44(6) Bulgarian Aliens Act, available in Bulgarian at: http://bit.ly/2jpEaqx.
100 AIDA, Country Report Bulgaria, 2017 Update, February 2018, available at: http://bit.ly/2ErP7Qz, 56-57.
101 AIDA, Country Report Greece, 146.
102 AIDA, Country Report Spain, 32.

database.[103] Until 2017, people were detained for short periods, rarely exceeding one day. More recently, however, due to organisational difficulties on the part of the authorities such as the unavailability of interpreters and doctors, there have been cases of persons detained in the reception area for 5-6 days.[104]

Other examples of such *de facto* detention include some of the hotspots in **Italy**,[105] or the Reception and Identification Centres in **Greece**.[106] According to Greek law, the latter operate under a "regime of restriction of freedom of movement within the Centre" for an initial period of 3 days, which can be extended by another 25 days.[107] Insofar as this "restriction of freedom of movement" entails "the prohibition to leave the Centre and the obligation to remain in it",[108] it constitutes deprivation of liberty. No remedy is available to challenge the initial decision.[109] In practice, the Reception and Identification Centres on the islands of Lesvos, Chios, Samos, Leros and Kos do not apply this regime and allow people to freely leave and enter the premises, due to criticism by national and international organisations and bodies and to the limited capacity to maintain and run closed facilities on the islands with high numbers of people. On the other hand, newly arrived persons are *de facto* detained in the Reception and Identification Centre of Evros near the Turkish land border, as they are not allowed to exit the facility.[110]

What the Italian, Greek and Slovenian examples have in common is not only the informal nature of detention at points of arrival but also the rationale underlying it. These policies are not aimed at preventing an "unauthorised entry" into the national territory but rather at screening newly arrived persons to establish identity and nationality, to conduct medical examinations and to refer them to and/or begin an asylum procedure or return procedure. Persons claiming asylum are channelled in the regular procedure in Italy and Slovenia. The situation in Greece is more complex and has been shaped by the EU-Turkey statement.[111] Whereas the law foresees the application of an exceptional fast-track border procedure to asylum seekers hosted in Reception and Identification Centres,[112] this procedure is only applied in the centres of Lesvos, Chios, Samos, Leros and Kos in practice; the regular procedure is applied in Evros.[113]

Policies of *de facto* detention may also be applied vis-à-vis specific points of arrival in a country. The transit zones referred to earlier are a pertinent example. Many countries such as **France**, **Germany**, **Austria**, **Greece**, **Romania** and **Serbia** which confine asylum seekers in airport transit zones do not concede the use of deprivation of liberty and thereby refrain from issuing detention orders, justifying the necessity and proportionality of detention and the inapplicability of less coercive alternatives. Interestingly, in the case of **Austria**, asylum seekers applying at the airport are held in the initial reception centre (*Erstaufnahmenstelle*, EAST) of Vienna Airport Schwechat, one of the three centres operating admissibility and Dublin procedures in the country. Whereas applicants in the other two EAST – Thalham and Traiskirchen – are allowed to move within the respective districts where the centres are located, those in the EAST of Vienna Airport Schwechat are deprived of their liberty insofar as they are confined within the premises of the centre.[114]

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103 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac'… (recast), *OJ* 2013 L180/1.
104 AIDA, Country Report Slovenia, 55.
105 AIDA, Country Report Italy, 2017 Update, March 2018, available at: https://bit.ly/2Ga01zb, 108. One exception is Trapani, where people are free to enter and exit as of April 2017.
106 AIDA, Country Report Greece, 2017 Update, 152.
107 Article 14(2) Greek Law 4375/2016.
108 Article 14(3) Greek Law 4375/2016.
109 The prolongation can be challenged: Article 14(4) Greek Law 4375/2016.
110 AIDA, Country Report Greece, 2017 Update, 152.
111 European Council, *EU-Turkey statement*, 18 March 2016, available at: http://bit.ly/2C0EdiO.
112 Article 60(4) Greek Law 4375/2016.
113 AIDA, Country Report Greece, 2017 Update, 67.
114 AIDA, Country Report Austria, 2017 Update, March 2018, available at: http://bit.ly/2tmJVfW, 44, 68.

