


“Criminal or nay?” Migrants’ administrative detention within the IAHRs: lessons (not) learned by Europe

“Penale o no?” La detenzione amministrativa dei migranti all’interno del Sistema Interamericano dei diritti umani: lezioni (non) imparate dall’Europa.

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ABSTRACT: In this paper, several aspects of the administrative detention discipline in the light of the Inter-American Human Rights System (IAHRs) standards will be addressed. Through a comparative approach, the paper aims at assessing whether the latter provides better protection to detained migrants in respect of other regional systems, such as EU law or ECHR legal framework, from both a substantive and a procedural standpoint. In the first paragraph, a general introduction upon the structure and the aim of the IAHRs will be developed, emphasising the relevant sources of law which have been involved in the creation of such a legal framework. Then, a brief analysis specifically devoted to the migrants’ status within the IAHRs will be offered, also considering the international legal standards on the matter. In the third paragraph I will explain different aspects of administrative detention of migrants—both substantive and procedural ones—in the light of the relevant IAC(t)HR case-law, which might seem to acknowledge its *de facto* criminal nature. A constant reference to the analogous CJEU and ECtHR jurisprudence on the matter will be provided. Finally, a comparison between Europe and America systems upon different standards of migrants’ administrative deprivation of liberty will be presented, arguing that the IAHRs approach

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seems more consistent with international law and, with respect to the European legal framework, more attentive to the paramount importance of the fundamental rights and freedoms to be accorded to aliens subjected to allegedly non-criminal custodial measures.

KEYWORDS: right to personal liberty; *habeas corpus* guarantees; Inter-American Convention on Human Rights; administrative detention; Article 5 ECHR; Article 6 CFR; Article 9 ICCPR; principle of legality.

ABSTRACT: *Nel presente lavoro verranno affrontati diversi aspetti della disciplina della detenzione amministrativa alla luce degli standard del Sistema Interamericano dei Diritti Umani (IAHRS). Attraverso un approccio comparatistico, il contributo intende indagare se quest'ultimo fornisca una migliore protezione ai migranti detenuti rispetto ad altri sistemi regionali, come il diritto dell'UE o il quadro giuridico della CEDU, sia da un punto di vista sostanziale che procedurale. Nel primo paragrafo, verrà sviluppata un'introduzione generale sulla struttura e sull'obiettivo dell'IAHRS, sottolineando le fonti giuridiche rilevanti che sono state coinvolte nella creazione di tale ordinamento. Successivamente, verrà offerta una breve analisi specificamente dedicata allo status dei migranti all'interno dell'IAHRS, considerando anche gli standard legali internazionali in materia. Nel terzo paragrafo illustrerò i diversi aspetti della detenzione amministrativa dei migranti – sia sostanziali che procedurali – alla luce della pertinente giurisprudenza della Corte Interamericana dei Diritti Umani e della relativa Commissione, che sembrerebbe riconoscerne la natura sostanzialmente penale. Verrà fatto un costante riferimento alla pertinente giurisprudenza della Corte di Giustizia dell'Unione europea e della Corte europea dei diritti dell'uomo in materia. Infine, verrà presentato un confronto tra i sistemi europei e americani su diversi standard di privazione amministrativa della libertà dei migranti, sostenendo che l'approccio dell'IAHRS sembra più coerente con il diritto internazionale e, per quanto riguarda il quadro giuridico europeo, più attento all'importanza fondamentale dei diritti e delle libertà fondamentali da riconoscere agli stranieri sottoposti a misure detentive asseritamente non penali.*

PAROLE CHIAVE: diritto alla libertà personale; garanzie dell'*habeas corpus*; Convenzione interamericana dei diritti dell'uomo; detenzione amministrativa; articolo 5 CEDU; articolo 6 CFR; articolo 9 ICCPR; principio di legalità.

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'It is a gross injustice to deprive of his liberty for a significant period of time a person who have committed no crime and does not intend to do so. No civilised country should willingly tolerate such injustices.'

Lord T. Bingham, 'The Rule of Law', Allen Lane, 2010, p. 73

1. SOME INTRODUCTIVE REMARKS UPON THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Regional systems of human rights protection aim at complementing the analogous—and wider—legal structure that emerged after World War II under the aegis of the United Nations (UN)². The UN 'mantle of universality'³, namely the idea that every individual is entitled *per se* to certain fundamental rights as a member of the human family, has characterised all the programmes promoted at the international level since the very beginning of the post-war period⁴. Yet,

² Upon the historical context in which regional systems have been developed see WESTON, Burns; LUKES, Robin Ann; HNATT, Kelly. Regional Human Rights Regimes: A Comparison and Appraisal. *Vanderbilt Journal of Transnational Law*, Nashville (TX), v. 20, n. 4, p. 585-638, 1987.

³ HUNEEUS, Alexandra; RASK MADSEN, Mikael. Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems. *International Journal of Constitutional Law*, Oxford, v. 16, n. 1, p. 137, 2018. <https://doi.org/10.1093/icon/moy011>

⁴ The UN Charter, which represents the founding document of the UN, was signed in 1945 by 51 countries. It aims at reaffirming 'faith in fundamental

the socio-political peculiarities of each region (e.g., Europe, America, Africa) progressively led, in the second half of the 20th century, to the creation of different regional frameworks for the protection of fundamental rights, seen as more adequate to guarantee the effective enjoyment of these prerogatives by individuals than the UN system. Compared to the latter—which is still based on the idea that States are the main subjects of international law—regional systems have progressively promoted the idea that individuals themselves, as holders of inviolable and intangible rights, could bring their claims that a violation of those prerogatives might have occurred before *ad hoc* judicial (or quasi-judicial) bodies, whose decisions would be binding. Very often, they are regional courts and/or commissions, which are charged to deal with individual applications pertaining to the alleged violation of a provision laid down in a Convention or a Treaty listing the fundamental rights to be recognised to human beings⁵.

In sum, the process was characterised by the need to establish an institutional structure which may complement the broader UN system of human rights protection:

‘Over the years, regional systems, particularly those established in Europe and the Americas, have provided the necessary intermediary between state domestic institutions which violate or fail to enforce human rights and the global human rights system which alone cannot provide redress to all individual victims of human rights violations. At the global level, no permanent human rights court

human rights’, which are described as ‘inalienable rights of all members of the human family’ (emphasis added). See, also, the wording of the Article 1 of the Universal Declaration of Human Rights (UDHR), where it is set forth that ‘[a]ll human beings are born free and equal in dignity and rights’.

⁵ Analogously, within the UN system, a Human Rights Committee (HRC) has been established which is entitled *inter alia* to receive individual complaints asserting that the rights under the International Covenant on Civil and Political Rights (ICCPR) have been violated. Nevertheless, its jurisdiction does not refer to a certain geographical area, but it is linked to the State Parties to the ICCPR. See *amplius* CONTE, Alex; BURCHILL, Richard. *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*. London: Routledge, 2016.

has thus far been created to allow individual complaints against governments for violations of human rights'⁶.

Besides, the proliferation of subsystems for the protection of human rights has historically led to a strengthening of fundamental guarantees and protections in certain areas of the world (e.g. America or Africa) where not all the States that are part of the regional organization concerned have always had a fully democratic architecture. Hence, the broad effectiveness of human rights protection has progressively grown up thanks to these regional machineries for the promotion and protection of fundamental rights, as 'the greater the dispersion of human rights initiatives, after all, the greater the likelihood that international human rights and their challenge to traditional notions of state sovereignty will be taken seriously'⁷.

