Protection of human rights in the case of immigration related detention in the EU:

Between international law and international relations

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"In particular, the plight of migrants in an irregular situation is one of today’s most critical human rights challenges. Perhaps the most important point to stress is that migrants, whether regular or irregular, should enjoy the same fundamental human rights as anyone else." Navi Pillay, UN High Commissioner for Human Rights

Abstract

The aim of this thesis is to explore the relation between the extent of abidance to human rights international law provisions in regard to the detention of immigrants in the countries of EU, and the motivations for doing so, as presented in the international relations theories. The principal research question is: Why are immigrants facing problems in obtaining human rights in the context of immigration related detention? The answers are implicitly found in the answers to the underlying question: Why do states crate and obey international law? Methodologically, the problematic is approached through the theoretical analysis of International Relation theories: Realist, Institutionalism, Liberalism and Constructivism. Each of these theories provides different factors as explanatory for the actions of the states, respectively: power, existence of institutions, interest of individuals and social practices. National law remains the key system in the protection of rights due to its enforceability. Despite the existence of provisions relating to the rights of aliens, national law primarily protects the rights of nationals. From the second half of the 20th century international law has developed rapidly and has influenced the development and advancement of human rights and standards. However, due to the lack of strength in its enforceability, its application is dependent of the political interest and motivation of individual states, both in their inclusion of international law provisions into their national legal systems and its enforcement, and in the use of the constellation of power in international relations in applying pressure on other states to do the same. Entities like European Union bring a new quality to this problematic, given its specific legal structure that has influenced the rethinking of national sovereignty as the uncontested authority in creating and abiding the law. Nonetheless, provision and protection of individual's rights remains tightly knit to and dependent upon citizenship.

Key words: Immigration Related Detention, Non-Citizens, International Law, Detention Conditions, International Relations
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1951 Refugee Convention: UN Convention Relating to the Status of Refugees

CAT: Committee against Torture, monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

CCPR: Human Rights Committee, monitors the implementation of the International Covenant on Civil and Political Rights by its State parties.

CEDAW: Committee on the Elimination of Discrimination against Women, monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women.

CERD: Committee on the Elimination of Racial Discrimination, monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties.

CESCR: Committee on Economic, Social and Cultural Rights, monitors the implementation of International Covenant on Economic, Social and Cultural Rights by its States parties

CMW: Committee on Migrant Workers, monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families by its State parties.

CRC: Committee on the Rights of the Child, monitors the implementation of the Convention on the Rights of the Child by its State parties

EC: European Commission

ECHR: European Court of Human Rights, supranational court established by the European Convention on Human Rights

ECJ: The Court of Justice of the European Union

EU: also Union, European Union, a partnership between 28 European States: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece,
Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom and Republic of Croatia

**European Convention on Human Rights:** Convention for the Protection of Human Rights and Fundamental Freedoms

**ICCPR:** International Covenant on Civil and Political Rights

**IR:** International relations


**SPT:** Subcommittee on Prevention of Torture, is a “treaty body in the United Nations human rights system. It has a preventive mandate focused on an innovative, sustained and proactive approach to the prevention of torture and ill treatment.”

**UNDHR:** The Universal Declaration of Human Rights

**Union:** European Union

**Human rights:** “Human rights are rights inherent to all human beings (…). We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.” This thesis will, by human rights, mean codified human rights and the authoritative interpretations of the codified text.

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DEFINITIONS

Asylum seeker: A person who applied for the status of a refugee but the decision determining his/her status has not been made

Citizen: A legally recognized subject of a state. In this thesis citizen means: A citizen of one of the member states and a citizen of the EU

Convention Against Torture: a UN convention, formally: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention: Formal multilateral treaties usually open for participation to all or a big number of states. Most commonly negotiated within international organizations.

Council of Europe: formally The European Council, an EU institution without legislative power that “provides the Union with the necessary impetus for its development and defines the general political directions and priorities thereof. It does not exercise legislative functions.”

Country of origin: The country where a person migrated from, and whose citizenship they hold

Declaration to a convention: Declaration made by states regarding their understanding of the text of a convention. Such interpretative declarations are not legally binding. Declarations are legally binding for the states if they are required by the convention itself, or if a treaty provides for it but does not require it to be made

Dublin System: 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 (recast), Regulation (EU) No. 603/2013 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the recast Dublin Regulation and Regulation (EU) No. 118/2014 which amends Regulation (EC) No. 1560/2003 laying down detailed rules for the application of the recast Dublin Regulation.

European Commission: “The European Commission is the EU's executive body and represents the interests of Europe as a whole (as opposed to the interests of individual countries). The term 'Commission' refers to both the college of commissioners and the institution itself – which has its headquarters in Brussels, Belgium with offices in Luxembourg. The Commission also has offices known as 'representations' in all EU member countries. The Commission's main roles are to: set objectives and priorities for action; propose legislation to Parliament and Council; manage and implement EU policies and the budget; enforce European Law (jointly with the Court of Justice); represent the EU outside Europe (negotiating trade agreements between the EU and other countries, etc.)”

European Commission: A body of the EU, “The European Commission represents the interests of the EU as a whole. It proposes new legislation to the European Parliament and the Council of the European Union, and it ensures that EU law is correctly applied by member countries.”

Immigrant: In this thesis an immigrant is a person who, for whatever reason, left their country of origin and arrived at the border or entered any of the Member States

Immigrated related detention: All forms of detention of non-citizens in the state detaining them as a response to migration. Usually has administrative grounds, however specifics can diverge among the Member States.

International law: In this thesis refers to the codified law created by states and addressing the states. Contains multilateral treaties, conventions, Convenants etc. as well as jurisprudence of international courts, as well as the interpretations of treaty based bodies in regard to the conventions they were established by. In this thesis it connotes international human rights law.

Irregular immigrant: also illegal immigrant, undocumented immigrant is a person who is present in a state without the permission of that state. Connotes illegal entry and/or stay

Jurisdiction: “The territory or sphere of activity over which the legal authority of a court or other institution extends” and “the official power to make legal decisions and judgements”

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5Official website of The European Commission, available online at: http://ec.europa.eu/atwork/index_en.htm
**Member States:** States members of the European Union

**Non-citizen:** also *alien,* “any individual who is not a national of a State in which he or she is present.”7 In this thesis refers to a persons who does not have a citizenship of any of the Member States, that is who is not a citizen of the EU

**Optional Protocol:** Additional legal instrument added to a treaty

**Quota:** “A quantitative restriction (quota or cap) which many countries place on the number of migrants to be admitted to their territory each year”8

**Refugee:** A person who has been granted a status of a refugee in the county where they are present, as defined in the UN Convention relating to the Status of Refugees9

**Regional law:** Regional level of International law, refers to the region of the EU. Mostly connotes law created by the

**Removal:** “The enforcement of the obligation to return, namely the physical transportation out of the country of a person who is in another country irregularly”10

**Return:** “The movement of a person who is returning to his/her country of origin, country of nationality or country of habitual residence usually after spending a significant period of time in another country. The return may or may not be voluntary”11

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**Rule of law:** The UN definition: "For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."\(^{12}\)

**Schengen Agreement:** An international treaty that creates common border for States Parties, removing internal borders and allowing free movement of citizens from States Parties

**State power:** the repressive power of the state and the power a state has in the realm of international relations

**States Parties:** “a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument.”\(^{13}\)

**Supranational:** The power or influence higher than the state

**The Court of justice of the European Union:** a supranational court that “interprets EU law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court if they feel their rights have been infringed by an EU institution.”\(^{14}\)

**Treaty based body:** Established by international conventions and in charge of monitoring their implementation

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**Treaty:** an instrument binding under international law, in this theses referees only those between states

**UN:** United Nations, international organization “committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Due to its unique international character, and the powers vested in its founding Charter, the Organization can take action on a wide range of issues, and provide a forum for its 193 Member States to express their views, through the General Assembly, the Security Council, the Economic and Social Council and other bodies and committees.”

1. INTRODUCTION

1.1 Contextual background

In 2012, immigration to EU, not including refugees and asylum seekers, amounted to 1 170 665 persons. Approximately 1.5 million recognized refugees live in the EU member states, Norway and Switzerland. Number of asylum applicants grew by 30 000 between 2011 to 2012. Europe now has 60 million international migrants (around 9% of total European population), 5% of whom are refugees. The number of irregular immigrants is estimated between 5 and 8 million. War in Syria, Afghanistan, Arab Spring and instabilities in other parts of the world are resulting in a great influx of immigrants, both documented (legal) and undocumented (illegal), to the European Union. Detention of such persons is a common practice among the EU Member States. International law, including the EU regional law contains a number of provisions regarding the rights of aliens and their detention. Harmonization process of EU provisions is taking place. EU migration policy has two aspects: economic one regarding the need for labor and the "failed" integration policies that reflect the need for a stricter border control and policy orientation towards return migration. This paper will not focus on the economic aspects. In regard to the detention, of asylum applicants and irregular migrants, the principle is that a person should not

