The Obligation to Fingerprint Asylum-seekers and Irregular Migrants

A Study of EU law and Italian law

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Abstract

This thesis examine the legal obligation to fingerprint asylum-seekers and irregular migrants, a field of law that is partly governed by EU law and partly by the Member States national laws and practices. The Member States has a far-reaching obligation to fingerprint asylum-seekers and irregular migrants according to the Eurodac Regulation, which aims to facilitate the Dublin Regulation and the allocation of asylum applications across the Member States.

Secondly, this thesis explore whether Member States lawfully, in full compliance with fundamental rights, may use detention and physical coercion for the purpose of fingerprinting asylum-seekers and irregular migrants who refuse to have their fingerprints taken, an issue that has been alerted by the European Commission as an increasing problem over the past years. The procedure for obtaining fingerprints is determined in accordance with the Member States national laws and practices. Relevant EU law, including secondary legislations and the European Convention on Human Rights, is therefore analysed together with the laws and practices for obtaining fingerprints in Italy. Italy is studied as an illustration of a Member State with a large influx of asylum-seekers and irregular migrants due to the country’s geographical position in the Mediterranean. It is found that this issue touches upon several fundamental values of the Union, such as humanitarian aspects of asylum and fundamental human rights as well as the upholding of an European Common Asylum System and an Area of Freedom, Security and Justice. It is questioned whether the legal grounds suggested by the European Commission on the use of coercive measures for the purpose of obtaining fingerprints from asylum-seekers and irregular migrants are serving the stated objective that the provisions are aiming to fulfill. The fact that coercive measures for this purpose is based on unclear legal grounds, both under EU law and under Italian law, is criticised for putting an excessive burden upon the asylum-seekers and irregular migrants entering the Union, undermining human rights and legal certainty.
It is found that the European Union has limited powers to influence the Member States national laws and practices when Italy, and other Member States, fail to systematically fingerprint asylum-seekers and irregular migrants in accordance with the obligations set up by the Eurodac Regulation. This is found to be a result of the European soft law tools currently governing the obtaining of fingerprints. The present political conditions in the Union, with competing policy opinions on migration, also prevent the Union from adopting harmonised measures, based on legality and solidarity, to systematically fingerprint asylum-seekers and irregular migrants.
"I was put in a camp. We were taken to an office where they took fingerprints. The head of police said I would be arrested if I refused. After that I was free so I went to Milan. I left Syria to pull the rest of family out, but now I am fingerprinted and I can't bring my family here. Our first experience of Europe is a lie. My experience didn’t just destroy my dreams; it destroyed my families’ dreams. I am destroyed completely”.

Young Syrian male survivor of the 11th October sinking in 2013, rescued 120 kilometers from the Italian Island of Lampedusa.¹

1 Introduction

1.1 Background

Europe is living through, what is defined by the UN as an "historic maritime refugee crisis". 219,000 migrants crossed the Mediterranean Sea in 2014, traveling under terrible conditions in overcrowded and unseaworthy boats. War, conflict and extreme poverty continue to push people to seek safety in Europe and during the first six months of 2015, as many as 137,000 migrants had arrived in Europe, marking an 83 per cent increase over the same period in 2014.² The increased influx of asylum-seekers and irregular migrants to the continent and its evolving response raise profound questions and challenges for the Member States of the European Union and for the Union’s asylum and migration policy.

Italy is one of the Member States that is experiencing a staggering increase in the number of migrants due to its major external sea borders and geographical position in the Mediterranean. Italy’s maritime search and rescue operation, now with the support of the European border agency FRONTEX, has saved thousand of lives, and one of the issues that has dominated the debate is how the Member States should proceed once the migrants have arrived safely in the country. Reception systems and systematic identification procedures need to be put in place, involving registration and the obtaining of fingerprints from the asylum-seekers and irregular migrants.


Over the past year, the European Commission has been alerted by Italy and other Member States that asylum-seekers and irregular migrants have been refusing to cooperate in being fingerprinted by the receiving authorities. Many migrants do not wish to stay in their country of first-arrival, something that they can be compelled to if they leave their fingerprints according to the mechanisms set up by the Dublin Regulation. The Dublin Regulation compromise a series of criteria for allocating responsibility for asylum applications and stipulates inter alia that the state where the asylum-seekers first arrives is responsible for the asylum application.

The Member States have a far reaching obligation under EU law to fingerprint asylum-seekers and irregular migrants since the Member States are legally bound by the Eurodac Regulation. The Eurodac Regulation sets up rules for the fingerprinting of migrants and aims to facilitate the Dublin Regulation and the allocation of asylum applications across the Member States. This obligation is complemented by the Member States national laws, setting up provisions relating to identification procedures and the taking of fingerprints of migrants. These national provisions may for example include the obligation to fingerprint a person who is applying for a residence permit in the Member State.

The procedures for obtaining fingerprints, on the other hand is solely determined in accordance with the Member States national laws and practices. The European Commission’s awareness of the fact that a large number of asylum-seekers and irregular migrants refuse to have their fingerprints taken, and the fact that the Member States

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3 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum lodged in one of the Member States by a third-country national; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

4 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention (valid until 20 July 2015 see recast Regulation (EU) No 603/2013 of the European Parliament and the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice).
procedures did not satisfy the obligation under EU law, led to a series of actions by the European Commission. Based on this, the European Commission presented a document outlining a possible common approach for coercively obtaining fingerprints from migrants.\(^5\) The document is a non-binding document without enforcement mechanisms. However, the Member States need to take the guidelines into account when applying procedures for obtaining fingerprints established in national laws and practices. Guidelines enacted by the European Commission are part of a broader normative framework that may constitute useful points of reference to norms producing legal effects. The fact that the guidelines have certain hard law characteristics, such as the imposing of an obligation, also effect their legal status.\(^6\)

1.2 Purposes and delimitations

The initial purpose of this thesis is to examine the legal obligation to fingerprint asylum-seekers and irregular migrants. Secondly, this thesis aims to explore whether Member States lawfully, in full compliance with fundamental rights, may use detention and physical coercion for the purpose of fingerprinting asylum-seekers and irregular migrants who refuse to have their fingerprints taken. On this basis, this thesis makes an effort to evaluate the factors that should be taken into account, balancing human rights against the underlying purposes for obtaining fingerprints from migrants and the general interests of the Union. Finally, this thesis aims to examine whether the use of coercion for the stated purpose in fact is a human rights violation, and if so, whether it is justifiable to use coercive measures for the purpose of obtaining fingerprints from asylum-seekers and irregular migrants.

Since it is a field of law that is partly governed by EU law, and partly by the Member States national laws and practices, the examination will be carried out by studying relevant EU law and relevant laws and practices on the obtaining of fingerprints in Italy. It is relevant to examine the national provisions of a Member State since the procedure


for taking fingerprints is determined in accordance with the Member States national laws and practices. Italy is chosen as an illustration of a Member State of first-arrival, with a major influx of asylum-seekers and irregular migrants due to the country's geographical position in the Mediterranean. It has also been reported that Italy is failing to fingerprint many of the arriving migrants and that the authorities are experiencing it to be difficult to fingerprint large groups of arriving migrants after naval rescue operations due to the lack of systematic fingerprinting procedures. By studying the Italian identification procedure, involving the taking of fingerprints of migrants, an illustration will be made of the provisions that govern the practical application, as well as practical issues that arise, and how these may be solved.

When examining the obligation to fingerprint asylum-seekers and irregular migrants under EU law, relevant secondary legislation such as the Eurodac Regulation, the Return Directive and the Reception Conditions Directive will be analysed. It will be explored whether these frameworks can provide a legal basis, as proposed by the European Commission, for coercive measures for the purpose of fingerprinting asylum-seekers and third-country nationals who refuse to have their fingerprints taken.

Coercive measures are an effective means for the state to pursue an legitimate aim. However, the use of such measures are subject to a comprehensive legal framework since they constitute a serious interference with fundamental human rights. In the European Union, the European Convention on Human Rights and its court, the European Court of Human Rights, has a decisive role in the protection against arbitrary coercive measures, aiming to ensure individuals the full enjoyment of human rights. The Convention has the same legal value as the Treaties and is legally binding on the Union and its Member States. The use of detention and physical force for the purpose of fingerprinting asylum-seekers and irregular migrants will therefore be analysed on the basis of the right to liberty and security in article 5 of the European Convention on Human Rights and the prohibition of torture, and inhumane or degrading treatment or punishment in article 3 of the European Convention on Human Rights, along with the

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8 See article 6 of the Treaty on European Union.
principles of arbitrariness, necessity and proportionality. These rights are chosen for the study since detention infringes on the right to liberty, and because the use of physical force must not exceed the requirements set up by article 3 of the Convention.

In order to fulfill the purpose of the study, the following questions will be answered:

- What obligation exists under EU law and Italian law to fingerprint irregular migrants and asylum-seekers?
- Are detention and physical coercion permitted under EU law and Italian law for the purpose of fingerprinting asylum-seekers and irregular migrants? What are the legal bases for these coercive measures and what coercion is deemed necessary and proportionate?
- Can the European Union enforce the Member States to comply with the obligations set up by the Eurodac Regulation to fingerprint asylum-seekers and irregular migrants?
- Is the use of coercive measures for the purpose of obtaining fingerprints from asylum-seekers and irregular migrants when they refuse to have their fingerprints taken in fact a human rights violation?
- If so, can it be justifiable to use coercive measures for the purpose of obtaining fingerprints from asylum-seekers and irregular migrants?

This thesis will mainly focus on relevant provisions under EU law and Italian law when exploring the obligation to fingerprint asylum-seekers and irregular migrants, as well as the possible legal grounds for using coercive measures for this purpose. International laws and treaties and international refugee laws will be used in less extent due to the fact that this area of law is mainly governed by EU law and the Member States national laws and practices. Sources from international law will though be used to support my own legal reasoning evaluating whether it is justifiable to use coercive measures on migrants for the purpose of obtaining their fingerprints.

Furthermore, this thesis will not examine the legal basis for fingerprinting accompanied and unaccompanied minors seeking asylum, or arriving irregularly to a Member State. The legal framework concerning reception, care and rights for minors is comprehensive and therefore had to be eliminated due to the scope of this thesis and space limitations.
However, the topic is suitable for further research since it is uncertain under which circumstances a non-cooperative minor may be fingerprinted, and whether coercive measures may be permissible in such a case.

1.3 Methodology

The legal dogmatic method is used to pursue the objectives of this thesis. The legal dogmatic method is used to present and interpret applicable law as it is prescribed by existing legislations, case law, legal principles and doctrine. The material is analysed in relation to the legal issues; to examine the legal obligation to fingerprint asylum-seekers and irregular migrants, finding and analysing possible legal basis for the use of coercive measures, as well as evaluating whether it is justifiable to use coercive measures in order to obtain fingerprints. The topic addressed in this thesis has recently been addressed as a growing issue by the European Commission and the Member States of the Union. The scope of already existing research material is therefore limited. Mainly primary sources of EU law will be used, such as the European Convention on Human Rights and secondary legislations, together with supplementary sources including the case law of the European Court of Human Rights and general principles of law. Relevant primary sources of Italian law will be used to illustrate the Italian procedure for obtaining fingerprints from asylum-seekers and irregular migrants.

