

International Institute of Humanitarian Law



International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies

STUDI



Politica



FrancoAngeli

I lettori che desiderano informarsi sui libri e le riviste da noi pubblicati possono consultare il nostro sito Internet: www.francoangeli.it e iscriversi nella home page al servizio "Informatemi" per ricevere via e-mail le segnalazioni delle novità.

International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies

41st Round Table on Current Issues
of International Humanitarian Law
(Sanremo, 6th-8th September 2018)

Editor Giorgio Battisti

Associated Editor Gian Luca Beruto

 **FrancoAngeli**

Gen. Giorgio Battisti is a retired Lieutenant General in the Italian Army. His last assignment was Commander Italian Army Training and Doctrine Command in Rome. Throughout his career he has held multiple command and staff positions in Italy and abroad. He took part in the UN Mission in Somalia in 1993, and the NATO Mission in Bosnia in 1997. Furthermore, he deployed to Afghanistan four times in 2001/02, 2003, 2007 and 2013/14. During his last tour of duty in Kabul he served as ISAF HQs Chief of Staff.

Mr. Gian Luca Beruto holds a Master's degree in International Political Science and is currently Assistant to the Secretary-General of the International Institute of Humanitarian Law. His career has developed in different areas including peacekeeping, conflict management, institutions building, governance, disarmament, assistance and protection of migrants and refugees. In 2005 and 2006 he was part of the Disarmament Demobilisation Reintegration (DDR) programme of the UN Mission in the Democratic Republic of Congo.

The International Institute of Humanitarian Law would like to thank Ms Shirley Morren, librarian of the Institute and Mr. Edoardo Gimigliano, who were involved in the painstaking task of proofreading and editing.

Copyright © 2019 by International Institute of Humanitarian Law.

Stampa: Digitalprint Service srl – sede legale: via dell'Annunciata 27, 20121 Milano;
sede operativa: via Torricelli 9, 20090 Segrate (MI)

Table of Contents

| | | |
|--|----|----|
| Preface <i>Fausto Pocar</i> | p. | 11 |
| Opening session | | |
| Welcome address <i>Alberto Biancheri</i> | » | 15 |
| Opening remarks <i>Fausto Pocar</i> | » | 17 |
| Opening remarks <i>Helen Durham</i> | » | 20 |
| Opening remarks <i>Sebastiano Cardi</i> | » | 24 |
| Message <i>Peter Maurer</i> | » | 25 |
| Keynote address <i>Steven Hill</i> | » | 28 |
| I. Setting the scene: the humanitarian and legal challenges | | |
| The human cost of detention in particular in States affected by armed conflicts: the physical, psychological and societal consequences of deprivation of liberty <i>Ana Racu</i> | » | 37 |

| | | |
|--|----|-----|
| Humanitarian challenges in contemporary armed conflicts: an operational overview <i>Laurent Saugy</i> | p. | 46 |
| Contemporary challenges when applying IHL and IHRL to protect persons deprived of their liberty in relation to armed conflict, in particular NIAC <i>Blaise Cathcart</i> | » | 51 |
| Les défis légaux et opérationnels posés par la privation de liberté durant les opérations militaires extraterritoriales : une perspective (européenne) d’Etat <i>Camille Faure</i> | » | 58 |
| II. The legal basis for deprivation of liberty in times of armed conflict | | |
| Argument in favour of IHL providing a legal authority for deprivation of liberty in relation to NIAC <i>John Swords</i> | » | 69 |
| Argument against IHL providing a legal authority for deprivation of liberty in relation to NIAC <i>Lawrence Hill-Cawthorne</i> | » | 78 |
| III. Preventing arbitrary detention: grounds and procedures for deprivation of liberty in times of armed conflict | | |
| Grounds and procedures for deprivation of liberty in times of IAC and NIAC – existing law and policy proposals <i>Jelena Pejic</i> | » | 87 |
| Protéger les individus de la détention arbitraire dans les opérations « anti-terrorisme » : l’expérience d’un Etat <i>Abdoulaye Kaka</i> | » | 102 |
| Deprivation of liberty during NIAC security screening operations <i>Chris Jenks</i> | » | 111 |

IV. Ensuring humane treatment and conditions of detention

- Adequate conditions of detention and the protection of vulnerable groups during armed conflicts**
Jes Rynkeby Knudsen p. 123
- Ensuring humanitarian treatment and conditions during the initial stage of detention: the Colombian case study**
Javier Alberto Ayala Amaya » 130
- Humanitarian consequences of overcrowding and legal responses in times of armed conflict**
Piera Barzanò » 151