In **Hungary**, the policy of *de facto* detention extends to the transit zones established in Röszke and Tompa on the land border with Serbia, where all new asylum seekers with the exception of unaccompanied children below the age of 14 are now placed. The Immigration and Asylum Office issues a ruling (*végzés*) ordering the applicant's place of residence in the transit zone.[115] This ruling is not considered a detention order and cannot be appealed *per se*. As detailed by the ECtHR in the *Ilias and Ahmed v. Hungary* judgment, which condemned Hungary of arbitrary detention, "the applicants' detention apparently occurred *de facto*, that is, as a matter of practical arrangement. This arrangement was not incarnated by a formal decision of legal relevance, complete with reasoning."[116] The case is now pending before the Grand Chamber of the Court.

Open reception upon arrival

Not all countries detain irregularly arriving non-nationals as a rule. In 2017, a shift in policy occurred in **Malta**, which channels those arriving irregularly by boat to its Initial Reception Centre (IRC) for a period of 7 days "to be medically screened and processed by the pertinent authorities."[117] The objective of the IRC is therefore akin to the centres operated in Italy, Greece and Slovenia.

The IRC is located within the premises of the Marsa reception centre and originally operated as a closed centre. Asylum seekers were *de facto* detained as they were locked up in the IRC without a formal detention order and had no access to the courtyard during their stay.[118] However, the authorities have reconsidered this practice following advocacy efforts from UNHCR and civil society organisations. The IRC has operated as an open centre since September 2017 and people are free to enter and exit.[119]

It should be noted, however, that the Maltese policy developed following a sharp reduction in disembarkations of persons rescued at sea, as a result of an informal agreement with Italy in 2014. The situation could likely change as far as Frontex operations are concerned, given that the recently launched "Operation Themis" will not automatically transport rescued persons to Italian ports, as was done by its predecessor, "Operation Triton".[120]

3. Conditions and safeguards in places of detention

Regardless of its official designation by states, the detention of asylum seekers cannot be permissible if it fails to observe the requirements of legality. These include not only necessity, proportionality and a prior consideration of alternatives, but also as short a duration as possible, appropriate living conditions, and access to legal assistance, UNHCR and civil society organisations.

Duration of detention at the border

Asylum seekers should be detained "only for as short a period as possible" and insofar as the grounds for their detention remain applicable, according to the recast Reception Conditions Directive.[121] Specifically in the context of the border procedure implemented at borders or in transit

115 Sections 80/J(5) and 5(2) Hungarian Asylum Act.
116 ECtHR, *Ilias and Ahmed v. Hungary*, Application No 47287/15, Judgment of 14 March 2017, para 67.
117 Maltese Ministry for Home Affairs and National Security, *Strategy for the reception of asylum seekers and irregular migrants*, December 2015, 10.
118 AIDA, Country Report Malta, 2016 Update, February 2017, available at: http://bit.ly/2n5RU95, 44.
119 AIDA, Country Report Malta, 2017 Update, February 2018, available at: http://bit.ly/2FoMoIW, 49.
120 Frontex, 'Frontex launching new operation in Central Med', 31 January 2018, available at: http://bit.ly/2nxJ4md; Times of Malta, 'Malta faces migration uncertainty as EU launches new coast guard mission', 3 February 2018, available at: http://bit.ly/2s8LIo2.
121 Article 9(1) recast Reception Conditions Directive.

zones, the recast Asylum Procedures Directive states that an asylum seeker must be released and allowed into the territory "[w]hen a decision has not been taken within four weeks".[122]

As Article 43 of the Directive expressly refers to decisions taken under its Articles 31(8) and 33,[123] the four-week deadline for a decision concerns the issuance of a first-instance decision on the asylum application and does not include the duration of a potential appeal.

In practice, the maximum time limit in national law for issuing a first-instance decision in the border procedure varies across European countries as follows:

Deadline for a first-instance decision in the border procedure		
Country	Facility where border procedure is applied	Deadline
EU		28 calendar days
Austria	EAST Vienna Schwechat	7 calendar days
Belgium	Closed centre	28 calendar days
Germany	Airport transit zone	2 calendar days
Spain	Centre for Detention of Foreigners; Transit zone	4 calendar days
France	Waiting zone	2 working days
Greece	Airport transit zone Reception and Identification Centre	28 calendar days 2 calendar days
Netherlands	Airport detention centre	28 calendar days
Portugal	Airport detention centre	7 working days
Switzerland	Airport transit zone	20 calendar days

Source: AIDA, Country Reports, 2017 Update. In **France**, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) has 2 working day deadline to transmit its opinion to the Ministry of Interior. in **Austria**, the 7-day deadline concerns the transmission of the file to UNHCR, which must approve the decision.

