

# **Detention of Asylum Seekers in regard to Dublin II**



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## **Abstract**

Seeking Asylum or seeking international protection is only one of many problems in today's world. Many wars; civil wars, and the war on terror have made people seek international protection, and because of it the world is facing an asylum storm day by day. Europe is also affected by many international protection seekers. Europe wants to protect its borders from illegal immigrants and at the same time Europe wants to protect those who really need International protection. Because of this Europe has created a common asylum policy within the EU. The EU wants a mechanism to regulate asylum inside the EU and for this purpose has created a regulation which is based on the concept of responsibility sharing between the Member States, called the Dublin regulation.

This thesis is focusing on Detention under the New amendments proposal of the Dublin regulation II. The Dublin regulation II has faced a huge amount of criticism from many organizations, partners and the ECRE itself and Many stakeholders including the UNHCR. Amnesty International, They has commented on it and asked for urgent reform. Different reports have come out asking for existing regulations to be amended in order to create a greater protection of the human rights of those people who really need international protection, and EU Member States should also bear responsibility in equal manner.

That is the reason EU are working on these amendments. That detention of asylum seekers should normally be avoided in general is part of the international framework, but the present day's Detention practices towards asylum-seekers are extensive and recognized as an administrative practice. Human rights instruments ensure that individuals are not arbitrarily or unlawfully deprived of their liberty, but those human rights instruments are not able to safeguard asylum-seekers who are frequently subjected to detention.

The main purposes of refugee protection is to safeguard human rights, that is to say that asylum-seekers should be treated in accordance with human rights standards, not only refugee law, or at least that refugee law should follow the footprints according to basic human rights standards.

Asylum seekers' rights to liberty and security of person, and freedom of movement, are strengthened through human rights instruments and mechanisms, but holding them in Detention violates their basic Human Rights. The new amendments proposal of the Dublin regulation II in the area of Detention is somehow to try to respect the basic concept of Human Rights. For this reason Detention as a whole has been given its own chapter with different articles, which is comparatively a very good approach and to be welcomed.

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# Part I

## 1 ABOUT THESIS

### 1.1 Subject and Purpose of the Thesis

Today the international community has witnessed large-scale movements of people across international borders " By the end of 2007, the total population of concern to UNHCR was estimated at 31.7 million people, including 11.4 million refugees 2 ; 740,000 asylum-seekers; 731,000 refugees who had repatriated during 2007; 13.7 million IDPs protected/assisted by UNHCR; 2.1 million IDPs who had returned to their place of origin in 2007; some 2.9 million stateless persons; and some 69,000 Others of concern. The total population of concern to UNHCR decreased by 3 per cent during 2007<sup>1</sup>. Because of these large movements of asylum-seekers the asylum mechanisms are getting in trouble. States try to control large-scale movements of people, and one of the tools they utilize for this is detention. In the area of asylum seekers and refugees arbitrary detention is frequently used all over the world every day. Detention of asylum seekers and refugees appears to have increased in the western world<sup>2</sup>. Many countries use detention of asylum seekers because they are using restrictive measures towards other potential applicants. This restrictive methodology undermines the universal right to seek and enjoy asylum in other countries. Seeking asylum is a right of the individual but granting asylum is up to the will of the States. The right to be granted asylum, considered as a right of the individual, is not internationally accepted Sovereign States to decide which foreigners should be allowed to stay within their territory<sup>3</sup>. In the case of detention a developing trend can be observed because the EU has come with a single chapter and different articles concerning the protection of asylum seekers and refugees in accordance with their basic Human Rights in their latest amendments regulation.

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1 UNHCR Statical Yearbook 2007, Trends in Displacement, Protection and Solutions

2 Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in Detention of Asylum Seekers in Europe: Analysis and Perspectives, Hughes, Jane and Liebau, Fabrice (eds.), 1998, p. 142.

3 morten kjaerum, the concept of country of first asylum [http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/intjrl4&div=66&id=&page=\)](http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/intjrl4&div=66&id=&page=)

According to new amendments basically asylum-seekers can be detained who is subject of a decision of transfer to the responsible Member State. The EU wants to respect the Human Right concept and work on common asylum policy because the EU wants to balance its obligations towards the International community and towards asylum seekers.

The main purpose of this thesis is to describe the background and point out what the amendment proposal has to say concerning detention, and analyze it according to the international Human rights conventions and standards of today. European countries are number one in respecting the human Rights. In this context the Dublin regulation came as a systematic approach towards the treatment of asylum-seekers and the protection of their rights. But the Dublin regulation II fail to gets its goal, the Dublin regulation II not mention anything about detention and many asylum-seekers are detained under Dublin system without any fixed rule or guidance. Because of this needed amendments are welcome in the area of detention but still there is a lot of gapes exist. Before it is adopted by the Member State they should go through those gapes than it will able to get the goal of this regulation, if not after some years again regulation will face huge comment that it is unsuccessful to reach its goals in the area of detention.

## **1.2 Methodology**

In the area of detention the laws and regulations of the European Union are in compliance with the international human Rights laws for protecting refugees. It is very important to analyse it on the basis of sources of international Human Rights Law. The case of asylum and Detention is actually the subject matter of Human Rights. The research is quite new in this area because the latest amendments in the Dublin regulation have not been practiced yet. The books, articles, documents from UN, the European Convention on Human Rights, and case law from the European Court of Human Rights has been valuable and informative for the analysis of the subject matter.

Main focus is in the Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State responsible for examining an asylum application lodged in one of the Member States (hereinafter the Dublin Regulation)<sup>4</sup>. is now coming with

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<sup>4</sup> Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national(2003a) Official Journal L 050, 25/02/2003 P. 0001 – 0010



amendments. This Instrument must be considered in the context of the international obligations which Member States of the European Union show to the International Community. It should be considered whether that instrument is in compliance with International Human Rights in the area of detention.

### 1.3 **Limitations and Definition**

The thesis reviewed the main international conventions related to detention such as the International Covenant on Civil and Political Rights, the 1951 Refugee Convention and the European Convention on Human Rights and international standards e.g. the United Nations High Commissioner's Executive Committee's Conclusion No.44 and the 1999 Guidelines which is provided by United Nations and the amendments proposal of the Dublin Regulation II which will be bound by Member States of the European Union. I mention the Dublin Regulation and amendments proposal in chapter 3.

To understand the thesis, the definition of an Asylum seeker is important. Asylum seeker usually applies to those whose claims are being considered under admissibility or pre-screening procedures as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request<sup>5</sup>. I explain the term Detention in Part II chapter 2, in chapter 4 provisions of the existing amendments' proposal in the area of detention and in chapter 5 I analyze those provisions which include the amendments' proposals in the area of detention, in chapter 6 mention about current States Practices Under Dublin Regulation II, in chapter 7 mention Final Conclusions and Final Remarks. Every chapter ends with Concluding Remarks.

I do have a great interest toward to European Asylum System and Europe consider as a protector of Human Rights, First country, Safe country etc. In this point of view in my consideration there should not be any Human Rights Violation but Surprisingly in the area of Detention Human Rights Violation exists. Because of that I chose to write this thesis on the Detention under new amendments of Dublin Regulation II.

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<sup>5</sup> UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, paragraph 4.

## Part II

## 2 INTRODUCTION

### 2.1 Definition

A State or Government that is holding a person in a particular area either for interrogation or for punishment for illegal activities are exercising their right to detain. This power of the authorities is not without limits. Individuals cannot be held in detention without warrant or charge, and cannot be kept in detention for an unreasonably long time.

Large numbers of individuals are presently subject to detention or similar restrictive measures in different parts of the world. Individuals can be in detention under the law or full compliance with established human rights standards, but it is not acceptable that individuals are being kept in detention illegally.

The UNHCR considers detention as confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory<sup>6</sup>

Among the concepts of human rights, the Right to liberty is a basic fundamental human rights principle which is included in The Universal Declaration of Human Rights as well as in various regional human rights instruments. In addition, almost all the International conventions define liberty as freedom from Detention. Because of that, holding individuals in detention without a legal reason constitutes a violation of the basic Human Rights of individuals. There is no distinction regarding the purpose of the detention, all individuals who are kept in custody are in detention.

### 2.2 Legal Detention

A State does have a Right to take or suspend Liberty from individuals. Legal detention is established by or founded upon law or official authority or accepted rules in the legal

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<sup>6</sup> Office of the united nations high commission for Refugees Geneva UNHCR revised guidelines on applicable criteria and standards relating to the Detention of Asylum seekers (February 1999).

system. If the state is in danger because of the activities of a person, then the State can suspend the liberty of that person. It means that the Person can be put in detention. Examples of individuals that can be detained are criminals and people who are involved in terrorism. Persons committing activities which are against the rules of the community, society, State or International community, or people acting against the state law or International Law can be held in detention. Lawful detention is allowed. Detaining criminals is an almost universal practice. Putting a person in detention in accordance with the law is Legal detention. Detaining criminals is legal, but treating them inhumanely while in detention is illegal. What constitutes an illegal activity is defined by the states individually. Some acts are crimes in some states but not in other States. All the basic human rights principles should be respected by the state. In lawful detention all procedures should be according to law. When illegal activities happen, the perpetrators should receive a sanction. In legal detention there should be a time limitation. Individuals should know why they are in detention and how long the detention will last. Article 9 ( 2-5 ) of the International convention on civil and political Rights describes the procedures for legal detention. The European convention of Human right article 5 (2) also states: that anyone who is arrested shall be informed promptly of the reasons for their arrest.

### **2.3 Arbitrary Detention**

Arbitrary detention by the state of an individual is illegal and violates the basic principles of Human Rights. No one shall be subjected to arbitrary arrest, detention or exile<sup>7</sup>.

There is no sufficient explanation given to those individuals who are arrested arbitrarily, they are not told why they are arrested, and the individuals are not presented with any warrant for their detention. This violates their basic right to liberty. It is unacceptable when the a State uses wide discretionary powers that are not prescribed by

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<sup>7</sup> Article 9 Universal Declaration of Human Rights Human Right United Nations(1998-12-01)( See, for example,Art. 9, 1 966 Covenant on civil and political Rights; Art. 5, 1950 European Convention; Art. 2, Protocol 4, European Convention; Art.7,1969 American Convention; Art. 6, 1981 African Charter on Human and Peoples' Rights; also art. 5,1985 United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live: UNGA res. 40/144, 13 De c. 1985, Annex.

law to detain individuals. Arbitrary detention violates the International standards of basic Human Rights, which is mentioned in the Universal Declarations and Regional human rights instruments.