V. Specific challenges I: detention and detainee transfers in multinational operations

- Les défis opérationnels de la privation de liberté et du transfert de personnes capturées en opérations multinationales**
Pascale Têtu » 159
- Implementing the legal framework relating to the deprivation of liberty by peacekeeping forces: a practical example**
Stéphane Wohlfahrt » 166
- Detainee transfers under IHL of IAC and under IHL of NIAC**
Tilman Rodenhäuser » 180

VI. Specific challenges II: detention by non-State armed groups

- La privation de liberté par des groupes armés non-étatiques en pratique**
Hichem Khadhraoui » 191
- Which legal framework applies to deprivation of liberty by non-State armed groups and do they address the particular challenges when detention is conducted by non-State armed groups?**
Katharine Fortin » 200

| | | |
|---|----|-----|
| Ways to address legal and implementation challenges when armed groups detain <i>Sandesh Sivakumaran</i> | p. | 225 |
|---|----|-----|

VII. Legal boundaries of migration-related detention

| | | |
|--|---|-----|
| Humanitarian consequences of migration-related detention <i>Caroline Dulin Brass</i> | » | 235 |
|--|---|-----|

| | | |
|---|---|-----|
| The human right to liberty in the context of migration governance: some critical remarks on the recent practice in the light of the applicable legal framework <i>Marcello Di Filippo</i> | » | 239 |
|---|---|-----|

| | | |
|---|---|-----|
| Migration detention of vulnerable migrants: particular needs and recent legal developments <i>Renate Winter</i> | » | 254 |
|---|---|-----|

| | | |
|---|---|-----|
| Presentation of the winning submission to the “2018 Sanremo New Voices in International Humanitarian Law” essay competition: <i>Policies of discrimination based on national origin in migration-related detention: realities and remedies</i> <i>Jinan Bastaki</i> | » | 260 |
|---|---|-----|

VIII. Strengthening detainee protection

| | | |
|--|---|-----|
| Strengthening the legal framework protection of detainees: what role for standard-setting? <i>Frederik Harhoff</i> | » | 271 |
|--|---|-----|

| | | |
|---|---|-----|
| What makes parties to armed conflicts comply with applicable law? The ICRC’s Roots of Restraint in War study <i>Fiona Terry</i> | » | 282 |
|---|---|-----|

| | | |
|--|---|-----|
| Strengthening specific knowledge of and compliance with applicable international law by armed forces: which role for training? <i>Grant Davies</i> | » | 296 |
|--|---|-----|

Concluding session

| | | |
|---|----|-----|
| Closing remarks <i>Helen Durham</i> | p. | 305 |
| Closing words <i>Fausto Pocar</i> | » | 308 |
| Acronyms | » | 309 |
| Acknowledgements | » | 315 |

The human right to liberty in the context of migration governance: some critical remarks on the recent practice in the light of the applicable legal framework

Marcello DI FILIPPO

Professor of International Law, University of Pisa; Coordinator of the Observatory of European Migration Law; Member, IIHL

1. Introduction

In this contribution¹ I will focus on the detention of migrants as a possible restriction to the right to the liberty (or personal freedom) of the concerned persons. There is sometimes confusion between the restriction to freedom of movement within the territory of a single state, internal freedom of movement, and, on the contrary, the restriction to personal freedom or liberty *stricto sensu*.

Freedom of movement inside the State territory is recognized to any foreigner legally staying (under the human right treaties) and to refugees (in the Geneva Convention). It admits restrictions but it is only partially related to our topic. What I want to discuss here is the basic human right to liberty, which has more solid foundations if compared to the right to freedom of movement within the territory of the State.

It must be admitted that, as happens with comparative constitutional law, international human rights law and international law in general allow for restrictions to personal liberty for reasons different from the commission of a crime, for instance in case of infringement of certain provisions spelled in administrative law, or in case of social dangerousness of the individual concerned. Thus, it is not surprising that restrictions to

¹ In consideration of the nature of the present contribution, the usual bibliographical references are omitted. For some recent studies on the subject, see *ex multis* C. Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', 19 *Indiana Journal of Global Legal Studies* 257 (2012); A. Nethery, S.J. Silverman (Eds.), *Immigration detention: The migration of a policy and its human impact*, Routledge, Taylor & Francis Group, London and New York, 2015; M.J. Guia, R.E. Koulis, V. Mitsilegas (Eds.), *Immigration detention, risk and human rights: Studies on immigration and crime*, Springer, Cham, 2016; F. Spitaleri, *Il rimpatrio e la detenzione dello straniero tra esercizio di prerogative statali e garanzie sovranazionali*, G. Giappichelli Editore, Torino, 2017.

personal freedom can be adopted also for migration purposes. Nevertheless, some criteria and limits must be respected. Unfortunately, States do not always respect these criteria and limits.