Soft law tools, that is non-legally binding documents, will be used to some extent. Soft law tools are not sources of law and do not provide legal reasoning, but serve to interpret legally binding sources of law and is a complement to these sources. Soft law tools also help to place the legal issues in a wider social and political context. Reports from various NGO’s, mainly from the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees (UNHCR), will be used for the purpose of illustrating the challenges relating to the migratory influx to Italy and for the support of my own legal reasoning. Other important soft law tools such as the European Commission’s non-binding document “on the Implementation of the Eurodac

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9 European Commission’s staff working document, Supra note 5; European Commission, Meeting document from the General Secretariat of the Council to the Delegations on Best Practices for upholding the Obligation in the Eurodac Regulation to take fingerprints, 30 October 2014, (DS 1491/14).
Regulation as regards the obligation to take fingerprints”, outlining a possible common approach for coercively obtaining fingerprints will be used and analysed, since it is the only existing document attempting to provide some guidelines for the Member States practices on fingerprinting migrants.

1.4 Outline

The following chapter (chapter 2) will provide a short overview of the European asylum and migration policy and the European Union’s legislative competences in this field. The chapter also aims to illustrate current challenges and approaches for the common migration policy by highlighting Italy as first-arrival country for many asylum-seekers and irregular migrants, and by illustrating the Union’s current approach to migration by presenting the European Commission’s European Agenda on Migration. Chapter 3 and 4 proceeds in examining and analysing possible legal grounds for using coercive measures on asylum-seekers and irregular migrants for the purpose of obtaining their fingerprints by studying relevant EU law and Italian law. The following chapter (chapter 5) will explore if the European Union can enforce the Member States to comply with their obligation under the Eurodac Regulation. The last chapter (chapter 6) will address some legal and human rights concerns about using coercive measures for the purpose of fingerprinting migrants. The chapter examines if the use of coercive measures for the stated purpose in fact is a human rights violation, and the aim of the chapter is to evaluate whether it is justifiable to use coercive measures for the purpose of fingerprinting asylum-seekers and irregular migrants.
1.5 Terminology

In this thesis various terms, sometimes interchangeable, referring to "migrants" will be used. The type of term used depends on how they are used in EU legislations, mostly relating to the status of the person and rights recognized by international law and EU law.

*Asylum-seeker* refer to a person claiming international protection under Article 1 A (2) of the UN Geneva Convention, due to the risk of persecution in their home country.

*Irregular migrant* refer to a third-country national who does not fulfill or no longer fulfills the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in the Member State concerned. Some documents, mostly published by UNHCR and other NGO’s also refer to irregular migrants as *economic migrants*. Economic migrant refer to a person who emigrates from one region to another, because the living conditions or job opportunities are not good in their country of origin, to seek an improvement their standard of living elsewhere. However, the term irregular migrant will be used in this thesis.

*Third-country national* is used in many EU legislations, often together with the term "foreign national" or "non-EU foreign national", referring to individuals who are neither from the EU/EEA country, or Switzerland, in which they are currently residing, nor from another Member State of the European Union, an EEA country or from Switzerland.\(^{10}\)

\(^{10}\) EEA countries refers to Iceland, Lichtenstein and Norway who are not Member States of the European Union but are part of the Single market and the European Economic Area (EEA), allowing the free movement of people. Switzerland is neither an EU nor EEA member but is part of the Single market under the EU-Swiss bilateral agreement.
2 The European migration challenges

2.1 Migration policy in the European Union - a short overview

The European Union’s migration and asylum policy is a relatively new area of policy making. Whereas the free movement of persons was one of the fundamental freedoms in the Community framework established in the 1950’s, the Union originally had no powers concerning migration policies. The Treaty of Rome, establishing the European Communities, contained no provisions concerning asylum and immigration matters. First in 1993 with the Treaty of Maastricht were migration considered an area of common interest and migration policies was established within the frameworks. Since then, the significance of the unions asylum and migration policy has expanded rapidly from an intergovernmental regime, in which only a handful of member states participated outside the Treaty framework, towards a profound cooperation where the asylum and migration policy as part of the Area of Freedom, Security and Justice has been listed as one of the Union’s fundamental objectives in the Treaty of Lisbon.

The Treaty of Lisbon of 1st December 2009 marked the full incorporation of migration and asylum matters within the Treaty framework. Article 67 (2) and article 78 of the Treaty of the Functioning of the European Union (TFEU) forms together with article 18 of the EU Charter of Fundamental rights the legal basis for a common asylum policy. Article 79 sets out a common immigration policy. The Common European Asylum System is a key policy goal aiming to ensure uniform minimum standards in all the Member States. The Common European Asylum System consists of five main

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12 The Treaty of Maastricht organised EU policy areas into three so called ”pillars”. The original treaties establishing the European Community with its supranational decision making procedure became the first pillar. The new area of Common Foreign and Security Policy became the second pillar. The third pillar, the relatively non-binding cooperation in the area of Justice and Home Affairs, comprised matters of asylum and migration policy.
legislative acts; The Qualification Directive\textsuperscript{14}; The Asylum Procedure Directive\textsuperscript{15}; The Reception Conditions Directive\textsuperscript{16}; The Dublin Regulation and The Eurodac Regulation. Article 80 TFEU enshrines the principle of “solidarity and fair sharing of responsibility” in the EU asylum and migration policy and enables the union to adopt measures to implement the principle.\textsuperscript{17}

The ratification of the Lisbon Treaty significantly influenced the development of the EU asylum and migration policy. First of all, the Treaty granted EU new competences on asylum which went beyond the minimum standards set up by the previous treaty. Secondly, the Treaty reinforced the role of the EU institutions. The intergovernmental methods were set aside for the ordinary legislative procedure, with qualified majority voting in the Council and co-decision with the European Parliament. The Court of Justice of the European Union got full jurisdiction to rule in cases of infringement where Member States have failed to fulfill their obligations under the Treaties.\textsuperscript{18} The Lisbon Treaty rendered the EU Charter of Fundamental Rights legally binding in all Member States and it is applicable on EU policy areas including matters concerning asylum and migration.\textsuperscript{19}

Asylum and migration is now a clear and manifested policy area within the Union but the diversity in the nature of the problems associated with immigration has historically been a substantial obstacle to the development of a common migration policy. Migration policy is sensitive to its nature due to its relevance to state sovereignty and

\textsuperscript{14} Council Directive 2004/83/EC of 29 April 2004 on 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.


\textsuperscript{18} Boswell, C, Geddes, A, Supra note 11, p.10.

\textsuperscript{19} Kaunert, C, Leonard, S, Ibid, pp.15-16.
national identity. The European cooperation on matters of asylum and migration has therefore been communitised step-by-step and the European powers and responsibilities have led to isolated common policies concentrated to areas in which the Member States are pursuing a common interest. This concerns, for example, improved state control over migration, cooperation between the border police and a strengthened fight against irregular immigration and asylum abuse.\textsuperscript{20}

The Member States asylum and migration policies are therefore governed by several legal spheres; the national legislation of the Member States; EU legislation on the movement of European Union citizens and the movement of third-country nationals and treaties concluded within the Council of Europe, such as the European Convention on Human Rights and several international human rights treaties.\textsuperscript{21} Some asylum and migration policy areas are regulated by the Member States themselves in the national laws of the state, such as the total number of migrants that can be admitted to the country to look for work or the final decisions on asylum applications, while other asylum and migration policy areas, or parts of the policy, are governed by common rules and measures.

\subsection*{2.2 Recent policy developments and trends in asylum and migration matters}

In recent years, the Union’s primary focus has been to create an holistic approach on migration, taking into account the geographical and economic challenges due to an increasing surge of asylum-seekers and irregular migrants to Europe. The strategy includes external as well as internal dimensions and focus on the strengthening of external borders, building and continue to develop a Common European Asylum System and to create global partnerships for migration and development in third-countries. The creation of an holistic approach on asylum and migration is subject to a number of challenges, such as striking the right balance between the humanitarian aspects of asylum and fundamental human rights for migrants, and security concerns.

\textsuperscript{20} Lavenex, S, \textit{Focus migration - country profile No. 17, European Union}, p. 1.

\textsuperscript{21} Treaties concluded within the framework of the United Nations and bilateral and multilateral treaties concluded between the Member States of the Union and third states can also be included in the legal spheres governing the Member States asylum and migration policies.
Another challenge is the management of the root causes that make people embark on dangerous journeys towards Europe, fleeing from poverty and insecurity in their countries of origin. The negative trend in the public opinion towards immigration in many Member States and the consequences of the economic crisis also creates competing policy opinions between the Member States, challenging common approaches on asylum and migration.22 Solidarity and burden-sharing has been demanded by front-line Member States such as Italy and Greece who are experiencing an increased influx of asylum-seekers and irregular migrants, something that has not yet been fully complied with by the other Member States.

2.2.1 The increased influx of migrants to Italy

Since the implementation of the Schengen agreement into the EU framework in 1998 Italy continued to be a key point of entry into the Schengen area due to its major external sea borders and geographical position in the Mediterranean.23 Ongoing conflicts in the region of its immediate neighborhood makes Italy more vulnerable than other Member States to major migration flows.

Italy started experiencing a staggering increase in the numbers of migrants after the Arab spring in 2011 with 62,700 arrivals that year, 4,500 up from the year before. After dipping in 2012, the numbers started rising again in 2013 (43,000) and reached a new peak in 2014 (170,000).24 This represented an increase of 277 per cent compared to 2013. In 2015 the figure is expected to be even higher, over 55,000 refugees and migrants arrived during the first six months of 2015, an increase in comparison to the same period 2014 (41,200).25 War, conflict and extreme poverty continue to push people to seek safety in Europe. The lack of legal routes leaves no other choice than to pay


23 UN Human Rights Council’s Report, Supra note 7, p. 9.

24 UN High Commissioner for Refugees’ Report, Supra note 2, p. 14.

large sums to cross the Mediterranean by boat, which is a strong initiative for smugglers to continue to increase their activities.\textsuperscript{26}

The Mediterranean route has been recognized by UNHCR as a mixed migration channel, used by both economic migrants\textsuperscript{27} and by those seeking international protection. The refugees and migrants arriving in Italy are mainly from Eritrea, Nigeria and Somalia, followed by Syria and Gambia.\textsuperscript{28} More women, children and elderly persons are embarking boats towards Italy, adding to the already large proportion of vulnerable people. Many of the migrants who arrive are under the age of 30 and are diagnosed with trauma and are often victims or witnesses of physical and sexual violence.\textsuperscript{29}

The increased movement of refugees and migrants, that in recent years have been reaching Italy by boat is partly a result of movements prompted by events in North Africa. Libya has become one of the main stepping-stones towards Europe for refugees and migrants from Africa and the Middle East hoping to survive the boat ride across the Mediterranean. The post-arab spring civil war and lawlessness in Libya has made trafficking a lucrative business, exploiting migrants fleeing from war, conflicts and persecution.\textsuperscript{30} Refugees and migrants are not only fleeing war and hardship, but are also facing the risk of abuse and violence by the smugglers before and during the trafficking. Before departure, migrants can often spend weeks or months detained by smugglers in constant fear of being deceived and abused. During sea crossings, they end up in unseaworthy and overcrowded boats, typically made of rubber or wood, with no food or


\textsuperscript{27} In the context of “mixed migration” UNHCR uses the term “economic migrant” which refer to a person who emigrates from one region to another because living conditions or job opportunities are not good in their country of origin and to seek an improvement their standard of living elsewhere. However, the term “irregular migrant” will be used in this research.