In this regard, it is noteworthy that the UN expressly allows for the possibility to build up regional arrangements, insofar the latter would have implemented the 'maintenance of international peace and security'⁸. Nevertheless, the legal basis for the opportunity for UN Member States to establish regional organisations which may also deal with human rights protection lies elsewhere, and might be indirectly found in Article 56 of the UN Charter, that set forth the faculty for States 'to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55', the latter provision mentioning, in turn, 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'⁹. The UN approach on the matter has been always proactive, to the point that the UN General Assembly urged Member States to take into consideration the possibility to implement *ad hoc* arrangements in

⁶ MUGWANYA, George William. Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System. *Indiana International & Comparative Law Review*, Indianapolis, v. 10, n. 1, p. 41, 1999.

⁷ WESTON, Burns; LUKES, Robin Ann; HNATT, Kelly. Regional Human Rights Regimes: A Comparison and Appraisal. *Vanderbilt Journal of Transnational Law*, Nashville (TX), v. 20, n. 4, p. 588, 1987.

⁸ Article 52(1), UN Charter.

⁹ Article 55(c), UN Charter.

order to set—each in their own region—a ‘suitable regional machinery’ with the purpose of ensure the concrete protection of fundamental individual prerogatives¹⁰.

Within the framework of the mentioned universal values, therefore, the first regional organizations were being created. Their establishment lies in the middle ‘between “universal” human rights standards and regional diversity and traditions’¹¹. Accordingly, all regional human rights systems share a connection based on ‘common challenges, and notably by shared ideas and practices’¹² – their activities may be considered as being conducted within the boundaries of those values that has already been acknowledged by the international community¹³. Nowadays, the main—and more effective—regional human rights systems are implemented within the framework of regional organisations, such as the Council of Europe (CoE), the Organization of American States (OAS)¹⁴, both established in the 1948, and the African Union (AU), which was created in 2002 and *de facto* replaced the Organisation of African Unity (OAU) previously established in 1963¹⁵.

¹⁰ UN GENERAL ASSEMBLY. Regional arrangements for the promotion and protection of human rights, 16th December 1977, A/RES/32/127. Retrieved from: <https://www.refworld.org/docid/3b00f13940.html>.

¹¹ ENGSTROM, Par. Human Rights: Effectiveness of International and Regional Mechanisms. *Oxford Research Encyclopaedia of International Studies*, Oxford, 22 December 2017. Retrieved from: <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-214>.

¹² HUNEEUS, Alexandra; RASK MADSEN, Mikael. Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems. *International Journal of Constitutional Law*, Oxford, v. 16, n. 1, p. 137, 2018. <https://doi.org/10.1093/icon/moy011>.

¹³ See Article 1, UN Charter.

¹⁴ All 35 independent States of the Americas have ratified the OAS Charter and are members of the Organization. See https://www.oas.org/en/member_states/default.asp. Accessed on July 9, 2022.

¹⁵ Other regional organisations which have built up regional human rights systems are the League of Arab States (LAS), established in 1945—and which has created the Arab Human Rights Committee in 2009—and the Association of South-East Asian Nations (ASEAN), established in 1967 and which has set up the ASEAN Intergovernmental Commission on Human Rights (AI-CHR) in 2009.

Focusing on the specific context of the American continent, it is worth recalling that the Inter-American Human Rights System (IAHRS) originated from the American Declaration of the Rights and Duties of Man (ADHR), which was approved at the Ninth International Conference of American States held in Bogota in 1948. Surprisingly, it was the first international human rights document, as the better known UDHR would not be adopted until a few months later by the UN General Assembly. It aims at enumerating and fostering shared human rights standards¹⁶, emphasising the fact that the latter are based on the concept of ‘human personality’, and hence predate the formation of the state – ‘essential rights’ are merely to be *acknowledged* by national authorities to every individual, as they are deemed to be encompassed with *ius naturale*¹⁷. Although becoming a party to the American Declaration does not trigger contractual obligations to other States Parties¹⁸, there is a broad consensus within the IAHRS that the American Declaration is a source of international obligations for the Member States of the OAS¹⁹. At the same Conference, the Charter of the Organisation of the American States (OAS) was officially adopted²⁰. The latter was a further political step that strengthened the protection of fundamental rights within IAHRS, aiming at building up ‘a system of individual liberty and social justice

¹⁶ ENGSTROM, Par; HILLEBRECHT, Courtney. Institutional change and the Inter-American Human Rights System. *The International Journal of Human Rights*, London, v. 22, n. 9, p. 1112 *et seq.*, 2018. <https://doi.org/10.1080/13642987.2018.1534786>.

¹⁷ Among them, it is noteworthy that Article I ADHR protects the right to liberty and personal security of every human being and that under Article XXV ADHR ‘no person may be deprived of his liberty except in cases and according to the procedures established by pre-existing law’. See *infra* § 3.2.

¹⁸ SHAVER, Lea. The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection. *Washington University Global Studies Law Review*, Washington, v. 9, n. 4, p. 642, 2010.

¹⁹ See, *inter alia*, IACtHR. Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention On Human Rights. Advisory Opinion OC-10/89, 14th July 1989, para. 24. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_10_ing1.pdf. Accessed on July 9, 2022.

²⁰ ORGANIZATION OF AMERICAN STATES (OAS). Charter of the Organisation of American States, 30 April 1948. Available at: <https://www.refworld.org/docid/3ae6b3624.html>. Accessed on July 9, 2022.

based on respect for the essential rights of man' under the influence of the UN Charter²¹. Importantly, the OAS Charter expressly set forth that fundamental rights of the individual shall be protected by the OAS Member States 'without distinction as to race, nationality, creed or sex'²².

The fundamental core of human rights in the Americas, therefore, is embodied *ab origine* by the peculiar interdependence between the ADHR and the OAS Charter which, since the post-war period, have formed a *cordon sanitaire* around the individual, holder *ex se* of these inviolable prerogatives. Nevertheless, the merely theoretical affirmation of these rights could have jeopardized their compliance by OAS Member States.

Thus, in 1959, the latter created the Inter-American Commission of Human Rights (IACHR) through an *ad hoc* Resolution²³, which entered into force in 1960. Composed of seven human rights experts, it became a prominent organ of the OAS in 1967 with the first reform of the OAS Charter. Its main aim is to foster the 'observance' and 'protection' of fundamental rights. Similarly to the former European Commission of Human Rights (ECmHR), it may receive and investigates individual complaints that allege violation of fundamental rights. A quasi-judicial body, in performing its mission, it shall apply human rights standards that are enshrined in the ADHR, in the OAS Charter and—from 1969—in the Inter-American Convention on Human Rights (ACHR)²⁴.

Ten years later, the ADHR standards were 'complemented'²⁵ through the adoption of the ACHR. The latter, mirroring the correspondent

²¹ Articles 1 and 4, OAS Charter.

²² Article 5(1)(j), OAS Charter.

²³ The Santiago Resolution, drafted on 12-18th August 1959, is available at: <http://www.oas.org/consejo/meetings%20of%20consultation/Actas/Acta%205.pdf>. Accessed on July 9, 2022.