In section 2, I will provide some selected and illustrative examples of international legal provisions dealing with detention of human beings, migrants and foreigners included. A basic feature of their content should be never forgotten: liberty is the rule, detention is the exception, to be handled with care. In section 3, I will propose a focus on the European Union, in consideration of its nature of regional lawmaker and policy actor in migration issues and because of the worrying trends that we are witnessing, where detention seems to be turning into a sort of ordinary device for migration control, well beyond the strict limits foreseen in international human rights law. In section 4 I will devote some remarks to the role of international tribunals and supervisory bodies and to the complimentary (and equally relevant) role that may be played by domestic guarantee institutions (even outside the judiciary) and by other actors. In Section 5 I will try to be a little provocative: even when migratory detention may be legally justified, is there any sense in it? Does it produce results or does it only produce the violation of human rights of the person even though such violation was not intended? Does it even produce a negative effect on the community that should be protected at least according to the public discourse of State authorities? In my opinion, we should not stop at the purely formal aspect. And we should wonder whether sound alternatives to detention and removal are possible and if a vision focussed mainly on restrictive policies is adequate when confronted with the indications contained in the two Global Compacts adopted by the international community in late 2018.

2. The right to liberty and the requirements to fulfil for possible restrictions: freedom must be the rule, detention must remain an exception

The right to liberty is recognized to any human being in numerous treaties on human rights and is confirmed in the constitutional provisions of the vast majority of civilized nations. As a reference yardstick, I will employ here the European Convention on Human Rights (ECHR), adopted in Rome in 1950, though specifying that other relevant international

provisions follow a comparable approach². Article 5 par. 1 ECHR states that «*Everyone* has the right to liberty and security of person» (emphasis added). It is perfectly clear that no personal condition bears influence on the entitlement to such freedom. Any human being enjoys it, and there is no possibility to distinguish between a regular migrant, a citizen, a foreigner with undefined migratory status and so on.

The quoted provision goes on underlining that «No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law». Before recalling the permissible derogation grounds, I want to highlight how exceptions are a *numerus clausus* and must remain exceptions, in the meaning that they must be construed narrowly in order to avoid that the right to personal freedom is deprived of its same essence, as repeatedly underlined by any international court or body monitoring the respect of human rights. Moreover, only a legal procedure can authorize a public authority to adopt restrictive measures, so that any risk of arbitrariness is prevented.

Amongst the grounds for adopting a restrictive measure, Article 5 interestingly lists the «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» (letter f). Thus, custodial measures adopted in the context of fight to irregular migration or stay may be permitted, provided that they are provided by law, adopted according to the proscribed procedure, necessary and proportionate with regard to the aim to prevent an unauthorised entry or to carry out the removal towards another State. These are just minimal guarantees but are extremely important in the light of the trend of many border authorities or police forces to treat irregular migrants as second-class persons.

Article 5 goes further, stating under para. 2 that, «Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him».

Finally, para. 4 states that «Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.»

This quick reference to international legal standards illustrates how challenging this issue is: nowadays a very fundamental right, a core

² See for instance Article 9 International Covenant on Civil and Political Rights (1966); Article 7 American Convention on Human Rights (1969); Article 6 African Charter on Human and Peoples' Rights (1981).

heritage of every human being, is put in question by the practice of many States and especially the ones of destination of many migrants. Unfortunately, on this point, the European Union - as I will try to illustrate below, § 3- is not leading the international community to a higher standard as it does, for instance, in the protection of the environment.

In order to appreciate how crucial the recent developments are, suffice it to recall that the personal liberty of foreigners has usually been restricted in the past mainly during international conflicts (the enemy aliens being subjected to internment or summarily expelled), or by authoritarian regimes. Instead, what we are witnessing today is that consolidated democracies and rich countries (the European ones regrettably staying in the forefront) use with a worrying frequency the instrument of detention of migrants and do not elaborate a sound legislative framework around this choice. On the contrary, they sometimes play with words, preferring to avoid terms equivalent to detention and using instead nouns such as *rétention* (in French), *trattenimento* (in Italian), *internamiento* (in Spanish)³. Whatever term is employed, what must be kept clear in mind is that the guarantees for personal liberty do apply.