The government cannot deprive an individual of their liberty without proper due process of law. Arbitrary detention is a violation of basic national and international Human Rights. Articles 9 and 11 of the International convention on civil and political Rights 9(1): Everyone has to right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. In the same articles 2-5 the procedures for lawful arrest are given. And in articles 11: No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation. If the activities of an individual are not of an illegal nature, then facing detention for such activities constitutes an inhuman process by the state. In a sense arbitrary detention is in itself an illegal process. In practice, arbitrary detention is quite common. Many countries do practice it and there is no data on how many individuals that suffer this condition, in some cases lots of individuals are missing also.

It is very sad that states practice it and those who are kept on Arbitrary detention never know when they can enjoy their Right to liberty. When an individual is in arbitrary detention the probability of getting inhuman treatment is very high. This is another reason why arbitrary detention should be avoided. Arbitrary detention is common during war or civil war. In the case of immigrants, asylum-seekers and refugees are often subjected to it. “Arbitrariness” is not only to be equated with “against the law” and must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability<sup>8</sup>.

-Globalization and information technology are making the world smaller day by day, affecting the lives of individuals profoundly. Individuals trying to protect their basic Human Right; Right to life, by seeking international protection, are suffering arbitrary detention from the state from which they seek protection. The UNHCR has called upon States, the High Commissioner and other concerned parties to take all necessary measures to ensure that refugees are protected from arbitrary detention and violence.<sup>9</sup>

<sup>8</sup> Human Rights and Refugee Protection Self-study Module 5, Vol. II UNHCR 15 December 2006.

<sup>9</sup> UNHCR The Executive Committee Conclusion; No. 50 (XXXIX) – 1988.

## 2.4 Asylum-Seekers and Detention

Asylum seekers are those who are mentioned in the 1951 Convention relating to the Status of Refugees and in the 1967 protocol. Detention should normally be avoided for asylum-seekers. Seeking asylum is also a basic Human right, viz. protection of the Right to life which is mentioned in the Universal Declaration of Human Rights.

Large numbers of asylum-seekers are detained arbitrarily as a standard practice. Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation<sup>10</sup>.

Many states have a detention policy towards asylum-seekers. Detention of asylum-seekers may be necessary in cases where the person does not have identity documents, or uses false documents, but states should consider the individual asylum-seekers' situation. Instead of considering the situation of the asylum-seeker, the state practice arbitrary detention of those who are threatened of being prosecuted. Sometime the state doubts that asylum-seekers have not destroyed their documents with the sole purpose of misleading the authorities. They use this as an argument for detention being necessary in order to verify the asylum-seekers identity.

Many countries use Detention as a mechanism which seeks to address the particular concerns of the State related to illegal entry. Such practices require the exercise of great caution. Some countries are claiming that detention is needed to facilitate the quick processing of applications, to increase the removal of growing number of failed asylum seekers and to gain greater control over the asylum system as a whole<sup>11</sup>.

Unfortunately people who are seeking asylum can also be held in detention. The practice exists all over the world. It exists despite of Article 31 of the 1951 Convention Relating to the Status of Refugees. States keep asylum-seekers and refugees in detention. Human Rights mechanisms also allow asylum-seekers and refugees to be

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10 UN High Commissioner for Refugees, Detention of Refugees and Asylum-Seekers, 13 October 1986. No.44(XXXVII)-1986. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html> [accessed 18 March 2009].

11 Detention of asylum seekers in the UK, thematic Briefing prepared for the Independents Asylum Commission information centre about Asylum and refugees (ICAR)2007.

kept in lawful detention. Detention of the refugees and asylum seekers is accepted if it is necessary. The UNHCR Executive Committee stated that : if necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order<sup>12</sup>. (These embody some sixteen 'basic human standards', geared in particular to the objective of attaining a lasting solution to the plight of those admitted).The issue of detaining asylum-seekers has raised the question of whether this constitutes humanitarian behavior. Almost all the countries of Europe, the US, Canada, and Australia do exercise a detention policy towards asylum seekers.

## 2.5 Concluding Remarks

As mentioned above, sometimes and in certain situations, the detention of individuals can be legitimate. Depriving individuals of their Rights to liberty and freedom is sometimes necessary. Detention under the law is **allowed**. But arbitrary detention is illegal.

The state does have a right to suspend the Right of liberty and freedom from individuals if it is necessary in a lawful way. An arbitrary Detention is commonly used against asylum-seekers. **It is practice** in most countries, and this is very inhuman. Asylum-seekers are normally not doing any illegal activities but still their Right of liberty and freedom is suspended. In all countries detention of asylum-seekers exists. It should end. Holding individuals in detention for no good reason puts the standard of civilization of the state in question.

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<sup>12</sup> Executive Committee Conclusion No. 44 (1986), para. (b). In 1981, the Executive Committee, acting on the recommendations of the Sub-Committee of the Whole on International Protection, adopted a series of conclusions on the protection of asylum seekers in situations of mass influx: Report of the 32 nd Session: UN doc.A/AC.96/601, para. 57.

### **3 DETENTIONS OF ASYLUM SEEKERS – AN INTERNATIONAL INSTRUMENT**

#### **3.1 International Conventions and Standards**

National and international law allows that individuals be kept in legal detention if it is necessary. Several international instruments and standards concern themselves with the detention of individuals. Normally all those International instruments were applied to refugees who are seeking international Protection, because Asylum-Seekers in first hand are individuals. Some conventions are only related to the protection of asylum-seekers and refugees. In International conventions this is needed to protect the rights of individuals on an International level. The word convention is synonymous to treaties, protocols, charters, covenants, declarations etc. and establishes rules expressly recognized by contesting states<sup>13</sup>. All the international community is free to ratify the international conventions. If a state ratifies an international convention, then that State is bound by the obligations therein. According to the Law of Treaties a treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation<sup>14</sup>.

International Standards are such instruments which do not have a legally binding force like that of conventions or treaties but do have a disciplinary effect on the states . It is called a soft Law. International standards, such as for example recommendations and guidelines of different UN bodies, can be seen as accepted norms by the international community, and usually these norms represent the consensus among the states and should therefore be respected <sup>15</sup>.In international community soft law does have a very good effect when the international community needs an Interpretation of international Law.

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13 UN Treaty Reference Guide, available at (UN Treaty Reference Guide).

14 Vienna Convention on the Law of Treaties, 24 May 1969, 1155 U.N.T.S.331, entered into force January 27, 1980.

15 The Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section II, paragraph 11.

### **3.1.1 Universal Declaration of Human Rights**

After World War II the International community started to think about protection of Human Rights on an international level. The unnecessary loss of life in inhuman ways during the war got worldwide attention. In consequence the International community formulated the Universal Declaration of Human Rights<sup>16</sup>. It is a basis for protecting Human Rights in the International community.

In the UDHR article 3 a basic tenet of liberty is laid out as follows: “No one shall be subjected to arbitrary arrest, detention or exile.” It is a fundamental principle among the member states of the United Nations. The Member States of the UN agree to respect the UDHR. In theory a generally declaration does not have any binding force. However, the UDHR is recognized as a fundamental principle which the member states is bound to respect. The Declaration must be ratified by the states as a treaty, and this gives it its binding nature. Of course a declaration is of great significance, but it is more of a hortatory and recommendatory nature than in a formal sense binding, even though arguments have been developed for viewing the UDHR binding as customary international law<sup>17</sup>.

The UDHR gives individuals freedom from arbitrary arrest, detention or exile. All the Member States should respect it as fundamental Principles to protect individuals from detention. Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognized as a basic human right.

### **3.1.2 International Covenant on Civil and Political Rights**

As an International convention the ICCPR has a very important role in protecting the Human Rights of Individuals. ICCPR article 9 is the key provision in international law guaranteeing the right not to be arbitrarily detained, as follows:

- a)** Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her]

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<sup>16</sup> Universal Declaration of Human Rights, General Assembly res.217A (III), of December 1948, U.N.Doc A/810 at 71 (1948) .

<sup>17</sup> See Harris, David and Joseph, Sarah (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, 1995, p. 1ff and Steiner, Henry J., and Alston, Philip, *International Human Rights in Context: Law, Politics, Morals*, 2000, p. 136Ff.



liberty except on such grounds and in accordance with such procedure as are established by law.

**b)** Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his [or her] arrest and shall be promptly informed of any charges against him [or her].

**c)** Anyone who is deprived of his [or her] liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his [or her] detention and order his [or her] release if the detention is not lawful.

**d)** Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

These articles protect individuals against arbitrary deprivation of liberty and ensure individuals' liberty and security. Member states should respect this provision. In the Human Rights Committee General Comments states that article 9.1 is applicable to all deprivations of liberty, including for the purpose of immigration control. Also in cases of so-called preventive detention, for reasons of public security, the detention should be controlled by the same provisions, e.g. it must not be arbitrary and it must be based on grounds and procedures established by law<sup>18</sup>.

ICCPR article 12 also describes restrictions on movement. It is also a kind of deprivation of liberty. Severe restrictions on movement may be considered a deprivation of liberty<sup>19</sup>.

### **3.1.3 The 1951 Refugee Convention**

The 1951 Refugee Convention also states that asylum-seekers, can be held in detention. The Article 31 of the 1951 Convention Relating to the Status of Refugees states as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without

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<sup>18</sup> Human Rights Committee, Right to liberty and security of persons (Art.9):.30/07/82. CCPR General comment 8. General Comments, Sixteenth session, 1982.

<sup>19</sup> See, e.g., Celepli v Sweden, HRC Case No. 456/1991, and Karker v France, HRC Case No. 833/1998.

authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

According to The Vienna Convention on the Law of Treaties, International treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose<sup>20</sup> In the 1951 convention article 31 (1) emphasize that refugees who ‘come directly’ and show ‘good cause’ can entry the country without authorization and state should protection those persons whose life or freedom was in danger. Threats to life or freedom can be a possible reason for illegal entries. Refugees who come directly from a dangerous situation, are able to provide a good reason for entering illegally, and who presents themselves to the authorities without delay, deserve immunity from penalties for illegal entry.

Article 31(2) concerns restrictions of freedom of movement and the issue of detention. Restrictions on the freedom of movement of refugees and asylum seekers violate the fundamental protection of human rights. States do have a power to limit the freedom of movement of refugees, in exceptional circumstances, in the interests of national security. States can impose restrictions if it is necessary. The responsible State can apply restrictions only until the refugee status is officially recognized by the state or the refugee obtains admission to another country.

This is the provision which is given in the 1951 convention, but asylum seekers are still placed in illegal detention. In Europe, Asia, Africa, Americas, as well as in Australia asylum seekers are usually placed in detention, even though the Convention has directed that asylum-seekers and refugees who are coming directly from danger should get immunity from such penalties: UNHCR found several different types of detention in operation, including detention at border points or in airport transit areas, and that the grounds for detention also vary<sup>21</sup>. The UNHCR made this statement in 2000, but the use

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<sup>20</sup> Art. 31(1), 1969 Vienna Convention on the Law of Treaties: UN doc. A/CON F.39/27; Goo dwin- Gill, G .S., *The Refugee in international Law*, Clarendon Press, Oxford, 2 nd ed., 1996, 366-8

<sup>21</sup> UNHCR, *Reception Standards for Asylum Seekers in the European Union* (Geneva, July 2000).

of detention in such cases is still increasing. The states responsible for this claim that Refugees and asylum seekers are being detained, because of lack of proper documentation, false documents or illegal entry.

