

Comments on: Draft General comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention

submitted on 30 October 2020

by the REMAP Research Group

Prof. Dr. Jürgen Bast, Justus Liebig University Giessen, Germany

Prof. Dr. Frederik von Harbou, University of Applied Sciences Jena, Germany

Dr. Janna Wessels, Assistant Professor, Free University Amsterdam, the Netherlands

REMAP Research Group
c/o Chair of Public Law and European Law (Prof. Bast)
Justus Liebig University Giessen
Licher Str. 64
35394 Giessen, Germany
remap@recht.uni-giessen.de

Comments on draft General comment No. 5 (2020) – Migrants’ rights to liberty and freedom of movement

This following comments emerged in the context of a study on ‘Human Rights Challenges to European Migration Law (REAMP)’ published in October 2020.¹ The REMAP study is co-authored by Jürgen Bast, Professor of Public Law and European Law at Justus Liebig University Gießen (JLU), Frederik von Harbou, Professor of Law at the University of Applied Sciences Jena (EAH), and Janna Wessels, Assistant Professor of Migration Law at Free University Amsterdam (VU). It was funded by Stiftung Mercator, a nonprofit foundation under German law.

The REMAP study aims at re-mapping the legal framework of Human Rights law applicable to European migration policy and examines the implications of this framework in practice. The first edition focuses, inter alia, on the deprivation of liberty. Given that neither the European Union nor its Member States are Parties to the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the study mainly relies on other sources of international law and EU law. We hope that a condensed version our legal evaluation of migrants’ rights to liberty and freedom of movement may nonetheless provide relevant input to the Committee in concluding its important task of drafting General comment No. 5 (2020).

We have identified four interrelated layers of Human Rights standards as being particularly relevant to determine under which circumstances restrictions on the spatial movement of migrants constitute a Human Rights violation. Human Rights law protects not only against detention unless duly justified (first layer) but also against other forms of arbitrary limitation of movement (second layer). In all situations in which migrants’ liberty and freedom of movement is restricted, Human Rights law prohibits inhuman or degrading treatment (third layer), and it precludes other, less severe interferences with private life if they do not meet the requirements of the principle of proportionality (fourth layer). In other words, Human Rights law determines both the question of *whether* a person’s spatial movement may be restricted (first and second layer) and of *how* such restrictions may be carried out (third and fourth layer).

1.1 Protection against arbitrary detention

The right to liberty and security is one of the oldest and most fundamental Human Rights. The guarantee of *habeas corpus* applies to all human beings, regardless of immigration or other status.² The right is expressed in two provisions of the Universal Declaration of Human Rights of 1948: ‘Everyone has the right to life, liberty and security of person’ (Art. 3 UDHR) and ‘No one shall be subjected to arbitrary arrest, detention or exile’ (Art. 9 UDHR). The prohibition of arbitrary detention is a well-established rule of customary international law and is codified in a broad range of treaties.³

¹ J. Bast, F. von Harbou and J. Wessels, *Human Rights Challenges to European Migration Policy (REMAP study)*, published online 27 October 2020, available at www.migrationundmenschrechte.de.

² As reaffirmed, for example, in HRC, General Comment No. 15: The Position of Aliens under the Covenant, HRI/GEN/1/Rev.1, at para. 1 and 7.

³ V. Chetail, *International Migration Law* (2019), at 133.

At the universal level, it has been included in Art. 9 of the ICCPR.⁴ The jurisprudence of the Human Rights Committee (HRC, the treaty body entrusted with the supervision of ICCPR) has clarified that in order to comply with the requirements of lawfulness and non-arbitrariness, the principles of reasonableness, necessity, and proportionality apply.⁵ While the detention of migrants is not prohibited per se, it must pursue a narrow and specific aim and be necessary and proportionate to reach this aim, taking into account the individual circumstances of the case at hand. Illegal entry by migrants does not in itself justify their detention; additional factors particular to the individual are required, such as the likelihood of absconding or a risk of acts against national security.⁶ Following the same line of reasoning, the UN Working Group on Arbitrary Detention reiterates the principles of reasonableness, necessity, and proportionality in the light of the circumstances specific to the individual case.⁷ The UN Working Group recalls that the ‘standards restated in the present deliberation apply to all States in all situations, and factors such as the influx of large numbers of immigrants regardless of their status ... cannot be used to justify departure from these standards’.⁸