\textsuperscript{28} UN High Commissioner for Refugees’ Report, Supra note 2, p. 11.

\textsuperscript{29} UN Human Rights Council’s Report, Supra note 7, p. 6.

water. The journey from Libya to Italy can take one to four days, or even longer, depending on the weather conditions and the condition of the boat.31

The refugees and migrants who are rescued at sea and are taken to the nearest Italian shore, usually to the island of Lampedusa, Sicily or the southern regions of Italy. However, not everyone survives the dangerous journey and over the recent years there has been a number of tragedies where boats in distress, carrying hundreds of migrants, have sunk. UNCHR report that 1,800 people are estimated to have died in the Mediterranean trying to reach Europe during the first six months of 2015. A number thirty times higher than in 2014.32

In 2014, 62,000 people applied for asylum in Italy, which is approximately half of the arriving migrants. Thus for many who arrive, Italy is considered a country of transit. The majority of the refugees and migrants coming to southern Europe do so with the intention of traveling onwards, and are often refusing to be fingerprinted for this reason. The reason for not staying in the country of arrival is often to be reunited with family members who are already residing in northern or western Member States such as, Sweden or Germany.33

2.2.2 A European Agenda on Migration

The need for a more holistic approach to asylum and migration, together with an unprecedented influx of migrants on the EU’s southern borders and the tragic deaths of migrants attempting to cross the Mediterranean irregularly led to the presentation of the European Commission’s European Agenda on Migration in May 2015.34 The agenda


32 UN High Commissioner for Refugees’ Report, Supra note 2, p.8.

33 UN High Commissioner for Refugees’ Report, Ibid, p.16.

34 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, Brussels 13.5.2015 COM(2015) 240 final.
contains short term, medium and long term priorities for EU to better manage the various aspects of migration. The agenda calls for immediate actions to prevent further losses of migrant’s lives at sea by providing additional funding for the European Agency of the Management of Operational Cooperation (also known as FRONTEX) search and rescue operations at sea.\textsuperscript{35} An EU naval force, called EUNAVFOR Med, was set up with the overarching objective to help save lives by targeting criminal networks of smugglers and traffickers, as well as destroying their vessels. It is suggested that the Italian-commanded force, based in Rome, will operate in the southern central Mediterranean, in cooperation with Libyan authorities. The agenda also suggests resettlement and relocation programs. The relocation program allows the most effected Member States, mainly Italy and Greece, to benefit from provisional relocation measures that temporarily derogates from the rules set up by the Dublin Regulation and the provision that the state where the asylum-seekers first arrives is responsible for the asylum application. The plan is to relocate asylum-seekers who arrive in Italy and Greece to other Member States over the next two years based on a distribution key. In addition the Commission suggests that 20,000 persons from conflict areas will be resettled across the Member States in co-operation with UNHCR.

More long term goals are: to reduce the initiatives for irregular migration by addressing the root causes of migration by building a stronger partnership with key countries outside the EU, and a new policy on legal migration through actions such as reviewing the Blue Card scheme and re-prioritising integration policies.

One of the main objectives of the agenda is to strengthen the common asylum policy and the Commission stresses the Member States responsibility to comply with the Dublin Regulation and the Eurodac Regulation. The Commission calls for a greater responsibility and solidarity across the Member States, in line with the demands made by Italy, and stresses the fact that 72 per cent of all asylum applications EU-wide are shared between five Member States. Member States must also fully implement the rules on taking migrants' fingerprints at the borders, which is crucial for determining the

Member State responsible for assessing the asylum claim. The Commission suggests that this will be achieved through the creation of "hotspots" teams established from the European Asylum Support Office (EASO), FRONTEX and EUROPOL who will provide operational help in frontline Member States to swiftly register and fingerprint migrants as they arrive on EU territory. How the procedure for obtaining the fingerprints should be carried out is not defined in the agenda.
3 The legal obligation to fingerprint asylum-seekers and irregular migrants

3.1 Introduction

As previously stated, the European Commission has over the past year been alerted by Member States that asylum-seekers and irregular migrants have been refusing to cooperate in being fingerprinted by the Member States’ authorities. A large number of asylum applications are being made in different Member States from the one through which the applicant entered the Union, even after being rescued at sea. The asylum-seeker or irregular migrant often have contact with the authorities in the Member State of first-arrival but manage to travel further before their fingerprints have been taken. Many also refuse to have their fingerprints taken upon request. Further, the border authorities face difficulty in fingerprinting large groups of migrants arriving in the Member State after a rescue operation at sea.\(^{36}\)

In the summer of 2014, the European Commission carried out an ad-hoc enquiry together with the European Migration Network to find out how Member States, including Italy, were dealing with this situation. The Commission found that the measures in the Member States varied. Some Member States permit the use of detention for the purpose of fingerprinting asylum-seekers and irregular migrants and that some Member States permit the use of physical force. A few Member States did neither allow detention nor physical force for the purpose.\(^{37}\)

Various NGO’s have reported on the use of excessive force in Member States for identification purposes.\(^{38}\) The UN’s Special Rapporteur on Human Rights have reported the use of excessive force in the identification procedures in Italy when asylum-seekers

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\(^{36}\) European Commission’s staff working document, Supra note 5; European Commission’s Meeting document from the General Secretariat of the Council to the Delegations, Supra note 9. The non-cooperation has also been acknowledged by the UN’s Special Rapporteur on Human Rights in the Report by the Special Rapporteur, Supra note 7, pp. 9-10.

\(^{37}\) European Commission, Meeting document from the General Secretariat of the Council to the Delegations, Ibid.

and irregular migrants do not cooperate, refuse to provide personal details or to have their fingerprints taken. The coercive measures include physical violence and/or taser. The Special Rapporteur expresses a special concern about the uncertainty of the limits of the use of force for the purpose of fingerprinting asylum-seekers and irregular migrants.\footnote{UN Human Rights Council’s Report, Supra note 7, pp. 9-10.}

As a response to the Member States increased difficulty to fingerprint asylum-seekers and irregular migrants, the European Commission drafted a non-binding document presenting possible best practices for the Member States in order to ensure the they fulfill their obligation under EU law to take fingerprints. The document is intended to provide guidance to Member States on how to facilitate systematic fingerprinting and suggests that the Member States detain and use other coercive measures as a last resort in order to take fingerprints.\footnote{European Commission’s staff working document, Supra note 5.}

This chapter will examine the legal obligation to fingerprint asylum-seekers and irregular migrants under EU law and Italian law. The following chapter will examine whether coercive measures such as detention and physical force is permitted under EU law and Italian law for the purpose of fingerprinting asylum-seekers and irregular migrants. EU law will be examined, together with the European Commission’s guidelines, to find and analyse possible legal grounds for such measures. However, under the current legislation the procedure for obtaining fingerprints is regulated by the Member State’s national laws. Provisions under Italian law, with Italy as an example of a Member State with a large migration influx, governing the procedure for obtaining fingerprints from asylum-seekers and irregular migrants will therefore be presented, with the ambition to illustrate the current procedure in practice, as well as practical issues.
3.1.1 The legal obligation under EU law

The Member State’s obligation under EU law to take fingerprints is defined in the Eurodac Regulation.\(^{41}\) Eurodac is the first large-scale automated fingerprint identification system in the EU, operational since 2003, it includes fingerprints of asylum seekers and irregular migrants\(^{42}\) who have crossed the external borders of the Union. Fingerprints from persons who are found illegally present in a Member State may also be checked, but crucially not recorded, against fingerprints in the database subsequently taken from asylum-seekers.

The database of fingerprints is controlled by the Central Unit in accordance with article 3 of the Eurodac regulation, and 2.7 million sets of fingerprints were stored in the system by the end of 2014.\(^{43}\) The national authorities forward the fingerprints to the Eurodac Central Unit and the unit check whether the fingerprints forwarded are already stored in the system. If the fingerprints are already stored, the national authority will be informed of a ”match”, as well as which Member State that originally forwarded the fingerprints in question.

The current regulation is applicable until the 20 July 2015 when the recast of the regulation comes into practice. In addition the recast of the regulation lays down the conditions under which Member States’ designated authorities and Europol may request the comparison of fingerprint data for law enforcement purposes.\(^{44}\)

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\(^{42}\) The Eurodac regulation of 2000 uses the word ”aliens”. The Council and the Commission did not follow the advice by the European Parliament to use ”third-country nationals” instead of ”aliens”.


\(^{44}\) Regulation (EU) No 603/2013 of the European Parliament and the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Europol data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice).
The practical reason submitted by the national governments for the need to establish a central registration system for fingerprints was the fact that asylum-seekers seldom have their documents, such as identification cards or travel documents, upon arrival in the Member States. This make it difficult for the authorities in the Member State to identify the person, to establish the route travelled and to find out if the person had already applied for asylum in the same or in another state, which compromises the effectiveness of the Dublin regulation.45

The purpose of the establishment of the Eurodac Regulation is therefore to facilitate the application of the Dublin Regulation determining which state is responsible for the asylum application. One of the criteria set up by the Dublin Regulation stipulates that the Member State where the asylum-seeker first entered the EU is responsible for the asylum application.46 The purpose of the "single application" principle is to prevent persons applying for asylum in more than one Member State. The criteria also seeks to ensure that asylum applications submitted by different members of one family are examined by the same Member State and seeks to guarantee that at least one Member State is responsible for the examination of the asylum application to ensure effectiveness to an asylum procedure.

Regarding collection, transmission and comparison of fingerprints, a division is made in the Eurodac Regulation between data concerning applicants for asylum, third-country nationals who irregularly crossed an external borders and third-country nationals who illegally stay in a Member State. A wide set of rules defines the situations and the conditions under which data may be collected and stored and settles the procedure for transmitting and comparing those data.


46 See Article 13 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).
According to article 4 (1) of the Eurodac Regulation all Member States are obliged to promptly take fingerprints of all fingers of every applicant for asylum of at least 14 years of age. The data is subsequently transmitted to the Central Unit. The recast of the regulation is obliging the Member States to transmit the fingerprints within 72 hours except when the conditions of the fingertips of the person does not allow the taking of fingerprints. The purpose of this relate to the fact that asylum-seekers sometimes damage their fingertips in order to avoid getting fingerprinted. The fingerprints relating to an asylum application will then be stored for ten years and include information about the Member State of origin, sex, place and date of the application for asylum and the date on which the fingerprints were taken. The procedure for taking fingerprints is determined in accordance with national practices of the Member State concerned and in accordance with the safeguards laid down in the European Convention on Human Rights and the United Nations Convention on the Rights of the Child.

The obligation to fingerprint irregular migrants is distinguished in two categories and differ depending on whether the third-country national has been apprehended crossing the external border irregularly or if the third-country national is found on the Member States territory illegally. In both cases the third-country national has to be at least 14 years of age for the fingerprints to be taken.