²⁴ In respect to the OAS Member States which are, in turn, State Parties to the ACHR, 'human rights' has to be understood as the ones laid down in the ACHR. Analogously, with regard to other OAS Member States, 'human rights' has to be understood as the ones laid down in the ADHR. See Article 1(2)(a) and (b) of the Statute of the IACHR.

²⁵ CANTOR, David James-BARICHELLO, Stefania Eugenia. The Inter-American human rights system: a new model for integrating refugee and complementary protection? *The International Journal of Human Rights*, London, v. 17, n. 5-6, p. 691, 2013. <https://doi.org/10.1080/13642987.2013.825077>.

European Convention on Human Rights (ECHR), aims at recognising fundamental rights to ‘all person’—that is, every human being—subject to the jurisdiction of the States Parties, without any discrimination whatsoever²⁶. Interestingly, as Shaver rightly observed:

[while] the Declaration’s statements of human rights have, at best, the status of regional customary law[,] the Convention, in contrast, was designed to impose specific and legally binding obligations on ratifying States²⁷.

More importantly, the ACHR established the Inter-American Court of Human Rights (IACtHR) as the very judicial body of the OAS – more precisely, it has been designed as a ‘treaty body with voluntary jurisdiction’²⁸, the ACHR being the treaty to be specifically monitored²⁹. Since its foundation, the role of the IACtHR ought to be understood in conjunction of the IACHR. For the purpose of this essay, it is worth recalling what has been properly summarised with regard to the existing interconnection between the two institutions:

‘the Court works together with the Commission, hearing cases in which the Commission has found the state responsible for a human rights violation but in which the state has not adequately remedied such violations. More specifically, once an alleged victim has exhausted domestic remedies for his or her rights claim, he or she can take a petition to the [IACHR]. The Commission considers admissibility, merits and, as needed, reparations in a given case. The Commission also works to facilitate friendly settlement agreements when appropriate. If the Commission deems that a state has failed to

²⁶ Article 1, ACHR.

²⁷ SHAVER, Lea. The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection. *Washington University Global Studies Law Review*, Washington, v. 9, n. 4, p. 643, 2010.

²⁸ GIUPPONI, Belen Olmos. Assessing the evolution of the Inter-American Court of Human Rights in the protection of migrants’ rights: past, present and future. *The International Journal of Human Rights*, v. 21, n. 9, p. 1479, 2017. <https://doi.org/10.1080/13642987.2017.1348736>.

²⁹ It is noteworthy that the IACtHR’s jurisdiction relates only to OAS States which are, in turn, parties to the ACHR and that have accepted *expressis verbis* the jurisdiction of the Court.

implement its recommendations after a violation, the Commission then pursue adjudication at the [IACtHR], which also considers the admissibility, merits and reparations of the case at hand³⁰.

The core of this paper is to assess whether the IAHRs succeeds in adequately protecting the fundamental rights of detained immigrants, taking into account the different standards developed in Europe, through the interpretative action pursued both by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Indeed, as for other regional systems, immigration represents a testing ground for the resilience of basic human guarantees. If, on the one hand, every individual is supposed to be ontologically entitled to fundamental rights from the very moment of his birth (and this is a universally recognised assumption in all regional systems), on the other hand, it is also true that practice shows how the ‘universalism’ which allegedly characterised human rights matter may sometimes be affected by unexpected adjustments, to the point that certain prerogatives might become *weaker* when they are to be acknowledged *vis-à-vis* ‘non-citizens’. In other words, migration phenomena may challenge the idea that fundamental rights shall be ensured *in the same way to everyone*, despite the individual’s citizenship or nationality.

Within this problematic context, this paper will provide a comparative analysis of the IAHRs and ECHR/EU legal frameworks, trying to identify which regional system(s) provide(s) the higher degree of fundamental rights protection when administrative detention of foreigners comes to the fore. To this end, the methodology employed will be based on the comparative assessment of the existing provisions and their related case-law among supranational courts, considering both the substantive and procedural implications *in parte qua*.

2. THE IAHRs AND MIGRANTS’ RIGHTS: A GENERAL PORTRAIT.

Migrants’ rights are *naturaliter* located halfway between the universalism of human rights and national sovereignty, especially with

³⁰ ENGSTROM, Par; HILLEBRECHT, Courtney. Institutional change and the Inter-American Human Rights System. *The International Journal of Human Rights*, London, v. 22, n. 9, p. 1113, 2018.

regard to borders' control. Referring to different contexts, it has been noted that the IACtHR 'become renowned for the boldness of its determination to push the development of human rights standards'³¹. The same Author then emphasised that migrants have 'benefited from this approach from the very beginning of the Inter-American Court of Human Rights'³².

Admittedly, the ADHR ensures *expressis verbis* that, in principle, nationality shall not be a relevant factor within the IAHRs, as there are 'essential rights of man' which are not resulting from the fact that the alien concerned 'is a national of a certain state'³³. As already explained, the rejection of any nationality-test is widely accepted by the OAS Charter and, more importantly, by the whole structure of the ACHR, the latter identifying the 'human personality' as the very foundation for the recognition of the essential rights of man to every individual, despite his or her nationality³⁴. Moreover, in the Preamble of the Convention, a specific mention is made to the ADHR, to the UDHR, to the OAS Charter and to 'other regional systems' as being the very cornerstone of the IAHRs' standards, thus reinforcing the universalistic characterisation of the IAHRs as a whole. In other words, the notion of 'citizenship' (and, more broadly, any nationality-link) is deemed to be irrelevant for the purpose of human rights' recognition *vis-à-vis* an individual who aims at being protected within the IAHRs – it might not have been differently, as the drafters of all the aforementioned international treaties and declarations had never showed an explicit interest to regulate migrants' status³⁵. The overall

³¹ DEMBOUR, Marie-Bénédicte. The Migrants Case-law in the European Court of Human Rights: Critique and Way Forward, in ÇALI, Başak; BIANCU, Ledi; MOTOC, Iulia (eds.). *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press, 2021, p. 33.

³² DEMBOUR, Marie-Bénédicte. The Migrants Case-law in the European Court of Human Rights: Critique and Way Forward, in ÇALI, Başak; BIANCU, Ledi; MOTOC, Iulia (eds.). *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press, 2021, p. 33.

³³ IACHR. Rafael Ferrer-Mazorra et al. v. USA. Report no. 51/01 – Case 9.903, 4th April 2001, para. 178. Available at: <http://www.cidh.oas.org/annual-rep/2000eng/chapteriii/merits/usa9903.htm>. Accessed on July 9, 2022

³⁴ See the Preamble of the ACHR.

³⁵ Indeed, an exception may be found in Article XXVII ADHR which relates to the right to asylum to be accorded to 'every person' (but concerns *de facto* only foreigners seeking international protection).

approach implemented within the IAHRs *vis-à-vis* aliens' fundamental rights is therefore linked to Article II ADHR, which set forth that all persons are equal before the law and are entitled to all right and duties laid down in ADHR, discriminations on the basis of race, language, sex and any other factor not being peremptorily allowed. Subsequently, the OAS has reiterated these assumptions through the adoption of the Inter-American Democratic Charter (IDC)³⁶, being straightforwardly set forth that democracy and citizen participation—which are indispensable for the effective exercise of human rights and fundamental freedoms—are strengthened *inter alia* by the 'promotion and protection of human rights of ... migrants'³⁷. Quite redundantly, the Inter-American Convention of All Forms of Discrimination and Intolerance (ICADI)³⁸ reiterated the general principle of non-discrimination³⁹, besides highlighting, for the very first time, that every State Party holds positive obligations in promoting fundamental rights without discrimination based on 'migrant, refugee or displaced status'⁴⁰.