Provisions similar to Art. 9 ICCPR can be found in other universal Human Rights treaties, such as Art. 16 of the Migrant Workers Convention (ICRMW) and Art. 37 of the Convention on the Rights of the Child (CRC).⁹ The ‘presumption of liberty’ for migrants is also reflected in regional Human Rights law, including in Art. 6 of the African Charter on Human and People’s Rights (ACHPR, ‘Banjul Charter’) and in Art. 7 of the American Convention on Human Rights (ACHR). The Inter-American Commission on Human Rights explicitly rejects a ‘presumption of detention’ for migrants¹⁰ and acknowledges that the constraints on immigration detention must be even stricter than those governing pre-trial or other forms of preventive criminal detention.¹¹ This international consensus is confirmed in Objective 13 of the Global Compact for Migration: ‘Use immigration detention only as a measure of last resort and work towards alternatives’ (para. 29).¹²

⁴ Art. 9(1) ICCPR: ‘Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established in law.’

⁵ HRC, *Van Alphen v. the Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988, at para. 5.8; *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, at para. 9.2.

⁶ See, e.g., HRC, *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, at para. 9.4; *A.G.F.K. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, at para. 9.3–9.4.

⁷ HRC, Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45, at para. 14, 19–20 and 22–24.

⁸ *Ibid.*, at para. 48.

⁹ E.g., Art. 16 ICRMW; Art. 37 CRC.

¹⁰ In the *Maribel Cubans* case, the Inter-American Commission on Human Rights criticized US practice leading to ‘a presumption of detention rather than a presumption of liberty’, which the Court regarded as ‘fundamentally antithetical’ to Art. I (liberty), XXV (protection against arbitrary arrest and detention) ADHR. See Gomez, ‘The Inter-American System: Report No. 51/01, Case 9903 Rafael Ferrer-Mazorra et al. (United States), Report No. 51/01, 4 April 2001 Inter-American Commission on Human Rights’, 2 *Human Rights Law Review* (2002) 117; for an elaborate examination of the presumption of liberty in the Inter-American system, see M.-B. Dembour, *When Humans Become Migrants* (2015), at 369–401.

¹¹ Costello, ‘Immigration Detention: The Grounds Beneath Our Feet’, 68 *Current Legal Problems* (2015) 143, at 171.

¹² See also GCM, Objective 21, para. 37 (‘Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration’).

To complete the picture of relevant guarantees in universal Human Rights law, reference is made to the 1951 Convention Relating to the Status of Refugees (Geneva Refugee Convention, GRC). Art. 31 GRC exempts refugees from penalties for illegal entry. This provides an additional source of protection against detention of asylum seekers upon entry. According to legal scholarship, depriving asylum seekers or refugees of their liberty for the mere reason of having entered or stayed illegally would amount to a penalty under Art. 31(1) GRC.¹³ In addition, Art. 31(2) GRC entails a necessity requirement regarding refugees unlawfully in the country, but only if they come directly from a territory where their life was in danger. In its 2012 Revised Guidelines on Detention of Asylum Seekers, UNHCR confirmed the principle that asylum seekers should not be detained for the sole reason of seeking asylum and that detention is only permissible in exceptional circumstances, when it is reasonable, necessary, and proportionate in order to attain a limited range of objectives.¹⁴

In the European legal space, Art. 5 ECHR incorporates the right to liberty and security of the person. Rather than a generic prohibition of arbitrariness, however, it provides an exhaustive list of six situations of when detention may lawfully occur. In the context of immigration detention, the relevant provision is point (f) of Art. 5(1) ECHR, which reads: ‘the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’.

