

Deprivation of liberty and alternatives to detention under EU and International Law

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Outline

- Restrictions to the freedom of movement and deprivation of liberty
- Conceptual understanding of ATD
- International Human Rights Law (ICCPR/HRC)
- EU law (Charter)
- Deprivation of liberty and alternatives in EU Law

Deprivation of liberty and restrictions to the freedom of movement

- Difference is one of degree or intensity, and not of kind
- Starting point: concrete situation
- Criteria: type, duration, effects, manner of implementation of the measure in question
- Case-specific assessment, all elements examined cumulatively

e.g. ECtHR, *Austin and Others v. the United Kingdom* (Judgment) (2012) Applications Nos. 39692/09, 40713/09 and 41008/09, para. 57; ECtHR, *Guzzardi v. Italy* (Judgment) (1980) Application No. 7367/76, paras. 92–93

Conceptual understanding of alternatives to detention

□ ATD: broad understanding

e.g. '[a]ny legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country'

IDC & La Trobe, *There are alternatives* (2011), 12

□ ATD: narrow understanding

'a practice used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State's disposal and should therefore be used'

C Costello & E Kaytaz, *Building Empirical Research into Alternatives to Detention* (UNHCR, 2013), 10-11

FROM LIBERTY TO DETENTION

LIBERTY

**ALTERNATIVES
TO DETENTION:**

DETENTION

**REPORTING
SPONSORSHIP
FINANCIAL GUARANTEE
DESIGNATED RESIDENCE
ETC.**

**WHAT ARE ALTERNATIVES
TO DETENTION IN THE EU
LEGAL FRAMEWORK?**

Non-custodial measures applicable to those exceptionally liable for detention and which respect fundamental rights. Although they may include limitations on the freedom of movement, they cannot amount to deprivation of liberty.

PERSONAL LIBERTY AS A FUNDAMENTAL RIGHT

- The right to liberty and security is guaranteed in International, European and EU law as fundamental to a democratic society.

Article 9 ICCPR



Article 5 ECHR



Article 6 EUCFR



- The right to liberty concerns the physical liberty of the person; its aim is to ensure that no-one is arbitrarily dispossessed of this liberty.



Arbitrary Deprivation of liberty: International Human rights law

- Presumption in favour of personal liberty but no absolute protection against deprivation of liberty

Article 9 ICCPR



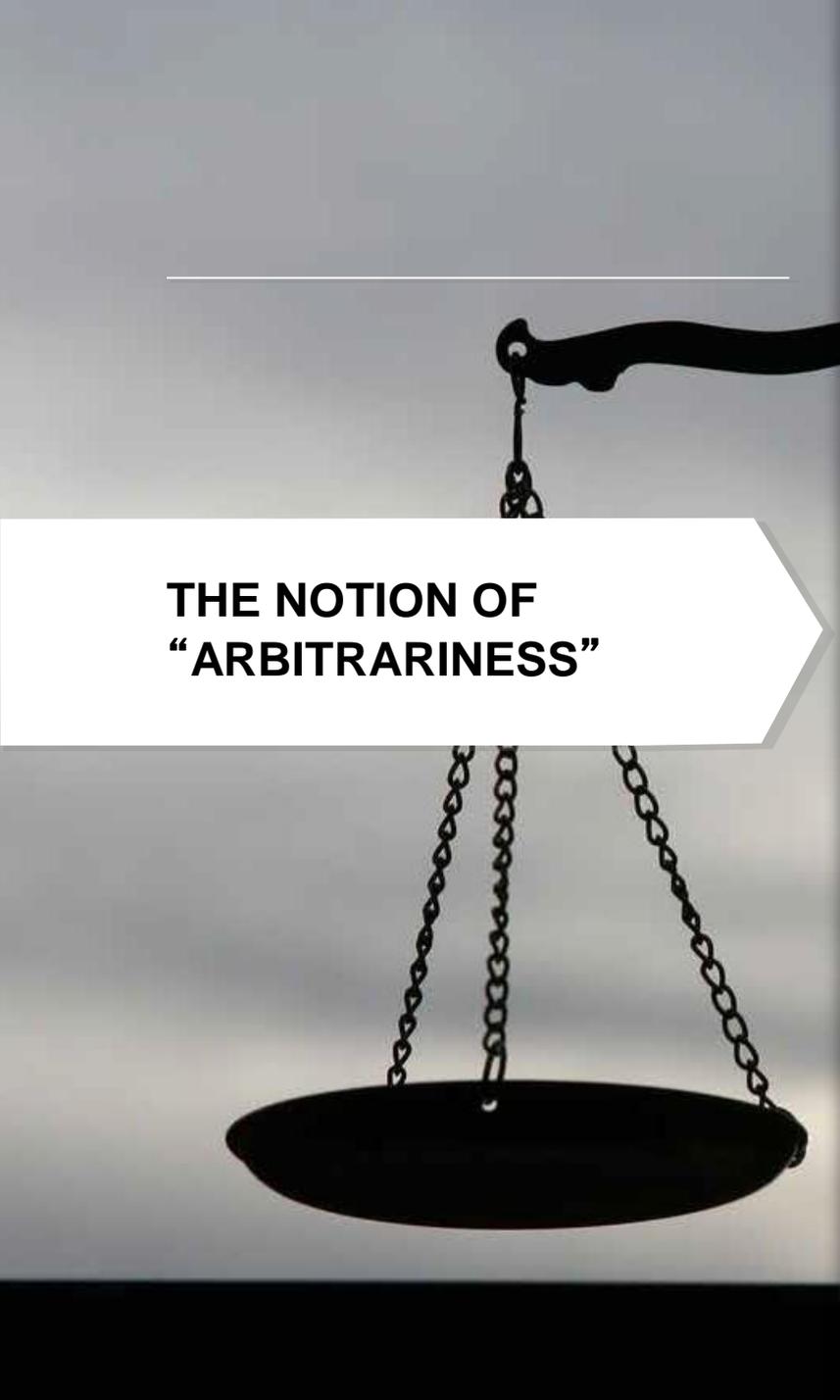
Para 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

