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The 'inquisitorialisation' of asylum procedures: Are States (still) conforming to the spirit and the letter of the 1951 UN Convention on Refugees?

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Abstract

The recent so-called refugee crises have sparked controversies over the 1951 UN Convention on Refugees. For some, the Convention is outmoded whilst for others, it is problematic at its core, thus justifying the toughening up of its implementation. This paper explores the concept of 'inquisitorialisation', drawing on some aspects of the crimmigration theoretical framework and using France and Malta as case studies, looking at what 'inquisitorialisation' may look like in the future for Mediterranean countries. It also alludes to Switzerland, particularly after its adhesion to the Schengen arrangement and the Dublin association agreement, as prefiguration of what 'inquisitorialisation' may look like in the future for Mediterranean countries. The paper posits the following points; i) at its very core, the 1951 Convention on Refugees is still relevant and probably even more so than at its inception; ii) often times, the nation states' interpretation and implementation are problematic. The paper comes up with the concept of 'crimasylisation', that is, the criminalisation of asylees (US expression) or the criminalisation of asylum seekers during the asylum process.

Keywords: Crimmigration; crimasylisation; inquisitorialisation; refugee law; 1951 UN Convention on Refugees

1. Introduction

In recent years if not decades, there has been a trend towards a toughening of the implementation of the 1951 Convention on Refugees and the associated 1967 New York Protocol. Behind such continuous toughening of the said Convention's implementation by various governments globally lies the premise that it has been seemingly abused and diverted from its original purpose - or in other words, violated. In this regard, the dominant narrative states that a large proportion of those who seek asylum violate the 1951 UN Convention on Refugees by (ab)using it in lieu of legal immigration routes. Hence the necessity to isolate these so-called 'bogus asylum seekers' to protect the integrity of the Convention on refugees.

In response to the perceived abuse of immigration processes in general, and asylum procedures in particular, states, through various government policies, have increasingly criminalised immigrants and asylum seekers alike, both on a rhetorical as well as practical levels. The practice of criminalising immigrants has given birth to the concept of crimmigration, that is the merger of criminal law and immigration law. Since the 1980s a substantial body of literature has been developed in this regard. The fusion of criminal law and immigration law (Stumpf, 2006) has manifested itself through governments using more and more coercive means, including detention (García Hernández, 2014). These coercive practices have resulted in state-generated injustices (Woolard, 2002).

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While crimmigration generally refers to the fusion of criminal law and immigration law, this paper specifically touches on the (con)fusion between criminal law and refugee law, drawing on some elements of the crimmigration theoretical framework, particularly in relation to international protection (Rosenberg-Rubins, 2023). More specifically, this paper focuses on the criminalisation of some aspects of the asylum process leading up to the granting (or not) of Convention Refugee status. As such, this paper aims at filling a gap in the existing literature and as a result, comes up, with the concept of 'crimasylisation', that is the criminalisation of asylees or asylum seekers during the asylum-seeking process.

Whilst one cannot rule out the possibility that asylum seekers might misuse and/or abuse of the 1951 Geneva Convention, one also cannot overlook the fact that some states breach this same Convention. Whilst certain breaches are blatant and outright contrary to the Convention, such as detention (including detention of children in all forms possible) pushbacks on land, pushbacks at seas, etc. other breaches might be more insidious. Such is the case of what this paper calls 'inquisitorialisation', i.e., the process of using inquisitorial methods in determining asylum cases. According to Collins dictionary (Collins Online Dictionary, n.d.), an inquisition is 'any severe or intensive questioning'. Taking this definition a step further in reference to what the dictionary names the 'American sense' of the word, 'inquisition' is said to be 'any harsh, difficult, and prolonged questioning'. The notions of harshness, difficulty, and prolonged process are at the heart of what this paper means when referring to the 'inquisitorialisation' of the asylum procedures. In the wake of calls in favour of toughening up asylum procedures, such notions conjure up and convey the idea that the asylum procedure has to be made cumbersome, at best, and harsh, at worst.

By focusing on the 'inquisitorialisation' of asylum procedures, this paper firstly argues that signatory states of the 1951 UN Convention on Refugees that choose to go down such path undermine the integrity of the said Convention to a greater degree than what asylum seekers violators could be accused of. Secondly, whilst possible misuses of the Convention by asylum seekers, if and when they occur, can be readily curbed or remedied, violations by States have much graver consequences not just in respect of the 1951 UN Convention, but also with regards to the greater body of Human Rights Law, underscoring a more adverse and disproportionate impact of such violations. Finally, in addition to the legal dimension of the issue at hand, the violations of the 1951 UN Convention on Refugees by signatory states in general, and the 'inquisitorialisation' process in particular, bear very concrete psychological consequences on people seeking asylum, especially on vulnerable groups of the population such as children and women. The psychological consequences of the practice of 'inquisitorialisation' cannot be overlooked nor downplayed and certainly not in the name of the 'expediency' arguments which are generally used. This paper is structured around these three premises.

2. Some preliminary conceptual considerations

Whilst crimmigration focuses on the criminalisation of immigrants in general, Rosenberg-Rubins' work (2023) narrows down the perspective to asylum seekers and refugees. In essence, Rosenberg-Rubins offers a specific brand of crimmigration as asylum seekers and refugees, stricto sensu talking, should not technically fall under the category of ordinary migrants. Indeed, asylum seekers and refugees are entitled to avail themselves of a particular form of international protection, i.e, the 1951 UN Convention on Refugees and the 1967 New York Protocol, which ordinary migrants cannot avail themselves of. In light of this topic we witness a (con)fusion of criminal law and refugee law. While giving credit to Rosenberg-Rubins for dedicating a specific reflection on the criminalisation of asylum seekers and refugees, the notion of crimmigration will continue to be used here for lack of a better term. Yet, when referring to the criminalisation of the asylum procedures, 'crimasylisation', i.e., the criminalisation of asylees or asylum seekers, would be a more accurate description and expression.