Each Member State is obliged according to article 8 of the Eurodac Regulation to promptly take the fingerprints of all fingers of third-country nationals who are apprehended by the competent control authorities in connection with irregular crossing by land, sea or air of the Member State having come from a third country and who is not turned back. This includes all persons who remain physically on the territory and who are not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back. Data on persons who have been apprehended crossing an external border irregularly are recorded for the purposes of comparison with data on applicants for asylum.

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47 See article 9 (1) of the Recast.


49 See article 14 of the Recast.
subsequently transmitted to the Central Unit. The accompanying data is largely the same as for asylum seekers.\footnote{See article 8 (2) (a) to (f) of the Eurodac Regulation and article 14 (2) (a) to (g) of the Recast.} The perquisites set up by article 8 are applicable on migrants arriving to the Member States by boat and when the migrants, in most cases are being rescued at sea by the Member States national authorities or a vessel taking part in a search and rescue operation.

As for asylum-seekers the recast introduce a 72-hour time limit for the transmission of data. The data should be stored in the central database for two years according to the current regulation, and 18 months according to the recast of the regulation.\footnote{See article 10 of the Eurodac Regulation and article 16 of the Recast.}

Member States who find third-country nationals illegally present on the their territory may take the fingerprints of the person in order to check whether the third-country national previously has lodged an application for asylum in another Member State.\footnote{See article 11 of the Eurodac Regulation and article 17 of the Recast.} The purpose is to compare the fingerprints with data recorded and transmitted by other Member States to the central database and not to record the fingerprints in the database. The regulation prescribe a general rule with grounds for checking whether the third-country national has previously lodged an application for asylum in another Member State. Possible grounds according to the regulation for checking the fingerprints against the database could be that the person declares that he or she has lodged an application for asylum but without indicating the Member State; the person objects to being returned to his or her country of origin by claiming that he or she would be in danger or that the person otherwise seeks to prevent the removal from the Member State by refusing to cooperate in establishing his or her identity, in particular by not showing, or showing false, identity papers.

It should be stressed that the Member States obligation to obtain fingerprints is not mirrored by an explicit corresponding obligation on the asylum seeker or irregular migrant to provide their fingerprints under the EU asylum and immigration framework. The Eurodac Regulation is solely addressing the Member States. The Asylum Procedure
Directive and the Qualification Directive does not specify any duty to provide fingerprints as part of the asylum seeker’s obligations in the procedures.

3.1.2 The legal obligation under Italian law

The Member States has a far-reaching obligation under EU law and the Eurodac Regulation to fingerprint asylum-seekers and irregular migrants. This obligation is though complimented by the Member States national laws setting up provisions relating to the identification procedure of migrants.

The obligation under Italian law to fingerprint asylum-seekers and irregular migrants are stated in the Immigration Act. Article 5 (2) bis. 4 of the Immigration Act states that a third-country national who wishes to apply for, or renew, a residence permit will have their fingerprints taken. The taking of fingerprints is part of a procedure called "fotosegnalamento" and consists of two photographic surveys, fingerprints and various anthropometric measurements. Any third-country national may also be fingerprinted if there is a reason to doubt the identity of the person according to article 6 (4) of the Immigration Act.

It should be stressed that there is an obligation under Italian law to follow orders given by the public security authorities. Non-cooperation with the authorities is stipulated as a crime, punishable with a fine. This means that asylum-seekers and irregular migrants commit a crime under Italian law if they refuse to have their fingerprints taken.

The obligation to obtain fingerprints under Italian law can be interpreted as a mirrored obligation, compromising both the authorities performing the procedure and the asylum-seekers. That the asylum-seeker submit his or her fingerprints is a requirement for the

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53 Legislative Decree No. 286 of 25 July 1998 on immigration and on dispositions applicable to foreign citizens.

54 Scuola Superiore dell’avvocatura, Progetto Lampedusa, Identificazione e fotosegnalamento, (Italian), p. 3.

residence permit to be issued. The criminalization of non-cooperation can also be described as an additional means to exert pressure on asylum-seekers and irregular migrants to comply with the law.

The taking of fingerprints is done by the authorities when submitting an asylum application at the Questura (Immigration office of the Police) or at the reception centers for asylum seekers, so called CARA (Accommodation Centers for Asylum-seekers). According to article 20 of the Procedure Decree No. 25/2008 should asylum seekers be accommodated in CARAs for (a) identification reasons if they do not have travel or identity documents, (b) if the asylum request has been lodged after the person has been stopped for having escaped or attempted to escape the border controls or (c) if the person presents the asylum request after being stopped for irregular stay in the Italian territory. The majority of the migrants rescued at sea are placed in the CARAs for the purpose of identification on the ground of article 20 (b).\textsuperscript{56}

\textsuperscript{56} Italian Council for Refugees, \textit{Asylum Information Database: Country report Italy}, January 2015, p. 52.
4 The practice of coercive measures in order to take fingerprints

4.1 Detention

4.1.1 Detention of asylum-seekers and irregular migrants under EU law for the purpose of obtaining fingerprints

Detention, or immigration detention (to distinguish it from criminal detention), refers to the detention of asylum-seekers and other migrants, either upon seeking entry to a territory or pending deportation, removal or return from a territory. It is primarily defined as detention that is administratively authorised that involves the deprivation of liberty in a confined place, such as a closed reception or holding center.57

This section will examine the legal basis for detention for the purpose of fingerprinting third-country nationals who refuse to have their fingerprints taken upon arrival in a Member State. That is, before a final decision on a claim for protection has been made and before a return decision to the country of origin, in order to fulfill the obligations under the Eurodac regulation. It should also be underlined that a distinction needs to be made between detention of asylum-seekers and irregular migrants, since international law and EU law recognize specific rights for asylum-seekers due to their status.

Detention is a serious interference with fundamental human rights, even if the migrant has entered the territory of a Member State illegally. In addition, it also effects persons who may be in need of international protection and persons who may just have been rescued at sea surviving a harrowing journey over the Mediterranean. Any measure of deprivation of liberty must therefore be provided by law in accordance with the European Convention on Human Rights and standards set up by the principles of arbitrariness, necessity and proportionality. The European Convention on Human Rights is binding upon all Members States and is of general application, meaning that its rights and freedoms apply to everyone within the jurisdiction of the contracting parties, and

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thus compromises asylum-seekers as well as irregular migrants. EU law also sets up rules regarding detention through its secondary legislation. The conditions for detention of asylum-seekers is governed by the recast of the Reception Conditions Directive, and the Return Directive regulate under what circumstances illegally staying third-country nationals may be detained.

(a) The European Convention on Human Rights - article 5 and the right to liberty and security

Article 5 of the European Convention on Human Rights grants everyone the right to liberty and security of person, and embodies a key element in the protection of an individual's human rights. The purpose of article 5 is to ensure that no one is deprived of their liberty in an arbitrary way. The article imposes a positive duty on the state that requires public authorities to take steps to guarantee people’s right to liberty and security and a negative duty requiring the state not to detain anyone arbitrarily for reasons not regulated by domestic law and as set out in article 5. The right to liberty of persons is not absolute and article 5 (1) allows for restrictions, provided that there is a procedure prescribed by law and that the exhaustive conditions under paragraph (a)-(f) are met. Detention which is not for an identified purpose under these conditions is automatically unlawful and a violation of the Convention. Therefore there is a need to examine whether the detention of asylum-seekers and irregular migrants for the purpose of obtaining their fingerprints could be a breach of article 5 of the Convention.

Possible applicable conditions for the lawfulness of detention, for the purpose of fingerprinting asylum-seekers and irregular migrants are article 5 (1) (b) or (f). The second limb of paragraph (b) allows for detention in order to secure the fulfillment of any obligation prescribed by law and paragraph (f) for detention of a person to prevent his or her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view of deportation or extradition.

58 See Article 1 of the European Convention on Human Rights which states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”.

59 Brogan and Others v. the United Kingdom, Application No. 11209/84, Judgement of 29 November 1988.
Paragraph (f) is the only paragraph explicitly stating the justifiable ground for detention of third-country nationals. It justifies detention to prevent a third-country national to enter a country unlawfully and detention whilst a third-country national is awaiting the execution of a decision of deportation or extradition. The question when the first limb of article 5 (1) (f) applies is largely dependent on the national laws in the Member States and the formal authorisation to enter or stay in the state, and many Member states permit short-term detention at the border, often in transit areas. Conditions are also set up by EU law. The Schengen Borders Code requires that a third-country national that does not fulfill the entry conditions is refused to enter the EU. The border guards of the Member States therefore have a duty under EU law to prevent irregular entry. Under the European Convention on Human Rights, the European Court of Human Rights has ruled on the lawful detention of asylum-seekers on the basis of article 5 (1) (f). In the case Saadi v. the United Kingdom, the court interpreted the meaning of ”unauthorised entry” as a lawful ground for detention. The court did not accept the suggested interpretation that as soon as an asylum-seeker surrender to the immigration authorities, he or she is seeking to effect an ”authorised” entry and that detention of the person in question is not justifiable under article 5 (1) (f). The court then relied on UNCHR soft law instruments and stated that only permitting detention under article 5 (1) (f) of persons who are trying to evade entry restrictions would be too narrow on the terms of the provision and on the states right to immigration control. It would also be inconsistent with the Conclusion no. 44 of the Executive Committee of the United Nations High Commissioner for Refugees’ Programme and the UNHCR’s Guidelines and the Committee of Ministers’ Recommendation. The guidelines of the UNHCR envisage the detention of asylum-seekers under certain circumstances, for example while identity checks are taking place. The Court held that the applicant’s seven-day detention, partly due to a mass influx situation, had not been in violation of Article 5 (1) (f).


62 Saadi v. the United Kingdom, Application No. 13 229/03, Judgement of 11 July 2006.

In the case the court grants the states a wide margin of discretion to detain asylum-seekers for the purpose of preventing unlawful entry. Not allowing detention in the initial stages of the procedure could make it difficult to identify a person who has entered the territory of the state. The certainty of the person's identity is a decisive measure whether or not to grant immigration clearance and/or asylum. The court also refers to the guidelines for detention of asylum-seekers issued by the UNHCR stating that identity checks could be a rightful ground for detention, provided that the detention is compatible with the overall purpose of article 5 and the safeguards set up by the provisions. Even though article 5 (1) (f) is the only paragraph explicitly stating the lawful grounds for the detention of third-country nationals, it could be questionable if detention for the purpose of fingerprinting asylum-seekers and irregular migrants would fall within its scope. The stated purpose for the application of the first limb of article 5 (1) (f) is to prevent a third-country national to enter the country unlawfully. While detention for the purpose of fingerprinting asylum-seekers and irregular migrants entering the territory of a Member State is to comply with the obligation to take fingerprints under EU law and to seek cooperation with persons refusing to get fingerprinted. Arguably, such a purpose could fall within the scope of paragraph (b).

The second limb of article 5 (1) (b) allows for detention to secure the fulfillment of an obligation prescribed by law. The purpose of the detention must solely be to fulfill the obligation and must not be punitive in its character. As soon as the relevant obligation has been fulfilled, the justification for detention under article 5 (1) (b) ceases to exist.64 The European Court of Human Rights has stated that the disclosure of details of a person's identity could be such an obligation to fulfill, and a justifiable ground for detention under article 5 (1) (b).65 The Eurodac Regulation imposes an obligation on the Member States, as stated in section 3.1.1, to fingerprint asylum-seekers and third-country nationals apprehended crossing an external border irregularly. Accordingly, the taking of fingerprints is an obligation prescribed by law. It can therefore be argued that

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64 Council of Europe and the European Court on Human Rights, Supra note 60, p. 13.