Albeit its universalistic characterisation, few provisions within the IAHRs relates specifically to foreigners, distinguishing somehow the degree of protection afforded to them from that of 'citizens'. For instance, the right to freedom of movement and residence in the territory of OAS Member States is stringently reserved to every person staying 'lawfully' in that territory⁴¹.

³⁶ OAS. Inter-American Democratic Charter. 11 September 2011. Available at: https://www.oas.org/charter/docs/resolution1_en_p4.htm. Accessed on July 9, 2022.

³⁷ See Article 9 IDC read in conjunction with Article 7 IDC. It is noteworthy that 'every person' is entitled to present an application to the IAHRs, as per Article 8 IDC.

³⁸ OAS. Inter-American Convention against all Forms of Discrimination and Intolerance. 6th May 2013. Available at: https://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp. Accessed on July 9, 2022.

³⁹ See Articles 2 and 3 ICADI.

⁴⁰ See the Preamble of the ICADI and, more particularly, Article 4 ICADI.

⁴¹ Article 22(1) ACHR. This prerogative is not absolute since several circumstances may allow a Member State to restrict the exercise of such a right as per Article 22(3) ACHR (e.g. national security or public order). Thus, even lawfully staying migrants may be returned when the aforementioned exceptions are met in the material case.

Indeed, it is a well-established principle of international law that the question whether an alien is ‘lawfully’ within the territory of a State is a matter ‘governed by domestic law’, which may provide for some restrictions with regard to the entry of a foreigner in that territory, ‘provided they are in compliance with the State’s international obligations’⁴². Hence, national legislatures do hold a certain margin of manoeuvre in regulating this important aspect of their public policies. Nevertheless, while the determination of who is a ‘citizen’ is a matter for the internal competence of States, national discretion *in parte qua* faces a constant process of ‘*restricció conforme a la evolució del derecho internacional, con vistas a una mayor protecció de la persona frente a la arbitrariedad de los Estados*’⁴³.

More specifically, States are generally free to establish mechanisms for the control of entry into—and departure from—their territory of persons who are not their nationals, this being part of States’ migratory policies⁴⁴. However, in order not to be deemed unlawful in the context of the IAHRs, such policies shall be consistent with the standards for the protection of human rights set forth in the American Convention⁴⁵. In *Vélez Loo*, the IACtHR has gone further, in assessing that the objects of national migration policies shall respect, in any case, ‘*los derechos humanos de las personas migrantes*’, without any specific reference to the

⁴² HRC. General Comment No. 27: Article 12 (Freedom of Movement). UN Doc. CCPR/C/21/Rev.1/Add.9, 2nd November 1999, para. 4. Available at: <https://www.refworld.org/pdfid/45139c394.pdf>. Accessed on July 9, 2022.

⁴³ See *inter alia* IACtHR. Caso de las niñas Yean y Bosico vs. República Dominicana. 8th September 2015, para. 140. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf. Accessed on July 9, 2022.

⁴⁴ See, for a definition of ‘*política migratoria*’ within the IAHRs, IACtHR. Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC-18/03, 17th September 2003, para. 163. Available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2003/2351.pdf>. Accessed on July 9, 2022.

⁴⁵ See, among other authorities, IACtHR, Caso de personas dominicanas y haitianas expulsadas Vs. República Dominicana, Excepciones Preliminares, Fondo, Reparaciones y Costas. 28th August 2014, para. 350. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_282_esp.pdf. Accessed on July 9, 2022.

ACHR⁴⁶. Besides, the execution of such policies shall comply with human rights guarantees⁴⁷ – a double-phases standard (purposes/execution) has thus been laid down by the IACtHR in evaluating the compatibility of national immigration policies with the IAHRs. If my reading is correct, even general provisions of international law shall be complied with by national authorities, from the very creation of the relevant legal framework to its execution within domestic law.

More importantly, the American Court has stressed the importance of ‘*instrumentos internacionales de derechos humanos*’ which shall always take pre-eminence over any achievement that States aim at attaining through their migration policies, by jeopardizing the principles of equality before the law and the principle of non-discrimination⁴⁸. Notably, the IACtHR had already pointed out that, as a rule, ‘*las distinciones que los Estados establezcan deben ser objetivas, proporcionales y razonables*’, thus establishing a three-way control upon any measure—be it of a criminal, civil or administrative characterisation—to be implemented *vis-à-vis* the non-citizens concerned. While ‘objectivity’ and ‘reasonability’ criteria may be difficult to assess *in concreto*—the former somehow overlapping that of legality and the latter encompassing that of necessity—the notion of proportionality relates, in principle, to the aim pursued. Indeed, proportionality does play a significant role in circumscribing what States are allowed to do in their sovereign sphere. National authorities, as the IACtHR has repeatedly stated, are prevented from generating an ‘indirect discrimination’ through the implementation of migration regulation policies, that is the disproportionate impact of provisions, as well as any other measure, which, albeit conceived under a broad approach, entail *de facto* ‘*efectos negativos para ciertos grupos vulnerables*’⁴⁹, as migrants—even

⁴⁶ IACtHR. Vélez Looz vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 97. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_218_esp2.pdf. Accessed on July 9, 2022.

⁴⁷ IACtHR. Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC-18/03, 17th September 2003, para. 168.

⁴⁸ IACtHR. Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC-18/03, 17th September 2003, para. 172.

⁴⁹ IACtHR. Nadege Dorzema y otros vs. República Dominicana, Fondo, Reparaciones y Costas. 24th October 2012, para. 235. Available at: <https://>

irregular ones—have been deemed to be⁵⁰. The concept of ‘vulnerability’ has thus been considered to be essential in the developing of an effective system aimed at protecting aliens from arbitrary migration policies and both the IACHR⁵¹ and the IACtHR⁵² have showed to accept this line of reasoning in their decisions, acknowledging the international stimuli coming *inter alia* from the UN General Assembly⁵³. Interestingly, the ECtHR’s settled case-law, so far, has acknowledged the quality of vulnerable persons solely *vis-à-vis* the applicants for international protection, thus advocating a lower standard than that of IAHRs⁵⁴.

Also, the IACtHR had further specified that, while *ad hoc* provisions may be implemented *vis-à-vis* foreigners (provided that they respect the three aforementioned principles) on the other hand, no prejudice to human rights shall occur in the enforcement of such rules⁵⁵. Moreover, States have been acknowledged to hold positive obligations in guaranteeing the principle of non-discrimination and the principle of equality before the law ‘*a toda persona extranjera que se encuentre en su territorio, sin discriminación alguna por su estancia regular o irregular, su*

www.corteidh.or.cr/docs/casos/articulos/seriec_251_esp.pdf. Accessed on July 9, 2022.

⁵⁰ IACtHR. Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC-18/03, 17th September 2003, para. 112, in which it is argued that ‘migrants are *generally* in a vulnerable situation as subjects of human rights’ (emphasis added).

⁵¹ See, more recently, IACHR. Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection. OEA/Ser.L/V/II, Doc. 255, 5th August 2020, para. 94. Available at: <https://www.oas.org/en/iachr/reports/pdfs/DueProcess-EN.pdf>. Accessed on July 9, 2022.