The states claim that detention is necessary. The 1951 Convention establishes rights and responsibilities for refugees. The claims of refugees should be examined by a proper state authority, and the state should meet its international obligations by which it is bound to follow proper procedure in dealing with asylum-seekers. The State should take into account the Principle of non-refoulement and penalties should not be imposed on refugees. If asylum seekers are penalized it is a violation of their basic Human Rights. It violates the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction<sup>22</sup>.

The stipulations in article 1 of the 1950 European Convention (*'The... Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention'*), and in article 1 of the 1969 American Convention (*'The... Parties undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction (their) free and full exercise...'*) are clearly linked to the matching duty to provide a remedy to those whose rights are infringed, or threatened with violation<sup>23</sup>. Article 31.2 gives priorities to the freedom of movement to those asylum-seekers whose status is not determined yet. States are not allowed to impose restrictions in the freedom of movement of refugees other than those that are necessary<sup>24</sup>. In this context, the word 'necessary' has provided states using detention with a useful loophole, which has prompted The Ad Hoc Committee on Statelessness and Related Problems to suggest that the term should be interpreted narrowly.

As a general provision asylum-seekers and refugees cannot be detained. The practice of detaining the refugees and asylum seekers is also a means of reducing the number of applicants by functioning as a deterrent. Asylum seekers and refugee cannot be

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22 This duty is recognized in article 2(1) of the 1966 Covenant on Civil and Political Rights (*'Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant...'*)

23 Art. 14(1), 1966 Convention on Civil and Political Rights; art. 13, 1950 European Convention on Human Rights; art. 25, 1969 American Convention on Human Rights.

24 Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 145ff.

penalized in general, but this provision can be suspended on necessary and reasonable grounds. Any penalization should be proportional. Asylum seekers can be detained if it is for their own benefit during the procedure of determining their refugee status.

If asylum-seekers are kept in detention, then it should be legal and asylum-seekers should get all the facilities which are needed. The UNHCR Guidelines also draw on general international law in regard to the treatment to be accorded to minors, other vulnerable groups, and women, and to the conditions of detention, which should be humane and with respect shown to the inherent dignity of the person, on the detention of refugees and asylum seekers in South Africa<sup>25</sup>. Basic Human Rights are recognizing by refugee law such as freedom of movement and the right to liberty and security of person. Law does not complete protected freedom from arrest or detention to the refugees and asylum-seekers. A State does have a power to control persons under their jurisdiction. Human Right mechanisms always provide limitations and procedures for arrest or detention which will not be arbitrary or unlawful. According to the International Law, the general rule is that asylum-seekers should not be detained because of unlawful entries, but in exceptional cases they may be detained:

- To verify identity ;
- To determine the elements on which the claim for asylum is based;
- If asylum-seekers have destroyed their travel or identity documents in order to mislead the receiving asylum-seekers authorities of the country;
- Or to protect national security and public order.

Detention should be carried out in a lawful and non-discriminatory manner. To put asylum seekers and refugees in unlawful detention means to violate the basic human rights standards:

- The right to liberty;

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<sup>25</sup> see Human Rights Watch/Africa, 'The Human Rights of Undocumented Migrants, Asylum Seekers and Refugees in South Africa', Submission to the Green Paper Task Group, 11 April 1997, 6-8; on migratory pressures, problems and responses, see 'Report by Mr. Glele Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance', UN doc.E/CN.4/1999/15/Add.1, 27 January 1999.

- The right to personal security.

In case there is a need for detention, the detention should not be arbitrary. The state must provide information concerning the reason for detention; the Asylum-seekers who are in detention must have prompt access to legal and other appropriate assistance, and be accorded the right to challenge the lawfulness of the deprivation of their liberty. Detention must not take place in ordinary prison facilities. The conditions of detention must be humane and respectful of the dignity of all individuals. Legal detention also must not continue when those needs or risks originally justifying detention are no longer present. Those are the basic international requirements if asylum-seekers need to be detained.

#### Article 32 Expulsion

“1. The Contracting States shall not expel a refugee lawfully in their territories save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary”. This article also applies to detention. Asylum-seekers who are a danger to national security or the public order of the nation can be expelled. While waiting for such an expulsion the asylum seeker or refugee can be detained<sup>26</sup>.

### 3.2 European Convention on Human Rights

European countries also use detention in an increasing manner. According to Article 1

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<sup>26</sup> Grahl Madsen, Atle, “Expulsion of Refugees”, in *Nordisk Tidsskrift for International Ret*, Vol. 33 (1963), p. 41-50, in *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen, Macalister-Smith, Peter and Alfredsson, Gudmundur (eds.), 2001, p. 7f.

of the ECHR, the rights set out in the convention are guaranteed to “everyone within [the] jurisdiction” of the contracting parties. The basic principles of the European Union are liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The European Union also respects the universal declaration of Human Rights and other regional conventions. The European convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a cornerstone for the protection of Human Rights in Europe. In its article 5(1) it states that « Everyone has the right to liberty and security of person». The individual does have the right to liberty and security which is the universal Human Rights principle. In the same time this convention emphasizes lawful detention: No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law (Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1 a; b; c; d; e; f; 2; 3; 4; 5).

In case a state needs to suspend that liberty and security it should be done legally, i.e. a lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law. In this convention article 5b describes how to treat an individual after a lawful arrest or detention. In article 3 it is said that No one shall be subjected to torture or to inhuman or degrading treatment or punishment<sup>27</sup>. It means that even when individuals are arrested or in detention they have a right to be treated humanely.

They are not to be subjected to torture or inhuman behavior or punishment. This means that the European convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) accepts the universal Principles of Human Rights. The ECHR also allows the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Article 5.1. of the ECHR allows for detention for the purpose of enforcing immigration control but Arbitrary detention is illegal and when the state needs to hold an individual in detention, then it should be according to law and should be in accordance with the procedures which are suggested by the law. The ECHR does not allow individuals to suffer torture and ill-treatment. It is a most abhorrent violation of human rights and human dignity. No exceptions to this are permitted under international law. All States have an obligation to eradicate all forms of torture and ill-

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<sup>27</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

treatment. That torture and ill-treatment are forbidden under international law. This concept is accepted by European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

### **3.2.1 EU and Detention to Asylum-seekers**

The European Union is concerned about the basic Human Rights of the individual. To protect the Individuals' basic Human Rights, there is a convention which European countries have accepted, but still different European countries practice detention of asylum-seekers. And the EU itself has also accepted it: Despite the efforts by the international community torture and ill-treatment persist in all parts of the world. Impunity for the perpetrators of torture and ill-treatment continues to prevail in many countries<sup>28</sup>. There are increasing problems with asylum in Europe. Normally detention as whole cannot be defined as torture and ill-treatment, but arbitrary detention, to which EU members still subject individuals, is a violation of the basic principles of Human Rights. It is often usual for EU states to exercise arbitrary detention toward asylum-seekers and refugees. When asylum seekers and refugees are kept in detention, then a report from JRS state their conditions as: They must accept the state of living conditions within the detention centre, and cohabitation with persons of differing nationalities, cultures and even personalities and temperaments; and they must accept the restriction on their freedom to move about as they please, even within the confines of the detention centre<sup>29</sup>.

As of today there is a big mass of refugees and asylum seekers moving towards the EU countries. It is very hard to discern illegal migrants from refugees and asylum seekers, and for this reason even in the EU countries it is normal to put asylum-seekers and refugees in detention. Europe is dedicated to asylum seekers and irregular migrants in administrative detention in Europe<sup>30</sup>.

Due to the increasing asylum problem in Europe, members of the EU have started to

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28 Guidelines to EU policy towards third countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (An up-date of the Guidelines)

29 Becoming Vulnerable in Detention; Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union, Executive Summary ,June 2010.

30 <http://www.detention-in-europe.org/>

discuss how Europe will manage their problems with asylum-seekers and refugees. After the discussion in October 1999 they came out with the conclusions of Tampere. The European Council decided that the EU needs a common European asylum system. The council of the European Union has presented a common policy on asylum, including a Common European Asylum System in order to harmonize common minimum standards in the area of asylum qualification for becoming a refugee or a beneficiary of subsidiary protection status, as well as procedures for applying for asylum, and Dublin regulation. In all those mechanisms there are not clear and sufficient legal minimum standards which have been established in Europe in the area of detention. For this reason, there is still lot of cases in the EU where States are putting asylum-seekers in detention. Most of these cases concern asylum-seekers considered to stay illegally in an EU as a third country nation. People in this category are detained in at least 230 detention centers in the EU.

### **3.3 Other Internationala Standrds**

The ExCom Conclusions and the 1999 Detention Guidelines are other International Standards which have played a significant role in detention of asylum-seekers or refugees. The Executive Committee is an advisory body of The United Nations High Commission for Refugees. ExCom adopts conclusions concerning asylum-seekers and refugees. Those conclusions do not have a binding force, but it acts as an indicator of the status of states' practice concerning the asylum-seekers and refugees. In 1986, the ExCom adopted Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers<sup>31</sup>. Conclusion No.44 reflects minimum standards, without prejudice to applicable higher standards established by domestic law or international law, as for example ECHR<sup>32</sup>.

ExCom is concerned that detention should normally be avoided, if necessary, detention might be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in

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31 ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, para. 128.

32 Ibid, preface.



which they intend to claim asylum; or to protect national security or public order<sup>33</sup>.The UNHCR issued the Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers in 1999.

These Guidelines addresses the existing standards on refugee detention. In this guideline it is stated that detention of asylum-seekers is inherently undesirable and that freedom from arbitrary detention is a fundamental human right, use of detention is, in many instances, contrary to the norms and principles of international law. It is a concern that the Western World is increasingly resorting to detention of asylum seekers. It expresses the importance of article 31 of the 1951 Convention and, in consistence with that article and the ExCom Conclusion No.44, states that detention should only be applied in cases of necessity. In Guideline 3 there is a statement of Exceptional Grounds for Detention. This is clearly prescribed by national law which is in conformity with general norms and principles of international human rights law.

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with EXCOM Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if necessary<sup>34</sup>.

### **3.4 Other Important Standards**

Detention is also an issue of concern for other Human Rights organs. In 1988, the General Assembly adopted a resolution made by the Office of the High Commissioner for Human Rights named Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>35</sup>.These Principles represent a consensus among states on how different rules of detention should be interpreted and that asylum seekers have a right, as all other individuals, to be treated in accordance with these

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33 ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, paragraph (b).