By addressing the issue of criminalisation in terms of governmentality (Foucault, 1978), with an emphasis on territoriality and state power (Bauder, 2016), Rosenberg-Rubins' analysis still remains at a macro-level. In contrast, by focusing on the procedural aspects of the asylum process through the

concept of 'inquisitorialisation', this paper aims at assessing the criminalisation of asylum seekers at a micro-level, thus seeking to fill the gap in the current literature.

3. Why include Switzerland into the list?

One may question the relevance of mentioning Switzerland alongside two *stricto sensu* Mediterranean countries, such as France (partly Mediterranean) and Malta (totally Mediterranean). Two reasons preside such choice.

Firstly, since its adhesion to the Dublin Regulation and its inclusion into the Schengen Arrangement, Switzerland is part of the FRONTEX mechanism. Secondly, of the three countries chosen, Switzerland is undoubtedly the one that has taken the process of the 'inquisitorialisation' of asylum procedures the farthest. As such, it could signal the direction towards which Mediterranean countries could head for in terms of 'inquisitorialisation'.

4. International legal instruments first: the 1951 UN Convention and the 1967 Protocol on Refugees

At the universal level, the status of refugees is fundamentally governed by two international legal instruments. These legal instruments are the 1951 Convention relating to the status of Refugees, which will be subsequently referred to in this paper as the 1951 Convention on Refugees, and the 1967 Additional Protocol relating to the status of Refugees, which broadens the geographic scope of the erstwhile Convention, and which will be subsequently referred to in this paper as the 1967 Protocol on Refugees.

How does one become a refugee according to the 1951 Convention on Refugees and the 1967 Protocol on Refugees? This apparently simple question is fraught with a certain degree of legal complexity. The verb 'to become' clearly conjures up the idea of a process by which one moves from a status of non-refugee to that of a refugee.

How does this process occur? Who determines the passage from not (yet) being a refugee to becoming one? Or, what determines the passage from one status to the other? The question of 'who' or 'what' is not merely a grammatical one. It is at the core of our questioning. Indeed, if the emphasis is put on the 'who' question, then the fate of those claiming the benefit of the 1951 Convention on Refugees heavily rests on governments of states that have signed up to the Convention. If the emphasis is put on the 'what' question, then while governments still retain some leverage on the asylum process, more strictures are on their actions, nonetheless.

In principle and in practice, 'who' and 'what' are not diametrically opposed. In an international system based on nation-states, individual rights are exercised through the mediation of the latter. So, the 'who' question is readily sorted and the answer is: the States that have signed up to 1951 UN Convention are the ones who determine, in practical terms, the process leading to the granting of refugee status. Likewise, the 'what' question is also solved by the fact that the 1951 Convention on refugees, by defining what is a refugee in its article 1, somehow sets the perimeter within which governments implement the said Convention. The question therefore lies in determining the right equilibrium between the 'who' and the 'what' in the actual procedures.

Given the nature of the 1951 UN Convention on Refugees, i.e., an international text, experts trying to tackle the refugee question from a legal perspective have resorted to international law concepts. Two schools of thought pitch one against the other. The first school of thought posits that the refugee status is constitutive. According to the constitutive theory of international law (Oppenheim, 1912), for a status to exist legally, it has to be formally recognised by other states. Applied to refugee status, the constitutive theory holds that in order to qualify as a refugee, the applicant has to be formally recognised as such by the host country, meaning that a refugee has to be validated by the state that receives his/her application. The opposing school of thought holds the view that refugee status is declaratory (Hathaway & Foster, 2014), i.e., it suffices for an applicant to meet objectively, almost prima facie, the minimum criteria set by the 1951 UN Convention on Refugees for him/ her to be considered a refugee. In other

words, the 'what' consideration (what determines the access to refugee status) prevails over the 'who' consideration, meaning that states would be reduced to a quasi-secretarial function of merely just taking stock of the situation. So much so that according to Hathaway and Foster (2014) if states do not conduct the verification process, over time they are supposed to give status to declaratory refugees in their territory. Reverting to the notion of statehood in international law, by way of comparison, the declaratory stance posits that the moment a state meets the minimum requirements that qualify it as a state (Montevideo Convention on the Rights and Duties of States, 1993, art. 1), that state does not need the formal recognition of other countries to exist as a legal entity (article 3 of the same Convention). This applies to the status of refugee, *mutatis mutandis*, and is illustrated by the concept of 'mandate refugee'. As an *obiter dictum*, it is worth highlighting that when it comes to statehood the declaratory approach has supplanted the constitutive approach in international law from a *lex lata* perspective.

The UN High Commissioner for Refugees (UNHCR) seems to hold a clear position on the issue. The UNHCR is the guardian of the 1951 UN Convention on Refugees according to article 39 (2) of the Convention. Its interpretation of the Convention is not superfluous and cannot be overlooked in the absence of a jurisprudence being produced by the International Court of Justice (ICJ). Furthermore, article 35 (1) entrusts the UNHCR with a supervisory task in relation to the implementation of the Convention. Therefore, the UNHCR must interpret the Convention, in order to be able to supervise it.

In this regard, the UNHCR's Note on determination of Refugee Status under International Instruments/EC/SCP/5 unequivocally holds the view that refugee status is declaratory. In its fifth point the Note states that,

From an analysis of the international legal instruments relating to refugees, it is obvious that determination of refugee status can only be of a declaratory nature. Indeed, any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not (UNHCR, 1977, point 5).

The declaratory nature of the refugee status could not be more clearly asserted. And in the absence of a jurisprudence developed by the ICJ, the UNHCR's stance bears a degree of authoritative weight[1].

In practice, as Cherem (2020) states: “refugee status is both declaratory and potentially verified by a formal status assessment” (p.36). Except in the case of group-based asylum, the refugee status is actually verified by a formal assessment.

5. National and European (EU) legislations

In terms of national laws, this paper refers to the French Code on the entry and stay of foreigners and the right of asylum (Code de l’entrée et du séjour des étrangers et du droit d’asile, CESEDA in short, 2021) and the 1998 Swiss federal law on asylum. They are used to illustrate the ‘inquisitorialisation’ of asylum procedures in each of these countries.