It should be noted that in **Hungary**, the border procedure has not been applicable since 28 March 2017, meaning that asylum seekers undergo the regular procedure in the transit zones. Accordingly, their *de facto* detention in those spaces is not time-limited.[124]

The law does not clarify how long an applicant can remain in a transit zone *after* a first instance decision, for instance pending the examination of an appeal. The European Commission has added the necessary details in the ongoing reform: its proposal for an Asylum Procedures Regulation states that the 28-day deadline binds Member States for the issuance of a "final decision", thereby encompassing both first-instance and potential appeal procedures.[125] The Council position so far seems to revert to a 28-day deadline for first-instance decisions only.[126]

Some countries have set absolute time limits to asylum seekers' stay in transit zones:

122 Article 43(2) recast Asylum Procedures Directive.
123 Article 43(1) recast Asylum Procedures Directive.
124 AIDA, Country Report Hungary, 22 and 84.
125 European Commission, *Proposal for an Asylum Procedures Regulation*, COM(2016) 467, 13 July 2016, Article 41(3). Note that under Article 55(1)(b) of the proposal, an appeal in the border procedure must be processed within 2 months.
126 Council of the European Union, *Proposal for an Asylum Procedures Regulation*, 5296/18, 16 January 2018, available at: http://bit.ly/2nFIyni, Article 41(3).

Maximum period of stay in transit zones		
Country	Facility where border procedure is applied	Deadline
EU		None
Austria	EAST Vienna Schwechat	42 calendar days
Spain	Centre for Detention of Foreigners; Transit zone	8 calendar days
France	Waiting zone	26 calendar days
Greece	Reception and Identification Centre	28 calendar days
Portugal	Airport detention centre	60 calendar days
Switzerland	Airport transit zone	60 calendar days

Source: AIDA, Country Reports, 2017 Update.

The remaining countries (**Belgium**, **Germany**, **Hungary** and **Netherlands**) have not laid down such a maximum period, however.

Conditions of detention

Under EU law, places of detention of asylum seekers must guarantee an "adequate standard of living, which guarantees their subsistence and protects their physical and mental health."[127] Article 18 of the recast Reception Conditions Directive, referring to the modalities of material reception conditions, expressly sets out the requirement of an adequate standard of living in respect of open accommodation centres but not when it comes to "premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones".[128] However, as premises at the border or private housing, flats and other premises adapted for housing applicants are covered by the "adequate standard of living" standard applicable to material reception conditions generally in Article 17(2), this omission cannot be interpreted as allowing lower standards in such premises compared to specialised detention facilities.

One crucial component of detention conditions in those facilities relates to asylum seekers' access to open air spaces.[129] Another concerns the guarantee of privacy and separate accommodation for detained families,[130] the separation of male and female detainees unless they consent to being held together,[131] as well as the provision of recreational activities and play for children.[132]

The difference between formal and *de facto* detention therefore has a clear impact on the actual conditions to which asylum seekers are subject. Some countries which do not recognise the holding of applicants at the border or in transit zones as detention seem to operate a regime in those facilities with standards falling short of those applicable to detention centres.

This is the case in **Spain**, where the conditions in the transit zone of Madrid Barajas Airport are inadequate for stays of several days, especially since the number of persons held there quadrupled over the past year while the capacity of the facility has stayed at 80 places. The facility has no natural light, while detainees are not given access to open air. The Spanish Ombudsman found in August 2017 that conditions there were insufficient and inadequate to host applicants for several days, and in

127 Article 17(2) recast Reception Conditions Directive.
128 Nor with respect to private houses, flats, hotels or other premises adapted for housing applicants. See Article 18(1)(a) recast Reception Conditions Directive.
129 Article 10(2) recast Reception Conditions Directive.
130 Article 11(4) recast Reception Conditions Directive.
131 Article 11(5) recast Reception Conditions Directive.
132 Article 11(2) recast Reception Conditions Directive.

particular children, pregnant women or elderly persons.[133] Also in **Greece**, detainees at the airport are held in substandard conditions. The Police Directorate holding facility at Athens International Airport where asylum seekers are held under "supervision" provides no place for outdoor exercise and/or yarding. According to the European Committee for the Prevention of Torture (CPT) the facility is unsuitable for detaining persons for longer than 24 hours.[134]