34 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 3.

35 Resolution 43/173: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly 9 December 1988.

standards<sup>36</sup> . These important standards will strengthen the work of the international community on sensitive human rights issues like asylum and detention.

### 3.5 Non-Governmental Organizations

NGOs have always played a very important role as advocates of human rights issues. In the Detention issue information concerning the human rights situation and human rights violations have been provided by NGOs. The most important NGO in the field of detention in Europe is the European Council on Refugees and Exiles (ECRE). In 1996 the ECRE issued a Position Paper on the Detention of Asylum Seekers<sup>37</sup>. In this position paper it emphasized that detention should only be used in exceptional cases and that alternative measures should always be considered. The ECRE strongly recommends the systematic use of detention as a part of the procedure for determining refugee status. Detention may be resorted to if it is necessary. National and European non governmental organizations (NGOs), academics and other civil society representatives continue to play an important role in the development of asylum systems at national and European levels<sup>38</sup>. NGOs are now a very strong part of this society. They are working on the very sensitive issues on human Rights and are able to give suggestions in these subject matters. Because of the strong involvement of NGOs, the international community has paid attention to sensitive human rights issues such as detention.

### 3.6 Concluding Remarks

As mention above, in the field of detention, the fundamental Rights such as liberty and freedom of asylum-seekers should be protected. There exist several instruments and standards which deal with the rights of individuals in general, and specifically with detention of asylum-seekers. The concept of the Human Right Law is internationally accepted as a principle. Many multilateral and bilateral treaties are established to maintain it, and they function as International Law in the International Community. But

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36 Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section II, paragraph 7

37 ECRE Position Paper on the Detention of Asylum Seekers, April 1996, available at < <http://www.ecre.org/positions/detain.shtml> > (25 October 2001).

38 UNHCR Response to the European Commission's Green Paper on the Future Common European Asylum System ; September 2007.

it is a problem that not all International law is binding and depends on the willingness of states to adhere to it. International Law that is binding is more effective between State parties. It creates duties between the states. In the context of detention state parties should deal with individuals within their jurisdiction, both aliens and nationals without discrimination, and based on its international obligations. In the case of asylum applicants none of the legal instruments are precise regarding detention; other international standards are in existence because of the poor protection of detained refugees and asylum seekers in the legal instruments. Despite the work of Non-Governmental Organizations NGOs and INGOs and other international standards, there work does not consider as legal binding instruments, because of that there are no effective legal instruments concerning detention of asylum-seekers. However, the NGOs and international standards still play an important role in this field.

## 4 DETENTIONS OF ASYLUM SEEKERS UNDER DUBLIN REGULATION II

### 4.1 Introduction

In 1920 the League of Nations was the first organization to bear the responsibility for dealing with 800000 Russian refugees in Europe. The largest population movements began in European history after World War II, when millions of people were suffering and became homeless by the fighting, released from captivity or expelled as an act of vengeance. At the Potsdam Conference in July 1945, British, American and Russian leaders agreed to '... recognize that the transfer to Germany of German populations ... remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken.' They also specified that '... any transfers that take place should be effected in an orderly and humane manner'<sup>39</sup>.

When the aftermaths of the World War had ended, the refugees' problem was not very important in Europe. There is no big discussion on this matter in Europe. There was no political agenda and much less attention given by the public also. In 1970 the Flow of refugees increased day by day, causing a need for European nations to discuss this subject matter again. Europeans started discussions on bilateral and multilateral levels. The product of these discussions was the treaty of the European Union or The Maastricht Treaty (TEU), its aims a harmonized policy on asylum and refugees. With TEU came along an ad hoc Group on Immigration, consisting of Ministers of Interior and Ministers of Justice, established by the Members of the European Community. The ad hoc Group suggested an intergovernmental instrument - the Dublin Convention.

**Treaty of Amsterdam:** The treaty of Amsterdam was the product of negotiations within the Intergovernmental conference. It was adopted on 17 June 1997 and constituted a revision of the treaty of Maastricht. It came into force in 1999. The Amsterdam treaty have been made in the field of asylum and immigration<sup>40</sup>.EU commitment came with **The Tampere Conclusion** which gives "The absolute respect of the right to seek asylum" and the need to maintain full respect for the principle of non-refoulement<sup>41</sup>. The EU concluded that they would adopt three Directives: "**The Reception Conditions**

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39 BBC [http://www.bbc.co.uk/history/worldwars/wwtwo/refugees\\_01.shtml](http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_01.shtml).

40 Refugee Protection A European challenge, Vigdis vevstad -ISBN 82-518-3630-1

41 Council, European. Political Guidelines: Presidency Conclusions, European Council (1999)

**Directive**, (*Minimum Standards for the Reception of Asylum Seekers*, 27 of January, (Council Directive 2003/9/EC). Official Journal L 031, 06/02/2003 P. 0018 – 0025 (2003a) **The Dublin Regulation**, (*Establishing the Criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (2003a) and **The Qualification Directive**." (*Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 29 of April, (Council Directive No. 2004/83/EC) Official Journal L 304 , 30/09/2004 P. 0012 – 0023).

Those are the directives the EU is following under the Asylum Procedures. CEAS 1st phase were completed in the sense that all EU countries have adopted these directives. But unfortunately the directives have only been adopted in theory, not in practice.

**Hague Programme** set a clear goal to establish a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. Common policy in the field of asylum, migration and borders started on the base of solidarity and fair responsibility sharing, it included financial implications and closer practical co-operation between Member States. It states that technical assistance, training, and exchange of information, monitoring of the adequate, timely implementation and application of instruments will be implemented. EU wants harmonization of legislation which will make it easier for the EU to work on a common asylum policy, migration and borders.

**Dublin regulation II** is a result of the EU's common European asylum system. Basically Dublin II is based on responsibility sharing between member states about the log application of asylum-seekers. Today the European Union is defined as a no border system in which internal borders for EU members have been abolished, but in the case of so called third country nations outside the EU, the borders have been reinforced.

An EU member can move from one EU state to another without restriction. In this modern world the EU member states will take the responsibility for those asylum-seekers and refugees who are seeking protection in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in the third country of origin.

The main principle of the Dublin Regulation is to stop the submitting of applications in

multiple Member States. The Dublin II Regulation provides a legal basis for establishing the criteria and mechanism for determining the State responsible for examining an asylum application in one of the Member States of the EU by a third country nation<sup>42</sup>. On 18 February 2003 the European Council adopted the Dublin II Regulation. The Dublin Convention establishes a hierarchy of criteria for identifying the responsible Member State and aims at ensuring that every asylum claim within the EU is examined by a Member State, as well as preventing multiple asylum claims and secondary movements of asylum seekers within European Union territory. The Dublin II Regulation gives criteria for determining which EU state is responsible for processing an asylum claim, thus constituting a system for responsibility sharing. This provision was not mentioned in the Geneva Convention on the status of refugees of 1951 or in the protocol of 1967.

The Convention will ensure that every asylum-seeker's application will be examined by a Member State, unless a "safe" non-Member country can be considered as responsible. This will avoid situations of refugees being shuttled from one Member State to another. It determines which country is responsible for processing an asylum request, eliminates "asylum shopping", and ensures that the examination of application should be done in only one country. It is the very important main theoretical aspect of the Dublin Regulation, the main aim of a Common European System is work within the areas of freedom, security and justice which has emerged from the idea of making the European Union a single protection area for refugees, based on the full and inclusive application of the Geneva Convention and the common humanitarian values shared by all Member States.

## 4.2 The Dublin Regulation II and Detention

There is no effective or specific provision for detention in the Dublin Regulation II. This Regulation does not offer specific guidelines on the use of detention. However in practice, Member States regularly detain asylum seekers who await a 'Dublin transfer'<sup>43</sup>.

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[http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=175&Itemid=209](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=175&Itemid=209).

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[http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=92&Itemid=213](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=92&Itemid=213)<http://www.detention-in-europe.org/index.php?>

In the Dublin Regulation II detention is mentioned only once as follows: In article 17 (2) The requesting Member State may ask for an urgent reply in cases where the application for asylum was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in **detention**.

It does not mean that normally asylum seekers or refugees cannot be held in detention, that they are held in detention because of problems of identifying their identity. In 2006 the ECRE and ELENA published a joint report on the application of the Dublin II Regulation in Europe which states: Many EU Member State are increasingly using detention in order to enforce effective transfer under the Dublin system.

The Dublin Regulation II therefore poses a challenge to the basic principles of Human Rights for the European Union. Many member states impose Detention upon returnees, some Member States detain applicants if national legislation provides for criminal sanctions for illegal entry. All the EU countries have ratified the 1951 Convention\ protocol 1967 Relating to the Status of Refugees, all the International Human Rights conventions which states that generally asylum-seekers or refugees cannot be kept in detention. It means the Dublin Regulation II is contradictory to all the International conventions. It is a weakness of the Dublin regulation II that have caused the ECRE to come up with Ten Recommendations for Reform of the Dublin Regulation which accepted increasingly using detention to enforce Dublin transfers.

In this recommendation they clearly state: Add a provision restricting the detention of Dublin claimants to a measure of last resort where non-custodial measures have been demonstrated not to work on an individual basis. Detention must be subject to procedural safeguards, and limited to the minimum time required to meet its lawful purpose<sup>44</sup>.

Detention should be avoided because it harms applicants physically and mentally who may already have faced detention in their countries of origin. Some European countries have announced legislative proposals for an increase in the detention of Dublin II applicants. This is worrying in that asylum seekers in detention frequently do not have

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[option=com\\_content&view=article&id=92&Itemid=213.](#)

44 Ten Recommendations for Reform of the Dublin Regulation.

access to essential procedural safeguards such as legal assistance or advice<sup>45</sup>. The Dublin Regulation is in force because of EU legal harmonization on asylum application between the member states. Such a regulation which gives a legal base for determining asylum applicants does have a lack of vital provisions for putting asylum seekers in detention. It is unacceptable. Everyone has deep concerns about it, as studies have shown how the Dublin regulation II affects the life of applicants in detention cases. It should be amended in order to respect the basic Human Rights Principles. If not, Detention will remain a controversial issue within the Dublin II Regulation.

## 4.3 **Amendments Proposal Concerning Detention of Asylum Seekers**

### 4.3.1 **Background**

As mentioned before because of weaknesses of different parts of the Dublin Regulation II, comments and suggestions has come to the effect that it needs to be amended. The ECRE is concerned that a number of Member States have resorted to the increased use of this measure for the effective transfer of asylum seekers to the responsible Member State<sup>46</sup>. According to the suggestion and recommendation from the ECRE and other governmental or non-governmental organizations, in December 2008 the European Commission Released a "recast" of the Dublin Regulation II.