Additionally, in the public discourse we are often witnessing debates where migrants are treated as a monolithic entity. On the contrary, we must distinguish, in order to understand who is caught by the detention apparatus set up for migratory purposes. Most of those arriving irregularly are fleeing their countries under a serious threat to their safety, with no real chance to employ a regular migratory channel. Some of those detained have already stayed in the host country and, upon having unsuccessfully tried to get a refugee status or other protection status, are ordered to leave; some of them have lost their residence permit or other protective status after a period of regular residence; some of them, finally, come from the criminal circuit proper, because in many countries, after having served a criminal punishment a foreigner is automatically expelled from the territory (or expulsion is inflicted as an alternative sanction to detention). So many kinds of individuals stay or may be caught by the detention circuit of migrants. But it does not end here. There can be minors, unaccompanied or travelling with some family member, often after a perilous journey; victims of torture in transit countries or of human trafficking.

³ In a similar vein, see P. Martucci, 'La detenzione amministrativa dei migranti irregolari. Una questione europea fra sicurezza, emergenza e continuità', in S. Amadeo, F. Spitaleri (Eds.), *Le garanzie fondamentali dell'immigrato in Europa*, G. Giappichelli editore, Torino, 2015, p. 325, esp. pp. 330-331.

The presence of asylum seekers, of minors and of other vulnerable persons adds complexity to complexity, given that the grounds for detention and its actual conditions must be matched against (at least) the Geneva Convention on Refugees (1951)⁴ and the UN Convention on the Rights of the Child (1989)⁵. Finally, the conditions of detention in general must comply with the international provisions on the prohibition of torture, of inhuman and degrading treatments and punishments⁶.

⁴ According to the prevalent view, Article 31 (1), on non-penalization for irregular entry, might be interpreted as applicable also to administrative detention's regimes which are not formally qualified as penal sanction. In any case, Article 31(2) underlines that the Contracting States shall not apply to the movements of refugees (coming directly from a territory where their life or freedom was threatened and who enter or are present in their territory without authorization) restrictions other than those which are necessary and that such restrictions shall only be applied until their status in the country is regularized. On this subject, see C. Costello (with Y. Ioffe and T. Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, doc. PPLA/2017/01, July 2017, pp. 32-33 (with further references to legal literature and international practice).

⁵ In November 2017, two general comments on the rights of migrant children were adopted jointly by the UN Committee on the Rights of the Child and the UN Committee on the Rights of Migrant Workers: see *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, doc. CMW/C/GC/3-CRC/C/GC/22; *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, doc. CMW/C/GC/4-CRC/C/GC/23.

A peculiar attention to the position of minors and to the need to avoid their detention has been given by the Inter-American Court of Human Rights (see *Advisory Opinion OC-21/14*, 19 August 2014, § 154), by the Parliamentary Assembly of the Council of Europe (see Resolution 2020 (2014) 1, *The alternatives to immigration detention of children*, 3 October 2014), and by UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*, 5 March 2015, doc. A/HRC/28/68, § 80).

⁶ See for instance, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Immigration detention*, Factsheet, doc. CPT/Inf(2017)3, March 2017.

Amongst the most relevant judgements of the European Court of Human Rights on migrants' detention, see judgement 15 December 2016 (Grand Chamber), *Khlaifia and Others v Italy*, no. 16483/12; judgement 14 February 2017, *S.K. v Russia*, no. 52722/15; judgement 25 January 2018, *J.R. and Others v Greece*, no. 22696/16; judgement 14 March 2017, *Ilias and Ahmed v Hungary*, no. 47287/15, now pending at the Grand Chamber.

For a broad overview of relevant ECHR case law, see European Court of Human Rights - Press Division, *Migrants in detention*, Factsheet November 2018, available at www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf.

A constant trend emerges from the formulation of international provisions and their interpretation by relevant bodies: liberty is the rule, detention is the exception⁷.

It is worth quoting some passages of the authoritative judgement issued in *Khlaifia*⁸ by the Grand Chamber of the European Court of Human Rights, where the case-law of the Strasbourg judges is aptly summarized:

- Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. Moreover, only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (§ 88);
- Article 5 § 1 (f) does not require the detention to be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. However, any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified only as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with “due diligence” or if there is no reasonable perspective of their actual conclusion, the detention will cease to be permissible under Article 5 § 1 (f) (§ 90);
- Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is, therefore, essential that the conditions for deprivation of liberty under domestic

⁷ As for the progressive interpretation adopted in the Inter-American system of human rights protection, see Inter-American Commission on Human Rights, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, doc. OEA/Ser.L/V/II.Doc. 46/15, 31 December 2015, pp. 179-191, available at www.oas.org/en/iachr/reports/pdfs/humanmobility.pdf. For space constraints, the following analysis will be limited to the standards developed in the context of the Council of Europe and of the European Union, although it is certain that the discussion of the trends emerging from the Inter-American circle (or possibly even from others, such as the African one) might be extremely interesting and promising.