65 Council of Europe and the European Court on Human Rights, Ibid, p. 14. See also, Vasileva v. Denmark, Application no. 52792/99, Judgement of 25 September 2003; Sarigiannis vs. Italy, Application No. 14569/05, Judgement 5 April 2011. Both cases concern the lawfulness of detention when the person refuses to disclose his or her identity.
detention, as a measure to obtain fingerprints from a person who is refusing to have his or her fingerprints taken, may be in compliance with rights secured by article 5 (1) (b). It should though be underlined that the provisions of article 5 (1) (b) do not cover situations where a person is detained as a sanction for failure to comply. That is only lawful when there has been a court order. The provision only permits detention to secure compliance with an obligation.\textsuperscript{66} Paragraph (b) does not explicitly cover the conditions under which third-country nationals can be detained, such as paragraph (f), but the wording of the provision and the case law of the European Court of Human Rights has given the provision a broad scope of interpretation.

The deprivation of a person's liberty must not only meet the conditions set up by article 5 (1) (a)-(f), but must also take the principles of arbitrariness, necessity and proportionality into consideration. Under the European Convention on Human Rights, the compliance with the state's national laws are not sufficient. In addition, article 5 (1) require that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The notion of arbitrariness extends beyond lack of conformity with national law; a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the European Convention on Human Rights. Detention under article 5 (1) must therefore be closely connected to the grounds of detention invoked by the national authorities. The conditions and the place of detention should be appropriate and the duration of the detention should not exceed the time reasonably required for the purpose pursued by the detention.\textsuperscript{67} The principles of necessity and proportionality are of great importance for detention decisions. The necessity test is done on a case-by-case basis and detention may prove necessary as a last resort when other less coercive measures cannot be effectively applied. The test may include considerations such as the likelihood of the person absconding.\textsuperscript{68} It should though be underlined that the European Court of Human Rights has found that the


\textsuperscript{67} De Bruycker (ED.), P, Bloomfield, A, Tsourdi, E, Pétin, J, \textit{Alternatives to Immigration detention ans Asylum detention in the EU: Time for Implementation}, 2015, p. 39.

\textsuperscript{68} European Union Agency for Fundamental Rights, \textit{Detention of third-country nationals in return procedures}, November 2010, pp. 21-22.
necessity test is not required for the detention of third-country nationals under article 5 (1) (f).  

To assess the necessity and arbitrariness of potential detention measures, questions of proportionality will automatically be raised. EU law requires the assessment whether the deprivation of liberty is proportionate to the objective to be achieved. The proportionality test also aims to strike a fair balance between the general interest of the community and the requirement of the protection of individual fundamental rights. The proportionality test in this case would weigh whether it is proportionate to detain an asylum-seeker or irregular migrant for the purpose of fulfilling the obligation under the Eurodac Regulation. An obligation that mainly aims to facilitate the Dublin Regulation and the mechanisms for allocating asylum application across the Member States.

The migration policy goals in the Union, aiming to ensure a uniform asylum system across the Member States, should also be taken into account in the balancing of interests. In a larger context does the obligation to fingerprint asylum-seekers and irregular migrants also facilitate other harmonizing legislations on asylum and migration, such as the facilitation to conduct proper return procedures. The obligations set up by the Eurodac Regulation is an important part of the Union’s policy concerning an European Common Asylum System, and is a constituent part of the Union’s objective of progressively establishing an Area of Freedom, Security and Justice.

The importance of obtaining fingerprints from migrants who has entered the Union is also a measure to ensure the free movement of people within the Schengen ”no borders-area”, and aims to offer a high level of protection to EU citizens. In order not to compromise the possibility for people to move freely within this area, EU states there must be effective controls at the points of entry into the Union. It is though difficult to regulate not only free movements of rights but also necessary restrictions and guaranteeing human rights.

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69 Saadi v. the United Kingdom, Application No. 13 229/03, Judgement of 11 July 2006.
However, this may not be phrased as how to “balance freedom and security”, but rather argued from the understanding that an Area of Freedom, Security and Justice requires a comprehensive legal framework governing both guarantees and harmonised restrictions of rights and liberties. The balancing of interests will be further discussed and analysed in chapter 6 of this thesis.

(b) Secondary legislation - The recast Reception Conditions Directive and The Return Directive

In addition to the European Convention on Human Rights are two main instruments regulating the detention of migrants under EU law; the Reception Conditions Directive and its adopted recast\(^{70}\) regulating detention of asylum-seekers, and the Return Directive\(^{71}\) governing pre-removal detention of third-country nationals.\(^{72}\) These directives are binding secondary legislations with the respect to the intended result, but the Member States chose form and method for national implementation.

The recast of the Reception Conditions Directive, which amends the Reception Conditions Directive from 2003, provide detailed rules allowing for detention of asylum-seekers in a limited number of cases. According to article 8 (2) of the Reception Conditions Directive an asylum-seeker can be detained when it proves necessary on the basis of an individual assessment if other less coercive alternative measures cannot be applied effectively. The conditions under which an asylum-seeker can be detained are set up in article 8 (3) (a)-(f) and paragraph (a) allows for detention in order to determine


\(^{72}\) Further EU legislations which contain provisions concerning detention of third-country nationals, which falls outside the scope of the research question, are; the Asylum Procedure Directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (valid until 21 July 2015, see recast Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection) and the Dublin III Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person).
or verify the persons identity or nationality. The directive also imposes specific procedural guarantees on the decision to detain and it require the detention to be applied for as a short time as possible to pursue the aim.

The Return Directive applies on third-country nationals who are staying illegally on the territory of a Member State. The Member States are obliged to issue a return decision when a third-country national is staying illegally on their territory. The Member States may detain third-country nationals who are subject of a return procedure in order to prepare the return and/or carry out the removal process unless other sufficient but less coercive procedures can be applied. According to article 15 (1) (a) and (b) is detention only justifiable when there is a risk of the person absconding or when the third-country national avoids or hampers the preparation of return or the removal process.

(c) Non-binding documents - the European Commission’s Best Practice on the Implementation of the Eurodac Regulation

The European Commission’s awareness of the fact that a large number of asylum-seekers and irregular migrants refuse to have their fingerprints taken upon arrival in the Member States led to the Commission’s outlining of a possible common approach for coercively taking fingerprints. The Commission distinguish between asylum-seekers and irregular migrants when using coercive measures.

The Commission suggests that asylum-seekers may be detained in order to verify the identity or nationality as a measure when they refuse to have their fingerprints taken. The ground for detaining an asylum-seeker for the purpose of verifying identity or nationality, as stated in the previous section, is set up by article 8 (3) (a) of the recast Reception Conditions Directive. The detention should last for as short a time as possible and only when it is necessary: as stipulated by EU law and the safeguards set up by article 5 of the European Convention on Human Rights. This means that detention is no

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73 See article 2 of the Return Directive.
74 See article 15 of the Return Directive.
75 European Commission’s staff working document, Supra note 5.
longer lawful when the fingerprints have been taken, unless there are other grounds under the Return Directive or the EU asylum framework to continue the detention. In cases where the asylum-seeker has damaged his or her fingertips in order to avoid getting fingerprinted, and when there is a reasonable prospect that the fingerprints can be obtained within a short period of time, the Commission suggests that Member States may keep the asylum-seeker in detention until fingerprinting is possible. Attempts to re-fingerprint should then be taken at regular intervals.

The Commission is using article 8 (3) (a) as the lawful ground for detaining asylum-seekers for the purpose of taking fingerprints in cases of non-cooperation. Though, it can be questioned whether such detention can be justified on the designated legal ground. Article 8 (3) (a) allows for detention for the purpose of verifying identity or nationality. The taking of fingerprints in accordance with the Eurodac Regulation on the other hand does not per se determine the identity or the nationality of an asylum-seeker. The only information obtained, which is submitted to the Eurodac Central Unit, is the fingerprints and the gender of the person. The collection and transmission of the fingerprints is not directly relevant to verify the asylum-seekers identity or nationality, but for the purpose to facilitate the application of the Dublin Regulation determining which state is responsible for the asylum application. In other EU law instruments governing asylum and migration law, such as the Qualification Directive, the establishment of a persons identity is stated to consist of the documentation at the asylum-seekers disposal regarding age, background, relevant relatives, nationality(ies); country(ies) and place(s) of previous residence, previous asylum applications, travel routes and travel documents.76 Hence, there is no mention of fingerprints as part of the establishment of the asylum-seekers identity.

The relevance of the data submitted to the Eurodac and whether or not it provides any information about identity or nationality depends on when the fingerprints are being taken and transmitted to the Central Unit. The fingerprints will in practice provide information on travel routes and enable a Member State to establish whether the

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76 See article 4(2) of the recast Qualification Directive, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
applicant previously has lodged an asylum application or transited through another Member State, if the applicant previously has been fingerprinted in another Member State.\textsuperscript{77}

It can be argued that a Member State of first-arrival do not have the possibility to verify an asylum-seekers identity on the basis of fingerprints since their obligation is to transmit fingerprints to the data base. The country of first-arrival will therefore not get any information of the person who has been fingerprinted because they will not get a "match" in the Central Unit when transmitting the fingerprints. It is therefore questionable if the detention of asylum-seekers for the purpose of taking fingerprints could be based on article 8 (3) (a) of the recast Reception Conditions Directive. The taking of fingerprints in such a case will not fall within the scope of determining the identity of the person.\textsuperscript{78} To apply "identity” as a reason for detention in an excessive manner would not be consistent with the obligation to interpret grounds for detention restrictively, and to only detain asylum-seekers in exceptional cases when its proved necessary and proportionate. Such detention can also be considered arbitrary and compromises legal certainty due to the lack of a close connection to the ground invoked by the national authority.

The situation may be different if an asylum-seeker who has been fingerprinted in the Member State of first-arrival is apprehended in another Member State and then refuse to be fingerprinted. If the asylum-seeker is detained for the purpose of obtaining his or her fingerprints, the transmission of the fingerprints to the Eurodac Central Unit would lead to a "match” and the Member State would have the possibility to request information about the person in question.\textsuperscript{79} It can be argued that this request of information is in accordance with article 8 (3) (a) and its legal basis to verify the persons identity, which would allow for detention for the purpose of taking fingerprints. However, to interpret the provision in this manner does not solve the initial problem. In the majority of the

\textsuperscript{77} European Council on Refugees and Exiles, \textit{ECRE Comments on the European Commissions Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints}, June 2015, pp. 4-5.

\textsuperscript{78} European Council on Refugees and Exiles, Ibid, p. 5.

\textsuperscript{79} See article 34 of the Dublin Regulation.
cases it is the Member States of first-arrival that are experiencing difficulties with asylum-seekers that refuse to get fingerprinted, often due to the fact that they wish to seek asylum in another Member State and that they do not want to risk being sent back to the country of their first-arrival.