Similar problems exist in the transit zone of Nikola Tesla Airport in **Serbia**. It has a size of 80m^2 and is equipped with 25 sofas and some blankets. There are no adequate conditions for sleeping and the ventilation is unsatisfactory. Detainees are locked up in the facility all day long.[135]

In **France**, the types of accommodation and living conditions vary across the 13 waiting zones. Asylum seekers may be accommodated in a nearby hotel, as is the case in Orly Airport, or in rooms within police stations. Some transit zones such as Roissy Charles de Gaulle Airport have hotel-type services and can host up to 160 people.[136]

In **Turkey**, the holding facility at Istanbul Atatürk Airport has two units, one for persons who have not made applications for international protection or whose claims are deemed inadmissible, and one for persons who have made an admissible claim for international protection.[137] While the former unit has systematically been the subject of critique by international bodies,[138] the latter unit was inaugurated on 20 April 2016 and has two dormitories – one for men and one for women – and a room for families and vulnerable persons, as well as a cafeteria. However, neither unit has access to natural light or outdoor space. Conditions in the transit zone of Esenboğa Airport in Ankara are reported to be more satisfactory.[139]

On the other hand, the short-term holding facilities in airports in the **United Kingdom**, where people may be held for 24 hours, are not subject to the usual rules which govern immigration detention but are inspected by the government's Prison Inspectorate.[140]

Conditions in airport transit zones in AIDA countries formally detaining persons arriving irregularly in general appear to be better compared to the aforementioned countries, although here too undue restrictions to open air access have been reported.

This is the case in **Switzerland**, where airport transit zones in Zurich and Geneva offer minimal conditions. Asylum seekers are entitled to a daily walk outdoors, but the walk is restricted to one hour a day, while the courtyard is no more than 60m^2 in Geneva.[141] In **Portugal**, on the other hand, he airport detention facilities in Lisbon, Porto and Faro airports have dedicated units for asylum seekers, separate from the units accommodating those who have not sought protection. The number of applicants that can be hosted in those units is 30 in Lisbon, 14 in Porto and 14 in Faro. Persons held in the detention facility at Lisbon Airport have unrestricted access to a courtyard of 70m^2 for a

133 AIDA, Country Report Spain, 68; Spanish Ombudsman, 'El Defensor del Pueblo inspecciona el cie de Aluche y la sala de asilo del aeropuerto de Barajas', 3 August 2017, available in Spanish at: https://goo.gl/kqW9CW.

134 AIDA, Country Report Greece, 164; CPT, *Report to the Greek Government on the visits to Greece carried out by the CPT from 13 to 18 April and 19 to 25 July 2016*, CPT/Inf (2017) 25, 26 September 2017, available at: http://bit.ly/2Fktu5U, para 59.

135 AIDA, Country Report Serbia, 2017 Update, February 2018, available at: http://bit.ly/2Gvg06U, 49.

136 AIDA, Country Report France, 105.

137 AIDA, Country Report Turkey, 2017 Update, March 2018, available at: https://bit.ly/2I1S9fS, 90; Council of Europe Special Representative for Migration and Refugees, *Report of the fact-finding visit to Turkey*, 10 August 2016, available at: http://bit.ly/2FmEFyw, para IX.1(a).

138 See e.g. CPT, *Report of the visit to Turkey from 16 to 23 June 2015*, 17 October 2017, available at: http://bit.ly/2zbXQWQ, paras 36-39.

139 AIDA, Country Report Turkey, 2017, 90.

140 AIDA, Country Report UK, 2017 Update, March 2018, available at: http://bit.ly/2Fm4nTI, 35-36.

141 AIDA, Country Report Switzerland, 95.

"reasonable period of time" in mornings and afternoons, although the facilities have been criticised by the Ombudsman for being too small, surrounded by walls and lacking natural lighting.[142] Finally, the detention centre of Schiphol Airport, the **Netherlands**, has a capacity of 470 places, 264 of which were occupied at the end of the year.[143]

Access to legal assistance, UNHCR and NGOs

Finally, disparities exist between European countries vis-à-vis the access of lawyers, UNHCR and civil society organisations to places of detention at the border. Access possibilities do not seem to depend on whether these spaces are formally qualified as detention facilities or not.