5.1. Asylum procedure under French Law

Why is France chosen as a case in point? Three reasons underpin the choice of the French law on asylum. The first reason is subjective and owes to the authors’ knowledge of the French legal system. The second reason owes to geographical factors as France is partly a Mediterranean country, thus facing some of the same issues that Greece, Italy, or Malta do face, for example. The third reason is the fact that, as an EU country, France has to align its asylum policy to EU legislation.

The French Code on the entry and stay of foreigners and the right of asylum will hitherto be referred to as CESEDA, its French acronym. The section of CESEDA dealing with asylum is to be found in Book VII (Livre VII), organised around four Titles (Titres), themselves organised around Chapters (Chapitres). We will focus on Title 2, Chapter 3 as this deals with the treatment of asylum applications. Applications for asylum are dealt with by French Office for Refugees and Stateless Persons (Office français de protection des réfugiés et apatrides), OFPRA as it will be referred to hereafter in this paper.

According to Title 2, chapter 3, article L723-3, OFPRA invites the asylum seeker to attend an interview. However, there is no need for an interview when OFPRA is in a position to grant refugee

status on the basis of evidence that it has, or if the application is manifestly baseless, or if the asylum seeker has a medical condition that would not be conducive to an interview.

CESEDA does not mention how interviews are to be conducted in the eventuality that they have to take place. One has to rely on practice to know how interviews are generally conducted. A look at OFPRA's material relating to interviews would tend to present the process as being straightforward and stress free. This is not, however, the opinion of some experts in the field based on their experiences as case officers. This is the case of Kohler (2015) who subtly alludes at what this paper labels as the 'inquisitorialisation' of asylum procedures.

According to Kohler (2015), 'L'instruction se fait donc principalement à charge et rarement à décharge, mettant ainsi le demandeur d'asile en déséquilibre face à l'égalité des armes, condition absolue d'un procès équitable.' (p.34), which can be roughly translated to: 'The investigation is therefore mainly conducted on an incriminating basis and seldom on an exonerating basis, thus putting the asylum seeker on an unequal footing with regards to the equality of arms, which is an absolute condition for a fair trial' (authors' translation). This statement seems to erfectly illustrate the core issue of 'inquisitorialisation' being hereby analysed. At least, two observations can be drawn from this statement made by a person who is a both a legal expert and an asylum case officer at OFPRA, providing us with a privileged view and an insider's perspective. The first observation, is that Kohler uses the word 'trial' ('*procès*', in French), as opposed to 'interview' ('entretien' in French), thereby comparing the process to a trial.

Although the asylum interview is not formally a trial, the use of the word 'trial' by a legal expert and practitioner is not an innocent allusion, particularly as the asylum interview is said to be more incriminating than exonerating. A trial involves a contradictory procedure, a prosecutor, a judge, a defense attorney, and of course, the 'accused', particularly in a criminal proceeding. As Kohler points out, the presence of a defense attorney is optional. An asylum seeker can be assisted by an NGO. But the NGO's role is limited to being present during the 'interview' to make sure that the formal conditions are respected (the presence of a translator when needed, for example). But representatives of the NGOs are prohibited to intervene in the course of the 'interview'. Should an asylum seeker need to be assisted by a lawyer, he or she would have to pay for the lawyer's services. However, the lawyer will not be allowed to speak for or on behalf of his/her client, which is basically contrary to any principle of a trial, not even to mention a fair trial. We have to keep in mind that, as Kohler puts it, the case officer, who embodies the State, fulfills at the same time the function of prosecutor (he /she is supposed to investigate the case and examine the evidence, if any) and the function of a judge by 'adjudicating' the case and deciding whether or not to grant asylum. There is obviously an asymmetry of power that is not present in a regular criminal case. On the one hand, the roles of both the 'prosecutor' who examines the case on an incriminating basis more than on an exonerating basis, and the 'judge' who decides the verdict, are personified by a single individual vested with the authority of the state. On the other hand, the asylum applicant, cannot avail himself/ herself of an effective defense attorney who would be able to intervene during the 'interview' when necessary. This creates an obvious imbalance that can be detrimental to the asylum applicant.

The second observation made by Kohler (2015), is that 'la charge de la preuve pèse sur le demandeur' (p.35), meaning that 'the onus of substantiating one's claim falls on the asylum seeker', confirming thus the incriminating nature of the process mentioned earlier and the 'inquisitorialisation' that ensues. This issue of the onus falling on the asylum seeker will be further discussed in the mention of the Switzerland case study as well.

The 'rationale' for the procedure to be inquisitive enough is 'expendiency'. The asylum seeker must be probed for 'the truth' to manifest, 'beyond any reasonable doubt', in line with criminal law approach. As will be outlined further on in this article, this process of an excessive inquisitive approach ('inquisitorialisation') is fundamentally at odds with the 1951 Convention on Refugees.

5.2. Asylum procedures under Swiss law

The next law on asylum to be examined is the 1998 Swiss Federal Law on Asylum. Regarding the granting of asylum, verifying Refugee status by a formal process of assessment is not the issue; the problem lies in the scope of the assessment.

In Swiss law, the asylum-seeker is treated like a suspect, a priori. The 'inquisitorialisation' process is obvious in the following modalities: body search, identification, and interview. A special emphasis is be put on body search and interview.

The 1998 Swiss Federal Law on Asylum establishes the right to body search asylum seekers and search their belongings (Article 9). This routine act in criminal cases once arrest is ordered, is applied to asylum seekers based on the rationale to look for 'travel documents, identity papers or dangerous objects, illicit substances, and property and goods of dubious origin'. The list looks a bit disparate and the lining up of 'illicit substances' and 'property and goods of dubious origins' adds to the general suspicion and contributes to the process of criminalisation in relation to asylum seekers.