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16 European Commission, Immigration in the EU, source: EUROSTAT 2014, “Data refers to non-EU nationals whose previous place of usual residence was in a non-EU country and who have established their usual residence in the territory of an EU State for a period of at least 12 months”, available online at: http://ec.europa.eu/dgs/home-affairs/e-library/docs/infographics/immigration/migration-in-eu-infographic_en.pdf
17 European Council on Refugees and Exiles, Refugees in the EU, official website, of ECRE, available online at: http://www.ecre.org/refugees/refugees-in-the-eu.html
19 Parliamentary Assembly, Council of Europe: Committee on Migration, Refugees and Displaced Persons, May 2012, available online at: http://assembly.coe.int/Main.asp?link=/committee/MIG/Role_E.htm
be held in detention for the sole reason of seeking international protection, and if detained it should be for as short as possible and subject to the principles of necessity and proportionality. Detention should particularly be in accordance with the Geneva Convention\textsuperscript{23}. Aside from the process of harmonization, Member States are parties to numerous international and regional conventions that contain provisions relevant to the detention of aliens, which protect human rights of both documented and undocumented migrants. Aside from conventions, relevant provisions are contained in protocols, declarations, principles and guidelines, all part of the international law\textsuperscript{24}. Directives of the EU address the problematic of undocumented migrants and asylum seekers.\textsuperscript{25} The author was unable to find a list of all detention and/or reception centers in the EU, however as visible from reports and comments of international bodies, they are present in almost all Member States\textsuperscript{26}. There is a great deal of evidence that detainees are deprived of liberty under criteria and conditions that are not in accordance with the rule of law.\textsuperscript{27}

\textsuperscript{23}Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 (‘the Geneva Convention’); also: 'The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation.’ Regulation (EU) No 604/2013

\textsuperscript{24}see Appendix 1


\textsuperscript{26}see : European Parliament study, The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states , IP/C/LIBE/IC/2006-181

\textsuperscript{27}"There is a great deal of evidence that, both in the UK and elsewhere in Europe and beyond, immigration detainees are deprived of their liberty in accordance with procedures and under criteria and conditions which fall short of rule of law standards. This is a matter of great concern. Those subject to immigration control are entitled to a presumption of liberty and freedom of movement. Wherever possible, methods other than detention should be identified and employed. Where detention does take place, it should be subject to rigorous criteria, scrutiny and safeguards. Standards should be principled, clear and transparent, and consistent." Study: Immigration Detention
Numerous reports by different committees related to the international conventions, have addressed the poor conditions in migration detention centers. These include, but are not limited to, systematic detention at borders, prolonged detention, not using detention as a last resort, lack of effective control of the conditions in detention centers, lack of access to detention centers by bodies of control, detention of undocumented children and lack of access to education, poor sanitary conditions in the centers, inadequate food and medical care, lack of access to legal help and lack of effective complaint system for the alleged violations against detainees, regulation of the usage of physical restraints of detainees, arbitrary expulsion of asylum seekers, detention in prison facilities.

International relations theory provides us with the logic behind the creation and implementation of International law, and can serve as an analytical tool in understanding the present conditions of immigration related detention in the European Union.

1.3 Aim, research question(s)

The aim of this thesis is to explore the relation between the extent of abidance to human rights international law provisions in regard to the detention of immigrants in the countries of EU, and the motivations for doing so, as presented in the international relations theories.

The objective is to examine, in the context of international relations theory, why are immigrants facing difficulties in obtaining their human rights despite a large body of international law provisions that protect them. The reasons for choosing this aim is the consideration of the historical context of the creation of international human rights law, and the current context in

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which the respect of human rights is challenged. It is challenged given the large number of documented and undocumented migrants, including refugees and asylum seekers arriving to the EU countries. In such situation the individual non-citizen subject of law seeking the protection of his rights has been replaced by a large group of non-citizens under the state jurisdiction seeking protection. This is evident in the case of migration related detention where the respect for the individual's human rights, given the group approach a state assumes in regulating detention, is replaced by the respect of human rights of a group.

The author proposes that International Relation theories offer the explanations to the motivations of states in creating and abiding the international law as well as the explanations for the relations between states on international level. When approaching the aim, the author supposes that the abidance to the human rights provisions relevant to the immigration related detention is determined by different reasons, and cannot be explained solely within one theoretical approach. The author further supposes that the large number of immigrants arriving in the EU changes the paradigm of human rights abidance from the relation: individual- state and introduces a new one: non-citizens en masse- state. Furthermore, the author assumes the position that the immigration related detention and the extent of abidance to international law is epiphenomenal to the state interests whose fulfillment is conditioned by the constellation of power in international relations.

**Research questions:** The main research question is: *Why are immigrants facing problems in obtaining human rights in the context of immigration related detention?* The answers to this question will be searched through the sub-questions, as presented below.

States are main actors in the creation of international law, and international law addresses the states for the most part. Human rights are primarily the rights of individuals, and the obligation for their respect, on the international level lies mostly on the states. There are several questions that arise in this problematic. Specific questions relating to human rights of detained immigrants fall under broader theoretical questions, primarily: Why do states create international law? Why

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29 The author finds this term to be most comprehensive term, synonyms include: as a body, all together, altogether, as a group, as a whole, jointly, esnamble, etc., see en masse. (n.d.). *Roget's 21st Century Thesaurus, Third Edition.* Available online at Thesaurus.com website: http://thesaurus.com/browse/en masse
do states obey international law? More specifically, Why did states create international human rights? and What is the position of non-citizens in this regard? Furthermore, What are EU provisions relevant to immigration related detention? and To what extent do Member States abide to these provisions? This thesis will first approach the motivation for the creation of international human rights and the human rights of non-citizens. Secondly, Why do states of EU obey international law? or Why don't states of the EU obey international law to the full extent? When attempting to address why detained immigrants face problems in obtaining their rights, the thesis will examine the motivations of states to abide international law, taking into the account the specifics of EU. The focus of the analysis is immigration related detention.

Research questions are addressed in the chapters 4 and 5 and are divided as follows:

Chapter 4, **Approaching the topic**, includes the following questions:

- Why did states create international human rights?
- What is the position of non-citizens in this regard?
- What are EU provisions relevant to immigration related detention?
- To what extent do Member States abide to these provisions?

Chapter 5, **Between international law and international relations**, includes the following questions:

- Why are immigrants facing problems in obtaining human rights in the context of immigration related detention?
- Why do states of EU obey international law?
- Why don't states of the EU obey international law to the full extent?
The author found it helpful to present the thesis and research questions by using a diagram:

**HUMAN RIGHTS OF IMMIGRANTS IN IMMIGRATION RELATED DETENTION: EU**

- Why are immigrants facing problems in obtaining human rights in the context of immigration related detention?

**INTERNATIONAL HUMAN RIGHTS LAW**

- Why did states create international human rights?
- What rights do non-citizens have?

**EUROPEAN UNION**

- What are EU provisions relevant to immigration related detention?
- To what extent do Member States abide to these provisions?

**IR THEORIES: INTERNATIONAL LAW**

- Why do states create international law?
- Why do states obey international law?

**MEMBER STATES ← EUROPEAN UNION → AN ACTOR IN IR**

- Why do states of EU obey international law?
- Why don’t states of the EU obey international law to the full extent?
1.3 Disposition

This thesis is divided into two parts:

1. Chapter 4 *Approaching the topic* offers a historical context of human rights and introduces the legal provisions and immigrants’ position in this regard, in relation to the immigration related detention. It includes the following:

**Why Human Rights?**

After presenting delimitations of the approach this thesis assumes regarding human rights, this section aims to present the human rights in a historical context of their creation, and their current relevance for the European Union, given the challenges it faces resulting from mass immigration. This is relevant given the authors claim of changed paradigm regarding human rights, considering the shift from individual as a claimant to human rights to the state to the non-citizens en mass as claimants.

**Rights of non citizens**

This section is dedicated to briefly presenting human rights of non-citizens on international, and regional EU level, and the state's obligations respectively. Since detained immigrants are non-citizens in the states detaining them, these rights are the standard applicable to the immigration related detention.

**Detention in the EU**

This section presents the EU legislation relevant to the immigration related detention and the conditions in the detention centers across the Member States. This is done in order to determine relevant law provisions and the extent of abidance to these provisions.

2. Chapter *Between international law and international relations* uses IR theories in order to explain why are immigrants facing problems in obtaining their rights. It includes:
Sovereignty

This section starts with the consideration of a state as a sovereign authority and the role of sovereignty in creation and abidance of human rights law. Furthermore, the relation between sovereignty and international law is contextualized in the European Union.

Levels of analysis

This section presents the relevant international actors in the realm of international human rights law: Member States, as individual actors and the EU as an actor.

European Union

EU is discussed as an entity in international relations and its position regarding the human rights international law provisions.

Why are immigrants facing problems in obtaining human rights in the context of immigration related detention?

The answer to the question lies in a broader theoretical consideration of the reasons states create international law, and the reasons they obey it, since the immigration related detention is primarily regulated by international law. Implicitly, the consideration is of the question: Why don't states obey international law? The possible answers are then explored in the theoretical realm of IR theories: Realism, Institutionalism, Liberalism and Constructivism.

Conclusion: This final section summarizes the previous ones.
2. **Methodology**

This thesis is constructed as theoretical analysis of factors affecting implementation of international law in the EU in regard to immigration related detention in the EU. It does not attempt to offer a direct solution to implementation problems, but rather aid such solutions by contributing to the knowledge on the factors affecting it.

Data used in this thesis is almost exclusively collected from official documents. These include international treaties and convenants, EU law provisions, reports of international committees established by international law, documents and research issued and published by the institutions of EU, or individual state governments. Other sources include academic research. Hence, the validity of information presented is ensured. All documents are available to the interested reader, hence the information presented is reliable. This data is used to answer the first set of research questions. Part of the thesis dealing with theoretical concepts uses theories of established scholars, and well known theoretical concepts. This thesis uses an analytical framework of different theories of International Relations in order to try and explain a phenomenon. It does not focus on one theory, but rather discusses the phenomenon through the lenses of different theories in order to bridge the gap between theory and chosen empirical phenomenon. In order to respect the ontology and epistemology of each theory, the thesis uses aspects of each separately, or rather it attempts to contextualize the conditions of immigration related detention in the EU in contrast to the relevant international law provisions in the light of aspect within different theories, without mixing the theories in one argument.