The original intent, in 1950, to draft an exhaustive list of detention grounds was to provide for more specific regulation than the generic clauses of the UDHR, but the ensuing case-law on Art. 5(1)(f) has some difficulties in keeping track with developments in universal Human Rights law. The ECtHR only reluctantly applies the principles of necessity and proportionality to cases of immigration detention. While the ECtHR has recognized in non-migration contexts that ‘it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances’,¹⁵ the Court has accepted the practice of detention for bureaucratic convenience in the migration context.¹⁶ In its *Saadi* judgment, the Grand Chamber explicitly held that necessity is not a requirement under Art. 5(1)(f) ECHR for the lawfulness of immigration detention upon entry.¹⁷

¹³ Noll, ‘Article 31 (Refugees lawfully in the country of refuge/Réfugiés en situation irrégulière dans le pays d’accueil)’, in A. Zimmermann (ed.), *Commentary on the 1951 Convention relating to the Status of Refugees* (2011) 1243, at para. 96; see also Goodwin-Gil, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalisation, Detention and Protection’, in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 185, at 195–196; A. Grahl-Madsen, *The Status of Refugees in International Law* (1972), at 209; A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’* (2011), at 11, available at <https://www.unhcr.org/4dc949c49.pdf>.

¹⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), available at <https://www.refworld.org/docid/503489533b8.html>.

¹⁵ ECtHR, *Witold Litwa v. Poland*, Appl. no. 26629/95, Judgment of 4 April 2000, at para. 78.

¹⁶ ECtHR, *Chahal v. UK*, Appl. no. 22414/93, Judgment of 15 November 1996 (regarding pre-removal detention), and *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008 (regarding detention upon entry).

¹⁷ ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, at para. 72–74.

This line of reasoning was widely challenged in legal scholarship.¹⁸ It also has outspoken critics within the Court¹⁹ and the Council of Europe more widely. The Parliamentary Assembly of the Council of Europe has expressly criticized the *Saadi* judgment,²⁰ and the European Commissioner for Human Rights and the European Committee for the Prevention of Torture have expressed their opposition to the use of immigration detention as a first response and deterrent to migrants reaching Europe irregularly.²¹ In its more recent case-law, albeit not decisively, the Strasbourg Court has been cautiously resiling from its previous position and increasingly incorporates elements of a full proportionality test (including the element of necessity).²²

To sum up the Human Rights standard regarding immigration detention, the prohibition of arbitrary detention is an absolute norm of customary international law. In the language of the Working Group on Arbitrary Detention, '[a]rbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers'.²³ In order not to be considered arbitrary, detention measures must adhere to the principles of reasonableness, necessity, and proportionality (i.e., in the doctrinal language of EU law, all elements of the principle of proportionality must be tested). Accordingly, the lower standard provided in the ECHR is superseded by the higher level of protection in universal Human Rights law.

In EU law, the latter standard is mirrored in Art. 6 EU-CFR, which replicates the plain wording of Art. 3 UDHR and Art. 9(1) ICCPR, without further qualifications or special provisions on immigration detention. Regardless of the general rule of interpretation established in the first sentence of Art. 52(3) EU-CFR, according to which the provisions of the EU Charter are presumed to have the same meaning as the corresponding provisions of the ECHR, we hold that the second sentence of Art. 52(3) EU-CFR applies. According to this clause, the above-mentioned rule of interpretation shall not prevent Union law providing more extensive protection.

¹⁸ G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (2010); Moreno-Lax, 'Beyond Saadi v UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5(2) *Human Rights and International Legal Discourse* 166; Costello, 'Human Rights & the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law', 19 *Indiana Journal of Global Legal Studies* (2012) 257; see also D. Wilsher, *Immigration Detention: Law, History, Politics* (2014).

¹⁹ In the *Saadi* case, by reference to international law documents, judges Rozakis, Tulkens, Kovler, Hajiyev, Spielman and Hiverlä formulated a joint partly dissenting opinion that ended on the oft-cited words 'Is it a crime to be foreigner? We do not think so', ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, dissent.

²⁰ A. C. Mendonça, *The Detention of Asylum Seekers and Irregular Migrants in Europe*, 11 January 2010, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12435&lang=en>, at 14 and 20.

²¹ Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom on 5–8 February and 31 March–2 April 2008, as cited in London Detainee Support Group, *Detained Lives: The Real Cost of Indefinite Immigration Detention* (2009), at 11, available at <https://detentionaction.org.uk/wp-content/uploads/2018/12/Detained-Lives-report1.pdf>.