The main aim of the proposal is to increase the system's efficiency and to ensure higher standards of protection for persons falling under the Dublin procedure. Moreover, in line with the emphasis put on solidarity in the Policy Plan on Asylum, the proposal aims to contribute to better addressing situations of particular pressure on Member States' reception facilities and asylum systems<sup>47</sup>. In the recast there are several improvements are founded which should be welcomed. In this recast detention is covered in one whole article. In this article clear and limited circumstances are defined under which asylum-

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45 For further information on the detention of asylum seekers in Europe please see Jesuit Refugee Service – Europe, Caring for Detainees, Detention in Europe, Administrative Detention of Asylum Seekers and Irregular Migrants, 17 October 2005.

46 Report on the application of DublinII regulation in Europe March 2006 AD3/3/2006/EXT/MH .

47 <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/758&format=HTML&aged=0&language=EN&guiLanguage=en> .



seekers subject to the Dublin procedure can be detained.

The new article on detention was added because of the underlying principle that a person should not be held in detention for the sole reason that individuals seek international protection. It is a Proposal for a regulation for the European Parliament and for the council states: in order to ensure that detention of asylum-seekers under the Dublin procedure is not arbitrary, limited specific grounds for such detention are proposed<sup>48</sup>.

#### **4.4 The Specific Provisions**

In the proposal are several improvements are suggested, one of them concerns detention, and detention is treated in the new article 27(1-12). Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Directive 2005/85/EC. If the amendment Proposal comes into effect, then it guarantees applicants that they cannot be held in detention just for asking for international protection. This recast suggests to follow in the footprints of EU Directive 2005/85/EC, and if there is a need to detain applicants, then it should be done in accordance with Directive 2005/85/EC.

To put an applicant in detention, a decision to transfer should have been made for that applicant. To keep applicants in detention there needs to be other strong reasons for this than simply their asking for international protection. Applicants who is subject to a decision of transfer by a responsible Member State, to a particular place and if there is a significant risk of the applicants absconding, then the member State can detain them.

The Amendments proposal is a suggestion to the states to follow the footprints of the EC Directive, which has positive points and will make it easier both for the applicants and for the Member States. There will not be conflicting procedures between the states. There will be harmonization with the EU directive and the Dublin Regulation.

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<sup>48</sup> Commission of the European Communities Com ;Proposal for a regulation of European Parliament and of the council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ; Recast (2008) 820 final).

#### 4.4.1 Less coercive measures

In article (27.2) Without prejudice to Article 8(2) of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers], when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, Member States may detain an asylum-seeker or another person as referred to in Article 18(1)(d), who is subject of a decision of transfer to the responsible Member State, to a particular place only if there is a significant risk of him/her absconding.

This article insists first on the use of "less coercive measures" Member State should not apply coercive measures less effectively. A person can only be held in detention if there is a significant risk of absconding. If not, the state cannot hold applicants in detention. In the case of detention the Dublin regulation II should follow the EU Directive 2005/85/EC. In the EU directive it is stated that: EU Member States "may confine an applicant (for asylum) to a particular place in accordance with their national law", when "it proves necessary, for example, for legal reasons or for reasons of public order" (Article 7 EU Council Directive of Minimum Standards for the Reception of Asylum Seekers.). Several human rights instruments allude to detention on the grounds of Public order. EU Directive 2005/85/EC also accept this concept. According to ICCPR "public order" covers public safety and prevention of crime<sup>a</sup>.

#### 4.4.2 Alternatives to detention

When assessing the application of other less coercive measures for the purpose of paragraph 2: Member States shall take into consideration alternatives to detention such as regular reporting to the authorities, the deposit of a financial guarantee, an obligation to stay at a designated place or other measures to prevent the risk of absconding.

Article (27.3), In this article Recast priority is given to alternatives to detention. This means that if there are any other possibilities, then the State should give a priority to consideration of alternatives to detention. Alternative detention is mentioned in this article because if there are alternatives to detention, there is less risk of absconding. That means that there is no need for detention if there is no risk of absconding. This article gives priorities to alternatives to detention and is a very good improvement to the

<sup>a</sup> 49 Human Rights Committee, Freedom of movement (Art.12):02/11/99. CCPR/C/21/Rev.1/Add. 9, CCPR General comment 27. General Comments, Sixty-seventh session, 1999.

Dublin Regulation recast. It is really supposed to protect the Human Rights of asylum-seekers and refugees.

#### **4.4.3 For the shortest period possible**

Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Directive 2005/85/EC. Detention pursuant to paragraph 2: may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25, until that person is transferred to the responsible Member State.

If there is necessary detention under transfer then detention should start after that moment of decision that applicants will be transferred to another responsible Member State and it will continue until the applicants have been transferred to the responsible member State. It means that applicants must not be held in detention, even when it is necessary, for a very long time. It gives the member state a procedural period of transfer from the moment of decision of transfer to the responsible Member State.

Detention pursuant to paragraph 2 shall be ordered for the shortest period possible. It shall be no longer than the time reasonably necessary to fulfill the required administrative procedures for carrying out a transfer.

Article (27.5) Recast suggests that Member states use as short periods of detention as possible. If a member State manages to execute a transfer faster than procedures allow, then applicants need not be in detention for a long period. This sub article tries to suggest time limitation for the shortest period of time limitations, the shortest period possible which should be reasonable to fulfill the administrative procedures with responsible Member State to carry out transfers. This sub article suggests that Member State hold applicants only for a short period in order to carry out administrative procedures.

#### **4.4.4 Only judicial authorities could order detention**

Detention pursuant to paragraph 2 shall be ordered by judicial authorities. In urgent cases it **may be** ordered by administrative authorities, in which case the detention order shall be confirmed by judicial authorities within 72 hours from the beginning of the detention. Where the judicial authority finds detention to be unlawful, the person

concerned shall be released immediately. The continued detention shall be reviewed by a judicial authority at reasonable intervals of time. Detention shall never be unduly prolonged.

Article (27.6\8); recast suggest to the member state that detention should be ordered by judicial authorities, sometimes if needed administrative authorities can also order detention, if it is urgent. But orders from administrative authorities shall be confirmed by judicial authorities within 72 hours from the beginning of the detention. If the judiciary find out that an administrative order was unlawful then the person shall be released immediately.

The provision of this article prevents arbitrary detention. Detention ordered will procure from only judicial authorities; it is very positive and no probabilities to hold applicants in arbitrary detention. If even in administrative authorities ordered detention, it needed to be confirmed by judicial in short period of time means there is less probability that applicants can kept in detention by state in arbitrarily way.

The Recast is against arbitrary detention, and the judiciary procedures and judiciary review in the recast is most welcome. Sometimes detention can still be continued, but in this case it should be reviewed by judicial authorities. This review can be requested by the person concerned or by administrative officer.

#### **4.4.5 Minors and Unaccompanied minors**

(27.10\11) Minors shall not be detained unless it is in their best interests, Detention of minors is to be avoided, but if it is in their interests, then detention is allowed. When minors are in detention it should be according to Article 7 of this Regulation and in the individual case minors can be detained in accordance with Article 11(5) of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers].

About Unaccompanied minors: Unaccompanied minors shall never be detained. Unaccompanied minors cannot be kept in detention under any circumstances. The UNHCR Guidelines on Detention state that asylum-seeking children should never be detained. Under international law, detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time. Art. 37(b), CRC Minors

could be detained for the sake of preserving family unity and protect a separated child from abduction and exploitation by traffickers.

#### **4.4.6 Other Facilitate**

Detention shall be ordered in writing with reasons in fact and in law, in particular **specifying the reasons** on the basis of which it is considered that there is a significant risk of the person concerned absconding as well as the time period of its duration. Detained persons shall immediately be informed of the reasons for detention, the intended duration of the detention and the procedures laid down in national law for challenging the detention order, in a language they are reasonably supposed to understand. (27.7\ 9).

If the individual needs to be detained, then the detention order should be in written form in accordance with national law. The Individual should know the specific reason that there is considered to be a significant risk of their absconding and that this is the cause of the individual being in detention.

The Individual has the right to know that there should be time limitations in this detention order. The Individual should get information about the reason for and duration of the detention. If the individual disagrees with the detention order or its duration then the individual should know that the detention order can be challenged according to national law. The information should be given in a language understandable to the individuals, which they are supposed to understand.

Member States shall ensure access to legal assistance and/or representation in cases of detention that shall be free of charge where the person concerned cannot afford the costs involved. Procedures for access to legal assistance and/or representation in such cases shall be laid down in national law.

If a Person who is seeking protection but unfortunately is kept in detention is not able to afford the cost of legal assistance, then member States have responsibilities to ensure legal assistance by national law.

Member States shall ensure that asylum-seekers detained in accordance with this Article enjoy the same level of reception conditions for detained applicants as those laid down in particular in Articles 10 and 11 of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers .

## 4.5 Concluding Remarks

From 1970 the EU member States have tried hard to harmonize policy on asylum and refugees, and the EU Directive and the Dublin system are products of their hard work in this field. The Dublin system exists because of EU legal harmonization in the field of asylum-seekers. As a whole the Dublin Regulation II is still not perfect. According to the ECRE and other stakeholders pointed out that there is a lot of gaps which should be fulfilled. This is the cause of the Commission of the European Communities coming out with the recast proposal of the Dublin Regulation II. Amendments are reconstructed in many areas, one of the most important areas is detention.

The Recast contains a whole article, number 27, which concerns detention and its procedures. It seems that the recast does not allow individuals to be kept in detention just for asking for international protection. But in the case of detention the recast suggests that the Dublin Regulation should follow the footprint of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers]. At most this recast allows individuals to be kept in detention for the purpose of transfer, or if there is a significant risk of him/her absconding.

In this recast a sub article describes a procedure for keeping applicants in detention and the obligations of the States in connection with this. There is also presented the rights of those applicants who are in detention. This recast focuses a lot on avoiding arbitrary detention. Civil Society Organizations have expressed support for the Commission's "recast" proposal. In general, organizations perceive it as a vast improvement over the status-quo.

The Commission's proposal is hailed as positive response to the years of monitoring done by a variety of organizations, all of which identify the very negative consequences asylum seekers face once they are in the 'Dublin system'<sup>50</sup>.

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[http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=175&Itemid=209](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=175&Itemid=209).

## **5 ANALYSIS OF THE DETENTION OF ASYLUM SEEKERS UNDER AMENDMENT DUBLIN REGULATION II**

### **5.1 Areas of Concern**

Because applicants are in detention under Dublin Transfer, the Dublin regulation presented the recast to ensure systematic rather than arbitrary detention of applicants. There is a good Response from civil society about the Recast of the Dublin Regulation II but still Civil Society and Organizations continue to argue that the Dublin system contains fundamental shortcomings that cannot be corrected through legislative amendments<sup>51</sup>.