The main ethical consideration of the author is deception. In order to avoid misinterpretation of data, the author presented a detailed human rights legal framework and immigration related provisions, without offering personal interpretations. Furthermore, the author did not classify the conditions in immigrated related detention, but rather used official documents to describe it. Author attempted to avoid omission by using a significant amount of official documents reporting on the immigration related detention. Furthermore, the author attempted to remain as neutral as possible with the regard to the topic when discussing the problematic. However, the author acknowledges the possible bias, primarily in choosing the object of theoretical analysis and in presenting its importance as a question. Theoretical discussion related to the questions
Why? are based on different theories on the subject. The author attempted to avoid misinterpretation by presenting each theory beforehand, and did not mix arguments from different theories. Where it might not be clear from the outline of the text what theoretical approach a discussed argument is taken from, he author included a reference stating this information. The author admits omission of certain arguments within theories. This is due to the comprehensiveness of approaches within theories and the selection criteria of relevance to the international law abidance.

3. **Theoretical framework**

3.1. Ontology, Epistemology

Ontology of this thesis is both realist and relativist in regard to different aspects of the thesis. This is due to the fact that the thesis deals with the state of affairs, on one hand, and the theoretical debate on why the state of affairs is such as it is, on the other. Ontological realism, that presupposes a reality independent of anyone's awareness of it, belief system etc. is assumed when considering the existence of international law provisions enumerated in treaties, EU law provisions and the conditions in detention centers. These aspects are taken as given facts and no theoretical weight is attached to them\(^{30}\). Regarding human rights, the author assumes such ontological approach, since this thesis does not debate the nature of human rights but rather refers to the texts of international law provisions. Furthermore, the author considers the conditions of detention in contrast to mentioned provisions, that is, as objective realization of the provisions, rather than personal experience of detention, or any subjective belief on what the conditions of detention are. On the other hand, ontological relativism, as a belief that reality is socially constructed, where all explanations of a phenomena are taken as equally valid, is assumed when analyzing the reasons for the state of affairs regarding detention.

Accordingly, the author presents different theories of IR that provide often contrasting views on the same subject matter.

Epistemology of this thesis, like the ontology, is not uniform. Rather, the aspects considered ontologically realist are approached from a position of positivist epistemology. The author maintains full distance from the subject matter and only presents it as it is, with no relation with the matter at hand.\textsuperscript{31} The his regard, the author is in accordance with the "theory that laws and their operation derive validity from the fact of having been enacted by authority or of deriving logically from existing decisions, rather than from any moral considerations (e.g. that a rule is unjust)."\textsuperscript{32} On the other hand, when assuming ontological relativism, the epistemology is subjective, meaning it is the subjective understanding of the phenomena that is used in explaining it.\textsuperscript{33}

3.2. Theories and theoretical concepts

When approaching the international human rights law, the thesis will rely mainly on the theories of human rights by Jack Donnelly and Andrew Heard.

Legal theoretical concept of sovereignty is also used in this thesis. In order to clarify future argument, this concept will be briefly presented here in two of its aspects: positive and negative:" states have been internationally enfranchised and possess the same external rights as all other sovereign states (negative sovereignty). But most of them lack the real features of statehood in providing public goods for their citizens (positive sovereignty)."\textsuperscript{34} Nonintervention and formal equality have been present in theory as dominant qualities of negative sovereignty since the

\textsuperscript{31}Fernandez, Christian, Lecture 2, ppt, \textit{Theory of Science and Research Methodology}, IMER master programme, Malmo University, 28 January 2014


\textsuperscript{33}Fernandez, Christian, Lecture 2, ppt, \textit{Theory of Science and Research Methodology}, IMER master programme, Malmo University, 28 January 2014

Treaty of Westphalia. On the other hand "a state is positively sovereign when it possesses the internal resources to decide which kind of polity it wants to become and acts on it successfully."35

There is no single theory that offers a complete explanation to the question why do states, or why don't states abide international law. Rather, combination of different explanations, provided within aspects of existing theories, can complement each other in providing a deep insight into the problematic. Thesis will use the following International Relations theories: Realism, Institutionalism, Liberalism, and Constructivism. These theories will be briefly presented here in general, as a background explanation in order to enable a better understanding of the arguments later selected, and in order to avoid negating specific epistemology of each theory. The specific stands on international law, within the selected theories, will be discussed later in the thesis.

None of these theories are monolithic in their explanations and positions. Main delimitation of the approach this thesis assumes with respect to the relevant IR theories used, is the fact that the author will not debate all relevant explanations and positions offered within different theories, but rather use those aspects the author finds most useful as analytical tools for a specific context in which a question is problematized. This does not mean the disregard for the full complexity of ideas presented within a certain theoretical paradigm, but rather a critically selective approach.

Realist theory sees international relations as anarchical and dominated by uncertainty, where no central authority can emerge, sand sovereign states are bound only by coercion or their own consent, and their main interest is power. Principal interest of sovereign states is survival, and they are rational actors in preserving it. In anarchy of international relations, Great Powers are decisive. Realist theory of international relation sees international law as a reflection of balance of power, however it can only be realized through state power, and it realization is dependent on the state's willingness to do so as conditioned by its interests. Hence, the states may create international law and institutions, they may reinforce these provisions, but such actions are determined by material interests and power relations.36

35 Ronzoni, Miriam, Two conceptions of state sovereignty and their implications for global institutional design, Critical Review of International Social and Political Philosophy Vol. 15, Iss. 5, 2012
36 Slaughter ,Anne-Marie, International Relations, Principal Theories, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011), available online at:http://www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG.pdf
Institutionalism, like the Realist theory, sees international relations as anarchical, however they see co-operation as a rational, self-interest strategy. Institutions, as sets of rules, norms, practices and decision-making procedures overcome uncertainty that undermines co-operation\textsuperscript{37}.

Liberalism acknowledges the importance of national characteristics in international relations. Andrew Moravcsik's theory of international relations has three core assumptions: non-state actors are fundamental in world politics, state represent and serve the interests of dominants subset of society, where the configuration of these interests in the international system determines state behavior. This theory offers useful insights important when creating international institutions\textsuperscript{38}.

Constructivism has its counterpart in Rationalism. It stresses that variables like military power or trade relations have social meaning where identity and belief belie simplistic notion of reality in which States pursue their interests. Constructivists distinguish between "logic of consequences" that rationally chosen actions maximize State's interests and “logic of appropriateness where rationality is heavily mediated by social norms. Furthermore, they emphasize non-state actors in international relations that are able to influence the behavior of states through rhetoric. Non-state actors are not passive and may pursue their own interests even against the wishes of States (eg. protection of human rights)\textsuperscript{39}

4. APPROACHING THE TOPIC

4.1 Why human rights?
The approaches to the basis for human rights contain various explanations and reasons for the existence of universal human rights. The extent of this debate is outside the scope of this thesis. What is relevant is the commonality between them: they all desire to protect and cultivate some quality of life and include subsistence rights. The choice of foundation of human rights may depend on what is wished to be protected. According to the United Nations Declaration on Human Rights, human rights come from "the inherent dignity of the human person", and as such they are particular to human beings. Human dignity, or "fundamental right to human dignity and integrity", is a concept heavily used in the jurisprudence of the Court of Justice of the European Union. In literature there is a debate on who is the "human" possessing them and what are the traits making a human. Furthermore, some authors claim that human rights are not rights if they cannot be exercised. Approaching the topic of undocumented, detained migrants as rights holders, in the context of this debate would be interesting and insightful however lies outside the scope of this thesis. In order to avoid the debate on the nature of rights in human rights, this paper will, by human rights of immigrants mean codified, treaty based human rights in the body of international law.

International human rights development gained strength with the Universal Declaration of Human Rights (1948) as a first document enumerating basic civil, political, economic, social and cultural rights of all human beings. UDHR, Covenant on Civil and Political Rights (1966) with two Optional Protocols (1966, 1989), and the International Covenant on Economic, Social and Cultural Rights (1966) are known today as International Bill of Human Rights. These documents have been created after the WWII, during the Cold War period and the block (Western Block and Eastern Block) division of the world. Human rights emerged from experiences, hence this historical context is important to note given the changed paradigm of international relations and political situation in the world today. For example, the 1951 Refugee Convention, has faced


numerous criticism for its inadequacy in dealing with refugees today, mainly due to the fact that its provisions were created to address the issue in a given time and situation that has changed.\footnote{See: Parliament of Australia, Millbank, Adrienne; Research Paper 5, The Problem with the 1951 Refugee Convention, 2000-01, available online at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05} Today, most asylum applicants in the EU come from (in order of number of applications): Afghanistan, Syria, Russia, Pakistan, Serbia, Somalia, Iran, Iraq, Georgia, Kosovo.\footnote{Eurostat, Bitoulas, Alexandros, Population and social conditions, data in focus (2013), Asylum applicants and first instance decisions on asylum applications: 2013 - Issue number 3/2014} Evidently, these are conflict and post-conflict states. Illegal immigration is hard to document therefore there is little information available of the countries of origin of illegal immigrants. However, those are mostly poor, politically (stability, peace, security, legal order and protection of citizens) and economically (lack of conditions for economic development and meeting basic needs of citizens) unstable countries.\footnote{Global Commission on International Migration (GCIM), Crisis in the Countries of Origin and Illegal Immigration Into Europe Via Italy, October 2005, Global Migration Perspectives, No. 53, available at: http://www.refworld.org/docid/436630b04.html} Given this changing paradigm, EU is no longer faced with individual non-economic migrants but en mass migration flows form less stable parts of the world. International human rights are constitutive elements of "civilized statehood" and they impose an obligation on the states to implement and protect them on their territory in regard to their own nationals and aliens on their territory or otherwise under their jurisdiction. Problems arising from immigration related detention in regard to, at best poor conditions in detention centers, duration of detention, etc. face us with the question of implementation of human rights in the changed paradigm, where the burden of sheer numbers of both documented and undocumented migrants arriving to the EU on the other challenges the extent of abidance to human rights and implicitly the international legitimacy of the Member States\footnote{Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. The Power of Human Rights. 1st ed. Cambridge: Cambridge University Press, 1999. Cambridge Books Online. Available online at: http://dx.doi.org/10.1017/CBO9780511598777 47 Donnelly, Jack, Universal Human Rights in Theory and Practice, Cornell University Press, 2003 48 "To the extent the governments protect human rights they are legitimate." Donelly, Jack, Universal Human Rights in Theory and Practice, Cornell University Press, 2003 page 12}
4.2 Rights of non-citizens