²² ECtHR, *Suso Musa v. Malta*, Appl. no. 42337/12, Judgment of 23 July 2013 and ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Appl. no. 10486/10, Judgment of 20 December 2011, at 124, are examples where the Court applies a proportionality test.

²³ HRC, Deliberation No. 5 on Deprivation of Liberty of Migrants, A/HRC/39/45, at para. 8; and see HRC, General Comment No. 35: Article 9 Liberty and Security of Person, CCPR/C/GC/35, at para. 66: 'The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by Art. 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.'

We argue that in respect of the prohibition of arbitrary detention, the relevant EU fundamental right in substance is consistent with the jurisprudence of the HRC rather than with the *Saadi* case-law of the ECtHR. In any case, the EU is legally bound to follow the rules of customary international law that are an integral part of the EU legal order and are binding upon the institutions of the Union, including its legislative bodies.

1.2 Protection against restrictions on the freedom of movement

Human Rights law also prohibits arbitrary limitations on the freedom of movement in the form of ‘area-based restrictions’²⁴ even if they do not constitute detention. In its initial form, the relevant right can be found in Art. 13 UDHR, which provides that ‘[e]veryone has the right to freedom of movement and residence within the borders of each state’. The main difference in relation to the concept of detention is the wider geographical scope of the bordered space (‘territory’) to which the guarantee of mobility relates.

However, subsequent instruments incorporating this right have conditioned it on lawful stay of the protected person. Art. 12(1) ICCPR limits freedom of movement and choice of residence to those ‘lawfully within the territory of a State’. A similar qualification is laid down in Art. 26 GRC, which requires a State to ‘accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances’. At the level of the Council of Europe, freedom of movement was added to the ECHR only in 1963 through Protocol No. 4, which entered in force in 1968. Likewise, Art. 2 of that Protocol grants freedom of movement to ‘everyone lawfully within the territory of a State’.

In contrast to the prohibition of arbitrary detention, the right to intra-territorial mobility is not an absolute right. Once a person is lawfully within a State, restrictions on his or her right guaranteed by Art. 12(1) ICCPR, as well as any treatment different from that accorded to nationals, must be justified under the rules provided for by Art. 12(3) ICCPR. This provision restricts permissible limitations to those ‘provided by law’ and necessary to protect national security, public order, health or morals, or the rights and freedoms of others; such limitations must also be consistent with the other rights recognized in the ICCPR.²⁵ Thus, restrictions applied in the individual case must have clear legal basis, serve one of the listed grounds, meet the test of necessity and the requirements of proportionality, and be governed by the need for consistency with the other rights recognized in the Covenant.²⁶ The ECHR has a comparable limitation clause in Art. 2(3) of Protocol No. 4 ECHR. In addition, Art. 2(4) Protocol No. 4 ECHR permits restrictions in certain areas as justified by ‘the public interest in a democratic society’. This wider scope of permissible restrictions is not warranted by the ICCPR.

In EU law, the legal status of the Human Right to intra-territorial mobility is not entirely clear. A distinction must be drawn here between the territory of each Member State, on the one hand, and Union territory as a whole (as defined in Art. 52(2) TEU and Art. 355 TFEU), on the

²⁴ Todt, ‘Area-based Restrictions to Maintain Public Order: the Distinction Between Freedom-restricting and Liberty-depriving Public Order Powers in the European Legal Sphere’, 4 *European Human Rights Law Review* (2017) 376.

²⁵ HRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

²⁶ *Ibid.*, at para. 2 and 16.

other hand.²⁷ The right to freedom of movement within the borders of a Member State is not mentioned in the EU Charter of Fundamental Rights. However, given that all EU Member States are party to the ICCPR, the GRC and to Protocol No. 4 ECHR (except for Greece, which did not sign Protocol No. 4) we assume that the right to freedom of movement within the territory of each Member State is recognized as a general principle of EU law, subject to the qualifications and permissible restrictions laid down in these instruments. In respect of the freedom of movement within the territory of the EU as a whole, Art. 45(1) EU-CFR grants this right to all EU citizens. For third-country nationals, Art. 45(2) EU-CFR incorporates the proviso of legal residence, stating that '[f]reedom of movement may be granted ... to nationals of third countries legally resident in the territory of a Member State.' This provision refers to the powers conferred on the Union by Art. 77, 78 and 79 TFEU. Consequently, the granting of this right depends on the institutions exercising that power.²⁸ A discussion of the extent to which a positive obligation exists to exercise this power is beyond the scope of this chapter (it may follow from the principle of non-discrimination; see Chapter 4 of the REMAP study).