For several references to the UN Committee on Human Rights’ case law on Article 9 ICCPR, see *inter alia* 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*, UNHCR Legal and Protection Policy Research Series, doc. PPLA/2011/01.Rev. 1, April 2011, pp. 18-28, available at www.refworld.org/docid/4dc935fd2.html.

⁸ Judgement 15 December 2016, qtd.

law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (§ 92);

- Paragraph 2 of Article 5 lays down an elementary safeguard: any person who has been arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: any person who has been arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with paragraph 4 (§ 115);
- Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty. The notion of “lawfulness” under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that a detained person is entitled to a review of the “lawfulness” of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the “lawful” detention of a person according to Article 5 § 1. The reviewing “court” must not have merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (§ 128);
- The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. The existence of the remedy must nevertheless be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness (§§ 129-130);
- Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided “speedily” by a court

and to have their release ordered if the detention is not lawful. Proceedings concerning issues of deprivation of liberty require particular expedition, and any exceptions to the requirement of “speedy” review of the lawfulness of a measure of detention call for strict interpretation (§ 131).

Against this legal background⁹, it appears interesting to devote some attention to the manner in which a regional lawmaker (namely, the European Union) has sought to strike a balance between the individual sphere and the public interest in fighting against irregular immigration and stay.

3. A not-so-exemplary European Union: detention as an “ordinary” device for migration control, rather than an exception to a fundamental right

Coming to the European Union legal order, it is developing in a way that formally tries to respect some of the criteria and limitations that I recalled above. It is of paramount importance that Article 6 of the EU

⁹ In the light of the foregoing, it appears difficult to reconcile with the ECHR the course of action adopted by Italian authorities in the ‘Diciotti case’, involving the forced permanence of 177 persons for five days on board a ship of the Italian Coast Guard (the Diciotti), anchored in one of the docks of the Italian port of Catania after having participated in a search and rescue operation coordinated by Italy. According to a specialized panel of the Tribunal of Catania, not allowing those persons to disembark and the consequent permanence on board for 5 days amounted to an unlawful restriction of personal liberty and was carried out upon a direct order coming from the Italian Ministry of Interior, without affording the concerned persons any of the procedural guarantees spelled in Article 5 ECHR (or in Italian law). Additionally, it is doubtful that the justification for this measure matches the requisites of necessity and proportionality. For a detailed account of the facts and the *prima facie* existence of a criminal liability (aggravated kidnapping) for the Ministry of Interior, see Tribunale di Catania (Sezione Reati Ministeriali), Relazione del 7 dicembre 2018, *Matteo Salvini*, n. 1/18, in Senato della Repubblica, *Richiesta di autorizzazione a procedere nei confronti del Senatore Matteo Salvini nella sua qualità di Ministro dell’Interno pro tempore*, doc. IV-bis, n. 1, 23 January 2019, p. 3 ff., available at [www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/\\$FILE/Doc.%20IV-bis,%20n.%201.pdf](http://www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/$FILE/Doc.%20IV-bis,%20n.%201.pdf). For a brief account, see M. Frigo, *The Kafkaesque “Diciotti” Case in Italy: Does Keeping 177 People on a Boat Amount to an Arbitrary Deprivation of Liberty?*, in *OpinioJuris*, 28 August 2018, available at <http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/#comments>; M. Savino, *The Diciotti Affair: beyond the Populist Farce*, in *Verfassungsblog*, 2 September 2018, available at <https://verfassungsblog.de/the-diciotti-affair-beyond-the-populist-farce>.

Charter of Fundamental Rights restates the first sentence of Article 5, para. 1 ECHR¹⁰. However, looking at certain details and at everyday practice, the European Union and its member States are giving the impression that in their eyes detention is becoming the rule while personal liberty of the migrants is downgraded to exception. This is really worrying. Examples can be drawn by the so-called Return Directive¹¹ that applies to any migrant who is subjected to a return or a removal procedure following an expulsion order or even a rejection at the border (except where a Member State avails himself of a derogatory clause). The Directive is based on some key elements:

- Overall mandatory purpose of removing the irregular migrant. Regularization (or “amnesty”) is not expressly prohibited and keeps a possible option for Member States¹². However, it must be admitted that the *leitmotiv* of the Directive is the actual implementation of return;
- To this end, possibility of recourse to the detention, up to 6 months, in case of risk of absconding or non-collaboration by the migrant. What risk of absconding means is not specified, and implementation practice shows that the mere fact of being in an irregular migratory status is too often deemed sufficient for national authorities in order to adopt detention measures. Moreover, non-collaboration with public authorities in the context of a sanction procedure - while being an individual right in criminal proceedings owing to the presumption of innocence - turns here (migration-law related procedures) into a justification for the imposition of a penalty (privation of liberty for a prolonged time);
- Detention proper should be a last resort measure, to be implemented if less coercive measures are not available. However, implementation practice does not exploit this possibility in a significant measure (on this point, I will come back below, § 5);
- Detention may be extended up to additional 12 months if removal

¹⁰ See also Article 52 EU Charter.