In **Portugal**, for example, the airport detention facilities are subject to the rules on access to detention centres set out in Article 10 of the recast Reception Conditions Directive, as transposed in Portuguese law.[144] This means that persons detained at airports have access to lawyers, UNHCR and the Portuguese Refugee Council; the latter has unrestricted access to asylum seekers only after their status determination interview, as opposed to lawyers who have access from the outset. The Portuguese Refugee Council is regularly present at Lisbon Airport for the provision of legal information and assistance.[145]

As regards **Switzerland**, the organisation ELISA provides legal assistance to asylum seekers in Geneva, while the Swiss Red Cross of Zurich together with the Zurich Legal Advice Office for Asylum Seekers provide assistance in Zurich. Third parties usually have no access to the transit zone.[146]

In **France**, the organisations authorised to access waiting zones are registered in a list published by Decree, which includes 13 organisations in total. This is different from the list relating to access to administrative detention centres, which authorises six organisations spread across different regions (*lots*). In practice, however, permanent presence is not secured. Only the National Association for Assistance at Borders for Foreigners (Anafé) makes occasional visits to the Roissy Charles de Gaulle Airport waiting zone, where most border procedures are conducted. At the same time, detained asylum seekers have no guaranteed access to phones and confidential contact with lawyers; these are supervised by police officers.[147]

In **Turkey**, the barriers to access to the transit zone of Istanbul Atatürk Airport are similar to those prevailing in pre-removal detention centres. Lawyers are required to submit a written permission request and regularly face onerous obstacles, ranging from delays to strict security checks. The process of access to the transit zone is marred by lack of standards and arbitrary practice, often depending on the individual lawyer. UNHCR does not have unrestricted access either: it submits permission requests in order to access the transit zone, as is the case in pre-removal centres.[148]

Transit zones in **Hungary** also raise serious questions regarding asylum seekers' access to legal assistance and counselling. Following the termination of cooperation agreements with the Hungarian Helsinki Committee in October 2017, no NGO lawyer has direct access to the transit zones. Lawyers can only represent the clients if the asylum seekers explicitly communicate in writing their wish to be represented before the Immigration and Asylum Office.[149]

142 AIDA, Country Report Portugal.
143 AIDA, Country Report Netherlands, 73.
144 Article 35-B(3) Portuguese Asylum Act.
145 AIDA, Country Report Portugal.
146 AIDA, Country Report Switzerland, 96.
147 AIDA, Country Report France, 111-113.
148 AIDA, Country Report Turkey, 92-93.
149 AIDA, Country Report Hungary, 90-91.

4. Beyond arrival: *de facto* detention

The isolation of reception centres from services and transport may constitute a significant factor triggering deprivation of liberty. Accommodation on a mountain pass, for example, from where the nearest lively town can only be reached by means of transport that asylum seekers cannot afford, or where asylum seekers require express permission to enter and exit, could be considered a deprivation of liberty in accordance with ECtHR case law.[150] Isolation potentially giving rise to deprivation of liberty underpins the remote locations of federal reception and processing centres in **Switzerland**, for example. There were still 780 places in remote locations at the end of 2017.[151]

The interplay between onerous rules and deprivation of liberty has been raised with regard to reception arrangements in different European countries. In **Germany**, for instance, the obligation imposed on an applicant in a Dublin procedure to stay in an assigned reception centre from 00:00 to 07:00 from Monday to Friday was considered unlawful by the Higher Administrative Court of Lüneburg, as it exceeded what was allowed under German law read in conjunction with Article 28 of the Dublin III Regulation.[152] Whereas a place of residence may be designated and reporting obligations can be imposed to ensure that the applicant is reachable by the authorities, the Court held that these obligations must be reasonable and proportionate in view of the purposes and individual circumstances of the case.