The topic of detention in the Dublin II regulation has faced huge criticism for a very long time. Every concerned part of the society is protesting against detention of those applicants who are seeking international protection. The recast contains one single article with one sub article dealing with this issue, and there are still gaps which need to be filled, or the contents made more concrete, in this article and sub article.

#### **5.1.1 Risk of absconding should be defined narrowly**

The concept of the host country means that asylum applicants who reach their ‘destination’ country are unlikely to abscond because they have a vested interest in remaining in the territory and in complying with the asylum procedure. There are no measuring mechanisms that define the risk of absconding in any article of the recast.

It is an open area where the individual member countries are left to use their own definitions. In the view of the ECRE risk of absconding should be defined narrowly, and the states should be bound to follow the narrow definition. According to UNHCR Detention of asylum-seekers should be resorted to only where necessary to achieve a legitimate purpose and where provided for by law. Legitimate purpose should be rigorously interpreted; for example, a marginal risk of absconding should not suffice to justify systematic detention, and detention should not automatically be used in all Dublin II cases<sup>52</sup>.

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[http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=175&Itemid=209](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=175&Itemid=209).

52 UNHCR Response to the European Commission’s Green Paper on the Future

In the recast there needs to be given certain criteria that determines what activities shows that applicants are in risk of absconding, if not it is only a means to put applicants in detention. What kind of acts by the applicants that leads to a risk of absconding should be defined clearly in order to protect the applicants' rights. Member States should not feel free to define risk of absconding by themselves. This is dangerous because among the member States the practice is very different towards applicants.

### **5.1.2 Less coercive measures required**

The Recast should follow the EU Directive 2005/85/EC, in which article 7 states that EU Member States "may confine an applicant (for asylum) to a particular place in accordance with their national law", when "it proves necessary, for example, for legal reasons or for reasons of public order. The need for detention should be established clearly and precisely in each individual case, Proportionality is a general principle of law and detention measures must be proportionate to the objectives to be achieved. The claim of necessity should also be justified in each case, and any perceived threat to public order should be made explicit. Which degree of crime that could justify detention should also be mentioned in the recast. If not, Member States will be at liberty to define necessity in any way that suits them, and make it very easy for them to put applicants in detention. Protocol to the ECHR, article 2.3 of the 4th states that: the public order ground is applicable in detention of refugees and asylum seekers. The 1951 Convention refers to public order but contains limited guidance concerning the scope of public order in the context of detention of asylum seekers. Necessity and Proportionality should be justified when detaining asylum-seekers.

### **5.1.3 Length of Detention**

The length of the detention is another unclear mechanism for detaining an applicant. Recast article 27. 5 suggests that applicants should be kept in detention for the shortest period possible. Only in that time where from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25, until that person is transferred to the responsible Member State.

It means that applicants can be kept in detention to fulfill that transfer administrative process. It seems that detention must not last longer than is required for a normal conduct of the proceedings. But how long that process should be taken is not mentioned

Common European Asylum System ,September 2007,p 21.



in this recast. It means it can take many months in practice. If the Dublin regulation is a legal mechanism, then it should be mentioned in the recast.

According to the 1999 Guidelines, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers and itself the ECRE Position Paper on the Detention of Asylum Seekers, a maximum period of detention should be established by law.

In the case of Letellier the Court stated that the national authorities should ensure that the pre-trial detention of an accused person does not exceed a reasonable time<sup>53</sup>. There is no mention of what a reasonable time is, but it should be according to criteria under article 5 of the ECHR. Regarding the time period of detention the ECRE recommended that Detention must be subject to procedural safeguards and limited to the minimum time necessary to meet its lawful purpose<sup>54</sup>.

Recast article 27.8 supports continued detention. It states that continued detention shall be reviewed by a judicial authority at reasonable intervals of time. The support for continued detention seems to contradict the notion of detention for the shortest period possible given in sub article 5. If the duration of maximum acceptable time periods had been made explicit instead of relying on a vague notion of the shortest period possible, the concept of systematic detention could have been fulfilled. The European Court of Human Rights states as follows: According to the developed practice, detention in such situations becomes arbitrary and disproportionate if the deportation or extradition procedures are not conducted with due diligence<sup>55</sup>.

#### **5.1.4 Alternatives to detention**

What the recast has to say about alternatives to detention, limited to article (27.3) alternatives to detention, is in contrast to the increasing use of detention of asylum seekers and/or refugees by the host governments.

<sup>53</sup> Letellier v. France, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, paragraph 35

<sup>54</sup> Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered ; March 2008.

<sup>55</sup> See Bozano v. France, Judgment of 18 December 1986, European Court of Human Rights, Series A 111 and Quinn, Judgment of 22 March 1995, European Court of Human Rights, Series A 311.

Alternatives to detention are for those asylum seekers who would not and should not be detained, and who are facing an unnecessary restriction on their freedom of movement and other rights because they are asking for international protection. Guideline 3 recommends that monitoring mechanisms can be employed as viable alternatives to detention<sup>56</sup>.

Alternatives to detention can include regular reporting to the authorities, the deposit of a financial guarantee, an obligation to stay at a designated place or other measures to prevent the risk of absconding mentioned in the recast. The UNHCR Legal and Protection Policy Research Series suggest in 2006 Bail, bond or surety, Reporting requirements, Open centers, semi-open centers, directed residence, dispersal and restrictions to a district, Registration and documentation, Release to nongovernmental supervision, Electronic monitoring and home curfew, Alternatives for children, Alternatives for other vulnerable persons<sup>57</sup>. Most of the subject matter which is mentioned by UNHCR is left by the recast.

The Recast did not mention some important alternatives to detention such as **Alternatives for children; Alternatives for other vulnerable persons**. The Recast supports that Minors shall not be detained if this is in the best interest of the minors instead of detention, alternatives to detention is more suitable for minors and other vulnerable persons. There are no further provisions for other vulnerable persons mentioned in the detention article. Ireland and Norway achieved higher than average transfer completion rates while making only limited use of detention, indicating that alternative measures can also be effective<sup>58</sup>. The ECRE further recommended the addition of a provision forbidding the detention of Dublin claimants except as an extraordinary measure of last resort, for cases where non-custodial measures

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56 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999 ( 'UNHCR Guidelines on Detention') Based on UNHCR Executive Committee (ExCom) Conclusion No. 44 (XXXVII) – 1986 on the detention of refugees and asylum seekers.

57 Alternatives to Detention of Asylum Seekers and Refugees ;Ophelia Field with the assistance of Alice Edwards External Consultants; Division of International Protection Services POLAS/2006/03 April 2006.

58 Commission, 2007 Evaluation Annex, p. 30.

demonstrably fail<sup>59</sup>.

### **5.1.5 Vulnerable persons**

There is no provision mentioned in the recast concerning detention of vulnerable persons. Vulnerable persons including the Sick, pregnant women, and physically disabled people are not mentioned in this recast Detention article. What kind of treatment will they get if these kinds of people fall under the Dublin Regulation? This is an unanswered question in the recast.,it is a very big gaps under recast. It should be discussed as soon as possible in order to get a better result from the new Dublin regulation.

## **5.2 Concluding Remarks**

Dublin Regulation II face huge criticism that it does have a lot gapes, after lot of work from different concern sector the amendment proposal came. The New recast is much more progressive than the Dublin Regulation II but if that recast could be given a little more emphasis and made more concrete on detention article, then without a doubt it could be a success as a whole both in principle and practice.

All claimants subject to Dublin procedures receive the same reception conditions as are required for other asylum seekers, and detention may be used only as an extraordinary measure of last resort, where non-custodial measures demonstrably fail<sup>60</sup>.

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59 Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered ; March 2008.

60 Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered ; March 2008.

## 6 STATES PRACTICES DUBLIN REGULATION II

### 6.1 Introduction

All member states including Norway and Island practice The Dublin II Regulation and it has impacted detention in the Member States. Out of 40,180 asylum cases accepted for transfer, only 16,842 actually took place.

The inefficiency of the Dublin II transfer system means that asylum seekers are kept in detention for too long a time<sup>61</sup>. Member States tries to Restrict the detention but as a whole the gapes of regulation it is not entirely successful. It restricts the detention of Dublin claimants to a measure of last resort, and to specifies the grounds on which detention may be ordered and the procedural safeguards provided for; and explicitly states in the Regulation that Dublin claimants are entitled to the same reception conditions as other asylum seekers, in accordance with the Reception Conditions Directive, Article 3(1). which lays down general rules notably on material reception conditions, health care, freedom of movement and the schooling of minors<sup>62</sup>.

Different reports shows that Bad practice of Dublin Transfers can keep asylum-seekers (especially children) in detention for long periods before they are deported back to their country of origin. Further below There is some States Practice of Detention under the Dublin Regulation II.

### 6.2 Germany

Those are the legal framework for German to deal with Asylum-seekers. Constitution for the Federal Republic of Germany (Grundgesetz).<sup>113</sup>;The Aliens Act of July 1990 (Ausländergesetz).<sup>114</sup>;The Law on Asylum Procedure of 16 July 1982 (Asylverfahrensgesetz) as subsequently amended. <sup>115</sup>; The Asylum Seekers' Welfare Act (Asylbewerberleistungsgesetz) of 5 August 1997<sup>63</sup>.

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61 [http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=175&Itemid=209](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=175&Itemid=209).

62 European Parliament 2004-2009; Committee on Civil Liberties, Justice and Home Affairs Draft Report on the evaluation of the Dublin system (2007/2262(INI)) ;13.05.2008.

63 UNHCR Reception Standards For Asylum-seekers in European Union,Geneva,july 2000.

Germany is also a part of the Dublin Regulation II, according to the German legal system. In Germany, asylum seekers are generally not subject to detention prior to a decision on their application. At the same time they have exceptions which seems mandated by German law, such as airport detention. People who arrive at major airports may be subject to the airport procedure. When they are in the airport procedure allows that they may be held in a closed facility at the airport for up to 19 days before a final rejection of their claim as manifestly unfounded. This detention is not considered to constitute a deprivation of liberty: German Constitutional Court, Decision of 14 May 1996<sup>64</sup> .

But time limit of detention in legislation does not provide for a maximum duration of detention (§ 18 a Asylverfahrensgesetz/Section 18 a of the Asylum Procedure Act). If an asylum application is rejected in accordance with the airport procedure applicants risk spending months in the closed centre, pending discretionary entry or removal. Germany believes in a speedy procedure, but if the Federal Office for the Recognition of Foreign Refugees concludes that it cannot decide the case within a short period of time, then applicants are allowed to enter the country and go through the regular procedure.