THE NOTION OF “ARBITRARINESS”

“It is not the deprivation of liberty itself that is disapproved of but rather that which is arbitrary and unlawful”

M. Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, 2005.

**The notion of arbitrariness
is the cornerstone of the system.**



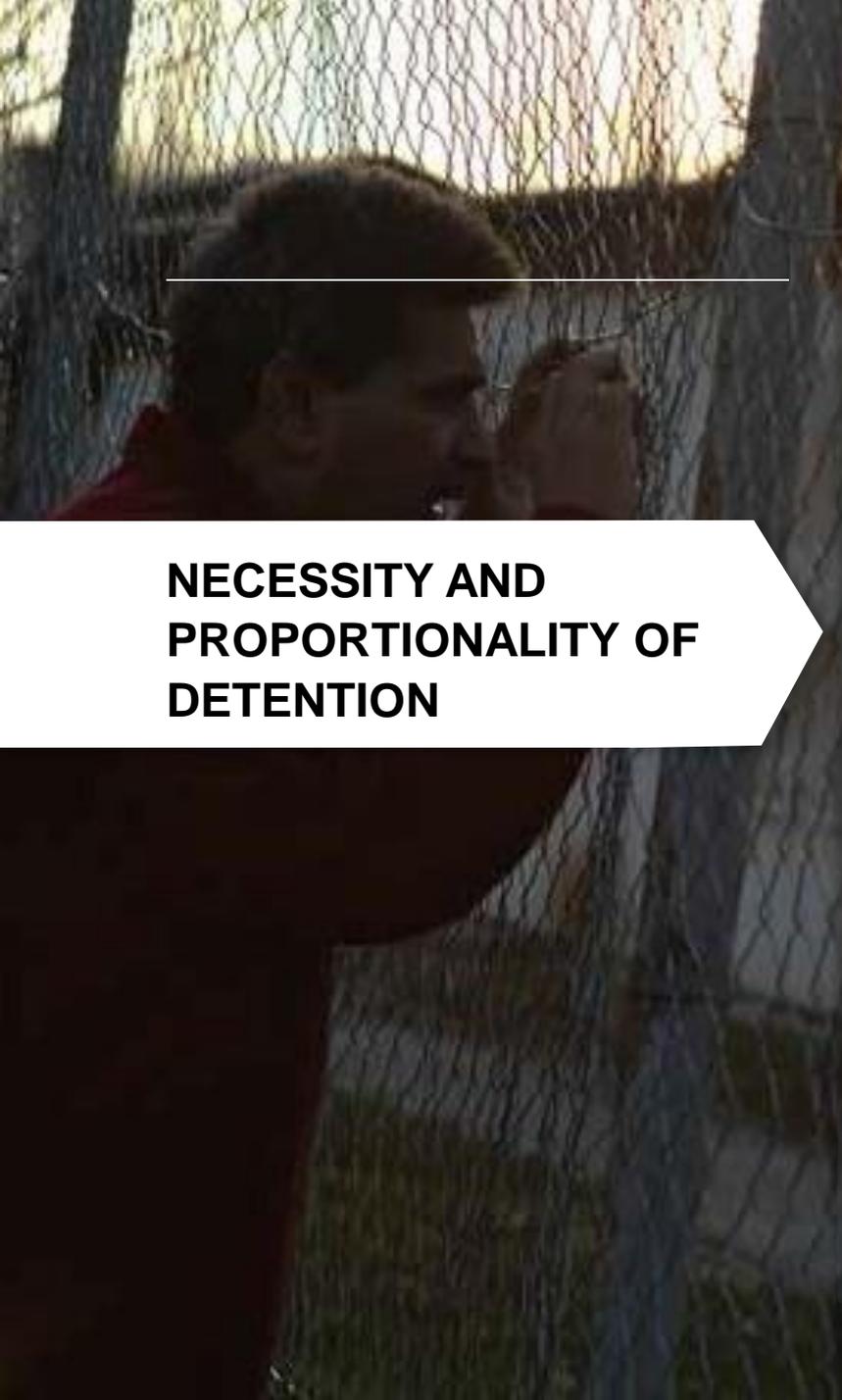
**THE NOTION OF
“ARBITRARINESS”**

- The notion of arbitrariness includes compliance with the law but goes beyond lawfulness.