Similar observations have been made in **Ireland**, where the Human Rights and Equality Commission noted in a recent commissioned report on Ireland and the Optional Protocol to the Convention against Torture that Direct Provision centres could be considered *de facto* detention.[153] This is due to the fact that, while people are free to leave Direct Provision centres at any time, this may be difficult or impossible in practice due to their limited financial allowance and often isolated location.[154] The temporary reception centres in **Serbia**, set up for persons aiming to apply for the waiting list to enter Hungary,[155] constitute another relevant example. In eight of the thirteen reception centres, Bosilegrad, Bujanovac, Divljana, Obrenovac, Pirot, Preševo, Sombor and Vranje, asylum seekers and other foreigners accommodated there are not allowed to leave the centre without a permission of the camp administration. Due to the high number of residents, exceeding 6,000 throughout 2016 and the first half of 2017, individuals in Preševo and Obrenovac were forced to wait for permission to exit for several days, thereby likely being subject to *de facto* deprivation of liberty.[156]

Finally, in **Switzerland**, the Swiss Centre for Expertise in Human Rights has also recently examined the regime of federal reception and processing centres in order to assess whether the reporting obligations and extent of supervision applied to asylum seekers constitutes a restriction or deprivation of liberty.[157] Its report confirms the fact-sensitive nature of the inquiry and the need to examine all the circumstances of the individual case to assess whether asylum seekers are detained or not.

150 ECtHR, *Stanev v. Bulgaria*, Application No 36760/06, Judgment of 17 January 2012, paras 123-132.
151 AIDA, Country Report Switzerland, 70.
152 German Higher Administrative Court of Lüneburg, Decision 13 ME 442/17, 22 January 2018, available in German at: http://bit.ly/2p0z7hR.
153 Irish Human Rights and Equality Commission, *Ireland and the Optional Protocol to the Convention against Torture*, September 2017, available at: http://bit.ly/2fEh5h6, 32.
154 AIDA, Country Report Ireland, 2017 Update, March 2018, available at: https://bit.ly/2JjOfQU, 59-60.
155 These are different from the asylum centres dedicated to persons who have applied in Serbia: AIDA, Country Report Serbia, 37.
156 Information provided by the Belgrade Centre for Human Rights, 7 March 2018.
157 Swiss Centre of Expertise in Human Rights, *Freiheitsentzug und Freiheitsbeschränkung bei ausländischen Staatsangehörigen - Dargestellt am Beispiel der Unterbringung von Asylsuchenden in der Schweiz*, 21 August 2017, available in German at: http://bit.ly/2BMEvhu.

Concluding remarks

Blurred boundaries between reception of asylum seekers, restrictions on movement and deprivation of liberty in EU and domestic law have generated crafty approaches on the part of European countries to deterring entry and policing those seeking protection on their territory. These have enabled states to circumvent procedural guarantees required to protect applicants from arbitrary detention, as well as to downplay the use of coercive measures in their asylum and migration control systems.

The legal fiction holding that asylum seekers located in transit zones or at the border have not legally entered the territory continue to be obstinately applied by many countries contrary to longstanding Strasbourg jurisprudence. This fiction is also being applied to areas far beyond the physical borders of states. In addition, many countries continue to qualify the confinement of asylum seekers in such areas as not amounting to deprivation of liberty, again contrary to ECtHR case law. The ambiguity of the EU asylum *acquis* as regards the legal regime applicable to transit zones, implying that applicants in such spaces may be considered to be "detained", "accommodated" or both, condones such practices.

Freedom of movement restrictions also stem from measures aiming at ensuring that applicants remain available to asylum authorities for the processing of their claims or administratively punishing them for reprehensible conduct instead of resorting to the criminal justice system. Case law and monitoring bodies have found *de facto* detention in reception modalities which in theory allow applicants to freely leave the premises but make it impossible in practice due their geographical location, onerous reporting duties or limited financial resources.

In times of increased migratory pressure, states justify restrictions on asylum seekers' movements as necessary for organisational purposes, to ensure swift processing of applications or to accommodate public order and security concerns. States' fixation with "absconding" from the asylum or the Dublin procedure has also generated a proliferation of ever-demanding reporting obligations and curfews in "open" reception or the establishment of such facilities in remote locations.

The comparative overview of European countries' practice has revealed a pressing need for legal clarity in national and European frameworks, in line with distinctions between restrictions on freedom of movement, deprivation of liberty and reception drawn by the Strasbourg jurisprudence and stemming from a faithful reading of human rights law. Though a factual assessment of all circumstances of the individual case will always be necessary, regardless of the official qualification of a restrictive measure in national law, legal certainty can be significantly enhanced by further clarification of the EU and national legal frameworks in this area. The findings of this report allow to make the following recommendations to Member States and EU co-legislators for improvements in EU law and national practice.