As far as interviews are concerned, it is necessary to assess the place they hold in the Swiss Federal law on asylum. In practical terms, in the Swiss system an asylum seeker undergoes a minimum of two interviews, in standards cases, and sometimes three, if felt necessary. The interviews are not necessarily undertaken all in a short span of time, which could be problematic in relation to the memory of the applicant. Should the asylum seeker 'contradict himself on essential points', this will probably be held against him/her possibly making his/her application seem dubious. Therefore, the slightest omission, 'incoherence' or lack of accuracy would cast doubts on the applicant's account, which might result in the application for asylum to be rejected. This features a reversal of the legal reasoning, a stance even stricter than the provision of the Swiss criminal law whereby doubts play out in favour of the accused (Article 10, Section 3 of the Swiss Federal Code on Criminal Procedure). This is undoubtedly at odds with the declaratory nature of the refugee status which should rest on the principle of *in dubio pro refugio*, i.e., doubts should benefit the refugee. The 1998 Swiss Federal Law on Asylum illustrates the rampant criminalisation of the asylum procedures and the obvious weakening of the declaratory nature of the refugee status.

The key provisions debated above are not necessarily specific only to the 1998 Swiss Federal Law on Asylum. To a varying degree of forcefulness, we find those provisions in statutes across countries. Therefore, one can find more of a difference in degree of 'harshness' between different national legislations, than differences in nature of the law. For example, in the Maltese law, the provisions on body search, identification and interview are to be found in the International Protection Act (2001), and more specifically, in the Procedural Standards on Granting and Withdrawing International Protection Regulations (2015). These pieces of legislation aim at transposing four European Union directives: Directive 2005/85/EC, Directive 2011/95/EU, Directive 2013/32/EU and Directive 2013/33/EU, in a move towards the Common European Asylum System (CEAS). Articles 13 and 24 of the International Protection Act state that a person seeking international protection shall be interviewed by the International Protection Agency 'as soon as practicable' (Article 13, paragraph 1) and, in the case of an accelerated procedure, in order to establish the admissibility of an application (Article 24, paragraph 3). The International Protection Act does not go into much detail. The details are to be found in the Procedural Standards on Granting and Withdrawing International Protection Regulations, 2015. However, the International Protection Act Article 2, paragraph (e) already states that an application for international protection would be considered 'manifestly unfounded if 'the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his claim unconvincing, etc.'. This mirrors, quasi verbatim, the 1998 Swiss Federal Law on Asylum on the same issue.

Beneath 'inquisitorialisation' and other mentioned 'diversions' from the 1951 UN Convention and the 1967 Protocol on Refugees lie broader considerations and concerns pertaining to the realm of Human Rights.

6. Beyond 'inquisitorialisation': the criminalisation of asylum seekers and what law has to do with it - challenges to the 1948 Universal Declaration of Human Rights

The 'inquisitorialisation' of asylum procedures is the tree that hides the forest of a broader attempt at poaching potential refugees' (human) rights to seek asylum. Without even referring to the different arrangements catering for refugees prior to World War I (Nansen passports, for example), a special mention should be made of the 1948, Universal Declaration of Human Rights (UDHR). Although not legally binding in theory, it is worth reminding that the UDHR has been adopted by a United Nations General Assembly's resolution (UNGA resolution 217 A), which in itself shows the importance of the UDHR's moral significance and legitimacy. In addition, the UDHR is incorporated into the preambles of many countries' constitutions, making it binding at national level. In its Article 14, the UDHR states that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution' (para 1). In essence, and without going back to times immemorial, the individual human right to seeking asylum deriving from the UDHR predates the 1951 Convention and the 1967 Protocol on Refugees. So, in the beginning was the UDHR, and the UDHR begat the 1951 Convention on Refugees, firmly anchoring refugees' rights into the realm of universal human rights.

6.1. A normalisation of certain human rights violations

Moving from principles to practices, this paper poses the question of how do states through government policies, try to abide by their international obligations regarding refugees, whilst being under the pressure to take a tougher stance on migration in general. This question is asked in the light that the refugee issue is often unduly subsumed within the broader migration issue. Migration and migratory flows have been a constant worry for countries and especially for countries in the Mediterranean. This has strengthened many countries' resolve to find ways to curb migration, even if this implies making deals with countries that cannot guarantee the safety and the good treatment of migrants in general, and asylum seekers and refugees in particular. In this respect, deals with Libya, i.e. Libya agreements ('Italy reups funding to force migrants back to Libya*',* 2023), Soudan, i.e. Khartoum Process (Hannun, 2023) or Morocco have clearly normalised, or at least downplayed, human abuses. The rhetoric from governments towards people using irregular routes of migration has also contributed to the banalisation of violent acts against migrants, including those among them who could qualify as refugees in the light of Article 1 of the 1951 Convention and the 1967 Protocol on Refugees. For instance, after the death of 37 asylum seekers on 24th June 2022, who were trying to cross the Spanish border from Ceuta and Melilla, Prime Minister of Spain at the time, Sanchez, praised the 'extraordinary cooperation' Spain had with Morocco and the need for more cooperation (Pinedo & Eljechtimi, 2022), overlooking the fact that genuine asylum seekers, who could have been among the people who had been killed, shouldn't be criminalised for choosing an irregular route. Indeed, in relation to potential refugees seeking entry into a country for the purpose of asylum, in its Article 31 the 1951 UN Geneva Convention on Refugees states that signatories of the Convention 'shouldn't impose penalties on account of their illegal entry or presence'. Likewise, Article 19 of the EU Charter of Fundamental Rights prohibits collective expulsion, which is what Spain and Morocco were doing in Ceuta and Melilla. Such policy which prevents people from even applying for asylum and having their cases heard is equivalent to pushbacks, whether this happens at sea or not. In recent years a case like that of Hirsi Jamaa & others v. Italy (2012), confirmed the illegality of such pushbacks. In this latter case, 24 people from Somalia and Eritrea were intercepted at sea and forced to return to Libya. The illegality of such pushbacks was again confirmed in the December 2020 by the European Court of Justice (ECJ) ruling with the case Commission v. Hungary (2020), forcing FRONTEX to stop its operation in Hungary.