¹¹ 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, OJ L 348, 24.12.2008, p. 98.

¹² See Article 6(4) of Directive 2008/115, which enables the Member States to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. Similarly, Recital 12 in the Preamble to the Directive states that the Member State should provide third-country nationals who are staying illegally but who cannot yet be removed with written confirmation of their situation.

has still not been possible for lack of cooperation by the migrant or by his/her country of nationality. It is striking that one additional year of detention - a measure that *de facto* amounts to a penal sanction - might be inflicted to the migrant as a consequence of the behaviour of another subject (his-her State), in flagrant contradiction with the basic principle of individual liability¹³;

- Weak provisions on minors (possibly subjected to detention too) and on division between families and other detainees, on time-limits for judicial review and for periodical reviews, on access by lawyers, NGOs, and independent observers.

A similar impression may be drawn from the Reception Directive¹⁴, establishing the reception conditions that apply to asylum seekers pending the examination of the application lodged by them.

The rules that are spelled out in the Directive look oriented towards the guarantee of asylum seekers' liberty, but in several aspects they are too vague, giving the impression the best from international practice or international developments has not been taken¹⁵. On the contrary, they seem to codify some restrictive views that have been developed by European States¹⁶.

Here is a list of some key (and often worrying) points:

- Member States shall not hold a person in detention for the sole reason that he or she is an applicant. In the same time, when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively;

¹³ Some clarifications on the interpretation of the Return Directive are provided by the European Court of Justice: see judgement 5 June 2014, *Bashir Mohamed Ali Mahdi*, Case C-146/14 PPU, ECLI:EU:C:2014:1320.

¹⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96.

¹⁵ On the peculiar sensitiveness of this issue, see for instance Committee of Ministers of the Council of Europe, *Recommendation (2003)5 on measures of detention of asylum seekers*, 16 April 2003; United Nations High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at www.refworld.org/docid/503489533b8.html.

¹⁶ See, *ex multis*, ECRE-Asylum Information Database, *The detention of asylum seekers in Europe: Constructed on shaky ground?*, Legal Briefing, June 2017, available at www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf.

- The list of grounds for detention (or for less restrictive measures) is rather long and sometime includes vague formulas, coming to be more permissive for States if compared to the Return Directive (*sic!*):
 - Need to determine or verify the identity or nationality of the applicant;
 - Need to determine those elements on which the application for international protection is based, in particular when there is a risk of the applicant absconding;
 - Need to decide, in the context of a procedure, on the applicant's right to enter the territory;
 - When he or she is detained subject to a return procedure;
 - Threat to national security or public order.¹⁷
- No precise time-limits are spelled out for detention, nor for judicial review;
- Possibility for minors to be detained is expressly foreseen, although with some additional guarantees;
- Access to detention facilities is afforded with a 'strong' formula to UNHCR but in weaker forms to legal advisors, family members, NGOs: this could impair effective access to justice for review of detention and in general the standard of treatment when detained.

The Dublin III Regulation¹⁸ recalls the possibility to put asylum seekers in detention, with formulas similar to the ones spelled in the Reception Directive and with a general *renvoi* to its provisions for matters not expressly disciplined in the same Regulation.

To sum up, although the abstract EU rules do not state it clearly, an overall evaluation of the legislative framework and of its implementing practice gives the clear impression that detention is not deemed as an exception (to be handled with much care), being rather a sort of common device of the machinery of migration control.

¹⁷ For a contribution to the clarification of these two notions in restrictive terms, see European Court of Justice (Grand Chamber), judgement 15 February 2016, *J.N. v Staatssecretaris van Veiligheid en Justitie*, Case C-601/15 PPU, ECLI:EU:C:2016:84.

It is striking to note that the Return Directive (valid for "normal" foreigners) does not include reasons of public order or security among the permissible ground for ordering or prolonging a detention measure: on this point, see European Court of Justice (Grand Chamber), judgement 30 November 2009, *Said Shamilovich Kadzoev (Huchbarov)*, Case C-357/09 PPU, ECLI:EU:C:2009:741, § 60 and §§ 69-71.