⁵² See e.g. IACtHR. Vélez Lóor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, paras. 98-99, and the case-law cited therein.

⁵³ UN GENERAL ASSEMBLY. Resolution A/RES/54/166 on ‘Protection of Migrants’. 24th February 2000, p. 2. Available at: https://www.iom.int/sites/g/files/tmzbd1486/files/2018-07/A_RES_54_166_en.pdf. Accessed on July 9, 2022

⁵⁴ See, *inter alia*, ECtHR. Mahamed Jama v. Malta. App. no. 10290/13, 26th November 2015, para. 100.

⁵⁵ See, among other authorities, IACtHR. Caso de las niñas Yean y Bosico vs. República Dominicana. 8th September 2015, para. 402.

*nacionalidad, raza, género o cualquier otra causa*⁵⁶, those principles being part of the *ius cogens* and thus to be complied with by every country, regardless of whether it is party to a particular international treaty⁵⁷. In other words, the duty to respect the aforementioned principles shall be observed regardless of the migratory status of the persons concerned⁵⁸ – this obligation binds the State not to introduce discriminatory rules, to eliminate those in force and to introduce new rules that acknowledge and guarantee the effective equality before the law of ‘*toda las personas*’⁵⁹.

As a matter of fact, the discretionary power accorded to national authorities *in parte qua* may imply further aftermaths. Indeed, only aliens ‘lawfully’ staying in the territory of an OAS Member State may be expelled ‘only pursuant to a decision reached in accordance with law’⁶⁰, thus apparently excluding irregular-staying migrants from benefit to the principle of legality applied to return procedures. One might think that that circumstance might be encompassed in the national degree of discretion which every State still holds in those matters which are not regulated otherwise. Indeed, this aspect has been further clarified by the IACtHR which, in a landmark Consultive Opinion in 2003, has addressed this issue. It is worth quoting the Commission at some length on this point:

‘Se debe señalar que la situación regular de una persona en un Estado no es condición necesaria para que dicho Estado respete y garantice el principio de la igualdad y no discriminación, puesto que, como ya se mencionó, dicho principio tiene carácter fundamental y todos los Estados deben garantizarlo a sus ciudadanos y a toda persona extranjera que se encuentre en su territorio. Esto no significa que no se podrá iniciar acción alguna contra las personas

⁵⁶ IACtHR. Caso de las niñas Yean y Bosico vs. República Dominicana. 8th September 2015, para. 402. See also IACtHR. Caso de las niñas Yean y Bosico vs. República Dominicana. 8th September 2015, para. 155 *in fine*.

⁵⁷ IACtHR. Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC-18/03, 17th September 2003, para. 100.

⁵⁸ IACtHR. Caso de las niñas Yean y Bosico vs. República Dominicana. 8th September 2015, paras. 141 and 155.

⁵⁹ IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 248.

⁶⁰ Article 22(6) ACHR.

migrantes que no cumplan con el ordenamiento jurídico estatal. Lo importante es que, al tomar las medidas que correspondan, los *Estados respeten sus derechos humanos y garanticen su ejercicio y goce a toda persona que se encuentre en su territorio, sin discriminación alguna por su regular o irregular estancia, nacionalidad, raza, género o cualquier otra causa*⁶¹.

Coming from international law, two guarantees are to be acknowledged to *all* foreigners, namely the right to seek—and to be granted—asylum in a foreign territory⁶² and the principle of *non-refoulement*⁶³. They constitute the very cornerstones of the international human rights law⁶⁴ and, accordingly, the IAHRs acknowledges their importance without any exception⁶⁵. *Inter alia*, it is noteworthy that as per Article 31 of the 1951 Geneva Convention: (a) national authorities are precluded from imposing ‘penalties’ against aliens due to their alleged

⁶¹ IACtHR. Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC-18/03, 17th September 2003, para. 118, emphasis added.

⁶² Article 22(7) ACHR. It is noteworthy that the ACHR plainly acknowledges the right to asylum, while the ECtHR does not provide for the right to asylum as such (‘The right to political asylum is not contained in either the Convention or its Protocols’), as stated *inter alia* in ECtHR. Salah Sheekh v. the Netherlands. App. no. 1948/04, 11th January 2011, para. 135. However, an indirect protection is afforded within the ECHR legal framework, through the assessment of an alleged violation of Articles 2 (right to life) and 3 (prohibition of torture) of the Convention (see, amongst other authorities, ECtHR. Chahal v. The United Kingdom. App. no. 22414/93, 15th November 1996, paras. 73-74, and ECtHR. Bader v. Sweden. App. no. 13284/04, 8th November 2005, para. 42.

⁶³ Article 22(8) ACHR.

⁶⁴ See, in this regard, IACtHR. Caso Familia Pacheco Tineo vs. Estado plurinacional de Bolivia, Excepciones Preliminares, Fondo, Reparaciones y Costas. 25th November 2013, paras. 137-143. Available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2013/9390.pdf>. Accessed on July 9, 2022.

⁶⁵ IACtHR. La Institución del Asilo y su Reconocimiento como Derecho Humano en el Sistema Interamericano de Protección (Interpretación y Alcance de los Artículos 5, 22.7 Y 22.8, en relación con el Artículo 1.1 de la Convención Americana Sobre Derechos Humanos. Opinión Consultiva OC-25/18, 30th May 2020, *passim* and spec. paras. 64-68, 99, 101-123 and 132. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf. Accessed on July 9, 2022.

irregular entry or stay when they present themselves to the competent bodies without delay and show good cause for their behavior; (b) a ‘penalty’ is certainly implemented *vis-à-vis* a foreigner when the latter is deprived of his liberty solely on the basis of his irregular entry or stay; (c) the act of entering a country for the purpose of applying for international protection should not be seen as an unlawful behavior⁶⁶. Nevertheless, the 1951 Geneva Convention also regulates the case of irregular-staying migrants, allowing States to apply restrictions on the movement of such individuals, provided they are necessary *in concreto* and are to be applied ‘until their status in the country is regularized or they obtain admission into another country’⁶⁷. Hence, every restriction on the freedom of movement, which sometimes might result in a complete deprivation of liberty of the individual concerned, shall comply with the necessity criterion in the material case, but also with that of proportionality relating to the timeframe in which that measure may be implemented. As every migrant at the border may be *in abstracto* an applicant for international protection, the guarantees provided for by international law—and broadly acknowledged within the IAHRs—might seem very high, in the light of a powerful Consultive Opinion delivered by the IACtHR in 2014:

‘... tanto la Convención Americana sobre Derechos Humanos en su artículo 22.7 como la Declaración Americana de los Derechos y Deberes del Hombre en su artículo XXVII, han cristalizado *el derecho subjetivo de todas las personas*, incluidas las niñas y los niños, *a buscar y recibir asilo superando el entendimiento histórico de esta institución como una “mera prerrogativa estatal”* bajo las diversas convenciones interamericanas sobre asilo’⁶⁸.

⁶⁶ EDWARDS, Alice. Back to Basics: The Right to Liberty and Security of Person and “Alternative to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants. April 2011, p. 11 *et seq.* Available at: <https://www.unhcr.org/4dc949c49.pdf>. Accessed on July 9, 2022.

⁶⁷ Article 31(2) of the 1951 Geneva Convention.