These are just a few examples which illustrate how hostile countries have become towards asylum seekers. This hostility is so normalised that States are ready to forego their human rights responsibilities for a stronger but more violent response to irregular migration, a concept that wrongly includes the those seeking asylum. Pushbacks and migration deals are becoming more and more common and are seen as necessary despite being a violation of human rights. This stands in a continuum with a poor understanding of the 1951 UN Convention on Refugees and/or a complete disregard for it.

This worry of migration flows doesn't only inform countries' first-hand response, which is to stop people from entering their territories at all costs and make sure that asylum seekers do not apply for asylum. It also informs how the asylum procedures are conducted and how the 1951 Convention on Refugees is interpreted. This creates a system whereby the starting point is that asylum seekers are ipso facto guilty and in breach of the law. When an asylum seeker starts the procedure, governmental authorities take an inquisitorial approach that requires asylum seekers to prove that they are genuine refugees. A whole system is then put in place to support this asylum procedural approach. This approach, as discussed earlier, does not only go against the letter and the spirit of the 1951 Convention and the 1967 Protocol on Refugees; it enhances and normalises human rights violations.

6.2. Inquisitorial asylum procedure and detention

There is one feature of the procedure for asylum that symbolises the inquisitorialisation process and epitomises the criminalisation of asylum seekers: detention. This is outrightly at odds with the spirit and the letter of the 1951 UN Convention and the 1967 Protocol on Refugees. Detention, which have been defined as the "deprivation of liberty in confined places such as a prison, or a purpose-built closed reception or holding centre" (Edwards & UNHCR, 2021, p.8) has now become integral to the functioning of the asylum procedure around the world. Yet, detention is not only limited to prison-like or proposed built places. The UNHCR, for example, defines detention as any place that deprives of liberty 'or confinent in a closed place which asylum-seeker is not permitted to leave at will, including through not limited to prisons or purpose-built detention…it can take place in a range of locations, including at land and sea borders, in the "international zones" at airports, on island, on boat' (2012, p.9). This means that practices such as those adopted in Australia, whereby asylum seekers are held on a specific island, e.g. Nauru, amounts to detention. Similarly, airport transit areas are also to be considered detention centres, according to the UNHCR. This is in line with a judgement from the European Court of Human Rights in Amuur v. France (1996) which notes that holding people in a restricted area of an airport amounts to a restriction of liberty in practice. That restriction should not be prolonged lest it turns into deprivation of liberty sanctioned accordingly in Article 5 of European Convention of Human Rights (1950). Likewise, holding 300 people on charter boats for a month, without allowing them to make a formal request for asylum and limiting their access to lawyers, as was done by the Maltese authorities in 2020, is not only a form of detention it is also a prolonged arbitrary detention which goes against Articles 2 and 5 of the European Convention of Human Rights (1950) and against Article 3 of the Universal Declaration of Human Rights (1948).

Other international conventions like the Optional Protocol against Torture and other forms of cruel, inhuman or degrading treatment or punishment, are in line with the UNHCR's definition of detention as any place "where persons are or may be deprived of their liberty either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence" (2002, p.2). The European Union Reception directive (Directive 2013/33/EU) defines detention as the 'confinement of an applicant by a member state within a particular place, where the applicant is deprived of his or her freedom of movement'. This is to say that many of the centres put in place for asylum seekers are essentially detention centres, a common tool used by state parties to the aforementioned international legal instruments.

There exists a lack of accurate statistical data with regards to the use and adoption of detention practices around the world. However, the Asylum Information Database (Aida) published a brief overview of the use of detention in terms of asylum seekers (Aida, 2017). Detention may be used at different points of the asylum process, including i) when the person first applies for asylum on arrival (front-end detention), ii) during the asylum procedure and processing, and/or iii) for those individuals whose asylum application was unsuccessful (back-end detention). In 2016 in Greece, about 4000 people were detained but only half had started their formal asylum application whilst in detention (European Council on Refugees and Exile (ECRE), 2017). Many of those asylum seekers were moved from reception and identification centres (RIC) to pre-removal detention centres as part of the EU-Turkey deal. The RIC part of the transfer would also be considered detention since there is some deprivation of liberty, even if it is not noted as such (ECRE, 2017). In countries like Germany, detention numbers

increased in 2016 in comparison to other years because of the use of detention for purposes of deportation (ECRE, 2017). In Poland, 292 children were detained making up about half of the asylum seekers detained in Poland (ECRE, 2017).

Similarly, in Malta, reports have been showing that there has been an increase in the use of detention to accommodate new policy (Aida, 2017). In 2021, 333 people were held in detention in October (Aida & ECRE, 2022) in Malta. Out of the three detention centres operated in Malta (aida & ECRE, 2023), the people sent to Safi center are mainly young men who are immediately detained upon arrival. In many cases the asylum seekers have been detained for 'weeks or months" before an assessment is conducted (Aida & ECRE, 2022, p. 66).

The problem with the normalised used of detention in asylum process and procedure is that the use of detention is against the spirit and the letter of the 1951 Convention (Article 31) and the 1967 Protocol on Refugees. Fleeing war and persecution is a valid reason to enter a country "illegally" as one's safety and ability to ask for asylum is more important than how they have entered the country. This is in addition to the second part of Article 31 that mentions there should not be any restrictions on refugee unless absolutely necessary.

The reception directive in its preamble section 15 states 'applicant should not be held in detention for the sole reason that they are seeking asylum' and can be detained 'only through very defined, exceptional circumstances, subject to the principle of necessity and proportionality' (Directive 2013/33/EU, para. 15). This is in addition to Article 8 of the directive. However, in practice countries have continuously disregarded the convention and the directive, such as the aforementioned case of 300 people being held on a boat in Malta in 2020 (Malta Independent, 2021)., where the government limited their access to lawyers and essentially stopped them from being able to apply for asylum.