Regarding the possibility to detain irregular migrants for the purpose of obtaining their fingerprints, the Commission’s best practice states that a migrant who has not applied for asylum and who continues to refuse to cooperate is to be considered an irregular migrant. The Member States are then obliged to issue a return decision, as stated in the Return Directive. It is suggested that detention may be allowed, if no other coercive alternatives than detention can be applied effectively, in accordance with article 15 of the Return Directive. The Return Directive can only be applied when the Member States choose to carry out a return procedure and article 15 of the directive states there must be a risk of the person absconding or that the third-country national avoids or hampers the preparation of the return or removal process. Article 15 (4) of the Return Directive require that there is a "reasonable prospect for removal" for the detention to be justified.

The condition set up by article 15 of the Return Directive that there must be a risk of the person absconding may be a justifiable ground for detention for the purpose of fingerprinting irregular migrants. The reason to believe that the person will abscond from the Member State of first-arrival is normally well-founded since many migrants wish to travel to another Member State. However, it is questionable if detention for the purpose of fingerprinting necessarily serve to facilitate the irregular migrants return to the country of origin which is the purpose of the Return Directive.

The requirement that there should be a "reasonable prospect of removal" to justify the detention could also be a possible hindrance for detaining irregular migrants for the purpose of obtaining their fingerprints. In the case Mikolenko v. Estonia, concerning the limits of pre-removal detention, the success and the prospect of the removal depended on the applicants co-operation. The court held that when a detainee refuses to co-operate there can not be a reasonable prospect of removal. Further detention will be in breach of
article 5 (1) (f) of the European Convention on Human Rights and the detainee must therefore be released.\textsuperscript{80}

4.1.2 Detention of asylum-seekers and irregular migrants under Italian law for the purpose of obtain fingerprints

The Italian Constitutions states that the legal status of foreigners is regulated by law in conformity with international norms and treaties, and the same article endorses the right to asylum.\textsuperscript{81} The Constitution also guarantees the right personal liberty and states that no one may be detained except for judicial reasons and in a lawful manner.\textsuperscript{82} The fundamental rights of undocumented migrants are stipulated in article 2 (1) of the Immigration Act. The article states that non-citizens, regardless if how he or she is present at the territory, shall have his or hers fundamental rights recognized.

Italian detention-related laws and practices distinguish between lawful detention of asylum-seekers and irregular migrants. Article 20 (1) of the Procedure Decree 25/2008, which transpose the Asylum Procedure Directive into Italian law, prohibits the detention of asylum-seekers for the only purpose of examining their asylum request.\textsuperscript{83} The grounds for lawfully detaining asylum-seekers are set up in the same article stating that the chief of the Questura (the Immigration Office of the Police) can detain an asylum seeker; (a) who falls under the exclusion clauses laid down in article 1 (f) of the 1951 Geneva Convention; (b) who has been convicted for one of the crimes listed in article 380 (1) and (2) of the code of penal procedures, as well as for crimes related to drug trafficking, smuggling of migrants recruitment of persons into prostitution and sexual exploitation and employment of children in illegal activities; or (c) who has been notified with an expulsion. Hence, there is no lawful ground for detaining an asylum-seeker for the purpose of verifying his or her identity as in EU law. Though, article 20

\textsuperscript{80}Mikolenko v. Estonia, Application no. 10664/05, Judgement of 8 September 2009.

\textsuperscript{81} Article 10 of the Constitution of the Italian Republic.

\textsuperscript{82} Article 13 of the Constitution of the Italian Republic.

\textsuperscript{83} Procedures Decree 25/2008; Dicreto Legisaltivo 28 Gennaio 2008 No. 25, Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato (Italian).
(2) states that persons requesting international protection must stay in a reception
centre, CARA (Accommodation Centers for Asylum-seekers), when it is necessary to
verify or to determine his or her nationality or identity. These centers are open centers
for the purpose of accommodation, basic services, emergency treatments and legal
counseling. The requirement for the asylum-seeker to stay in such an accommodation
for the purpose of identification can therefore not be seen as a deprivation of a persons
liberty.

The Italian law and detention practices concerning irregular migrants has a wider scope
of application. Detention of irregular migrants is permitted when it is not possible to
carry out an expulsion order by accompanying a person immediately to the border or to
push the person back immediately, due to temporary situations impeding the
preparation of repatriation. According to article 14 of the Immigration Act irregular
migrants can be detained at specified facilities for a period that is strictly limited to the
time necessary to determine the identity or nationality of the person. Other
circumstances permitting detention relate to the risk of the person absconding the
expulsion order. The difficulty of verifying the persons identity or nationality is also a
legal ground for extending the time limit of the detention period.

The obligation under Italian law to fingerprint third-country nationals who are applying
for a residence permit and in cases where there is a reason to doubt the identity of the
person does not correspond directly to the possibility to detain asylum-seekers for the
purpose of taking their fingerprints. Detention of asylum-seekers for the purpose of
verifying identity is not permitted at all under Italian law. Concerning the lawful ground
for detaining irregular migrants, it can be questioned whether the ground would permit
detention for the purpose of taking fingerprints. To apply article 14 of the Immigration
Act, an expulsion order needs to be carried out. The Member States should ensure that
fingerprints are taken immediately upon apprehension in connection with the irregular
crossing. No expulsion order is pending at this time. It can be argued that the detention
may only be lawful if the provisions provided are to the standard suggested by the

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84 Legislative Decree No. 286 of 25 July 1998 on immigration and on dispositions applicable to foreign
citizens (referred to as the Immigration Act).

85 See article 5 (2) bis. 4 and article 6 (4) of the Immigration Act.
Commission’s best practice. If a third-country national refuses to have their fingerprints taken they are seen as irregular migrants. The third-country national is then staying on the territory illegally and an expulsion order can be carried out. The issue of the expulsion order will make it lawful to detain the irregular migrant on the basis of article 14 and the obligation to verify the persons identity including the taking of fingerprints.

Following the discussions at the European level on the possible common practices to fulfill the obligation under the Eurodac Regulation to take fingerprints, the Italian Interior Ministry drafted a Circular with instructions to the authorities working with the identification of arriving migrants. The purpose of the Circular was to clarify the obligation to take fingerprints and the measures permitted when third-country nationals refuse to have their fingerprints taken. The Circular states that migrants who enter the territory illegally, also after being rescued at sea, should be identified by obtaining their personal and biometric details. The Circular underlines that the refusal to get fingerprinted is a crime under Italian law and that the refusal can result in judicial charges. The refusal to prove the identity when asked by the authorities to do so is stipulated as a crime, punishable with a fine according to article 4 of the Consolidated Law on Public Security and article 650 and 651 of the Criminal Code. The circular also states that the Police authorities can obtain the fingerprints even if the person refuses to have them taken and that it may be done by the use of force when considered necessary. The use of force is not defined in the circular and it is unclear if "the use of force” constitutes physical coercion or other coercive measures.

86 Ministero dell’Interno, Circolare, 26 Settembre 2014 (Italian)

4.2 Physical force

4.2.1 The practice of physical force on asylum-seekers and irregular migrants under EU law for the purpose of obtaining fingerprints

This section will examine whether it is permissible under EU law to use physical coercion for the purpose of fingerprinting asylum-seekers and irregular migrants. The meaning of physical coercion refers to the use of physical force, in this case to forcefully open someone's hand in order to obtain the person's fingerprints.

The use of coercion and force is subject to the Member States' national laws. In most cases, the authorities' possibility to use physical force is provided by security legislations such as Police regulations and criminal provisions. The use of coercive measures must though be practiced in full respect of fundamental rights guaranteed by the European Convention on Human Rights, as well as the principles of necessity and proportionality.

4.2.2 The European Convention on Human Rights - article 3 and the prohibition of torture

Article 3 of the European Convention on Human Rights enshrines an absolute right prohibiting torture, and inhumane or degrading treatment or punishment. The state must not engage in torture, or inhumane or degrading treatment and is obliged to prevent such treatment from happening. Not all types of treatment fall within the scope of the article. To be considered a breach of article 3, the conduct must involve a minimum level of severity. Whether the threshold has been reached depends on the circumstances of the case, such as the person's vulnerability, the duration of the treatment and the physical and the mental effects. The behavior needs to be classified under the article either as torture, inhumane or degrading. For the behavior to classify as torture and inhumane treatment, the treatment needs to be severe, which includes intense mental and physical suffering. Hence, the threshold for torture and inhumane treatment is high, and it can

88 Ireland v. the United Kingdom, Application number 5310/71, Judgement of 18 January 1978.

89 Council of Europe, The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights, Human rights handbooks No. 6, pp. 11 and 16.
be argued that it is unlikely that physical force for obtaining fingerprints, such as opening the persons hand, automatically reached the requirements. Degrading treatment on the other hand, aims at aroused feelings such as fear, anguish and inferiority that humiliates and debases the victim. Whether the treatment is degrading is subjective and only the victims feelings are sufficient for the assessment.\textsuperscript{90} One could consider that it is likely that the person who is fingerprinted against his or her will with the use of physical force will feel diminished and degraded by the authorities decision to use force against the person’s will. Again, it needs to be assessed whether the required severity is reached, as well as if the use of force can be deemed necessary and proportionate.

The use of physical force for the purpose of taking someones fingerprints has never been tried by the European Court of Human Rights. The court has though ruled on ill-treatment in connection with identity checks, and whether article 3 has been breached in such a case. In the case \textit{Darraj v. France}, the court ruled that the use of physical force against a 16 year-old boy during an identity check at the Police station had been disproportionate. The boy was stopped by the Police and was brought to the station for an identity check since he did not carry any papers proving his identity. The boy had been handcuffed and hit several times by the Police officers, resulting in bruising and a fracture. The treatment was considered inhumane and degrading, and that the use of force exceeded a reasonable use of force in relation to the circumstances of the case. The behavior was considered a violation of article 3.\textsuperscript{91} The court reached the same conclusion in the case \textit{Sarigiannis v. Italy} concerning a father and a son who were detained by the Revenue Police during an identity check at an Italian airport. The applicants in the case had objected to the identity check, stating that the check was discriminatory and unlawful. The applicants were then detained for not disclosing their identity on the basis of article 14 of the Italian Immigration Act. The ground for detention was considered lawful by the court, but not the force used while the applicants were detained. The father had suffered a cranial trauma, multiple grazes to the back, wrists, ears and neck and the son had suffered sprains of both wrists, bruising and grazing to the left shin. It was shown that the Police officers also had been injured.


\textsuperscript{91}\textit{Darraj v. France}. Application no. 34588/07, Judgement of 4 November 2010.
during the incident. The use of force was though deemed disproportionate by the court. The court stated that the father had been uncooperative when he was stopped by the Police but that he had not been violent. The Police officers injuries were assessed as a matter of duress.\textsuperscript{92} Similar circumstances were present in the case \textit{Cigerhun Öner v. Turkey} where a Turkish minor refused to cooperate with the Turkish authorities during an identity check. The 12-year-old boy was ill-treated by Police officers while being held in police custody, after he refused to give his name in an identity check, leaving him with bruises on his thigh and near his right eye. The court found that the boy had been subjected to inhuman and degrading treatment in violation of article 3 and that there had been no effective punishment of the Police officer responsible, in further violation of article 3.\textsuperscript{93}

The cases that has been presented concern the use of force, and the use of necessary and proportionate force by the authorities, during an identity check. The case of \textit{Sarigianni} and the case of \textit{Cigerhun Öner} also concern the use of force in relation to article 3 of the convention when the applicant had been uncooperative and refused to provide details about their identity. It should be stressed that the reviewed cases concerned citizens of another Member State or citizens of the state in question, and not third-country nationals. However, the rights guaranteed by the European Convention on Human Rights applies to ”everyone”, including asylum-seekers and irregular migrants, as stated in article 1 of the Convention. It may therefore be concluded that the judgements may provide some guidelines concerning the use of coercive measures on asylum-seekers and irregular migrants.