Applicants who are processed according to the airport procedures should get free legal counseling . As far as illegally staying third-country nationals are concerned, they can be detained for 6 resp. 18 months (§ 62 Aufenthaltsgesetz/Section 62 of the Residence Act).

Illegally staying third-country nationals are detained either in particular detention facilities/premises for the purpose of removal or in penitentiary institutions<sup>65</sup>. Refugees can claim exemption from penalties for illegal entry, even if they have passed through a third State on their way to Germany from the State of persecution. Germany detains asylum seekers who apply for asylum at international airports and illegally staying third-country nationals. According to JRS Germany: During 2008, the number of detainees housed in detention facilities in Germany diminished, with 1,250 detained in

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64 Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection ;Guy S. Goodwin-Gill Professor of International Refugee Law University of Oxford Member of the English Bar ;October 2001.

65 <http://jrsusa.org/detention/germany.php>.

the Berlin Detention Centre (this compares with 1,380 in 2007)<sup>66</sup> The increasing number of detention cases is because of Dublin II, A growing number of the detainees were so-called Dublin II cases; i.e. individuals who had come to Germany via another European Union member state, were subsequently arrested, usually at the airport, and ordered to return to their country of first entry<sup>67</sup>.

Germany also follows the Dublin II for transfer of asylum seekers, according to which asylum-seekers are held in detention while awaiting a Dublin II transfer in Germany. The German government, for example, very reluctantly uses the derogation clause of Article 3(2), which allows Member States to examine an asylum claim without a transfer on humanitarian grounds<sup>68</sup>.

### **6.3 Great Britain**

The United Kingdom Immigration and Asylum Act 1999, section 31 accepts the same condition as the 1951 refugees convention. The United Kingdom is also a part of the Dublin Regulation II, which is a binding measure of European Community law. But UK practice regarding the detention of asylum seekers is very different. In practice Immigrants can be detained at any stage of the procedure to stay in the United Kingdom. Every kind of Immigration including asylum-seekers are in detention if they have lack of or improper immigration documents for presence in the country. Those are:

- Asylum seekers whose claims are being processed;
- Immigrants who have not arrived legally;
- Overstayers who have failed to leave the country on expiry of their visas;
- Foreign criminals awaiting deportation;
- Or rejected asylum seekers awaiting removal.

In many cases the categories overlap, for example an illegal entrant or overstayer may

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66 <http://www.jrseurope.org/countries/germany.htm>.

67 <http://www.jrseurope.org/countries/germany.htm>.

68 [http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=175&Itemid=209](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=175&Itemid=209).

also be an asylum seeker<sup>69</sup>. In the United Kingdom, between one and one and a half per cent of the total number of persons seeking asylum are detained at any given time<sup>70</sup>. There is no legal limit to the time of detention. Regarding Legal Advice and Representation, it is very hard to get it: ‘access to competent and independent legal advice is becoming more, not less difficult, as fewer private practitioners offer legally aided advice and representation’<sup>71</sup>.

United Kingdom law was amended after the court decision of the Division Court in *R v. Uxbridge Magistrates Court & Another ex parte Adimi* [1999] 4 Imm AR 560; Section 28 of the Immigration and Asylum Act 1999 created the offence of ‘deception’ by non-citizens, including asylum seekers, who try to enter the country with false documents; the offence is punishable with up to two years imprisonment and/or a fine.

Under the Dublin regulation II the UK must formally request another member state to ‘take back’ an applicant within 3 months of the claim for asylum in the UK. A decision must be made on this request within two months and the UK has a further six months to enforce the transfer. But there is Exceptions to this that may be applied e.g. an urgent reply may be requested if the applicant is in detention. The UK asks for a response within two weeks in this situation<sup>72</sup>.

An example of UK practice is the case of Yusuf, who came to the UK from Iran. He was detained because the immigration officer felt that Yusuf’s appearance suggested that he was an adult. The Refugee Council was informed that his age had been disputed and a specialist adviser made an appointment with the detention centre to see him. When the adviser arrived for the appointment she was told that Yusuf had been moved to another detention centre. When the adviser tried to make an appointment to see Yusuf there she was informed that he had been removed to Greece. Yusuf had never had any legal advice; he had not been seen or spoken to by a child care professional. He was removed

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69 <http://jrsusa.org/detention/uk.php> .

70 UN doc.E/CN.4/1999/63/Add.3, 18 December 1998, Report of the Working Group on Arbitrary Detention

71 *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies*. RSC Working Paper No. 27

72 *Refugees counsel briefing Unaccompanied Children and the Dublin II regulation* November 2006; page 1.

within 48 hours of arriving in the UK, despite his claim to be a child. Professionals in the UK are particularly worried about Yusuf as it is likely he will have been detained and/or denied access to the asylum procedure in Greece. On 12th May 2010 the UK Coalition government announced: We will end the detention of children for immigration purposes<sup>73</sup>.

#### **6.4 Norway**

Norway is not a Member of the EU, but Norway participates in the asylum system of the EU. To handle asylum-seekers in Norway, Norway uses national law. In Norway the relevant national laws for deciding asylum-applications are the newly passed Immigration Act of 2008, the Human Rights Act and the Administrative Act, in addition to subsequent regulations, International conventions and Dublin Regulation II. Norway is a state party to the United Nations Convention Relating to the Status of Refugees and its Protocol, as well as to the International Covenant on Civil and Political Rights and its First and Second Optional Protocols.

The Aliens Act provides that asylum seekers may be detained at the border in an immigration detention center or regular prisons by police if,

- Upon arrival, their identity cannot be established.
- And those asylum-seekers are detained if that last rejection of asylum claim is made and still asylum-seekers are in Norway.
- Asylum-seekers who are falling under Dublin Regulation are also detained.

That provision is according to § 106. Pågripelse og fengsling utlendingsloven. In practice, detention was rare in Norway in 2000-2001, but it has increased now. This year most of the Somali applicants are forcefully transported to other EU Member Countries because of the Dublin II regulation<sup>74</sup>.

Month statistic September 2010 transfer from Norway

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<sup>73</sup> <http://www.guardian.co.uk/politics/2010/may/12/lib-dem-tory-deal-coalition>.

<sup>74</sup> [https://www.politi.no/vedlegg/lokale\\_vedlegg/politiets\\_utlendingsenhet/Vedlegg\\_903.pdf](https://www.politi.no/vedlegg/lokale_vedlegg/politiets_utlendingsenhet/Vedlegg_903.pdf) .



Nationality	Transport number
Somalia	311
Serbia	298
Afghanistan	297
Iraq	255
Eritrea	239

The five Member Countries PU have returned asylum seekers to are:

Member Country	Total number
Italy	697
Serbia	297
Greece	277
Sweden	244
Poland	198

## 6.5 Greece

In Greece, according to the penal law as amended in 1996 by Law No. 2408/1996 and Law No. 2521/1997, criminal courts may not order the deportation of an alien sentenced to imprisonment, if this is contrary to the provisions of international agreements to which Greece is a party. In practice, however, the courts continue to order the deportation of irregular migrants convicted for illegal entry or stay, without regard to their status<sup>75</sup>. Aftoforo Trimeles Plimeliodykeio Mytilinis Court of First Instance (Criminal Cases), Mytilini, Greece, 1993: Shimon Akram & others, reference: No.585/1993) Iraqi citizens found innocent of the crime of illegal entry; referring to Article 31 of the 1951 Convention, among others, the Court concluded that refugee

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<sup>75</sup> Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection Guy S. Goodwin-Gill Professor of International Refugee Law University of Oxford Member of the English Bar ; A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations October 2001 .

status precludes the imposition of penalties on asylum seekers for illegal entry<sup>76</sup>. The Effect of the Dublin Regulation II in Greece is horrible.

Under The Dublin Regulation II asylum seekers are forcibly returned to Greece and held in detention. Different reports and findings of international human rights monitoring bodies and NGOs argue that the principle of non-refoulement is severely threatened by the Greek practice of illegal deportations, and consequently by transfers of asylum seekers to Greece under the Dublin II Regulation<sup>77</sup>. The experience of Greek Helsinki Monitors is that lawyers are not always given access to detention facilities where asylum seekers are held in custody, as they sometimes have to give the names of their clients in order to be admitted<sup>78</sup>. The reception and detention conditions for asylum seekers in Greece were also criticized, as was the inadequate use of the sovereignty clause in article 3 (2) of the Dublin II Regulation<sup>79</sup>.

A decision by the European Court of Human Rights, *S.D. vs. Greece* states that His detention with a view to expulsion had in fact had no legal basis in Greek law after that date since asylum seekers whose applications were pending could not be deported. His detention had therefore been unlawful, in violation of Article 5 para. 1. *S.D.* had been unable to have the lawfulness of his detention reviewed by the Greek courts

Alternatives to detention are not considered and no individual assessment of the need to detain an asylum-seeker takes place<sup>80</sup>

An example of Greece practice is the case of Michael, an unaccompanied child from the Middle East, had sought asylum in Greece and was held in detention for three months, where he was beaten and exploited. He was released from detention after signing a

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76 Ibid

77 *Out the Back Door: The Dublin II Regulation and illegal deportations from Greece* ;Oslo/Athens, October 2009

78 Ibid

79 Ibid .

80 UNHCR advocates for consideration of alternatives to detention, see: UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, guideline no. 4, <http://www.unhcr.org/refworld/docid/3c2b3f844.html>. See also *S.D. v. Greece* (Appl. no. 5341/07, 11 June 09), where the European Court found a violation of Article 5(1) of the ECHR in relation to the detention of an asylum-seeker.

document saying he would leave Greece immediately, despite no decision having been made on his claim for asylum. Still unable to return to his home country because of fear of persecution there, Michael fled to the UK. The Home Office asked Greece to ‘take back’ Michael despite being aware of his experiences. Michael was removed to Greece earlier this year. We do not know what happened to him on return and we fear that Greece never fully examined his asylum claim. Transfers of asylum-seekers to Greece under the Dublin II-regulation is a systematic violation of the non-refoulement principle laid down in the Geneva Convention on Refugees and needs to be abolished at once<sup>81</sup>.

Here is the example of Detention center in Greece In October 2009, the authorities announced the temporary closure of the Pagani detention center on Lesbos island and the intention to replace it with new facilities in 2010. This centre is located in an old warehouse. When UNHCR staff visited the facility in late August 2009, it held more than 850 people, including 200 unaccompanied children, mostly from Afghanistan, in a building with maximum capacity for 300 people. One room housed over 150 women and 50 babies, many suffering from illness related to the unsanitary conditions and overcrowding. It is reported in UNHCR Briefing Note “UNHCR alarmed by detention of unaccompanied children in Lesbos, Greece<sup>82</sup>.