The detention length for asylum seekers is often longer than is lawful. In 2021, the ECHR, in the case Feilazoo v. Malta, found Malta in violation of Article 3 and 5(1) of ECHR, in that not only was that detention time too long, but the conditions of plaintiff's detention were not adequate. He was also unlawfully detained because of COVID regulations and he was kept in isolation for long periods of time during detention. In addition, his deportation had not been made in an adequate manner. Cases such as these are not rare but, rather common in the treatment of asylum seekers in detention.

In 2021 the Council of Europe commissioner was alerted by the conditions of asylum seekers in detention centers such as Safi in Malta. The report showed that the conditions were inhumane. They not only deprived asylum seekers of their freedom, but asylum seekers were kept in overcrowded facilities and not much access to sunlight they were unable to have contact with the outside world (Conditions in Detention Facilities, 2023). Moreover, the facilities lacked clean water and adequate sanitation (Conditions in Detention Facilities, 2023). The CPT report of September 2020 talks of poor detention conditions that is akin to mass institutional neglect by authorities (Conditions in Detention Facilities, 2023, para 23). This goes explicitly against Article 3 of the ECHR, which prohibits the use of torture or inhumane or degrading treatment. This also goes against a number of directives such as the European Union Reception directive in Article 10(2)(3)(4) (Directive 2013/33/EU).

It is also mentioned that children (unaccompanied minors) were held in detention before their age could be assessed and therefore detained with adults (Conditions in Detention Facilities, 2023). This goes against Article 22 of the Convention on the Rights of the Child (1989). Children seeking refuge must receive adequate protection. Article 37 of this said Convention prohibits torture or cruel treatment of children, as well as deprivation of liberty unless otherwise necessary according to the law and as a last resort. The European Union Reception Directive (Directive 2013/33/EU), in its Article 21, demands that states take into account specific situations such as unaccompanied minors, this further affirming Articles 23 and 24, the latter making sure that unaccompanied minors are in suitable accommodation not detention.

Such conditions of the detention centres also add to 'use of excessive force and other questionable forms of punishment' (Conditions in Detention Facilities, 2023, para 49). There are reports 'from migrants detained at Lyster and Safi detention centre that mentions physical torture, beatings, solitary confinement, denial or delay of medical care and also electrocution' (Conditions in Detention Facilities, 2023, para 56). Again, this goes against several of the conventions and directives mentioned above.

The right of liberty is enshrined in other conventions and international documents. Articles 3 and 9 of the UDHR provide that everyone has the right to liberty and security and prohibit “arbitrary arrest, detention and exile” (1948, para 1). Article 9 of the International Covenant on civil and political rights (ICCPR) (1966), also prohibits arbitrary detention and deprivation. This arguably includes detention for immigration purposes (Edwards & UNHCR, 2021). Moreover, although the ICCPR leaves spaces for detention if it is authorized by national law, the same covenant cautions that “this discretion is limited by human rights guarantees” (Edwards & UNHCR, 2011, p.21). Yet, at the time of writing, this is not the case in many countries that detain asylum seekers.

The UNHCR's guidelines encourage the use of alternatives to detention and repeats that detention shouldn’t be arbitrary or habitual. The vast majority of people comply with the procedure imposed to them and do not abscond, thus proving that not only is detention not necessary (Edwards & UNHCR, 2021), but it also does not need to be a feature in asylum procedure. Detention goes against the spirit and the letter of the 1951 Convention on refugees and should always be the last resort.

7. Expedited asylum procedure and ‘safe countries’

In 2021, Ahmed's case was brought to the ECHR, after being held in detention for 2 years by the time his case went to court (S.H. v. Malta, 2022). Given the fact that he originated from a country that was considered as ‘safe’, his asylum claim was rejected and he only had three days to get the International Protection Appeals Tribunal (IPAT) to review his case. In this review system one is not allowed ‘to present their views or be represented by a lawyer’ (Galand, 2022, para 6.). Despite the fact that Ahmed was going to be persecuted if he was sent back to Bangladesh, IPAT refused to review other documentations to substantiate his claim. The ECHR confirmed that he couldn’t be sent back to Bangladesh and Malta had failed to properly look at the risk of harm. The ECHR noted that the review system in place by IPAT for ‘safe countries’ wasn’t sufficient nor was the review to be considered an appeal. Coincidentally, even the Constitutional Court of Malta confirmed that the review system wasn’t an appeal and that the review system breached Malta's constitution’ (Galand, 2022).

Ahmed's case is emblematic of another system that is being normalised in the asylum procedure, but which forgoes asylum seeker rights and human rights: the premise of safe countries. This is now being used by several states to conduct expedited asylum procedures. Again, the goal is to reduce the time spent on cases and reduce the number of asylum seekers.

In 2018, Greece implemented a specific border accelerated procedure based on Article 60(4) L4375/2016 in implementation of the then EU-Turkey deal applied for those seeking asylum from the islands of Lesvos, Chios, Sampos, Leros, and Kos (4.4. Special Procedures: Admissibility, Border and Accelerated Procedures, n.d.).

The Council of Europe noted that there was a worry that expedited procedures may lack quality of decisions. Italy, like Malta and other countries in Europe, has adopted the concept of ‘safe countries’ with the decree No.113/2018. The European commission proposed a list of ‘safe countries’ of origin on September 2015 and this was later mentioned as one of the many key measures in the European Agenda on Migration (AEDH, EuroMedRights & FIDH,2016). This was ‘presented as an essential tool supporting swift processing of application (AEDH, EuroMedRights, & FIDH, 2016, p.11). This means that if one comes from any of the supposedly ‘safe countries’ their asylum request is ipso facto unfounded and therefore the applicant would have to go through the expedited procedure. The concept of safe country is enshrined in the (Directive 2013/32/EU) on procedures for granting and withdrawing international protection. Under this directive people coming from safe countries only get accelerated procedure.