In the presented cases the court dealt with applicants that had been injured quite severely by the officers. All applicants had been abused, resulting in bone fractures and bruises, all typical examples of behavior that should fall within the scope of article 3 considering the severity and circumstances of the cases. As previously stated, not every treatment falls within the scope of the article and the treatment needs to be of a

\textsuperscript{92} \textit{Sarigiannis v. Italy}, Application no. 14569/05, Judgement of 5 April 2011.

\textsuperscript{93} \textit{Cigerhun Öner v. Turkey}, Application no. 2858/07, Judgement of 23 November 2010.
particular severity. The opening of someone's hand with the use of force for the purpose of taking the person's fingerprints also needs to be of a certain severity for it to be distinguished as degrading treatment. It would require quite a lot before the use of force to open someone's hand resulted in similar injuries as in the referred cases. The wording of article 3 though suggests that minor injuries fall within the scope of the article since degrading treatment compromises emotions, such as fear and inferiority. The European Commission on Human Rights also has formulated degrading treatment as "treatment that drives the victim to act against his will or conscience". Physical force, even less severe and at the minimum level, can undoubtedly be unpleasant, distressing and humiliating for the person exposed, but the necessity of using force for the purpose of achieving a given objective can have an impact on the treatments lawfulness. Opening someone's hand by force against the person's will for the purpose of obtaining the fingerprints can be degrading but the use of physical force may also be strictly necessary for identification purposes and serve other purposes, ultimately the upholding of migration policy goals in the Union, as well as an Area of Freedom, Security and Justice. One can also argue that if the asylum-seekers or irregular migrants would not refuse to be fingerprinted, no coercive measures need to be used to ensure that the requirements set up by the Eurodac Regulation and the Members States national laws are met. The underlying purposes for obtaining fingerprints and the interests of the Union must be weighted against humanitarian aspects and human rights. Circumstances, such as the possibility that the asylum-seeker or irregular migrant might already have been detained due to the fact that they are refusing to have their fingerprints taken, should be considered to be in favor for the individual when assessing the proportionality. That the applicant was detained and thereafter abused in the Sarigiannis case and in the Cigerhun Öner case was considered an aggravating circumstance by the European Court of Human Rights.

94 The separate opinion of Judge Fitzmaurice in the case Ireland v. the United Kingdom, Application No. 5310/71, Judgement of 18 January 1978 paragraph 27, known as the case of the five interrogation techniques, explain the notion of "degrading treatment" as "something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers...".

4.2.3 The European Commission’s best practice and the use of physical force

The Commission’s best practice is providing some guidance regarding the possibility to use physical force in order to obtain fingerprints from asylum-seekers and irregular migrants. The Commission though suggests that physical coercion should be allowed if the initial counseling, whereby the third-country national is explained his or her rights and obligations, does not succeed and the person still refuses to co-operate with the authorities. The best practice states that officials trained in the proportionate use of coercion may apply the minimum level of coercion required, while ensuring respect of dignity and physical integrity of the person, to take the fingerprints. The Commission suggests that authorities carrying out the procedure conduct a case-by-case assessment, taking into account the specific circumstances and vulnerabilities of the person concerned and that the use of force is always recorded. The record should be retained for as long as necessary in order to enable the person to legally challenge the actions of the authority.96

The Commission’s suggestions are an attempt to clarify the practices when asylum-seekers and irregular migrants refuse to have their fingerprints taken. It is although questionable if the suggestions are sufficient when dealing with measures infringing human rights. The minimum level of coercion that may be used is not detailed or explained. Like with a possible lawful ground for detaining asylum-seekers and irregular migrants it is disputable whether the necessity of the use of force is in line with the purposes and aims of the Eurodac Regulation. Since, the taking of fingerprints is not an objective in it self, but a means of a form of evidence for the application of the Dublin Regulation.97

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96 European Commission’s staff working document, Supra note 5.
97 European Council on Refugees and Exiles, Supra note 76, pp. 8-10.
4.2.4 The practice of physical coercion on asylum-seekers and irregular migrants under Italian law for the purpose of obtaining fingerprints

There is no provision in the Italian Constitution equivalent to the rights guaranteed by article 3 of the European Convention on Human Rights, but article 13 of the Constitution states that any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished.98

As stated previously, there is an obligation under Italian law to follow orders given by the public security authorities, including for the purpose of proving one's identity. Non-compliance with the obligation is a crime and punishable with a fine.99

Current legislation does not provide for the possibility of the public security authorities to use physical coercion to compel someone to have their fingerprints taken. The authorities' possibility in general to use lawful physical force is affected by whether the person in question is using active resistance or passive resistance. It is permitted to use necessary and proportionate force when the person is violent or use violence against an officer. The situation is more complicated concerning the use of force to overcome passive resistance, which is usually the case when asylum-seekers and irregular migrants refuse to get fingerprinted.100 By law the use of physical force is only permitted in cases of passive resistance if the person is subjected to a preliminary investigation. Then Police officers may obtain hair and saliva from the person, in full respect for the person's dignity and with the approval of a Public Prosecutor.101 The Italian Court of Cassation has ruled on the use of physical force in cases of passive resistance regarding a person refusing to give details about his identity and to follow the

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98 The fundamental rights in the European Convention on Human Rights is though guaranteed in article 117 of the Italian Constitution. The Convention's scope and effects on Italian national law and the legislators' obligation to comply with the standards set up by the Convention was clarified in the Constitutional Courts judgements no. 348 and n. 349 of 2007.

99 See article 4 of R.D. 18 giugno 1931, n. 773 (Gazz. Uff. 26 giugno 1931, n. 146): Approvazione del testo unico delle leggi di pubblica sicurezza and article 650 and 650 Codice Penale (Testo coordinato ed aggiornato del Regio Decreto 19 ottobre 1930, n. 1398), (Italian).

100 Associazione per gli Studi Giuridici sull'Immigrazione, L'identificazione dei cittadini stranieri da parte delle forze di Polizia e il divieto dell'uso della forza per i rilievi fotodattiloscopici, Scheda pratica, 2014, (Italian), pp. 5-9.

101 See article 349 par. 2 of the Code of Criminal Procedure.
Police to the station. The question was whether it would be permissible to escort the person by force to the office. The court stated that the refusal to provide one’s personal details justifies the action of escorting the person coercively and the use of physical force if the person refuses the escort. The same justifiable ground also applies in cases of passive resistance. The court underlined that the use of force must be strictly proportionate to the type of degree of resistance.102

The Circular drafted by the Italian Ministry of Interior with instructions to the authorities concerning practices for fingerprinting arriving migrants briefly touches upon the possibility to use force for the purpose of fingerprinting migrants. The Circular states that the fingerprints of third-country nationals can be taken by the use of force when it is considered necessary.103 What kind of force is considered to be lawful is not defined. Also, no guidance is provided concerning the assessment of necessity and proportionality.

4.3 Concluding remarks on the possible use of coercive measures for the purpose of obtaining fingerprints

In the previous chapter it has been demonstrated that article 5 (1) (b), rather than article 5 (1) (f) of the European Convention on Human Rights, may provide a justifiable ground for detaining asylum-seekers and irregular migrants for the purpose of obtaining their fingerprints. It has though been questioned whether the Commission’s proposal to detain asylum-seekers and irregular migrants on the basis of article 8 (3) (a) of the recast Receptions Conditions Directive and article 15 of the Return Directive can be considered to serve the objectives that the provisions are aiming to fulfill. To invoke coercive measures on a legal ground that is not closely connected to its actual purpose compromises legal certainty and may in an arbitrary way undermine human rights. The same conclusion can be drawn from the Italian national practices for using detention to obtain fingerprints. Under Italian law, there is also an uncertainty about the legal ground for using detention for this purpose.

103 Circolare, Ministero dell’Interno 26 Settembre 2014, (Italian).
When finding a lawful legal ground to forcefully open someone’s for the purpose of obtaining the persons fingerprints, based on article 3 of the European Convention on Human Rights and its case law, it has been argued that it is uncertain if the use of force by trained personnel as suggested by the Commission will be of such severity that is required by article 3. A possible legal ground for such measures may also be supported by the case law of the Italian Court of Cassation, but neither in Italian law, nor in the Commission’s best practice is it defined what is deemed to be minimum coercion and what is considered to be a proportionate use of force.

In this chapter, some factors has been identified to be important for the assessment of the criteria of necessity and proportionality, and for the balance of interests. Coercive measures can only be used as a last resort when no other less coercive measures can be used, and has to be proportionate to the objective to be achieved. The objective to be achieved, along with the Union’s general interests in migration matters, has been identified as the fulfillment of the Eurodac Regulation aiming at facilitating the Dublin Regulation and the allocation of asylum applications across the Member States. The interests of the asylum-seekers’ and irregular migrants’ right to liberty and their protection against torture and degrading treatment also need to be balanced against the overall purpose for fingerprinting asylum-seekers and irregular migrants. Namely to ensure that key elements of the Union’s migration policy are met, such as upholding the European Common Asylum System, an Area of Freedom, Security and Justice and the free movement of persons within the Schengen area - one of the fundamental objectives of the Union.

If using coercive measures on asylum-seekers and irregular migrants, who are refusing to be fingerprinted, in fact constitutes a human rights violation, together with an evaluation on whether it is justifiable to use coercive measures for this purpose will be further discussed in chapter 6.
5 How to enforce the obligation to fingerprint asylum-seekers and irregular migrants in the Member States

The Eurodac Regulation requires that all asylum-seekers and third-country nationals apprehended illegally crossing an external border of a Member State, that are over 14 years of age, are fingerprinted. Third-country nationals found illegally on the territory of a Member State may also be fingerprinted for the purpose of checking whether the person previously has lodged an asylum application in another Member State. How to obtain the fingerprints and the procedure that is used are up to the Member States to determine in accordance with their national laws and practices.

In this thesis the Italian procedure for obtaining the fingerprints from asylum-seekers and irregular migrants has been examined, as an illustration of a Member State’s national practices for identifying migrants. From the findings it can be concluded that the practices, especially when the asylum-seeker or irregular migrant is refusing to have their fingerprints taken, do not allow fingerprints to be taken to the extent that is required to fulfill the Eurodac Regulation. There is for example no lawful ground for detaining asylum-seekers for the purpose of determining the identity of the person under Italian law and the practices for using physical force for the purpose of obtaining someone’s fingerprints are based on unclear legal grounds.

A relevant question is therefore if the European Union can enforce Italy and other Member States to comply with the obligations under the Eurodac Regulation to fingerprint asylum-seekers and irregular migrants?