Two main issues of construction arise from this overview. The first question is who is to be considered lawfully present on state territory. In principle, this matter is governed by national law, provided it is in compliance with international obligations.²⁹ On the other hand, this cannot imply unlimited discretion on the part of the States. Since 'lawful stay' is a concept laid down in an instrument of international law, it can have an autonomous meaning and is ultimately a matter for international interpretation.³⁰ According to legal scholarship, migrants whose right to stay is subject to determination or adjudication should be considered as lawfully on territory.³¹ The same rationale applies to those migrants who are qualified as non-deportable, such as people with toleration status (*Duldung*) in Germany or Austria.³² However, the right to freedom of movement does not apply to those who have entered or are present irregularly and do not have a pending request for regularization of their stay, or to those whose request has been rejected and who are not considered unreturnable.

The second issue relates to the delimitation of restrictions on movement – which are justifiable for a larger range of reasons – from deprivations of liberty that constitute detention. In that regard, the Strasbourg Court has stated that the difference between restrictions on freedom of movement and deprivation of liberty is one of degree rather than substance.³³ The label of

²⁷ On the legal concept of Union territory, see Bast, 'Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts', 76 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL)* (2017) 277.

²⁸ See Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, OJ 2007 C 303, 17.

²⁹ HRC, General Comment No. 27: Article 12 (Freedom of Movement), CPR/C/21/Rev.1/Add.9, at para. 4.

³⁰ L. Slingenberg, *The Reception of Asylum Seekers under International Law* (2014), at 110–111.

³¹ Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 68 *Current Legal Problems* (2015), at 147 and 174.

³² See Report of the Special Rapporteur for the Human Rights of Migrants, Francois Crépeau, A/HRC/20/24, at para. 54; HRC, *Celepli v. Sweden*, CCPR/C/51/D/456/1991, at para. 9.2; for an extensive consideration on the meaning of lawful stay in the context of the Refugee Convention, see J. Hathaway, *The Rights of Refugees under International Law* (2005), at 173.

³³ See ECtHR, *Khlaifia and others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, at para. 64.

the measure is irrelevant; determination requires a factual assessment of the concrete situation (type, duration, effects, and manner of implementation).³⁴ This line of reasoning is significant in the context of this study in two respects. First, it implies that a measure that is not explicitly labeled as detention may nonetheless be subject to the stricter test provided by Art. 9 ICCPR and Art. 5 ECHR. Second, the so-called alternatives to detention are not exempted from observing strict Human Rights standards. Arguably, the closer a liberty-restricting measure comes to being a detention measure, the stricter these standards must be.

1.3 Protection against detention conditions that amount to inhuman or degrading treatment

As to the conditions of detention or other forms of mobility restrictions, any deprivation of liberty must respect the detainee's dignity and cannot be in conflict with the prohibition of torture or inhuman or degrading treatment. That prohibition is laid down in numerous universal instruments, such as Art. 5 UDHR, Art. 7 ICCPR and Art. 1 and 16 CAT, as well as regional instruments such as Art. 3 ECHR, Art. 5 ACHR and Art. 5 ACHPR. The prohibition of torture and inhuman or degrading treatment or punishment is mirrored in Art. 4 EU-CFR. It is considered to be an absolute guarantee. If detention conditions are found to amount to such treatment, detention will automatically be unlawful.