Given the strong link between citizenship and obtaining rights, immigrants, especially undocumented immigrants, refugees and asylum seekers are very vulnerable groups against the state power. State power connotes the repressive power of the state and the power a state has in the realm of international relations. Majority of human rights provided in international conventions apply to non-citizens under the state jurisdiction. The ICCPR, like numerous other conventions, includes the provision of non-discrimination and equality before the law. Non-citizens have, but not limited to, the following civil rights: right to life (freedom from arbitrary

49see also: Office of the United Nations High Commissioner for Human Rights, The rights of non-citizens, HR/PUB/06/11 UNITED NATIONS PUBLICATION

50see Appendix 1

51 "Article 2
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html

CERD recommends that the states parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as appropriate to their specific circumstances "ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;"2 (7) Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004). In the general recommendation 30 CERD stated "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim." General Recommendation No.30: Discrimination Against Non Citizens 10/01/2004

52 "Article 26
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available online at: http://www.refworld.org/docid/3ae6b3aa0.html

Human Rights Committee further explained the provision by stating: "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens." UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at: http://www.refworld.org/docid/45139acfc.html
killing), right to freedom from torture or cruel, inhuman or degrading treatment or punishment, right to freedom from slavery, freedom from arbitrary arrest or detention, right to legal assistance in the language they understand, freedom from refoulement, prohibition of penalization of refugees for breaking migration laws, right to asylum, protection as a minor, right to recognition everywhere as a person before the law, right to appear in front of a court, right to a fair trial, right to legal remedies, right to compensation should it be granted in a due process of law, right to communication with consular officials i.e with the county of origin. Right to liberty of movement and freedom to choose his residence is conditioned by lawful residence within the territory.

CERD, in the General Recommendation 30, clarified that States Parties are obligated to eliminate discrimination, where differentiation based on citizenship is considered discrimination if not applied pursuant to a legitimate aim and proportional to it, in the enjoyment of civil, political and cultural and social rights, excluding those rights reserved for citizens, like voting, since human rights are in principle to be enjoyed by all persons. Furthermore, "States parties are

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53See Human Rights Committee Communication No. 560/1993 (A v Australia), Where HRC found that detaining asylum seekers in not per se arbitrary under international law, however such detention should be periodically reviewed, and should not continue if there is no legitimate factors justifying it, even if the entry was illegal. Also see Communication No. 1050/2002 : Australia. 08/09/2006, CCPR/C/87/D/1050/2002. (Jurisprudence), where HRC noted that in respect to the reasons for detention, it is arbitrary to detain a person if the same end can be met through a less intrusive measure.

54Article 12

2. Everyone shall be free to leave any country, including his own
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." ICCPR, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html

Article 31 of The 1951 Refugee Convention, prohibits a state to impose penalties on refugees who are unlawfully present in the county of refuge, provided they “present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Restriction on movement can be applied only if necessary and only until their legal status is regularized. 189 UNTS 137/ [1954] ATS 5
under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of
these rights to the extent recognized under international law;”

All EU states are parties to the Convention for the Protection of Human Rights and Fundamental
Freedoms (The European Convention on Human Rights), a regional document that reaffirms the
provisions of international conventions. The implementation is monitored by the European Court
of Human Rights, that may, provided that all domestic remedies have been exhausted, “receive
applications from any person, non-governmental organization or group of individuals claiming to
be the victim of a violation by one of the High Contracting Parties of the rights set forth in the
Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any
way the effective exercise of this right.” Article 5 of The Convention provides the right to
liberty and security of person. However, this provision excludes "the lawful arrest or detention of
a person to prevent his affecting an unauthorized entry into the country or of a person against
whom action is being taken with a view to deportation or extradition.” The Convention adopts
the principle of non-discrimination, however, ECHR stated that preferential treatment based on
EU citizenship does not constitute discrimination in regard to deportation. Similarly, The

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55 UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on
56 Article 34, Council of Europe, European Convention for the Protection of Human Rights and Fundamental
Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available online at:
http://www.refworld.org/docid/3ae6b3b04.html
57 Article 5 (f) Council of Europe, European Convention for the Protection of Human Rights and Fundamental
Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available online at:
http://www.refworld.org/docid/3ae6b3b04.html
58 “Article 14 – Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on
any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin,
association with a national minority, property, birth or other status.” Article 34, Council of Europe, European
Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and
14, 4 November 1950, ETS 5, available online at: http://www.refworld.org/docid/3ae6b3b04.html
59 37. As a Moroccan national Mr C. claimed to be a victim of discrimination on the grounds of nationality and race.
He maintained that, in breach of Article 14 of the Convention taken in conjunction with Article 8 (art. 14+8), his
depортation amounted to less favourable treatment than was accorded to criminals who, as nationals of a member
State of the European Union, were protected against such a measure in Belgium.
38. Like the Government and the Commission, the Court considers that such preferential treatment is based on an
objective and reasonable justification, given that the member States of the European Union form a special legal
order, which has, in addition, established its own citizenship (see the previously cited Moustaquim judgment, p. 20,
Human Rights Committee stated that regarding discrimination based on citizenship” it is necessary to judge every case on its own facts.”60 The provisions, as well as the interpretations of international law provisions demonstrate the limitations non-citizens face due to citizenship status. In this regard, especially vulnerable are undocumented immigrants.

International law provides the right to freedom from arbitrary detention, where detention based on illegal entry is not arbitrary per se, but should be reviewed periodically, and used only when the aim cannot be achieved by less intrusive measures. Detained immigrants are to be treated with dignity and respect, free from torture, inhuman and degrading treatment. Article 14 of Convention Against Torture is of particular importance in the context of migration related detention. It provides that States Parties to the Convention shall undertake to prevent acts of cruel, inhuman or degrading treatment that do not amount to torture, when committed by, at the instigation of or with the consent or acquiescence of a person acting in official capacity.61 CERD, in its recommendations, finds that states are to ensure that centers for refugees and asylum-seekers meet international standards, and combat ill treatment and discrimination of non-citizens

61 "Article 16
1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."1465 UNTS 85 / [1989] ATS 21
by law enforcement agencies and civil servants. CERD recommendations also deal with expulsion and deportation of non-citizens, where laws regarding deportation should not discriminate, amongst other, on the basis of national origin and must respect the right of non-citizens to effective legal remedies. States should also ensure that non-citizens are not subject to collective expulsion. Furthermore, detained immigrants have civil rights, some of which have been previously enumerated, with detained non-citizens in mind.

62 "18. Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence;

19. Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards; (...)"


631 "6. EXPULSION AND DEPORTATION OF NON-CITIZENS

25. Ensure that laws concerning deportation or other form of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;

26. Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;

27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;

4.3 Detention in the EU

EU creates a common foreign and security policy, within its competence, for all the Member States. This common policy does not affect Member states' competence for their own foreign policy. Schengen Agreement (1995) created common borders and a set of rules to control them. Before presenting the legislation, it is important to note that EU Regulations addresses all states, natural and legal persons, and are directly applicable and binding. EU Directives, address all or specific Member States and are binding with the respect to the intended result, and are directly applicable only under particular circumstances.


Summary regarding detention: "In specific cases, and when less coercive measures are not sufficient, Member States may detain a third-country national during the return procedure if s/he risks fleeing or avoids/obstructs the preparation of return or the removal process. Detentions are ordered in writing by administrative or judicial authorities and must be reviewed regularly. The detention period must be as short as possible and not more than six months. Only in particular circumstances, when the removal of a third-country national might exceed the time limit set, Member States may prolong detention by a maximum of 12 months. Specialised detention facilities are to be used for the purpose; however, if this is not feasible, Member States may use prison accommodation with separate quarters for the third-country nationals." official website of the EU, available online at: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0014_en.htm


DIRECTIVE 2008/115/EC of The European Parliament And Of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals


Commission Of The European Communities, Brussels, 26.11.2007
Commission found "serious problems" in the application, where Seven Member States\(^70\) did not apply the Directive in detention centers. The Commission affirms that "automatic detention without any evaluation ... is contrary to the Directive." Reception conditions provided to asylum seekers were found to be generally satisfactory, with the exception of seven Member States\(^71\), where the length of detention varies between seven days and 12 months, and The Commission found the length to be contrary to the Directive. In some Member States, conditions of minors and unaccompanied minors detention were found to be contrary to the Directive. In regard to the Asylum Procedure Directive, The Commission found\(^72\) a low level of legal harmonization on asylum procedures between Member States. Regarding the EU Return policy\(^73\), The Commission found\(^74\) that a considerable gap between the persons issued with a return decision and those who, as a consequence, have left the EU, particularly due to the lack of cooperation from the non-EU country of origin or transit and the lack of cooperation from the individuals concerned. A consistent movement towards a wider implementation of alternatives to detention has been noted, with an legislative alternative to detention in national legislation of Member States. Unfortunately, The Commission found it to be rarely applied. Furthermore, irregular entry and/or