⁶⁸ See, amongst other authorities, IACtHR. Derechos y garantías de las niñas y niños en el contexto de la migración y/o en necesidad de protección internacional. Opinión Consultiva OC-21/14, 19th August 2014, para. 73. Available at: <https://www.acnur.org/5b6ca2644.pdf>, emphasis added. Accessed on July 9, 2022.

The resulting picture is thus a nuanced balance between, on the one hand, the States' right to exercise their national prerogatives and, on the other hand, the universalistic characterisation of human rights which shall be provided for to every human being, in spite of nationality.

3. IMMIGRATION DETENTION IN THE CONTEXT OF THE IAHRs: FROM AMERICAN LIGHTS TO EUROPEAN SHADES?

3.1. THE IAHRs CONSTITUTIONAL LEGAL FRAMEWORK AND ITS PARALLELS WITH THE EU/ECHR

With the aim to govern migration flows and to ensure public security, deprivation of liberty is the major legal tool that states implement *vis-à-vis* 'non-citizens', whether they are seeking or not international protection⁶⁹. No exception to this trend is to be found in the Americas⁷⁰, where, since 2000, it was noted that 'the main recourse used by transit and destination countries ... to deter irregular migrants is detention, which amount to a form of criminalisation of migrants'⁷¹. Detention for immigration purposes is widely known as 'administrative detention'⁷². It is apparent that its adoption by national authorities may infringe several

⁶⁹ See *amplius* MAJCHER, Izabella; FLYNN, Michael; GRANGE, Mariette. *Immigration Detention in the European Union. In the Shadow of the "Crisis"*, Cham: Springer, 2020.

⁷⁰ See the comprehensive data provided for by Global Detention Project (GDP), for every OAS Member State, in several updated country reports, which are available at: <https://www.globaldetentionproject.org/category/sidebar-publications/publications/country-reports>.

⁷¹ IACHR. 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. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 383. Available at: <http://www.oas.org/en/iachr/reports/pdfs/humanmobility.pdf>. Accessed on July 9, 2022.

⁷² This notion—which emphasise the fact that it is for the administrative authority to adopt the detention order at first instance, without the necessity for a *notitia criminis* to be previously drafted—aims at distinguishing this peculiar measure from the 'criminal detention', which is ordered by the judicial authority within criminal proceedings, being the person involved accused of a criminal offence.

migrants' fundamental rights, first of all that of personal liberty⁷³. However, its implementation has always been seen as a 'necessary adjunct'⁷⁴ to the sovereign power of states to control their territory and has never been put into question by international law⁷⁵.

Within the IAHRs, and analogously to the relevant ECHR provisions⁷⁶, the right to freedom of movement, as already explained, is solely ensured to 'lawfully' staying migrants and hence nothing precludes national authorities to detain irregular migrants for immigration purposes, such the execution of the relevant return procedures. Similar assumptions may be developed *vis-à-vis* applicants for international protections who, until a state has decided that they are allowed to stay in its territory, may be deemed as being unlawfully staying there⁷⁷. Detaining asylum seekers is widely recognised as a lawful practice and the IAHRs has followed this tendency, also upheld by the settled case-law of the ECtHR⁷⁸ and by the relevant EU provisions⁷⁹. Both irregular migrants and asylum seekers are therefore subject *ipso iure* to detention measures for immigration purposes, both under the ECHR, the EU and the IAHRs legal frameworks – as will

⁷³ This right is enshrined in Articles I and XXV ADHR. Moreover, as will be explained, the right to personal liberty is set forth *expressis verbis* in Article 7 ACHR.

⁷⁴ This wording has been adopted by ECtHR. Saadi v. The United Kingdom [GC]. App. no. 13229/03, 29th January 2008, para. 64. See COSTELLO, Cathryn. Immigration Detention: The Ground Beneath Our Feet. *Current Legal Problems*, Oxford, v. 68, n. 1, pp. 143-177, 2015. <https://doi.org/10.1093/clp/cuv015>.

⁷⁵ See EDWARDS, Alice. Back to Basics: The Right to Liberty and Security of Person and "Alternative to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants. April 2011, p. 18, and COSTELLO, Cathryn. Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law. *Indiana Journal of Global Legal Studies*, Bloomington, v. 19, n. 1, pp. 257-303, 2012.

⁷⁶ Article 2 of Protocol no. 4 to the ECHR.

⁷⁷ This is the position advocated by ECtHR. Saadi v. The United Kingdom [GC]. App. no. 13229/03, 29th January 2008, para. 65.

⁷⁸ ECtHR. Saadi v. The United Kingdom [GC]. App. no. 13229/03, 29th January 2008, para. 65.

⁷⁹ Reference is to be made to Directive 2013/33/EU (Reception Directive) and to Regulation (UE) 604/2013 (Dublin III Regulation) which allow *expressis verbis* the detention of applicants for international protection.

be seen, a foreigner who comes to the territory of an EU/OAS Member State may be deprived of his or her liberty *via* administrative measures⁸⁰.

Nevertheless, from Europe to Americas, administrative detention disciplines differ for many factors, such as the substantive grounds which may justify the measure⁸¹, the compliance with the principle of legality⁸², the notion of ‘arbitrary’ detention⁸³ and procedural rights accorded to the individual concerned⁸⁴. This phenomenon of normative differentiation between the IAHRs and the European juridical systems is slightly surprising as both legal frameworks acknowledge, albeit formally, the international law provisions on the matter⁸⁵.

In this regard, it is worth recalling that the foreigners’ deprivation of liberty for immigration purposes is a *species* of the broader phenomenon of deprivations of liberty *tout court*. As it is apparent, the prejudice inflicted on the fundamental right to personal liberty is of the same degree. The latter is specifically protected, in a slightly similar way (at least in general terms), both in the IAHRs and the ECHR legal systems.

Indeed, Article 7(1) ACHR provides for the ‘right to personal liberty and security’ of the individual. Being a very broad definition, the IACtHR has further specified that it consists in a two-sides prerogative: (a) the former is the right by which an individual, ‘*con arreglo a la ley*’, may organise his private and collective life following his personal views,

⁸⁰ See *infra* para. 3.2.

⁸¹ See *infra* para. 3.2.1.

⁸² See *infra* paras. 3.2.2.

⁸³ See *infra* para. 3.2.3.

⁸⁴ See *infra* para. 3.3.

⁸⁵ Indeed, both the IACHR and the IACtHR quote explicitly, and very often, the relevant provisions of international law—especially soft-law ones—when issuing their decisions upon immigration detention cases. Analogously, the ECtHR cited international treaties and soft-law instruments in seminal cases. The CJEU, nonetheless, seems reluctant to quote international law regulations, albeit the secondary law dealing with deprivation of liberty of third-country nationals is expressly affected by them. Moreover, both the ECHR and the IAHRs share the same common framework of protection, at least at a general level, when it comes to define the content of the right to liberty and security. Yet, as will be explained, two different approaches have astonishingly been followed.

this encompassing also ‘*la capacidad de hacer y no hacer todo lo que esté licitamente permitido*’⁸⁶; (b) the latter calls into question the absence of ‘*perturbaciones*’ which may hinder or limit the right to liberty ‘*màs allà de lo razonable*’⁸⁷. The ontological supremacy of the right to personal liberty *vis-à-vis* the other prerogatives enshrined in the ACHR has been well recognised by the IACtHR – in *Chaparro Álvarez y Lapo Íñiguez* the Court has reiterated that it constitutes a ‘*derecho humano básico, propio de los atributos de la persona, que se proyecta en toda la Convención Americana*’⁸⁸.