## **6.6 Is the Dublin Regulation a Violation of International Law**

The Existing Dublin regulation did not mention detention at all. That caused the member states to act in whatever way they like, and in this sense the existing Dublin Regulation constitutes Violations of International Law. But Analyzing the amendment proposal of the Dublin Regulation II it can be argued that some parts is in breach of international law and International human rights law . Those are: Unclear length of detention ; no mention of which kinds of acts show significant risk of absconding; application of public order or legal reasons; discriminatory act not pronounce about vulnerable Groups. Those areas of concern are in conformity with international laws and standards. It does not fulfill the requirements set out in the principle of proportionality and necessity which are the basic principles of International Law.

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81 <http://w2eu.net/2010/08/21/a-dublin-ii-deportation-diary/>.

82 28 August 2009, <http://www.unhcr.org/4a97cb719.html>.

Different examples show that arbitrary detention of asylum seekers in EU countries are practices which deprive them of their liberty for insufficient reasons. States are not bearing the responsibilities in some cases because national law itself violates the international law. According to treaty law and International principles States are bound to take responsibilities which are mentioned in that treaty, regulation or conventions if it is not in breach of International Law. Dublin regulation amendments did not provide any strong enforcement mechanisms to the Member States and because of this asylum-seekers are treated differently in the different EU member states.

The fact that no EU member states believe in alternatives to detention may be the reason why the Dublin regulation amendments do not give this a high priority either. The UNHCR and NGOS have for a very long time asked that priorities be given to it, but this amendment has not focused on it. According to the principle that detention should be avoided and only used when absolutely necessary, it can be argued that the Dublin regulation amendments are violations of international standards. Member States' Practice shows that those persons who are in detention are victims of human rights violations, There is no any States practice exists that any personal liberty is given under Detention. If the Dublin regulation amendments could be able to give priorities to alternatives to detention, then it can be possible to get humanitarian advantages for asylum seekers and it could be more respected in the International Human Rights area.

## **6.7 Concluding Remarks**

The different states' practice shows that detention of asylum-seekers in theory is not allowed, but in practice it still exists. Protection of Human Rights is the duties of the states. Seeking Asylum is a very important basic Human Right «Protect of life and liberty» Before putting applicants in detention a state should discuss the basic principles of International Law: the Principles of Proportionality and necessity. For example The Concept of Public Order, The Principle of Proportionality and necessity, Alternatives to detention etc are not much discussed by the states. Applicants are kept in detention because they are considered to be illegal immigrants. States' practice does not show any case or decision which is based on Individual Circumstances.

The Dublin regulation came because of systematic harmonization of asylum policy in the EU. But the gapes of Dublin regulation II asylum-seekers are kept in detention.

Dublin Transfer is based on principle of sharing responsibility between the Member States. But the effectiveness of the principle is weak because it effects asylum-seekers as a whole in detention area. The Recast has presented improvements and it is a very good step in the field of Detention of asylum-seekers, but it is still not perfect as a whole. The States have some very bad practices which have a huge effect on the basic Human Rights of applicants. Anyhow, the welcome steps in the Recast is giving hope for the future in the area of detention.

## 7 FINAL CONCLUSIONS

To keep individuals in detention without reason is a measure in violation of basic Human Rights. In order not to violate the basic Rights of liberty the International human rights instruments have developed a series of protective measures which ensure that individuals are not arbitrarily or unlawfully detained. There are different treaty provisions, guidelines and different international standards that exist in order to eliminate the more serious abuses to which detainees are frequently subjected, and to protect the basic rights of liberty. Because of different treaties States are obliged to protect Human Rights in this Modern world.

Asylum and Refugees should be protected with their basic fundamental Human Rights because they are also a part of Human Rights. From the 1951 convention to the Dublin regulation there is a process to ensure the basic Human Rights in the area of Asylum and Refugees. EU member states are party to the 1951 Convention, ICCPR, ECHR and its 4th Protocol and the Dublin regulation itself. This means that the EU member States are obliged to comply with them. International standards do not have a binding nature but they are adopted by an international consensus that causes them to be considered to have some authoritative value. EU is an international community which always wants to take the lead in its emphasis on the area of respecting and ensuring Human Rights, the rule of law and social justice.

On the one hand the EU member states have started to think about a regional Constitution and are working on common asylum policy, but on the other hand there are huge differences in the ways that different EU member states are treating refugees and asylum-seekers. The EU wants to make a wall against those unwanted immigrants who wants to enter the border of the EU. That is the reason for working out a common asylum policy for the entire EU. In addition to this the member states also want to have rules to determine responsibility, and for this purpose they have the Dublin regulation. Somehow the Dublin Regulation is good in theory, because it shares the burdens and stops double claims of asylum from applicants in different Member States, but at the same time it affects the applicants' human rights severely. It leads to consequences such as depriving asylum seekers of their rights to be treated in accordance with international

laws and standards.

Member States of the EU are applying more restrictive measures toward to the asylum-seekers. Unfortunately detention is also a part of it and Asylum-seekers are in unnecessary detention under the Dublin Regulation and will be detained under amendments proposal also in the name of sharing responsibilities.

## 7.1 Final Remarks

Before adopting these new amendments to the Dublin Regulation the Member States Should considers their deficiencies. This analysis has not covered all of the amendments. It has focused only on the detention topic. Maybe there are lots of other gapes which need to be reformed. Still this is a good time to do reform, rather than try it first and after some years again blaming the unsuccessful Dublin regulations and then point out that they need to be reformed. This regulation will affect a large number of asylum-seekers who want to go through its process. The present detention system in the amendments *proposal* basically exists because of responsibility sharing. Because of responsibility sharing there is a transfer process, in which asylum-seekers can be kept in detention according to the amendments.

In the area of detention the procedures provided under ICCPR and ECHR should not be underestimated. It seems that a risk of arbitrary detention nonetheless remains, there is a provision of category-based detention which is unacceptable. Those kinds of provisions violates international law. If it is a violation of International law, then the member states themselves have an obligation towards the international community to take responsibility not to adopt those regulations which violate international Law.

If the Dublin regulation amendments really are to ensure the basic human Rights of asylum-seekers in the area of detention, the European Commission should take seriously those recommendations which are given by organizations like ECRE, UNHCR and other NGOS that already have been working in this area for a very long time.

Treaties, conventions, Rules and regulations are meant to be gone through in positive aspects. They should be defined in good faith. A very important thing is to distinguish between those legal measures that exist to protect human being and those that prevent

them from performing unwanted activities. In the Human Right field all the legal measures are supposed to be for protection, and the Dublin regulation is also supposed to protect the rights of asylum-seekers. Surprisingly, the new amendments have left behind some major important issues in the detention area. It should be discussed by the Member States as soon as possible in order to achieve a satisfactory result.



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## **Appendix**

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL(Recast){SEC(2008) 2962} {SEC(2008) 2963 mention Detention as follows:

Article

(18) Detention of asylum seekers should be applied in line with the underlying principle that a person should not be held in detention for the sole reason that he is seeking international protection. In particular, detention of asylum seekers must be applied in line with Article 31 of the Geneva Convention and under the clearly defined exceptional circumstances and guarantees prescribed in Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers]. Moreover, the use of detention for the purpose of transfer to the Member State responsible should be limited and subject to the principle of proportionality with regard to the means taken and objective pursued

### **Section V. Detention for the purpose of transfer**

Article 27

Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Directive 2005/85/EC.
2. Without prejudice to Article 8(2) of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers], when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, Member States may detain an asylum-seeker or another



person as referred to in Article 18(1)(d), who is subject of a decision of transfer to the responsible Member State, to a particular place only if there is a significant risk of him/her absconding.

3. When assessing the application of other less coercive measures for the purpose of paragraph 2, Member States shall take into consideration alternatives to detention such as regular reporting to the authorities, the deposit of a financial guarantee, an obligation to stay at a designated place or other measures to prevent the risk of absconding.

4. Detention pursuant to paragraph 2 may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25, until that person is transferred to the responsible Member State.

5. Detention pursuant to paragraph 2 shall be ordered for the shortest period possible. It shall be no longer than the time reasonably necessary to fulfil the required administrative procedures for carrying out a transfer.

6. Detention pursuant to paragraph 2 shall be ordered by judicial authorities. In urgent cases it may be ordered by administrative authorities, in which case the detention order shall be confirmed by judicial authorities within 72 hours from the beginning of the detention. Where the judicial authority finds detention to be unlawful, the person concerned shall be released immediately.

7. Detention pursuant to paragraph 2 shall be ordered in writing with reasons in fact and in law, in particular specifying the reasons on the basis of which it is considered that there is a significant risk of the person concerned absconding as well as the time period of its duration.

Detained persons shall immediately be informed of the reasons for detention, the intended duration of the detention and the procedures laid down in national law for challenging the detention order, in a language they are reasonably supposed to

understand.

8. In every case of a detained person pursuant to paragraph 2, the continued detention shall be reviewed by a judicial authority at reasonable intervals of time either on request by the person concerned or ex-officio. Detention shall never be unduly prolonged.

9. Member States shall ensure access to legal assistance and/or representation in cases of detention pursuant to paragraph 2 that shall be free of charge where the person concerned cannot afford the costs involved.

Procedures for access to legal assistance and/or representation in such cases shall be laid down in national law.

10. Minors shall not be detained unless it is in their best interests, as prescribed in Article 7 of this Regulation and in accordance with an individual examination of their situation in accordance with Article 11(5) of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers].

11. Unaccompanied minors shall never be detained.

12. Member States shall ensure that asylum-seekers detained in accordance with this Article enjoy the same level of reception conditions for detained applicants as those laid down in particular in Articles 10 and 11 of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers].

## Abbreviations

UNHCR	United Nations High Commissioner for Refugees.
IDPs	Internally Displaced Person
UN	United Nations.
1951 CONVENTION	United Nations Convention Relating to the Status of Refugees .
1967 PROTOCOL	Protocol Relating to the Status of Refugees.
ECRE	European Council on Refugees and Exiles.
EU	European Union.
DUBLIN CONVENTION	State Responsible For Examining Applications For Asylum Lodged In One Of The Member States Of The European Communities.
US	United States of America
UDHR	Universal Declaration Of Human Rights
ICCPR	International Convention On Civil And Political Rights
Ad Hoc	For the Purpose (Only)
CEAS	Common European Asylum System.
AI	Amnesty International.
NGOs	Non Governmental Organization.
INGOs	International Non Governmental Organization
ECHR	European Convention on Human Rights.
JRS	Jesuit Refugee Service
BBC	British Broadcasting Corporation
TEU	Treaty On European Union
ELENA	European Legal Network on Asylum

EC	Europen Commission
CRC	Convention on the Rights of the Child
UK	United Kingdom.
EC	European Commission.
PU	Politiets Utlendingsenhet