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\(^70\)UK, BE, IT, NL, PL, LU, CY  
\(^71\)HU, LT, SI, EL, BE, IT MT  
\(^73\)"The term "Member States" used in the Return Directive context refers to 30 States: the 28 EU Member States minus UK and Ireland, plus CH, NO, Icl and Lie. Explanation: The Return Directive is a hybrid instrument and on the one hand is part of the Schengen acquis. It applies thus to Switzerland, Norway, Iceland and Liechtenstein. The UK and Ireland are not bound by that part of the Schengen acquis in accordance with Protocol 19. On the other hand, the Return Directive is a development of the acquis covered by Title V of Part Three of the Treaty, into which UK and Ireland could opt into in accordance with Protocol 21. However, these MS have not exercised such an opt-in." European Commission, Brussels, 28.3.2014 Com(2014) 199 Final Communication From The Commission To The Council And The European Parliament on EU Return Policy, available online at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/return-readmission/docs/communication_on_return_policy_en.pdf  
stay is found to be criminalized in the national legislation in the majority of Member States. While there is no EU legislation that forbids it, the jurisprudence of ECJ has limited and constrained the imprisonment of persons as a consequence. Dublin III Regulation\textsuperscript{75} establishes a system of responsibility of Member States to process asylum applications in a hierarchical order that better addresses situations of particular pressure on Member States' reception capacities and asylum systems\textsuperscript{76} In crisis situations, Member States have the obligation to report to The


\textsuperscript{76}“Key achievements

The new Dublin contains sound procedures for the protection of asylum applicants and improves the system’s efficiency through:

- An early warning, preparedness and crisis management mechanism, geared to addressing the root dysfunctional causes of national asylum systems or problems stemming from particular pressures.
- A series of provisions on protection of applicants, such as compulsory personal interview, guarantees for minors (including a detailed description of the factors that should lay at the basis of assessing a child's best interests) and extended possibilities of reuniting them with relatives.
- The possibility for appeals to suspend the execution of the transfer for the period when the appeal is judged, together with the guarantee of the right for a person to remain on the territory pending the decision of a court on the suspension of the transfer pending the appeal.
- An obligation to ensure legal assistance free of charge upon request.
- A single ground for detention in case of risk of absconding; strict limitation of the duration of detention.
- The possibility for asylum seekers that could in some cases be considered irregular migrants and returned under the Return Directive, to be treated under the Dublin procedure - thus giving these persons more protection than the Return Directive.
- An obligation to guarantee right to appeal against transfer decision.
- More legal clarity of procedures between Member States - e.g. exhaustive and clearer deadlines. The entire Dublin procedure cannot last longer than 11 months to take charge of a person, or 9 months to take him/her back (except for absconding or where the person is imprisoned).” official website of the European Commission, available online at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm
European Commission crisis management plan, among other in terms of the detention conditions. The Dublin system is a cornerstone in building a Common European Asylum System (CEAS) as a part of a common policy on asylum. European National Preventative Mechanisms against torture issued a declaration calling upon the Council of Europe to codify in detail rules on immigration related detention, based on international and regional human rights standards relevant to the deprivation of liberty on the basis of immigration status.

Despite legal provisions, detained immigrants to not enjoy human rights to the full extent. International and regional bodies, in charge of monitoring the implementation of international conventions and/or monitoring problems related to a specific area of interest expressed concerns regarding the problematic of immigration related detention in number or reports. Detention and reception centers are a common practice in EU. Parliamentary Assembly of Council of Europe Resolution 1707 (2010), summarized the situation as follows: increase in detention of asylum seekers and irregular migrants, attributed to both the growing number of migrants as well as to policy and political decisions, overcrowding in detention centres, use of alternative facilities inappropriate for detaining asylum seekers and irregular migrants belonging to this group (police

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77. Article 33 (3) of the 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

78. Articles (1) and (7), 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


80. Some of which include: Treaty-based bodies that monitor implementation of the core international human rights treaties: Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT) , Subcommittee on Prevention of Torture (SPT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED), UN Charter based: Human Rights Council, Universal Periodic Review, Human Rights Council, Special Procedures of the Human Rights Council, Rights Council Complaint Procedure, UN agency of The Office of the United Nations High Commissioner for Refugees, Council of Europe Commissioner for Human Rights, Group of Experts on Action against Trafficking in Human Beings (GRETA), European Commission against Racism and Intolerance (ECRI), Committee on Migration, Refugees and Displaced Persons
stations, prisons, disused army barracks, hotels, mobile containers), mass and needless detention due to the usage of detention as a first rather than last response, use of detention as deterrent for further migration, often appalling detention conditions, high cost of often and prolonged detention, detention of asylum seekers who should be distinguished from irregular migrants and should not be detained solely on the basis of lodging a claim for asylum, nor for their illegal entry or presence in the country where they lodge a claim for asylum, nor for their illegal entry or presence in the country where they lodge a claim for asylum according to the 1951 Refugee Convention, lack of precise, accessible legal framework governing the use of detention under international human rights law and refugee law, national law insufficiency (leaving too much discretion to immigration officials), lack of transparency (leaving individuals open to abuse or arbitrariness), limited access to lawyers by detainees.

81“4. Conditions and safeguards afforded to immigration detainees who have committed no crime are often worse than those of criminal detainees. Conditions can be appalling (dirty, unsanitary, lack of beds, clothing and food, lack of sufficient health care, etc.) and the detention regime is often inappropriate or almost entirely absent (activities, education, access to the outside and fresh air). Furthermore, provision for the needs of vulnerable persons is often insufficient and allegations of ill-treatment, violence and abuse by officials persist. This all has a negative impact on the mental and physical well-being of persons detained both during and after detention.” Resolution 1707 (2010) Parliamentary Assembly of Council of Europe, Assembly debate on 28 January 2010 (7th Sitting) (see Doc. 12105, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Mendonça). Text adopted by the Assembly on 28 January 2010 (7th Sitting). See also Recommendation 1900 (2010).

82“5. Detention is costly in financial terms for the states which often resort to this measure and which detain persons for lengthy periods of time. The European Union Return Directive, which provides for a maximum length of detention for irregular migrants of up to eighteen months, can be criticised for adopting the lowest common standard with regard to length of detention thereby allowing European Union member states to practice long-term detention, and increasing the possibility for states to increase their minimum duration of detention.” Resolution 1707 (2010) Parliamentary Assembly of Council of Europe, Assembly debate on 28 January 2010 (7th Sitting) (see Doc. 12105, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Mendonça). Text adopted by the Assembly on 28 January 2010 (7th Sitting). See also Recommendation 1900 (2010).
5. **Between international law and International relations**

5.1 **State sovereignty** has a core meaning of supreme authority within a territory\(^83\). Such organization enables functional obtaining of interests of its members, but also leaves the members subjects to the power of the state\(^84\). Human rights developed to "reconcile the effectiveness of state power with the protection against that same power."\(^85\) The creation of International Bill of Human Rights\(^86\) came after the destruction of the Second World War, when it became evident that a state apparatus can be effectively used to legally commit atrocities against its citizens. Therefore, basic human rights, independent of any condition, were enumerated in international law. Today, international human rights are regarded as constitutive elements of modern and "civilized" statehood\(^87\). Given that sovereignty is traditionally based on two doctrines: nonintervention and formal equality\(^88\), a new consideration of classical concept of state sovereignty was assumed with the internationalization of human rights norms. Documents dealing with human rights\(^89\) existed before the emergence of the modern state, and continued to exist in a limited scope on the national level. However, despite the internationalization of human rights, fundamental characteristic of modern state's power was, and still is to a large extent, sovereignty. In terms of international law, states have the supreme authority in creation of their own limitations, that is sovereign states create international law and have the authority and responsibility to implement and protect them. "With power and authority thus doubly

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\(^85\)Ibid.

\(^86\)International Covenant on Civil and Political Rights-168 ratifications, Optional Protocol to the International Covenant on Civil and Political Rights has 115 ratifications, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty has 81 ratification, International Covenant on Economic, Social and Cultural Rights has 162 ratifications on May 1st 2013, info. available online at: https://treaties.un.org/Pages/ParticipationStatus.aspx


\(^88\)"Westphalian sovereignty" based on the Treaty of Westphalia, 1648

\(^89\)like the Magna charta libertatum (1215), The Ahdnama of Fatih Sultan Mehmet (1463), Déclaration des droits de l'homme et du citoyen(1789), The Constitution of the United States of America (1787) and Bill of Rights (1791),
concentrated, the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement."  

5.2 Levels of analysis

The question, why do states abide to international law is a perplexing one, and in this thesis will be examined in the context of European Union. On one hand, Member States are parties to a number of international conventions that address human rights and the rights of those under state's jurisdiction. These rights protect the immigrants, to a certain extent, given that certain rights, like voting are reserved for citizens. On the other hand, EU is an entity to which states have transferred a certain amount of sovereignty, and that regulates certain issues with authority for all member states, thus creating a supranational body of law directly applicable in the States Parties. Hence, when examining the immigration related detention accordance with international legal provisions we can talk about individual Member States as actors in international relations and about the EU as an actor, given the existence of agreements in international law between the EU and non-member states and international organizations and a

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91 As stated by The European Court of Justice: "In addition the task assigned to the court of justice under article 177, the object of which is to secure uniform interpretation of the treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals "Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62.
92 By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each member state of provisions which derive from the community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system." Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64.
certain amount of sovereignty transferred to the Union. This transfer is primarily reflected on the weakening of the negative sovereignty, but it has a weakening effect on the positive aspects of sovereignty as well, notably in the sphere of human rights and immigration policy.