More specifically, the emphasis has been put on the ‘physical’ liberty of the individual⁸⁹, which must be protected by guaranteeing ‘*formas mínimas de protección legal*’ for prisoners⁹⁰. The IACtHR has plainly set forth that there shall be a presumption of liberty – restrictions or limitations of personal freedom are deemed to be always the exception⁹¹, being the very purpose of Article 7 ACHR to protect every human being from illegal or arbitrary interferences implemented by national authorities⁹². Thus, the structure outlined by the ACHR, and summarised here, gives the impression that it aims at protecting every person—including irregular immigrants—from illegal intrusions by the State into their personal and

⁸⁶ IACtHR. *I.V. v. Bolivia, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 30th November 2016, para. 151. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf. Accessed on July 9, 2022.

⁸⁷ IACtHR. *Ramírez Escobar y otros vs. Guatemala, Fondo, Reparaciones y Costas*. 9th March 2018, para. 327. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_351_esp.pdf. Accessed on July 9, 2022.

⁸⁸ IACtHR. *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 21st November 2007, para. 52. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_170_esp.pdf. Accessed on July 9, 2022.

⁸⁹ IACtHR. *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 21st November 2007, para. 53.

⁹⁰ IACtHR. *López Álvarez vs. Honduras, Fondo, Reparaciones y Costas*. 1st February 2006, para. 59. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_141_esp.pdf. Accessed on July 9, 2022.

⁹¹ See *inter alia* IACtHR. *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 21st November 2007, para. 53 *in fine*.

⁹² IACtHR. *Ruano Torres y Otros vs. El Salvador, Fondo, Reparaciones y Costas*. 5th October 2015, para. 140. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_303_esp.pdf. Accessed on July 9, 2022.

physical sphere, considering any form of arbitrary and unlawful detention contrary to the Convention.

The first paragraph of Article 7 ACHR, which is *ex se* a general regulation, is evidently redolent of Article 5 ECHR⁹³, as the two provisions share the same wording⁹⁴ and the same purpose, that is ‘the protection of the individual against arbitrary interference by the State with his or her right to liberty’⁹⁵. However, differently from the whole Article 5 ECHR and the relevant EU pieces of legislation, none provision of Article 7 ACHR relates specifically to foreigners. Hence, the latter shall enjoy the same degree of guarantees afforded to any other human being by the IAHR and, accordingly, the IACtHR has applied its settled case-law on Article 7 ACHR also to migration-related cases of administrative detention of aliens. As has been noted, the settled case-law of both the IACHR and the IACtHR have ‘broadened the scope of Article 7 to protect migrants in detention’⁹⁶.

Interestingly, from a theoretical point of view, there is a discrepancy between the ECtHR/CJEU and the IAHR for what concerns the very nature of administrative detention. Following a landmark judgement of the IACtHR, indeed, it may be inferred that even deprivation of liberty of immigration purposes constitutes a ‘penalty’, despite its formal administrative *habitus*:

‘administrative sanctions, as well as penal sanctions, constitute an expression of the State’s punitive power and that, on occasions, the nature of the former is similar to that of the latter. Both, the former

⁹³ It is worth recalling that Article 6 of the EU Charter of Fundamental Rights (‘CFR’ or ‘the Charter’) relates to the rights guaranteed by Article 5 ECHR, and as per Article 52(3) of the Charter, they have the same meaning and scope. See CJEU. Case C-601/15 PPU, J.N. v Staatssecretaris van Veiligheid en Justitie. ECLI:EU:C:2016:84, para. 47.

⁹⁴ About the concept of ‘physical security’ within the ECHR legal framework see ECtHR. McKay v. The United Kingdom [GC]. App. no. 543/03, 3 October 2006, para. 30.

⁹⁵ ECtHR. Creangă v. Romania [GC]. App. no. 29226/03, 23 February 2012, para. 84.

⁹⁶ HERNÁNDEZ, Joel. Inter-American standards on migration, asylum and refugee law. *University of Vienna Law Review*, v. 2, n. 2, p. 209, 2018. <https://doi.org/10.25365/vlr-2018-2-2-198>.

and the latter, imply *reduction, deprivation or alteration of the rights of individuals*, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to *intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals*, and subject to a careful verification of whether or not there was unlawful conduct⁹⁷.

In *Vélez Loor*, which is the first decision of the IACtHR concerning human rights of irregular migrants within the IAHRs⁹⁸, the Court reiterated these assumptions⁹⁹, labelling the administrative deprivation of liberty implemented *vis-à-vis* the applicant in the material case as being a ‘*punitive custodial measur[e]*’¹⁰⁰ or, alternatively, a ‘*punitive penalty*’¹⁰¹ or, significantly, an ‘*administrative measure of a punitive nature*’¹⁰². In that case, Mr Vélez Loor had been sentenced, following a decision issued by an administrative authority, to a two-years imprisonment due to his irregular immigration status¹⁰³. Grouping the definitions laid down below it would seem that the Court was advocating the semantic equivalence between

⁹⁷ IACtHR. Baena-Ricardo et al. v. Panama, Fondo, Reparaciones y Costas. 2nd February 2001, para. 106. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf. Accessed on July 9, 2022.

⁹⁸ MASON, Ashley. Interpretation of the American Convention in Latin America: The Impact of the Inter-American Court of Human rights’ decision in *Vélez Loor v. Panama* on irregular migrant rights. *Law and Business Review of the Americas*, v. 18, n. 1, p. 71, 2012.

⁹⁹ IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 170.

¹⁰⁰ IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 167, emphasis added.

¹⁰¹ IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, paras. 163 and 172, emphasis added. See also para. 185 *in fine* where the measure at stake was merely defined as a ‘penalty’, or para. 177 where it has been broadly defined as a ‘sanction’.

¹⁰² IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 170, emphasis added.

¹⁰³ The decision, issued by an administrative authority (i.e. the National Immigration Office), was based on Article 67 of Decree Law No 16 of 1960, which reads as follows: ‘the aliens who evade their return orders by staying in the country in a clandestine manner or circumvent them by coming back to the country, shall be sentenced to two years of agricultural work in the Penal Colony of Coiba and shall be obliged to leave the country at the end of that

the notions of ‘custodial measure’, ‘penalty’ and ‘administrative measure’, thus upholding the idea that even deprivations of liberty implemented *via* administrative orders are a ‘penalty’, in the sense of the ACHR.

Yet, a blurred point of the Court’s line of reasoning concerns the notion of what is ‘punitive’. As appears from the wording below, the Court separates the concepts of ‘penalty’ from that of ‘punitive’, thus suggesting that there might be penalties which, however, do not hold a punitive character¹⁰⁴.