The Commission’s suggestions on possible practices to coercively obtain fingerprints from asylum-seekers and irregular migrants is part of a non-binding document which is used as a soft law tool to coordinate national practices and policies. The guidelines have limited legal force and does not have any enforcement mechanisms. However, the Member States need to take the guidelines into account when performing the procedures for obtaining fingerprints concluded in national laws and practices. The norms developed in this way are not directly applicable or transposable into national law, but
the Member States commit themselves to engage in the coordination mechanism. In this way the Member States room for maneuver regarding the national practices for obtaining fingerprints from asylum-seekers and irregular migrants is slightly reduced. The fact that the guidelines have certain hard law characteristics, such as the imposing of an obligation, also effect their legal status.

The European Commission are not in the position to call states to account based on the non-compliance with the guidelines. The question is though whether the Commission can impose an enforcement action on a Member State who fails to systematically fingerprint asylum-seekers and irregular migrants in compliance with the Eurodac Regulation. In this case based on the fact that states such as Italy to some extent are failing to fulfill the Eurodac Regulation based on insufficient national identification practices. The Commission can perform this task in its share of competence in articles 77-79 of the Treaty of the Function of the European Union (TFEU). The failure to comply with EU law, stated in the Commission’s right to initiate a procedure for failure to fulfill an obligation in article 258 TFEU, can be constituted in different forms, for example a failure to apply and enforce a regulation. However, with the present political conditions in the Union, with competing policy opinions on migration between the Member States, is it unlikely that such a process would be initiated in the near future.

The Member States possibility to fulfill the obligations under the Eurodac Regulation is to some extend held back by the dissenting political options in the Union. Member States that are typically states where asylum applications eventually are made are trying to push the Member States of first-arrival to increase their resources to enable a swifter and more comprehensive identification procedure. The Member States of first arrival, including Italy, on the other hand states that they lack resources to manage to systematically fingerprint the arriving migrants, due to the largely increased influx of

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asylum-seekers and irregular migrants to their borders.\textsuperscript{106} In some cases, as found in this thesis, it is the national legal framework that is preventing the Member States from fingerprinting migrants to the extent that is requested by the Union.

6 Legal and human rights concerns about using coercive measures for the purpose of fingerprinting migrants

6.1 Are human rights violated?

When identifying factors that might affect the outcome of the balancing of interests of the asylum-seekers’ and irregular migrants’ right to liberty, and their protection against torture and degrading treatment, against the general interests of using coercive measures, the question must be asked whether a human rights violation in fact may occur. The reason for the Commissions’s suggestion for the use of detention and physical force as measures to fulfill the obligation to obtain fingerprints in the first place is due to the fact that many migrants are refusing to participate in the identification process when asked to do so by the authorities of the Member State. Accordingly, one can argue that if the asylum-seekers or irregular migrants would not refuse to be fingerprinted, no coercive measures need to be used to ensure that the requirements set up by the Eurodac Regulation and the Members States national laws are met. The use of detention and coercive measures is then a necessity as a last resort, when no other less coercive measures, such as to verbally convince someone, is effective. The necessity to use coercive measures for this purpose is then deemed to be a determining factor. However, an additional issue concerns the requirements that can be imposed upon the the asylum-seekers and irregular migrants and their obligation to provide their fingerprints. In this thesis, it has been found that the Member States obligation to obtain fingerprints in accordance with the Eurodac Regulation is not mirrored by a corresponding obligation on the asylum-seekers and irregular migrants to provide their fingerprints. In this thesis, it has been found that the Member States obligation to obtain fingerprints in accordance with the Eurodac Regulation is not mirrored by a corresponding obligation on the asylum-seekers and irregular migrants to provide their fingerprints to the border authorities. Under current EU law, the migrants arriving in the Union has the right to refuse to not leave their fingerprints upon request. One possibility is to criminalize the refusal to comply with an order, as in Italy, but this does not resolve the practical issues and it is not desirable to link migration with the notion of criminalization. Taking this into account, the premiss should be that any use of coercive measures is to be considered an infringement of human rights, and that the measures needs to be clearly stated and defined by law.
6.2 Factors affecting the balance of interests

All migrants have human rights, even when they are residing in a country where they are not citizens. Human rights standards set up by the European Convention on Human Rights also apply to non-EU citizens and the general rule is that the rights should be guaranteed without discrimination between EU-citizens and third-country nationals. This is demonstrated by the use of the word "everyone" as the subject in some of the articles. Asylum-seekers are also a particularly vulnerable group, fleeing from persecution and/or armed conflicts, giving them a specific protective status under the UN’s 1951 Refugee Convention.\textsuperscript{107} It should also be recalled that many of the asylum-seekers already have suffered serious ill-treatment in their country of origin or on their journey towards Europe. It has therefore previously been questioned whether these fundamental rights can be restricted for the purpose of facilitating the fulfillment of the Eurodac Regulation, and ultimately the Dublin Regulation. As stated previously, the Dublin Regulation is determining which state is responsible for an asylum application, and one of the criteria is that the Member State where the asylum-seeker first entered the EU is responsible for the application. This criteria also seeks to ensure that at least one Member State is handling the application and aims to prevent migrants to apply for asylum in more than one country. In addition, concerns may also be raised regarding the fact that a person that has been subjected to coercive measures for the purpose of obtaining the fingerprints may be detained shortly after, but on the basis of a return decision when there is a risk that the person absconds, as stated in the Return Directive. Migrants, who have suffered ill-treatment, are at risk of being subject to coercive measures not only once, but twice.

If coercive measures for the purpose of obtaining fingerprints are to be considered lawful, it is required that the infringement of fundamental rights are proportionate and necessary for the objective to be achieved. In this case by striking a fair balance between the asylum-seekers’ and irregular migrants’ right to liberty and personal dignity, and the Union’s interest of maintaining a Common European Asylum System through the mechanisms allocating asylum applications across the Member States. The

\textsuperscript{107} United Nations, The 1951 Convention and Protocol relating to the status of refugees.
proportionality test implies that the measure is disproportionate, even if it is considered to be necessary and appropriate, if it imposes an excessive burden on the individual.\textsuperscript{108}

In the \textit{Saadi case}, where the European Court of Human Rights ruled that article 5 of the Convention had not been breached, the six dissenting judges stressed their concern about the excessive use of detention used on asylum-seekers and irregular migrants.\textsuperscript{109} The dissenting judges underlined that detention always has to be in close connection to the aims to be achieved, and that this requirement is not met when the detention is pursued to facilitate administrative expediency unrelated to the initial grounds for the detention. In the \textit{Saadi case} the dissenting judges deemed the detention to be unrelated to preventing the applicant’s unauthorised entry into the Member State, and concluded that less coercive measures should have been used. It should also be stressed that the European Convention on Human Rights is applicable in conjunction with other international instruments protecting fundamental rights. The opinion of the dissenting judges is also based on the case \textit{Hugo Van Alpen v. The Netherlands}. The case is referring to article 9 of the International Covenant on Civil and Political Rights prohibiting arbitrary arrest and detention, also in cases of immigration control, and the fact that the Human Rights Committee’s case law has interpreted that the detention can not be imposed on grounds of administrative expediency.\textsuperscript{110} The concerns stressed by the dissenting judges in the Saadi judgement has been raised by The Parliamentary Assembly of the European Council and the Committee of Minister of the Council of Europe stating that respect should be encouraged for the safety and dignity of asylum-seekers and irregular migrants under all circumstances.\textsuperscript{111} Measures of detention of asylum-seekers should be applied only after a careful examination of their necessity in every individual case and should be prescribed by law and in conformity with standards


\textsuperscript{109} See the joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, \textit{Saadi v. the United Kingdom}, Application no. 13 229/03, Judgement of 11 July 2006.


established by the case law of the European Court of Human Rights. International law instruments share this view and article 31 of the UN Refugee Convention stresses that states should refrain from imposing penalties or unnecessary restrictions of movements of refugees entering the territory without authorisation. The application of the article requires that account is taken to both the developing factual circumstances affecting the movements of refugees and asylum-seekers and that the effective implementation requires concrete steps at the national level, such as ensuring that the persons are promptly identified and that the initial periods for detaining someone for the purpose of identification is minimized.

6.3 Is it justifiable to use coercive measures for the purpose of fingerprinting asylum-seekers and irregular migrants?

Whether it is justifiable to use coercive measures for the purpose of fingerprinting asylum-seekers and irregular migrants is as previously stated a matter of balancing individual human rights against the fulfillment of the Eurodac Regulation which aims to facilitate the Dublin Regulation. In a larger context it is also a matter of ensuring an Area of Freedom, Security and Justice and the free movement of people within the Union. Therefore effective controls and systematic identification procedures may be needed at the points of entry into the Union. Striking a fair balance between these interests is a difficult task because important values are at stake. There are well-founded grounds that support the necessity of a systematic identification process, not least to maintain basic values of the Union, and to maintain the rights that has been conferred to EU citizens in the Treaties. The right to liberty and the protection against torture, and inhumane and degrading treatment or punishment, are fundamental for upholding a credible human rights protection. Therefore, and based on precious findings in this thesis, my conclusion is that the Union at the very least should not restrict the asylum-seekers’ and irregular migrants’ right to liberty and their protection against torture, and degrading treatment, if the legal ground for coercively obtaining their fingerprints is not clearly stated in the law in line with the principle of legality.


It should also be stressed that migrants do not have an obligation under EU law to provide the authorities with their fingerprints, giving the migrants the right to refuse to leave their fingerprints in the Member State of first-arrival.

Finally, it should be emphasised that the issue ultimately derives from the fact that the mechanisms set up by the Dublin Regulation are not satisfactory. There are though other ways of allocating asylum applications across the Member States; ways that would pursue the principle of ”solidarity and fair sharing of responsibility” enshrined in article 80 of the Treaty of the Function of the European Union. If the ”irregular entry” criterion was removed from the Dublin Regulation and replaced with a ”free choice of Member State”, asylum-seekers would be registered in the Member State of entry and given a document recording basic data which would be presented to the authorities in the destination country.¹¹⁴ Coercion would only need to be used if applicants rejected in one Member State tried to make a repeated application in another. The incentive to refuse to be fingerprinted would decrease, which would facilitate the Union’s agenda on developing a Common European Asylum System.

Europe’s "refugee crisis" and its human tragedies has raised profound questions and challenges for the European Union’s asylum and migration policy and for the Member States of the Union, not least for Italy and other border Member States trying to put systematic identification procedures in place in line with the obligation to fingerprint arriving migrants under the Eurodac Regulation.

In this thesis, the effort to examine and evaluate how Member States lawfully, in full compliance with fundamental human rights, may use coercive measures to fingerprint asylum-seekers and irregular migrants who are refusing to have their fingerprints taken has touched upon several fundamental values of the Union. The European Union faces the challenge to maintain its reputation as a protector of human rights, while demands are raised to strengthen the external borders and tighten the controls. Striking a fair balance between humanitarian aspects of asylum and fundamental human rights and security concerns requires a comprehensive legal framework governing both guarantees and harmonised restrictions of rights and liberties. The principle of legality should always govern such a framework - including the possibility to use coercive measures to fingerprint asylum-seekers and irregular migrants against their will.
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