5.3 **European Union** is a specific entity in the realm of international relations. In order to contextualize the application of international and regional legal provisions applicable to the immigration related detention, the following passage will deal with the EU.

EU is a legal entity created and based on law, meaning that the objectives of the EU are pursued purely by the means of law, binding for the Member States and their citizens, in the form of regulations, directives and decisions, enacted by the EU institutions. A procedure to establish whether a State has failed to comply with the obligation imposed by the EU law is conducted before the Court of Justice of the European Union. If the Court issues a judgment against a State and it does not comply, a second court ruling can order it to pay lump-sum, fine or a penalty. Furthermore, there is judicial control of the action of the EU institutions and bodies. "Citizens and undertakings can only proceed against decisions that are personally addressed to them or, though addressed to others, have a direct individual effect on them." Moreover, ECJ established the liability of Member States for harm suffered by individuals resulting from the infringement of EU law. Liability exists for legal acts of States as well as for their failure to act in regard to EU provisions granting rights to individuals. Evidently, there is a difference between international human rights and EU law, where the EU law is a autonyms corpus that binds the Member States, while the enforcement of international law primarily depends on its

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incorporation in national legal systems. Nonetheless, the operation of EU law depends on the national systems.95

5.4 Why are immigrants facing problems in obtaining human rights in the context of immigration related detention?

Finally, after examining international human rights, EU legal provisions and the state of affairs regarding the immigration related detention, one common actor emerged as a dominant: a state. To address the questions: Why are immigrants facing problems in obtaining human rights? or Why is immigration related detention below the international and regional legal standards? first we need to address the question, as old as international law: Why do states obey international law? Implicitly, this question connotes another one: Why don't states obey international law?

Different authors approached these question using legal theories and concepts, and/or International Relations theories. The author has presented relevant IR theories that will be operationalized in answering the question. However, this does not mean exclusion of legal theory, rather a focus on IR theory, supplemented by legal theory. Furthermore, focus will be but on international law in the context of IR theories.

In accordance with pacta sunt servanda 96, by becoming member to an international convention, states create a legal obligation to abide to it under the regime of international law. Nonetheless, when their interests are stronger than the sense of obligation, it can happen that sates violate these obligations. 97


96 "Article 26: Pacta sunt servanda

1) Realist premise of anarchy in international relations must be reproached in the context of the EU, given that its mere existence contests this assumption. Nonetheless, the power structure within the Union arguably determines its existence and scope; hence the premise of anarchy and power relations cannot be fully discarded. Some authors, within the Realist theory, see international law as epiphenomenal, reflecting the interests of powerful states, however, this cannot be said for the international regime of human rights, given their nature and the constraint they put on states. Yet, precisely due to the nature of human rights, the abidance to the provisions, can be interpreted in such manner. In this light, the realist view of distributive consequences of power relations on international law, have a double meaning in the context of the EU. On one hand, to the extent that States have transferred their sovereignty to the EU, it becomes the powerful entity distributing the rights to individuals, for non-citizens, via states. On the other hand, the unequal distribution of power exists between the Member States. This has two consequences; firstly, the power relations are reflected on the areas and the authority of EU regulative power. Secondly, in accordance with the realist theory, the abidance to the EU law by the weaker Member States is the opportunity to be in the accordance with both the provisions favored by powerful States and by the EU as the entity of power. The same line of argumentation is applicable for the powerful States in regard to the EU as an entity of power. Moreover, in accordance to the realist theory, international law facilitates "cooperation among powerful states in their relation with weaker states." To sum up, policies and legal provision of EU, an entity created and operated by generally sheared interests and values, serve in enhancing security and material well-being of its Members, where the distribution of security and wealth

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http://search.proquest.com/docview/213526159?accountid=12249

99 Ibid.

100 Krasner , Stephen D. Sovereignty: Organized Hypocrisy, Princeton University Press 1999

http://search.proquest.com/docview/213526159?accountid=12249


http://search.proquest.com/docview/213526159?accountid=12249
depend on the constellation of power\textsuperscript{103} of its Members. Member States, comply for the fear that future cooperation in their interest might be jeopardized, as a consequence of retaliation and deteriorated reputation in international law compliance\textsuperscript{104}. To illustrate, a recent referendum on migration policy introducing migration quotas in Switzerland can be analyzed in this context of power and interest in contrast to retaliation and reputation. Such policy would be a violation of the EU-Switzerland free movement treaties and would have consequences on the future cooperation between EU and Switzerland, especially in the light of labor migration and free market participation. However, Switzerland is a relatively powerful state, and relative to this power has the ability to pursue its interests through policies, some other states cannot afford to adopt, due to the constellation of power. Similarly, Switzerland cooperates with the EU, while not being a member, to the extent its relative power allows.

Departing from this example, the author will try to further the understanding of the problematic within the institutionalism theoretical approach.

2) Institutionalism \textit{theory}, like the realist, takes the basic premise of anarchy in international relations and offers further insight into the problematic. In his work \textit{After hegemony: cooperation and discord in the world political economy}, Koehane analyzes the cooperation between states on based on the economic, as the strongest bidding interest of states with developed economy, given that policy-maker use cooperation to reach a variety of ends, where such cooperation helps foster humane values.\textsuperscript{105} The authors choose to present this approach to institutionalism theory because of its supplementing consideration of the realist approach. As defined by Oran Young, institutions are "sets of rules of the game or codes of conduct that serve to define social practices, assign roles to the participants in these practices and guide the interactions among occupants of these roles."\textsuperscript{106} In this sense EU is an institution of cooperation, and the failure to comply within this context, carries both of the above mentioned consequences: retaliation and deteriorated

\textsuperscript{103}Ibid.
\textsuperscript{105}Keohane, Robert O., With A New Preface By The Author. \textit{After hegemony: Cooperation and discord in the world political economy}. Princeton: Princeton University Press 2001 page 10, 11 page 10, 11
reputation. The author disagrees with Koehane that retaliation is ineffective or weak\textsuperscript{107}, but rather considers it in the context of power and interest. Agreeing with the premise that economic cooperation offers the strongest platform, the author argues that given this interest, weaker states have a great interest in compliance especially if the need for further cooperation exists and if retaliation would threaten the state interests. The author finds this to be true for both powerful and comparatively less powerful states. This point can be observed on the relations between Greece and the EU on one hand, and the relations between Member States regarding the policy towards Greece, in the midst of the economic crisis. In the context of this example the author agrees with Koehane, that "for the reason of reputation as well as fear of retaliation and concern about the effect of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interests counsels them not to."\textsuperscript{108} The author emphasizes the effects of precedents, as an explanatory tool why Member States "bailed out" Greece to a certain extend. In the context of an institution such as the EU, the abidance to its norms, and incorporated values, or rather the lack of, can set a powerful precedent that might undermine the institution itself, thereby undermining the future realization of interests. In the opinion of the author, the same principle applies to the abidance to the provision regarding immigration related detention, taking the self-interest as the modifying agent to the extent of abidance without abandoning cooperation with the institution. Furthermore, within the presented reasons for institutional cooperation, states consider long-term interests, hence what might be contrary to the current interests of the Member States, has a significance in the long-term calculation. Therefore, by institutionalizing cooperation within the EU, Member States put greater importance on reputation and more value on reciprocity in their behavior.\textsuperscript{109}

Upon examining general reasons for cooperation, the following passage focuses on the cooperation in the area of human rights, that is, the abidance to the provisions. Goldsmith and

\textsuperscript{107}"If international regimes depended entirely for compliance on specific retaliations against transgressors, they would be weak indeed." Keohane, Robert O. With A New Preface By The Author. After hegemony: Cooperation and discord in the world political economy. Princeton: Princeton University Press 2001 page 105

\textsuperscript{108} Keohane, Robert O. With A New Preface By The Author. After hegemony: Cooperation and discord in the world political economy. Princeton: Princeton University Press 2001 page 106 Italics not in the original

\textsuperscript{109} for more on reciprocity, see Keohane, Robert O., Reciprocity in International Relations, International Organization, Vol. 40, No. 1 (Winter, 1986), pp. 1-27
Posner\textsuperscript{10} present two modes of cooperation in the realm of human rights: symmetric and asymmetric. The author will focus only on the asymmetric cooperation, presented as the situation where state A abuses the its citizens, and state B does not but cares about the citizens of the state A. The author notes that when using this model, the focus is not only of citizens but rather all persons under the state's jurisdiction, as provided in human rights instruments discussed in the previous chapters. The reasons for asymmetric cooperation are presented as: "(1) sympathy for coethnics and coreligionists; (2) an instrumental interest in human rights based on the belief that human rights violations will destabilize A when B has an interest in maintaining A as a viable state"\textsuperscript{111} This explanatory model is very useful in the analysis of the Member States given that they have interest, as explained earlier, in maintaining stability of Members as a means of maintaining stability of the Union. This application of the theory is relevant given the explanation of means of asymmetric cooperation by Goldsmith and Posner as: "In the case of asymmetric human rights law, cooperation is achieved by a payment- in recognition, aid, credit, military assistance, and so forth- from A to B in return for A's commitment to refrain from abusing people under its control."\textsuperscript{112} Such means of cooperation are visible within the Union, with the following adjustments to the model: for the most part, B is the EU. The payment is carried from the EU funds, and conditioned by EU law and the bodies of the Union\textsuperscript{113}. Furthermore, given the complex structure of the Union, each State is A, given the established


\textsuperscript{11}Goldsmith JL, Posner EA. The limits of international law. Oxford University Press; 2007 page 114

\textsuperscript{111}Ibid.