In its case-law regarding Art. 3 ECHR in the context of detention,³⁵ the ECtHR has developed a number of important and detailed positive obligations of States. In order to establish whether the required level of severity has been reached, the Court takes into account the cumulative effect of detention conditions, ranging from sufficient and adequate living space, including sanitary products and meals, to medical care and assistance.³⁶ However, even though the Court has found violations in numerous cases, it has so far failed to derive general principles regarding the required standards. This has enabled some more controversial judgments in which the Court has found that the situation fell short of a violation of Art. 3 ECHR.³⁷

³⁴ ECtHR, *Z.A. and others v. Russia*, Appl. no. 61411/15, 61420/15, 61427/15 and 3028/16, Judgment of 21 November 2019, at para. 138; *Ilias and Ahmed v. Hungary*, Appl. no. 47287/15, Judgment of 21 November 2019, at para. 217–218; see Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' 35 *Refugee Survey Quarterly* (2016) 7, at 11.

³⁵ See, e.g., ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/06, Judgment of 21 January 2011, at para. 205–234; *S.Z. v. Greece*, Appl. no. 66702/13, Judgment of 21 June 2019, and *HA.A. v. Greece*, Appl. no. 58387/11, Judgment of 21 April 2016.

³⁶ L. Slingenbergh, *The Reception of Asylum Seekers under International Law* (2014), at 300–304 and 310.

³⁷ Such as, controversially, in ECtHR, *J.R. and others v. Greece*, Appl. no. 22696/16, Judgment of 25 January 2018. For a discussion concerning in particular Greece, see Vedsted-Hansen, 'Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?', in V. Chetail, Ph. de Bruycker, F. Maiani (eds) *Reforming the Common European Asylum System: the New European Refugee Law* (2016) 317.

1.4 Protection against detention conditions that violate other Human Rights, including the right to private and family life

While Art. 3 ECHR (and its counterparts in universal Human Rights law) constitutes an absolute standard for detention conditions, other provisions of Human Rights law provide further limitations on such measures. They serve to fill a gap in protection where the threshold of severity that constitutes inhuman treatment is not exceeded.

Art. 10(1) ICCPR enshrines a right to humane treatment in detention. It states in positive terms: ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ Case-law of the Human Rights Committee demonstrates that breaches of this article need not reach the threshold of inhuman treatment.³⁸

Art. 10(1) ICCPR does not have an explicit equivalent in other Human Rights instruments.

At the European regional level, the ECtHR combines the assessment of the lawfulness of detention with the adequacy of detention conditions, to a similar effect. The safeguard provided by Art. 5(1) ECHR is that the detention must be ‘in accordance with law’. As the Strasbourg Court has established, lawfulness involves a requirement of non-arbitrariness, which amounts to a compendium of factors, including those relating to the place and duration of detention: ‘the place and conditions of detention should be appropriate’, bearing in mind that asylum seekers are not convicted of a criminal offense; and ‘the length of the detention should not exceed that reasonably required for the purpose pursued’.³⁹ In other words, the Court clarified that there must be a link between the ground of permitted deprivation of liberty, on the one hand, and the place and conditions of detention, on the other hand.⁴⁰ It has repeatedly held that detaining children in closed centers designed for adults does not take account of their extreme vulnerability and that their detention is therefore disproportionate and unlawful under Art. 5(1)(f) ECHR.⁴¹ Although the Court does not label it that way, this essentially constitutes a proportionality assessment, allowing the ECtHR to measure detention conditions not only in terms of Art. 3 ECHR (which precludes any balancing with the public interest pursued) but also in terms of a more flexible standard derived from Art. 5(1)(f) ECHR. If detention conditions were adequate, the detention measure would not be disproportionate and thence would be lawful.

Restrictions on movement may also interfere with other Human Rights, in particular the right to private and family life. The most developed jurisprudence in this regard stems from the

³⁸ HRC, *Penarrieta, Pura de Toro and others v. Bolivia*, Communication No. 176/1984, CCPR/C/31/D/176/1984; *Francesco Madafferi et al. v. Australia*, Communication No. 1011/2001, CCPR/C/81/D/1011/2001: the HRC found that the separation of a family pending removal causing financial and psychological difficulties would violate Art. 10(1) ICCPR.

³⁹ ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, at para. 74. In addition, detention must be carried out in good faith and be closely connected to the purpose of preventing entry (or facilitating return).

⁴⁰ ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, at para. 118; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006, at para. 102; *Muskhadzhiyeva and others v. Belgium*, Appl. no. 41442/07, Judgment of 19 January 2010, at para. 73.