There are three main problems with this concept of a ‘safe country’, a concept that goes against asylum seekers’ rights. First, the safe country concept is not based on the 1951 Convention and the 1967 Protocol on refugees. Article 1 of the 1951 Convention mentions well founded fears of persecutions and has little do with the overall safety of a country. A country can be safe for one person or one group and not for others. Ahmed’s case in Malta is a clear example of the failure of this concept. Secondly, the list is not the same in every country in the EU. Some countries may just have one country on their list,

as is the case with Ireland, and others, like Malta, have a list of 23 safe countries, proving that there's no precise definition nor definite criteria of what is considered safe. Thirdly, the expedited procedure means that asylum seekers from so-called safe countries do not get their asylum requests sufficiently looked at and examined. The concept of safe country puts the burden of proof on the asylum seeker, who can be seen as guilty until proven otherwise. This also goes against Article 3 of the 1951 Convention on refugees that states that 'contracting states should apply the provision of this convention without discrimination founded on race, religion, or country of origin'.

In this section we have noted that states continually circumvent the 1951 Convention and the 1967 Protocol on Refugees which they are parties to on their own free volition, and that this puts the rights of asylum seekers at risk. When visiting Lumpedusa in June 2023, Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe declared: 'I am struck by the alarming level of tolerance to serious human rights violations against refugees, asylum seekers and migrants that has developed across Europe'. (Council of Europe, 2023, para 1).

Let it be reminded that the Council of Europe, of which all EU States are members and to which Switzerland adhered in 1974, is the guardian of the 1950 Europe Convention on Human Rights (ECHR). The Commissioner goes on to say that:

> despite many warnings, the lives of people at sea remain at risk in the face of insufficient rescue capacity and coordination, a lack of safe and legal routes and solidarity, and the criminalisation of NGOs trying to provide life-saving assistance. Elsewhere in Europe, pushbacks at land and sea borders, violence against refugees and migrants, denial of access to asylum, deprivation of humanitarian assistance and the harassment of refugee rights defenders, are widely documented'. (2023, para 2).

In an unequivocal way, she adds that

> reports of human rights violations against refugees, asylum seekers and migrants are now so frequent that they hardly register in the public consciousness. For their part, Council of Europe member states' governments, rather than holding each other accountable on the basis of commonly-agreed standards, have far too often silently tolerated or openly supported the adoption of laws and policies that have progressively stripped human rights protections from people on the move. Their collective focus on deterrence and shifting responsibility to third countries has created a breeding ground for practices that routinely violate refugees' and migrants' rights. (2023, para 3).

8. The 'inquisitorialisation' of asylum procedures: the psychological impact

An issue that is important to raise when discussing asylum seeking is the psychological impact that this has on a person. As our societies increasingly stress the importance of a person's mental health and raise more awareness on the topic, this awareness and understanding should also be extended to asylum seekers - who are human beings just the same - and are in fact more likely to experience poor mental health than people who have not experienced forced migration (Tomasi et al., n.d.). Asylum seekers and refugees are likely to experience higher rates of depression, anxiety and Post-Traumatic Stress Disorder (PTSD) (Fazel et al., 2005; Tempany, 2009) - this is linked to both their experiences before migrating to another place (e.g., experiencing war or persecution) as well as their experiences after having migrated (e.g., the trauma incurred during the journey, the stress of the asylum procedure, etc.).

There exists a circular relationship between mental health disorders and the asylum seeking process. Insecure asylum status and the stress of the asylum seeking procedure, which are some of the major stressors that asylum seekers face, can have a negative effect on PTSD, anxiety and/or depression symptoms in refugees. Studies have shown that the majority of stress factors which negatively impact asylum seeker's mental health are directly related to post-migration living conditions and restrictions - this includes the asylum-seeking process, being moved between asylum centres, an insecure legal status, and social isolation (Womersley et al., 2017). Being held in detention has also been found to

worsen the mental health of asylum seekers: depression, anxiety and PTSD have been commonly reported both during and following detention, due to factors associated with detention such as loss of freedom, loss of agency, violations of their human rights, and the perception of detention as a punitive measure (von Werthern et al., 2018). This point is of particular relevance to countries such as Malta, that has been repeatedly urged by the Council of Europe to change its approach towards immigration detention, as the "conditions of detention...verged on institutional mass neglect by the authorities" (Council of Europe, 2021, p.6) and the:

> living conditions, regimes, lack of due process safeguards, treatment of vulnerable groups and some specific Covid-19 measures were found to be so problematic that they may well amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights (Council of Europe, 2021, p.6).

Other research has shown that factors such as torture and poor housing conditions can have a harmful impact on asylum seekers' mental health (Song et al., 2015; von Werthern et al, 2018). Therefore, it is no wonder that in conditions such as these, asylum seekers' mental health degrades over time.

On the other hand, the symptoms of PTSD and depression can hinder the articulation of an effective asylum claim. PTSD is a disorder that results from direct or indirect exposure to a traumatic event, series of events or set of circumstances (for example death, or actual or threatened violence). The traumatic event that was experienced is then re-experienced in multiple different ways. The symptoms of PTSD can fall into four categories: intrusion, i.e., flashbacks, nightmares, uncontrollable thoughts about the traumatic event; avoidance (of trauma related thoughts, feelings or reminders); alterations in cognition and mood (negative alterations in mood, thoughts or feelings); and alterations in arousal and reactivity, i.e. angry outbursts, or recklessly or self-destructive behaviour (American Psychiatric Association, 2022). Depression, otherwise known as major depressive disorder or clinical depression, is a mood disorder that causes a persistent feeling of sadness and loss of interest. The symptoms of depression (which include a depressed mood, fatigue or loss of interest or pleasure in activities) can interfere with a person's daily life, causing clinically significant distress or impairment in social, occupational, or other important areas of functioning (American Psychiatric Association, 2022). The dissociative aspects of the PTSD symptoms (i.e., distortion) and the alterations in mood and cognition (i.e. the tendency towards non-linear narratives, the inability to recall the key features of the trauma) can therefore hinder the articulation of an effective asylum claim, as can some of the symptoms of depression - which can include trouble in thinking, concentrating, making decisions and remembering things (Hitchcock et al., 2018). If the investigative process that states undertake in order to double check the applicant's asylum claim, requires the applicant to give a detailed and consistent account of the traumatic experience which caused them to flee, this could potentially clash with some of the symptoms of PTSD and depression. Research shows that an estimated 31% of refugees and asylum seekers (1 in every 3) suffer from PTSD, anxiety and depression (Blackmore et al., 2020), this begs the question of whether and how this is being taken into account by states in the asylum-seeking process.