\textsuperscript{112}Ibid.

\textsuperscript{113}Migration and asylum are significant phenomena in today's world. Traditionally, each EU Member State has built its own policies in these sensitive areas. But developments such as the removal of internal border controls across most of the EU have made the case for greater coherence. This relatively recent cooperation has resulted in the development of an EU framework, including legally binding instruments, such as those under the Common European Asylum System. To support financially the internal dimension of this policy area, the EU had four different funds for 2007-13. Under the umbrella of a programme on solidarity and management of migration flows (SOLID), their resources were €4 billion. Examining the European Refugee Fund and the Integration Fund, the European Court of Auditors noted that most audited projects gave positive results, but highlighted a number of weaknesses to be addressed.” European Parliamentary Research Service.\textit{Briefing 11/02/2014}, available online at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130663/LDM_BRI(2014)130663_REV1_EN.pdf
lack of full abidance to the provisions, and at the same time, each state is B, given the participation in the EU bodies and the interests for maintaining the Union.

Thus far, this thesis looked at the creation and abidance to international law, as a relevant frame for the human rights in the case of immigration related detention, in the light of Realist assumptions about state behavior. Liberalist theoretical approach provides a criticism of these and offers an different insight in to the problematic. In order to provide further understanding on the conditions of immi grated detention as a reflection of the extent of State abidance to international law, that is the reasons for its creation and abidance, let us depart from realist assumptions and seek answers in the Liberal theory as presented by A. Moravcsik\textsuperscript{114} and the Liberal theory of international law\textsuperscript{115}.

3) The first core assumption of the Liberal theory\textsuperscript{116} is of politics being embedded in the social context that limits government’s purposes and possibilities. Individuals with autonomous interests seeking organized advancement of their social and political goals form society and their interaction form social order. Such interaction is often problematic due to competing interests. Two institutions at the base of social order and progress are legally-guaranteed individual rights and political and economic competition. Thus, competition between interests undermines the dominance of one. Minimal guarantee of rights and regulated competition bring progress. Furthermore, unlike the Realists, Liberals do not take for granted the assumption of precedent of individual's allegiance to the state above all other ties.\textsuperscript{117}


\textsuperscript{116}"The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence." : A. Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, International Organization, vol. 51, no. 4, page 516.

\textsuperscript{117}Andrew Moravcsik, \textit{Liberalism and international relations theory. No. 92}. Cambridge, MA: Center for International Affairs, Harvard University, 1992. pages 7, 8, 9
This theoretical position is a valuable one when talking about immigrants and human rights in the context of immigration related detention. In this view, human rights law is at the core of relation between state and individuals, and functions as a minimal guarantee of individual rights, especially given the "European tradition that individuals are separable from their society."\(^{118}\) If social order is comprised of individuals, where Liberalism abandons the assumption of allegiance to the state above all ties, the author states that immigrants may be seen as societal actors under the jurisdiction of the state, who seek recognition of their interests.

Second assumption of the liberalist theory is that "States (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics."\(^{119}\)

This assumption, in the EU context, is supported by the fact that member States are democracies; hence the representation of interest is based on representation achieved through election. Nonetheless, the author finds that the condition for democracy is a "citizen" as a person fully aware of the structure of governance, his/hers rights, political options available within the present parties, aware of the actions and attitudes of these political parties, who, based on this knowledge exercises either passive or active voting right. In the opinion of the author, this is an ideal that hardly reflects the standard among the EU citizens. Nonetheless, the above mentioned example of Switzerland referendum that supported the migration quotas can be reexamined in this theoretical approach. The Liberal theory is supported by the fact of national support for holding the referendum, and the generally growing anti-migration sentiment of citizens across Member States. Therefore, interest of the government stems from the interests of citizens, organized in seeking their fulfillment.

The creation of international order\(^{120}\) begins with the individual's voluntary codes of conduct\(^{121}\) that is, the creation of international law begins with the individual, rather than the state. It is the


\(^{120}\)In Liberal theory, treaty based international law is not the principal source of international law, however, the author will focus on this aspect. see Slaughter, Anne-Marie.; Alvarez, Jose E. A liberal theory of international
individual interest, organized within the state that determines the interest of the state (government) that in turn participates in the creation of international law. The effectiveness of international regimes depends on their establishment in the "functional demands of groups in domestic and transnational society, as represented by the domestic political institutions that mediate between society and the state." The importance of citizenship is visible from this position, given that immigration related detention connotes non-citizens. Hence, the demand for the respect for human rights cannot be carried out only by immigrants, but rather supported by the citizens who pressure the government for the compliance with human rights. Correspondingly, the citizens of the Union pressure the Union.

Third core assumption of the Liberal theory relates the behavior of states in international relations. The behavior of states in the realm of international relations is a reflection of the nature and configuration of state interests rather than state power, where ceteris partibus among state interests produce state cooperation and different interests create conflict. Hence, "it is the pattern of "demand" for certain international outcomes, not the specific institutional and geopolitical constrains imposed by international political system on the "supply" of these outcomes that imposes the fundamental constraint on state behavior." This position is a critique of realism in the sense that Realist acknowledge the existence of the state preferences seen as state interests by the Liberals, however the power relations often undermine these preferences and drive states in pursuing strategies that may diverge from these preferences. Both theories start with the assumption of states being rational actors but diverge in the explanations about how these preferences affect state behavior in international relations. Therefore, for Realists it is the external factors or relative capabilities that determine state behavior and for Liberals it is the internal interests or purposes. Moravcsik distinguishes between "maximalist Liberalism" as the

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123 Moravcsik, Andrew, Liberalism and international relations theory. No. 92. Cambridge, MA: Center for International Affairs, Harvard University, 1992 page 11
124 Ibid.
position that the relative interest determines the willingness of states to expend bargaining resources, and "minimalist Liberalism" as the position that state interests and therefore the extent of interstate cooperation are predicted by the Liberal theory and their outcomes, at least in part, are explained by Relativism.¹²⁵

And given the emphasis on the interest represented by the government/state, the author sees the extent of abidance to EU law, and international law, as symmetrical to the interests each Member State has within the full scope of its existence. Arguably, that is why Member States cooperate with the institutions of the Union, but considering their individual specifics, the extent of abidance varies. The problems presented in the context of immigration related detention, are general problems within the EU, but this does not mean that each state faces all the problems enumerated, nor is it a full picture of immigration related detention in each State. Furthermore, the EU as an entity does face all the problems mentioned, but in facing them, its interest is evident in the mechanisms used. To illustrate this point, one can, for example look at the criticism on The Return Directive for its failure to uphold human rights, especially regarding the duration of detention¹²⁶

In terms of compliance with international law and ensuring that immigration related detention meets its standards, the role of international pressure discussed within the Realist theory has a different interpretation in the Liberal theory. In the European system, as interpreted in the Liberalist theory, sanctions and reciprocity are not the primary mechanism ensuring the abidance to international law. Rather, the abidance depends on internal factors given that "the global rule of law depends on the domestic rule of law"¹²⁷ where the international law serves to "influence

¹²⁵ibid, page 14,15
and improve the functioning of domestic institutions.”\textsuperscript{128} Hence, by putting shame and coopting citizens, judges and law-makers on national level who in turn pressure the government, the abidance is achieved.\textsuperscript{129} The discussed reports on human rights and immigration related detention can be interpreted as shaming mechanisms with the purpose of compliance with international law. Coopting can be observed in the jurisprudence of the European Court of Justice\textsuperscript{130} and the European Court of Human Rights\textsuperscript{131}.

The change in the public attitude however, is achieved not only by shaming and coopting but also by international pressure aimed at internal factors within the state. In the context of human rights, sanctions for non-abidance are linked to the economic interests of interest groups. For example, conditioning the abidance by the access to the EU market is a form of international pressure. Example of EU Switzerland relations in this case is interpreted as such: internal interest groups influence Swiss policy, and the pressure of the EU is aimed at these groups, who should recognize their interest in the cooperation with the EU, and influence the government to respect the treaty based human rights of movement of EU citizens.\textsuperscript{132} The same logic is applicable to any issue at hand including the respect for human rights in the case of immigration related detention. Furthermore, the rise of anti-immigration groups and sentiments across Member States, as

\textsuperscript{128} Ibid.
\textsuperscript{129} Moravcsik , Andrew, Explaining international human rights regimes: Liberal theory and Western Europe. European Journal of International Relations, 1995, 1.2: 158
\textsuperscript{130} see for example: C-61/11 PPU - El Dridi, where the court interpreted The Return Directive and hence influenced national courts’ interpretations of the same: ”Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State’s legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.”
\textsuperscript{131} see for example: Hirsi Jamaa and Others v. Italy, Application no.27765/09, Council of Europe: Europen Court of Human Rights, 23 February 2012, available at: http://www.refworld.org/docid/4f4507942.html
\textsuperscript{132} Upon adoption of the mandate, the Council declared that while negotiations on an institutional framework should be launched, the conclusion of these negotiations and of negotiations on any further agreements on Swiss participation in the EU's internal market was subject to a comprehensive assessment of relations between the EU and Switzerland. Furthermore, the Council indicated that it expected Switzerland to honour its obligations arising from the agreement on the free movement of persons and its other agreements concluded with the EU, and to ensure the respect of rights of EU citizens acquired under the agreement on the free movement of persons. ”Council of The European Union, Presse 267: Negotiating mandate for an EU-Switzerland institutional framework agreement, available online at :http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/et/142503.pdf
interest groups affecting the actions of governments and in turn the actions of the EU, using the Liberal theory, can be an explaining reason for the EU’s lack of focus on the human rights of immigrants and its failure to apply stronger international pressure on governments and hence the interest groups, that violate these rights.