HRC, Hugo van Alphen



- The notion of arbitrariness requires detention to be necessary and proportionate.
- In this context, the question of whether or not to implement an alternative to detention arises.

A photograph of a person, possibly a detainee, looking out from behind a chain-link fence. The scene is dimly lit, suggesting dusk or dawn, with a warm glow from the sun low on the horizon. The person's face is partially obscured by the fence and shadows.

NECESSITY AND PROPORTIONALITY OF DETENTION

- ***Necessity test*** = National authorities have to verify for each profile whether there were not less coercive measures in order to achieve the same ends.
- ***Proportionality test*** = A fair balance must be struck between the protection of the general interest and the protection of an individual's fundamental rights.

INTERNATIONAL REFUGEE LAW

**Principle: Freedom of movement for asylum seekers
(Art.26)**

Exception: Provisional detention (Art.31 § 2)

- *Article 31 of the 1951 Refugee Convention*
 - §1 non-penalisation clause*
 - §2 restrictively applicable exceptions*
- *No grounds for detention established in the 1951 Refugee Convention.*

EU Landscape

-Article 6 EUCFR

Everyone has the right to liberty and security of person.

-Article 52 EUCFR

Para 1: Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Para 3: In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Detention and alternatives in the recast RCD

- ❑ 2003 instrument: “detention with another name”

“when it proves necessary, *for example* for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law”

- ❑ **Detailed** regulation in Arts 8-11 RRCD

DETENTION AND ALTERNATIVES IN THE RECAST RCD

SAFEGUARDS ON DETENTION OF ASYLUM SEEKERS IN THE RRCDC

A person cannot be held in detention for the sole reason that he or she is an applicant (Art.8 § 1)

obligation to apply a necessity and proportionality test (Art. 8 § 2, Rec. 15)

explicit obligation to conduct an individualised assessment in each case

alternatives have to be developed and considered (Art.8 § 4, Rec. 20)

exhaustive list of detention grounds (Art. 8 § 3)

timeframe: “as short a period as possible” (Art. 9 § 1, Rec. 16 on ‘due diligence’)

set of procedural guarantees (Art. 9, Rec. 15)

DETENTION AND ALTERNATIVES IN THE RECAST RCD

The detention grounds are broadly defined.

Detention of asylum seekers can take place in prison accommodation; (Art. 10 § 1)

Some basic guarantees are provided for vulnerable asylum seekers; (Art. 11 § 1)

The detention of unaccompanied children is permissible “in exceptional circumstances” (Art. 11 § 3)

Detention and alternatives in the recast RCD

1. **broadly defined** grounds for detention, (Art. 8 § 3 RRCD):
 - ✓ “in order to determine or verify identity or nationality”;
 - ✓ determining elements of the application (esp. if risk of absconding);
 - ✓ in order to decide, on the applicant’s right to enter the territory;
 - ✓ asylum applications in order to hamper removal;
 - ✓ national security or public order;
 - ✓ Dublin procedure (significant risk of absconding)

FOCUS ON ALTERNATIVES TO DETENTION IN THE RECAST RCD

Explicit obligation to consider less coercive alternative measures.

Rules concerning alternative schemes must be established in national legislation.

A non-exhaustive list of schemes are mentioned: regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place.

Alternatives should be “non-custodial”; must respect the fundamental human rights of applicants.

Deprivation of liberty and alternatives: realities

- ❑ Non-implementation of guarantees esp.:
 - at border areas (continuum of migration management-asylum seeking a short prelude to return)
 - for particular groups (those subject to 'Dublin' procedures)
 - for particular nationalities
- ❑ Classification of measures that deprive applicants of their liberty as ATD
- ❑ Implementation of ATD as a systematic control measure
- ❑ Forthcoming legislative wave: instrumentalises deprivation of liberty for migration management purposes

Further resources:

-Special issue in the Refugee Survey Quarterly, P. De Bruycker and E. Tsourdi (eds.), 2016, 35 (1) 'The Challenge of Detention to Refugee Protection'

-A Bloomfield, E Tsourdi & J Petin (authors), P De Bruycker (ed), *Alternatives to immigration and asylum detention in the EU: Time for Implementation* (Odysseus Academic Network/ULB 2015)

E Tsourdi, 'International human rights law, EU law, and alternatives to immigration detention: shaping control standards and judicial interaction in an heterarchy', in P De Bruycker, G Cornelisse and M Moraru (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing, 2020) 167-190

Questions and remarks

Thank you very much for your
attention

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