This question is an important one to pose, since trauma narratives are not always linear, neatly structured or coherent but, rather, can often be blurry or fractured. Both depression and PTSD have been shown to be associated with over general memory, i.e., a lack of specificity in one's autobiographical memory (Sumner, 2012; Valentino, 2011). The idea that an asylum seeker's account of a traumatic experience must be false if it is not coherent (in the manner that the authorities would prefer it to be) therefore, shows a lack of understanding of the realities of the state of many asylum seekers' mental health and how this may affect their recollection of the traumatic event experienced. When dealing with a group of people who have suffered from trauma and who require time and a sufficient level of trust to be able to speak openly about their traumatic experience, it is vital to ensure that they are treated with empathy during their asylum interview. However, what is experienced is often the contrary: interviews that trigger post-traumatic intrusions in the interviewee (Schock et al., 2015), and questioning techniques that not only have legal but also psychological implications. One such example would be the officers who are likely to conduct the asylum interview from a place suspicion and

doubt about the claims made by the interviewee - however, individuals who have suffered psychological trauma and have PTSD often have negative beliefs and expectations about oneself or the world (American Psychiatric Association, 2022), which can be expressed in various ways including the belief that other people (or even themselves) cannot be trusted. Being thrust into an interview setting in which they are treated like a suspect rather than as an individual seeking refuge may reconfirm this negative world view and cause further difficulties in opening up about their trauma. As a result of this, it has been found, that asylum seekers with PTSD might be more likely to be refused refugee status (Herlihy et al., 2002) however a person's diagnosis should not result in them being refused the protection that they need. Instead, the authorities should ensure that appropriate accommodations are put in place, such as giving asylum seekers the opportunity to read pre-written statements or to respond to questions in writing if unable to speak (Sarangi et al., 2021) so that, instead of being penalised for their mental health issues, they may be put at ease and be in a position where they can recount their traumatic experiences in a safe space and to the best of their abilities.

The best way to improve asylum seekers' mental health would be to release them from (or avoid putting them in) detention (Triggs, 2013). Yet, not only are asylum seekers often kept in detention for longer periods than is allowed even by national laws, they often also encounter barriers when it comes to accessing mental health care - such as language barriers, lack of proper therapeutic environment, problems with continuity of care, and more (Taylor-East et al., 2016) - meaning that their mental health problems go unaddressed or are not adequately addressed. A particularly egregious example of the many barriers faced by asylum seekers in accessing mental health services is the Malta Union of Midwives and Nurses' claim that asylum seekers (who were described as "illegal immigrants" in the union's statement) were "abusing from the system" by purposefully self-harming in order to be transferred from detention centres to Mount Carmel Hospital (the state-run mental hospital in Malta) - this prompted the union to instruct their nurses to refuse to admit and treat these "illegal migrants" who were there under "false pretexts" (Francalanza, 2021). As correctly underscored by the ECRE, the union made these claims and gave such instructions "without clarifying procedures for determining abuse of the system or documentation of the extent of this alleged problem" (2021, para 3). This refusal of care - and denial of access to a basic right - is especially harmful considering the numerous reports on the horrible conditions of Maltese detention centres and the ample research on the psychological effects of such conditions on asylum seekers (Verhülsdonk et al., 2021; World Health Organisation, 2022).

From this non-extensive and general overview of the mental health of people seeking asylum it is clear that the lack of regard and lack of accommodation for asylum seekers' pre-migration trauma as well as the lack of action taken to address their post-migration trauma (trauma which is a direct result of states' insensitive and harmful laws and practices) and the adverse effect that this has on their mental health - the current asylum seeking processes tend to completely disregard the asylum seekers' mental health and thereby violate their human rights.

9. Conclusion

Recent refugee-bashing threatens to undermine, and has in some instances undermined, the 1951 Convention and the 1967 Protocol on Refugees. Attacks levelled at these two international legal instruments were based on two premises. The first premise was that the 1951 Convention on Refugees and its associated 1967 Protocol are no longer relevant. Yet, the war between Russia and Ukraine seems to have woken up public opinions from the northern shores of the Mediterranean to the fact that positing the irrelevance of the 1951 Convention was a hasty conclusion. As long as wars, conflicts, persecutions or any other type of catastrophes will exist, and this seems to be the reality of the human condition so far, the 1951 will still be relevant. *Quod erat demonstrandum*. The second premise was that the 1951 Convention and the 1967 Protocol on Refugees are being abused and violated by asylum seekers. Whilst not excluding the temptation that some asylum seekers might not abide by the Convention on Refugees, this paper has highlighted and underscored an even greater danger and risk: the violation of the spirit and sometimes the letter of the 1951 Convention on Refugees by an increasing number of its signatories. This is probably more worrying than the violations from asylum seekers for at

least two reasons. First of all, according to the principle of *pacta sunt servanda*, state parties to a treaty have to abide by it. Secondly, should a state party to a treaty or a convention consider that the circumstances have changed (*rebus sic stantibus*), unlike asylum seekers, the state in question has the liberty to withdraw from the treaty or convention. This would have at least the merit of clarity. Violations of the 1951 Convention on Refugees have been blatant in some cases (e.g., detention and pushbacks) or insidious in other cases. Such is the case of the process of inquisitorialisation which illustrates an imperceptible and yet real attempt at 'deconventionalising' certain aspects of the 1951 Convention relating to the Status of Refugees.

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