Upon examining abidance of international law within the Liberal approach, the author acknowledges the value of its insight. While the interest groups play a role in the formation of governments' interests and its actions, the author remains unconvinced that they can be seen as the principal actors in international politics, where power structure is just a frame within which the governments acts, guided solely by internal interests. The author will now briefly approach the Constructivist theory in order to gain further understanding of why is immigration related detention below the standard of international law. The author would like to note a very reductionist approach to interpretations within the Constructivist theory and invites the reader to refer to the suggested literature for further information.

4) Prior to the creation and hence abidance of international law is state interest. Constructivist theory of N. Onuf, sees its formation, in terms of law, as stemming from practices, where practices not only establish but reflect on the norms. These norms are understood in their

133“HUMAN RIGHTS IN THE EUROPEAN UNION: In the face of a political and economic crisis affecting the European Union and many of its member states, protection of human rights is rarely a priority – especially when those negatively affected were marginalized or unpopular groups, such as Roma, migrants, and asylum seekers. Despite deteriorating rights in Hungary and elsewhere, EU institutions largely failed to live up to the promise of the EU Charter of Fundamental Rights, with the European Council particularly reluctant to hold member states to account for abuse.” Official website of the Human Rights Watch, available online at: http://www.hrw.org/tag/human-rights-european-union
136Three premises structure my systematic rendition of constructivism in World of Our Making: a) Society is what it does. Any coherent set of social relations (including international relations) is also, and always, a process in which agents and their worlds constitute each other. Co-constitution accounts for pervasive change and the appearance of constancy in social relations.b) Speech and its derivatives (rules, policies) are the media of social construction.
hierarchy, as the expression of authority that is to be abided. Moreover, international politics and international law are mutually constitutive.\textsuperscript{137} Christian Reus-Smit asserts that states, in the realm of international relations, behave as if there is a legal system, whose institutions legitimize raw power and self-interest of states, where the legitimacy of international system is based on its constitutional structure.\textsuperscript{138}

This approach is a valid explanation of the EU system, given its legal structure that has constitutional elements. Furthermore, legal hierarchy exists within this system that represents the values of its Member States. Nonetheless, the shortcoming of this explanation, as previously discussed, is the lack of direct enforceability national law has. Thomas Risse and Kathryn Sikkink\textsuperscript{139} address this issue, where they see the development of human rights norms through internationalization of norms. Hence, the discussion on human rights of non-citizens is linked to the state as an actor in international relations, and it can hardly be asserted that human rights steamed from wide international practices.

People become agents by living in a world of language. They depend on language to express their wishes, to translate their wishes into goals, and finally to act on their goals. Performative speech is the basis of, and template for, normative conduct. Social construction is always normative.\textsuperscript{c) As media, rules transform available materials into resources, eventuating in asymmetric opportunities for control and the asymmetric distribution of benefits. This is rule, and rule is to be found in every society—including international society.” Onuf, Nicholas, \textit{The Strange Career of Constructivism in International Relations : Workshop on (Re)Constructing Constructivist IR Research}, Center of International Studies, University of Southern California, October 6, 2001, presentation of the: Worlds of Our Donald J. Puchala, (ed.), \textit{Making: The Strange Career of Constructivism in International Relations}, in Visions of International Relations (Columbia: University of South Carolina Press, January 2002).


5.4 Findings

Numerous international legal provisions protect the rights of non-citizens. Member states have ratified crucial international documents enumerating these rights, and they have been further included and elaborated on the regional level of EU. Nonetheless, given the consideration of EU as an actor in international relations, some of its provisions are not in accordance with human rights (like The Return Directive regarding the duration of detention). Member States violate human rights on national level as well. Immigrants are facing problems in obtaining their human rights since international law abidance varies among states, depending of factors like power and interest. States are fundamental actors in the protection of human rights. Non-citizens are particularly vulnerable against the state’s exercise of repressive power, since their rights depend on the interest of a state to protect them. Different IR theories provide different reasons for why states create and abide international law. Realist theory emphasizes state power in IR that are defined by anarchy, as a main explaining factor for the behavior of states. Why they create international law and the extent to which they abide it, depends primarily on constellation of power in IR. Member States have different positions of power relative to each other, and the EU is powerful relative to individual states. The constellation of power relation within the Union is reflected on the behavior of the Union. Individual member states adjust their behavior according to the relative power they have, that determines their interests. Hence, abidance to international human rights law is a reflection of preference of relatively more powerful entity: Member State or the Union. The premise of anarchy in IR cannot be fully discarded given the power relations, however it has to be reconsidered, given that power determines IR, it also determines the absence of anarchy. Institutionalism theory, further elaborates on the power and interest, explaining EU as an institution of cooperation, based on the economic interest of its Members. Within the institution, cooperation is achieved through the fear of retaliation and diminished reputation. By not cooperating, states can set precedents that would jeopardize the institution and their fulfillment of interests. Human rights cooperation is dominantly based on asymmetric model, guided by the fear that noncompliance of other Member States can destabilize the Union.

Liberalist theory, approaches power and interest form a different perspective on IR and its actors
than the previous two theories, focusing on the individual rather than the state. In this light, human rights are essential medium in the relation individual-state. Nonetheless, citizenship is vital in the realization of interests, hence the respect of human rights of immigrants regarding immigration related detention depends on the dominant preferences amongst the individual citizens within the state, and EU citizens within this entity. Assuming that each state is guided solely by preferences not power, can be justified only to a certain extent, however, it does explain many examples of behavior. Hence, states create international law as a result of demand from within, and abide it for the same reasons. Finally, Constructivist theory assumes mutual constituting of international politics and international law. While this may be true for bilateral treaties, it can be hardly said that international human rights law was constituted by previous international practices.
6. **Conclusion**

European Union faces substantial migration flows from different parts of the world. Therefore, we can speak of human rights of non-citizens in the EU as a group demand for individual human rights, rather than an individual demand for human rights. Human rights of immigrants cannot be ignored, especially given the Union's system of values and the existence of both international and regional provisions that protect them. Despite these provisions, immigrants face problems in obtaining them, and Member States frequently detain immigrants, often below or despite legal standards. The question why they do not meet the legal standard has multiple aspects. Constellation of power in international relations and state interests along with mechanism used within this frame offer us an insight in the problematic. These insights have meaning both in terms of individual Member States and the EU as an entity in international relations. On one hand power relations explain why states engage in the creation of international law, and what consequences power has on its abidance, especially within the institutional character of the Union. On the other hand, state interest is not only relative to the power relations, but also to the internal interests and goals of States. Legal character of the Union is an important parameter in the assessment of the reasons and the extent of abidance. No single theory can be used to explain all implications of legal provisions, human rights within the frame of institutions, power and interest. Rather, they need to be approached from different theoretical angles, in order to gain understanding of problems faced in the implementation of international law. The author has offered a brief summary of relevant provisions, and mechanism within the EU, as well as the explanations existing within IR theories to the questions arising from immigration related detention. The approach was selective, with the selection criteria focusing on providing relevant answers to the questions posed. It is the opinion of the author that state and sovereignty remain core analytical starting points, thus making immigrants or non-citizens a specific challenge to the EU, especially given their present numbers. Nonetheless, immigrants, like the citizens of the EU are primarily human beings, and despite the changed historical paradigm of human rights, they remain a cornerstone of protection of dignified human life.

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Appendix 1

**International treaties and protocols**

Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1967)

Vienna Convention on Consular Relations (1963)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

International Covenant on Civil and Political Rights (1966)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (2002)


International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)


UN Declarations, Principles, Guidelines

Standard Minimum Rules for the Treatment of Prisoners (1977)

Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in which They Live (1985)

Body of Principles for the Protection of All Person under Any Form of Detention or Imprisonment (1988)

Rules for the Protection of Juveniles Deprived of their Liberty (1990)

United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules);

European regional norms and standards

Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted in 1987

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988).

DIRECTIVE 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

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)

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Integration of migrants: State of democracy in Europe. Measures to improve the democratic participation of migrants

Engaging European diasporas: the need for governmental and intergovernmental responses

The image of asylum seekers, migrants and refugees in the media
Doc. 11011 / Recommendation 1768 (2006)

Migration and integration: a challenge and an opportunity for Europe
Doc. 10453 / Resolution 1437 (2005)

Unaccompanied minors in Europe: issues of arrival, stay and return
Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights

Solving property issues of refugees and displaced persons

Roma asylum seekers in Europe

Improving the quality and consistency of asylum decisions in the Council of Europe member states

Europe’s “boat-people”: mixed migration flows by sea into southern Europe

Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers

Protecting migrant women in the labour market

Gender-related claims for asylum

Migrant women: at particular risk from domestic violence
Committee opinion Doc. 12054

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The situation of displaced persons (IDPs)
The situation of IDPs and returnees in the North Caucasus region
Doc. 12882 / Resolution 1879 (2012)

Solving property issues of refugees and displaced persons

Europe’s forgotten people: protecting the human rights of long-term displaced persons
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Doc. 11289 / Recommendation 1802 (2007)

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Doc. 10282 / Resolution 1404 (2004)

Undocumented migrant children in an irregular situation: a real cause for concern

Detention of asylum seekers and irregular migrants in Europe

Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants

Readmission agreements: a mechanism for returning irregular migrants

Regularisation programmes for irregular migrants

Human rights of irregular migrants