¹⁸ 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, OJ 2013 L 180, p. 31.

This conclusion is strengthened by the emphasis which accompanied the reaction in 2015 to the so called “refugee crisis” and to the terrorist attacks in Belgium and France, with the recourse to several measures such as the “hotspot approach” (based on a logic of containment and exclusion of foreigners in the Southern EU Member States) and the militarization of borders¹⁹.

4. The role of international and domestic tribunals, specialized bodies and other actors

Against this background and analogous developments in many destination countries (suffice it to think of Australia and US practice) a precious “supplementary role” may be exerted by international bodies (be them courts proper or specialized supervisory organs) when interpreting and clarifying the scope of international legal provisions, which are inevitably abstract and sometimes vague.

In the previous sections many references to various kinds of international documents are included, thus witnessing their valuable contribution. Additionally, they play a pedagogical role towards State authorities and civil society, extremely useful in the current times. So, their binding or soft nature is just one aspect to take into account.

However, one aspect of their action cannot be forgotten: the slowness. Exception made for the urgent procedure of the European Court of Justice (under the preliminary reference competence) and for the interim measures of the European Court of Human Rights (at least, to this author’s knowledge), too often international bodies do not have the capacity to quickly deliver “justice” in cases of unlawful detention of migrants and asylum seekers. International courts and bodies may deal with these complicated issues and they certainly give their contribution but, of course, they are not on the ground and can very rarely give an immediate or quick justice to persons in need of it.

Like in other fields regulated by international law, there is wide room

¹⁹ On this aspect, see J. Pétin, ‘Les hotspots: una réponse équitable pour une gestion efficace de la crise?’, in J. Auvret-Finck, A.S. Millet-Devalle (Eds.), *Crise des réfugiés, crise de l’Union européenne?*, Editions A. Pedone, Paris 2017, p. 127, esp. pp. 135-141; R. Palladino, ‘Il trattamento dei migranti all’epoca dell’emergenza: misura eccezionale o (quasi) regola?’, in G. Nesi (Ed.), *Migrazioni e diritto internazionale: verso il superamento dell’emergenza? Atti del XXII Convegno della Società Italiana di Diritto internazionale e di Diritto dell’Unione europea (Trento, 8-9 giugno 2017)*, Editoriale Scientifica, Napoli, 2018, p. 181, esp. pp. 197-201.

for an enhanced role of the national judiciary, which can benefit not only of the jurisprudence of specialized supervisory bodies, but also of other material produced by UN bodies (such as, for instance, the UN Working Group on Arbitrary Detention, the UN Special Rapporteur on the Rights of Migrants, etc.), by regional organisations (African Union, Council of Europe, Organization of American States just to name a few), by the ICRC and authoritative NGOs, and by academia.

Moreover, other domestic actors like ombudspersons, national commissions on human rights, parliamentary specialized committees, courts of auditors may play a significant role in enhancing the accountability of executive authorities when dealing with the liberty and the dignity of migrants. Last but not least, an informed public opinion, an organized civil society and an independent media sector all contribute to the actual protection of human rights, migrants' liberty included.

5. The need to (seriously) explore alternatives to detention, to resume the debate on regularization measures, and to look beyond the pathology of migration governance

The subsequent question is, even admitting that the circuit of detention for migrants has been set up and that it respects all the criteria that I summarily recalled before, does it have any sense? We have a long experience now. In many countries we almost systematically see that detention facilities or detention centres for migrants produce degrading treatments or sometimes even torture, and migrants can develop health problems. There are people who have been detained for quite a long time with little explanation about the future, who develop feelings of anxiety, frustration or depression. The heterogeneity of the people gathered in these centres result in a forced closeness between people who have never in their life spoken to a criminal and those who are used to living at the edge of the law. This can lead to a sort of indirect approach to the criminal circuit for people who were totally alien to it before being confined in such closed premises. Moreover, these places can encourage feelings of radicalization in some migrants. For vulnerable persons (minors, asylum seekers, victims of torture or of trafficking) the above-mentioned risks are even higher, given the frequent lack of dedicated services and structures.

More broadly, many available studies and reports highlight that detention does not prevent irregular arrivals or contribute to a significant success rate in implementing return decisions, while at the same time it

certainly produces the violation of basic human rights and unnecessary pain²⁰. Finally, detention of migrants causes high financial costs, in times of State's budget curtailment.