⁴¹ ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, *Muskhadzhiyeva and others v. Belgium*, Appl. no. 41442/07, Judgment of 19 January 2010, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006.

ECtHR case-law on Art. 8 ECHR (mirrored in Art. 7 EU-CFR; for details, see Chapter 5). According to the settled case-law, private life includes a person's physical and mental integrity and encompasses the development, without outside interference, of the personality of each individual in their relations with other human beings.⁴² Liberty of movement is an indispensable condition for the free development of a person.⁴³ In several cases the ECtHR has held that detention constituted a disproportionate interference with Art. 8 ECHR if no particular flight risk has been established.⁴⁴ Even where there was an indication that a family might abscond, authorities were found to have violated Art. 8 ECHR due to a failure to provide sufficient reasons to justify detention for a lengthy period.⁴⁵

Likewise, Art. 8 ECHR comes into play in the context of area-based restrictions. The Strasbourg Court considers Art. 2 of Protocol No. 4 ECHR and Art. 8 ECHR to be closely linked and regularly considers them together.⁴⁶ This is of particular relevance for irregular migrants: although they are excluded from the scope of Art. 2 Protocol No. 4 ECHR due to their unlawful presence, the protection granted under Art. 8 ECHR also extends to them. In a case involving the freedom to leave any country, laid down in Art. 2(2) Protocol No. 4 ECHR, the Court clarified: 'The fact that 'freedom of movement' is guaranteed as such under Article 2 of Protocol no. 4, which Turkey has signed but not ratified, is irrelevant given that one and the same fact may fall foul of more than one provision of the Convention and its Protocols'.⁴⁷ This reasoning can be extended to area-based restrictions not amounting to detention. In situations where Art. 2(1) of Protocol No. 4 does not apply, restrictions of movement may nonetheless violate other Convention rights, most notably the right to family and private life.⁴⁸ Accordingly, any type of area-based restriction for irregular migrants must be in accordance with Art. 8 ECHR.

⁴² ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. no. 13178/03, Judgment of 12 October 2006, at para. 83, citing *Niemietz v. Germany*, Appl. no. 13710/88, Judgment of 16 December 1992, at para. 29; *Botta v. Italy*, Appl. no. 21439/93, Judgment of 24 February 1998, at para. 32; *Von Hannover v. Germany*, Appl. no. 59320/00, 24 June 2004, at para. 50.

⁴³ HCR, General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, at para. 1.

⁴⁴ ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, at para. 147–148, *A.B. and others v. France*, Appl. no. 11593/12, Judgment of 12 July 2016, at para. 155–156; *R.K. and others v. France*, Appl. no. 68264, Judgment of 12 July 2016, at para. 114 and para. 117.

⁴⁵ ECtHR, *Bistieva and others v. Poland*, Appl. No. 75157/14, Judgment of 10 April 2018, at para. 88.

⁴⁶ See, e.g., ECtHR, *Olivieira v. the Netherlands*, Appl. no. 33129/96, Judgment of 4 June 2002, at para. 67–69; *Garib v. the Netherlands*, Appl. no. 43494/09, Grand Chamber Judgment of 6 November 2017; at para. 140–141; see also, more extensively, in the preceding Chamber judgment of 23 February 2016: ECtHR, *Garib v. the Netherlands*, Appl. no. 43494/09, at para. 114–117.

⁴⁷ The case involved restrictions of movement regarding a Turkish citizen by Turkey, preventing him from leaving Turkey to be with his family in Germany. Turkey had signed but not ratified Protocol No. 4; ECtHR, *Iletmis v. Turkey*, Appl. no. 29871/96, Judgment of 6 December 2005, at para. 50.

⁴⁸ In this regard, see ECtHR, *Battista v. Italy*, Appl. no. 43978/09, Judgment of 2 December 2014, at para. 51–52, where the applicant complained against compulsory residence order under both Art. 2(1) Protocol No. 4 ECHR and Art. 8 ECHR. The Court held that the claim raised under Art. 8 ECHR was 'closely linked to the complaint under Article 2 of Protocol No. 4' and therefore needed not be assessed separately.