1. European countries should eliminate any fictitious designation of transit zones or other facilities at the border as not being part of their national territory according to their national law, in line with ECtHR jurisprudence and the territorial scope of the recast Asylum Procedures and Reception Conditions Directives.

2. Where they prevent asylum seekers from leaving the transit zones or other border facilities to access other parts of their territory, European countries should legally qualify those measures as deprivation of liberty.

3. The Council and European Parliament should clarify in the reform of the recast Reception Conditions Directive that stay in a transit zone or a border facility amounts to deprivation of liberty where the applicant is not allowed to freely enter and exit the facility into the territory.

4. Where European countries resort to restrictions on freedom of movement or deprivation of liberty, in accordance with domestic law and human rights law requirements, they should *inter alia*: (a) conduct an individualised assessment of each case to establish necessity and proportionality; (b) consider the application of alternatives to detention; (c) communicate a duly motivated detention decision to the individual concerned; (d) specify the modalities of effective remedy before a court; (e) eliminate restrictions imposed upon access of legal representatives, UNHCR and specialised civil society organisations, including by guaranteeing access to phones and other communication methods and by respecting confidentiality of contacts.

ANNEX I – Statistics on detention of asylum seekers

The lack of accurate statistical data on the detention of asylum seekers remains a crucial gap in the CEAS, not least due to the absence of any EU obligation on states to collect and release figures on the number of asylum seekers detained at any given time.[158] A more crucial obstacle to a proper comprehension of the scale of detention stems from the opacity in which detention takes place.

Due to the lack of clarity as to whether measures applied by states amount or not to deprivation of liberty, statistics on detention are likely to misrepresent the actual number of people deprived of their liberty in European countries. To illustrate, when requested to give information on the number of asylum seekers detained in the course of 2017, selected countries provided the following figures:

Statistics on immigration detention provided by national authorities: 2017				
Country	Total Detained during 2017		In detention at the end of 2017	
	Asylum seekers	Total	Asylum seekers	Total
Austria	:	4,962	:	:
Bulgaria	2,194	2,989	30	284
Cyprus	238	:	42	70
Spain	1,380	:	:	:
Greece	9,534	25,810	1,771	2,213
Hungary	391	:	5	:
Malta	43	:	6	:
Netherlands	:	:	:	627
Poland	:	:	127	303
Romania	:	690	:	116
Sweden	:	:	4,379	:
Slovenia	48	236	2	7
UK	:	27,331	:	2,545
Switzerland	:	:	94	:
Serbia	4	:	1	:

Source: AIDA Country Reports, 2017 Update.

As will be seen from the table above, some countries do not disaggregate the detention population by status and could only provide general figures for 2017.

More importantly, however, these figures need to be qualified in several respects, as they leave out other instances where asylum seekers are deprived of their liberty, as discussed in Chapter II. For example:

- **Hungary:** The Immigration and Asylum Office reported 391 persons subject to asylum detention in 2017. This figure seems low because it omits the 2,107 persons held in the transit zones of Röszke and Tompa, also in a state of detention, during the same period;[159]
- **Greece:** The figures provided by the Hellenic Police only cover pre-removal detention centres and thus omit persons detained in police stations or at the airport. Statistics for persons *de facto* detained in Reception and Identification Centres are not available;[160]

158 For a discussion, see ECRE, *The detention of asylum seekers in Europe: Constructed on shaky ground?*, June 2017, available at: http://bit.ly/2G5MR2V; *Making asylum numbers count*, January 2018, available at: http://bit.ly/2CYMB6R.

159 AIDA, Country Report Hungary, 2017 Update, February 2018, available at: http://bit.ly/2Fnqu8V, 76.

- **Spain:** The figures provided by the Office of Asylum and Refuge refer to people applying for asylum from a Foreigner Detention Centre (CIE) and do not cover those detained at the border. Out of 6,151 persons applying at the border in 2017, Madrid Barajas Airport alone accounted for 3,182 applicants.[161]
- **Switzerland:** The number of asylum seekers reported in detention does not include those falling under Dublin procedures.[162]

Against that backdrop, data on detention of asylum seekers should be carefully framed and treated with caution to avoid inaccurate representation of the scale of deprivation of liberty practices.

160 AIDA, Country Report Greece, 144-145.
161 AIDA, Country Report Spain, 32.
162 AIDA, Country Report Switzerland, 2017 Update, February 2018, available at: http://bit.ly/2FoL9tg, 84.

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