

## International, Human Rights, and European Legal Approaches to Detention

*Kay HAILBRONNER (2007). "Detention of Asylum Seekers." European Journal of Migration and Law 9: 159 - 172.*

The question of how international, human rights, and European law govern detention – particularly of asylum seekers - is fraught. Indeed, while there are many ways that the law *could* curtail countries' sovereign rights to use detention, it is not always clear *how* it accomplishes this task. Kay Hailbronner here provides a legal opinion on the limits of European Member States' legal abilities to detain asylum seekers (and indicates the places where these countries overstep their restrictions). Hailbronner points to the so-called abuse argument as the most plausible legal argument for detention of asylum seekers: namely, European governments admit that there is no reason to detain bona fide asylum seekers, especially considering their vested interests in a rapid recognition procedure, but they do employ detention to prevent unlawful entry of asylum seekers seeking to bypass immigration restrictions. (160) He also draws attention to the dearth of facts about detention in Europe, the "wide range of approaches to detention" in Europe (165), and a concern that "a number of Member States have resorted to the increased use of [detention] for the effective transfer of asylum seekers to the responsible Member State" under the Dublin II Regulation. (163 - 164)

Pinning down when, where, why, and how obligations *not* to detain constrain European Member States occupies the majority of the article. Hailbronner notes that the "European Convention of Human Rights does grant a wide margin of discretion to contracting states to detain asylum seekers for the very purpose of preventing unlawful entry." (166) The Directive on Minimum Standards of Asylum Procedure as well as the Directive on Minimum Standards on the Reception of Asylum Seekers both provide rules for detention. (166) However, the Directives leave outstanding a number of issues, among which questions of time limits, necessity, proportionality, individual assessments, arbitrariness, and the treatment of children loom largest (169 - 171). Hailbronner concludes by stressing the need to develop better protection standards as well as studies on the efficiency of detention in order to "get a more rational basis for assessing the legitimacy of detention practices". (172)

Further reading:

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  - Saul, B. (2013). Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law. Legal Studies Research Paper No. 13/02. Sydney, Sydney Law School: 47.
  - Skulan, C. (2006). "Australia's Mandatory Detention of Unauthorized Asylum Seekers: History, Politics and Analysis under International Law." Georgetown Immigration Law Journal **21**(01): 61 - 110.
  - Wolfe, T. (2012). The Detention of Asylum Seekers in Europe. International Law LLM Thesis, University of Bristol: 41