It is time to seriously explore the alternatives to the detention of migrants. They are encouraged by many legal provisions, non-binding guidelines and reports issued by different international entities, with a constant eye not only to human rights but also to sustainability and practical aspects²¹. The pity is that these options are summarily discarded by many national governments. So, we must go back on that. Just to give an idea of what alternative measures may mean, here is an indicative list: registration with authorities; temporary residence permits; case management or case worker support; alternative family-based accommodation; residential accommodation; open centres or semi-open centres; regular reporting; designated residence; supervision; return counselling; return houses or return centres; bail, bond, guarantor or surety; electronic monitoring. Time has come for a renewed effort for implementing a more nuanced approach, where detention of foreign individuals is not the only option to enforce restrictive migratory policies.

In addition to that, in my opinion we should also go back on the (politically hot) issue of the regularization of migrants, or at least of a part of them. The reason is quite simple: as above emphasized, irregular

²⁰ See, *ex multis*, see A. Edwards, *Back to Basics*, qtd., pp. 51-89; Refugee Studies Centre, *Forced Migration Review No. 44 - Detention, alternatives to detention, and deportation*, September 2013, pp. 1-61, available at www.refworld.org/docid/523bf00b4.html; Ph. De Bruycker (Ed.), *Alternatives to Immigration and Asylum Detention in The EU. Time For Implementation*, Brussels, January 2015, available at <https://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf>; International Committee of the Red Cross (ICRC), *Policy Paper on Immigration Detention*, April 2016, reproduced in *International Review of the Red Cross* (2017) 99 (1), p. 359.

²¹ See, *ex multis*, Council of Europe - Steering Committee for Human Rights (CDDH), *Legal and practical aspects of effective alternatives to detention in the context of migration*, 7 December 2017, available at <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f>; Office of the United Nations High Commissioner for Refugees (UNHCR) and Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons - Summary Conclusions*, Geneva, 11-12 May 2011, available at www.osce.org/odihr/117327; Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, 1 April 2009, POL 33/001/2009, available at www.amnesty.org/en/library/info/POL33/001/2009.

At the EU level, see Fundamental Rights Agency, *Alternatives to detention for asylum seekers and people in return procedures*, October 2015, available at <https://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures> (here also a useful compilation of relevant international documents, with the related hyperlinks).

migrants or foreigners do not all have the same relationship with the host State and do not all pose a threat (or a serious enough one) to public interests. There can be balance-reasoning on this, and distinguishing amongst possible beneficiaries of amnesty measures is perfectly conceivable. This is nothing new: every host country has adopted in its history regularization programs, with different scope and names²². I do not mean that we must legalise every irregular migrant arriving into or already present on the territory of a State: however, the issue of regularization could be a pragmatic and intelligent way to reduce, at least in part, the problem and to pave the way for an effective integration process²³. Moreover, some form of regularization may be the only option practicable for the host State, whenever removal is technically impossible, as indirectly suggested by the European Court of Justice in *Mahdi*.²⁴

Finally, all that we are discussing here is greatly rooted in the bad governance of migratory flows. The call for a holistic and balanced migration policy might look naïf to many. Nevertheless, it seems that the international community as a whole (with the regrettable exception of some States) is rightly pointing in that direction, with the adoption in late 2018 of the ‘Global Compact for Refugees’ and of the ‘Global Compact for Safe, Orderly and Regular Migration’.

In the short-term, I strongly hope that detention of any human being returns to being an exception when States implement their migration policies.

²² See *ex multis* A. Kraler, ‘Fixing, Adjusting, Regulating, Protecting Human Rights - The Shifting Uses of Regularisations in the European Union’, 13 *European Journal of Migration and Law* (2011) 3, p. 297.

²³ For instance, Article 6(4) of EU Return Directive enables the Member States to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. Similarly, recital 12 in the preamble to the directive states that the Member State should provide third-country nationals who are staying illegally but who cannot yet be removed with written confirmation of their situation.

²⁴ Judgment 5 June 2014, *Bashir Mohamed Ali Mahdi*, Case C-146/14 PPU, §§ 86-89.

Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies

This collection of contributions made by renowned international experts and practitioners in the field of IHL explores realities and remedies of the deprivation of liberty in armed conflict.

The 41st Round Table on current issues of international humanitarian law (IHL), focussed on some of the fundamental themes of international humanitarian law, such as the definition and the existence of a right to detain under customary international law, detention by non-state actors and armed groups, as well as the distinction between the law applicable to detainees in international armed conflict (IAC) and non-international armed conflict (NIAC).

The Round Table provided a forum to discuss other relevant topics including the transfer of detainees and responsibility in case of violations of detainees' rights, particularly when they occur in multinational operations.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organization founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of international humanitarian law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close co-operation with the most important international organizations.