Moreover, and more confusingly, the Court excluded that ‘detaining people for non-compliance with migration laws should never involve punitive purposes’¹⁰⁵. Nevertheless, this line of reasoning does seem artificial, as a ‘penalty’ *per se* is conceived with the purpose of punishing someone for an unlawful behavior and hence does ontologically hold a punitive character. This seems the position taken by the IACHR in the 2015 – the Commission suggested that, exceptionally, a State ‘in exercising *its punitive authority*’ may deprive individuals from their liberty only in ‘situations that *violate fundamental legal interests*’, as detention is a measure of last resort¹⁰⁶. Moreover, the violation of an administrative rule, which is a circumstance that may trigger the implementation of administrative custodial measures *vis-à-vis* the foreigner concerned, is ‘something which in the opinion of the Commission *is not a fundamental right interest* that warrants *per se* deprivation of liberty’, that is, ‘administrative detention’¹⁰⁷.

period; they may be released at the discretion of the Ministry of Interior and Justice if they present a ticket to abandon the country’.

¹⁰⁴ Otherwise, the Court could have labelled those measures merely as ‘penalties’, the concept of ‘punitive’ being implicit therein.

¹⁰⁵ IACtHR. *Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 23rd November 2010, para. 171.

¹⁰⁶ IACHR. *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*. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 383, emphasis added. From the wording of the report, it is noteworthy that the Commission has linked the notion of ‘measures that entail deprivation of liberty’, broadly considered, to the State’s punitive power.

¹⁰⁷ IACHR. *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards*

Hence, if my reading is correct, the punitive character of deprivation of liberty as such, regardless to its formal labelling in domestic law, was acknowledged within the IAHRS. Indeed, this qualification—which leads to think that such a measure may be a criminal tool ‘in disguise’—seems to be acknowledged by the IACtHR merely on the fact that a deprivation of liberty occurred *in casu*¹⁰⁸, irrespective of the fact that such measure was not related to the commission of a criminal offence¹⁰⁹. This line of reasoning has been subsequently upheld in the IACHR Resolution No. 2/18, by which the Commission urged OAS Member States not to ‘criminalize Venezuelan migration, avoiding the adoption of measures such as ... penalties for irregular entry or presence; ... immigration detention ...’¹¹⁰.

As it is apparent, the IACHR linked the phenomenon of criminalizing immigration—which occurs *ipso facto* throughout the exercise of punitive powers—to ‘immigration detention’ as such, and broadly considered. There is no ground for assuming that administrative custodial measures should be excluded from this definition, considering that *ictu oculi* ‘detention is a tool that characterizes criminal law as opposite to administrative law, which, by nature, should resort to alternative interim measures to detention’¹¹¹. Additionally, it should be recalled that as per the new General Comment on Article 9 ICCPR drafted by the HRC in 2014, the Committee has stressed that administrative detention measures ‘must

of the Inter-American Human Rights System. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 384, emphasis added.

¹⁰⁸ It is noteworthy that administrative detention is probably the closest non-criminal measure to a criminal penalty that modern systems have developed, as the deprivation of liberty which occurs *vis-à-vis* the prisoner is *de facto* of the same degree in both cases.

¹⁰⁹ This might be inferred by the wording in IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 163.

¹¹⁰ See IACHR. Resolution 2/18: Forced Migration of Venezuelans. 14th March 2018. Available at: <https://www.refworld.org/docid/5aa956964.html>, p. 5, para. 11, emphasis added. Accessed on July 9, 2022.

¹¹¹ UN GENERAL ASSEMBLY. Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante. 65th Session, 3rd August 2010, A/65/222, para. 27. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/474/88/PDF/N1047488.pdf?OpenElement>. Accessed on July 9, 2022.

not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections¹¹². The approach followed in the IAHRs is clearly redolent of these assumptions. Accordingly, from a comparative point of view, since administrative custodial measures are deemed to hold a *de facto* criminal characterization, their implementation might constitute '*matière pénale*' within the meaning of the relevant ECtHR case-law¹¹³.

That being said, it may be noted that the IACHR has somehow updated *Vélez Loor* principles, to the point that, in any case, custodial measures are deemed to constitute 'punitive penalties', as they are a direct expression of the punitive power of the State. The main implications of this approach lie, as will be seen *infra*, in the restrictions put on the sovereign authorities to adopt detention measures *vis-à-vis* non-citizens only to certain exceptional circumstances¹¹⁴. Conversely, these *caveats* do not affect *in melius* the procedural guarantees to be ensured to the detainee – in the IAHRs, as has been already explained, all prisoners share the same procedural prerogatives, regardless of their nationality and despite the context in which a custodial measure has been adopted¹¹⁵.

Yet, within the European legal framework, no attention has been paid to the topic. Firstly, the CJEU has passively acknowledged the non-criminal measure of administrative detention to the point that it was for the Advocate General to stress this aspect *expressis verbis*¹¹⁶. Conversely,

¹¹² HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 14. Available at: <https://cutt.ly/DGZGwfZ> and the reference cited therein. Accessed on July 9, 2022.

¹¹³ About the notion of '*matière pénale*', see *inter alia* LASAGNI, Giulia. *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*. Cham: Springer, 2019, pp. 24-30 and the references cited therein.

¹¹⁴ See *infra* § 3.2.

¹¹⁵ The difference with the relevant ECHR provisions is blatant, as certain procedural guarantees (e.g. Article 5(3) ECHR) are provided for only *vis-à-vis* those who are placed in detention in the context of criminal proceedings. Analogously, the same holds true for what concerns EU law.

¹¹⁶ See, *inter alia*, CJEU. Case C-146/14, Direktor na Direktsia 'Migratsia' pri Ministerstvo na vatrešnite raboti v Bashir Mohamed Ali Mahdi, View of AG Szpunar. ECLI:EU:C:2014:1936, para. 47, and CJEU. Case C-383/13 PPU, M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie, View of the AG Wahelet. ECLI:EU:C:2013:553, para. 54.

the Court has never dealt with this issue and stayed silent on the point¹¹⁷. Secondly, and by analogy, the ECtHR has never taken position upon the inherent criminal nature of administrative deprivation of liberty of aliens, despite the fact that it was the same Court who developed, within the European legal order, the aforementioned notion of ‘*matière pénale*’ in the landmark judgement *Engel and Others*¹¹⁸. So far, *Engel* criteria have never been applied before the European Courts in administrative detention cases.

In the following paragraphs both substantive and procedural aspects of the latter will be analysed in the light of the IAHRs principles.

3.2. SUBSTANTIVE ASPECTS: GROUNDS FOR DETENTION, LEGALITY AND FREEDOM FROM ARBITRARINESS.

3.2.1. GLANCING AT GROUNDS FOR DETENTION IN THE AMERICAS, IN THE LIGHT OF THE EXCEPTIONALITY PRINCIPLE.

Whereas the first paragraph of Article 7 ACHR protects, in general terms, the right to personal liberty, the other sections of the former give concreteness to this prerogative – they consist in an exhaustive list of specific guarantees that a person deprived of his liberty shall enjoy, in any case, within the IAHRs. Placed in the context of aliens’ deprivation of liberty, these guarantees assume a fundamental role in the protection of the human rights of non-citizens.

As to the substantial grounds which shall be met in the material case in order to implement custodial measures *vis-à-vis* non-citizens, the view endorsed by the IAHRs may be seen as an attempt to diverge from both the European and the international ones. Very briefly, it is noteworthy that the drafters of the ECHR have chosen to list the exceptional circumstances which allow Member States to restrict or

¹¹⁷ See, for instance, the wording in CJEU. Case C-47/15, *Séline Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d’appel de Douai*. ECLI:EU:C:2016:408, paras. 55 and 62.

¹¹⁸ ECtHR. *Engel and Others v. The Netherlands*. App. nos. 5100/71 *et al.*, 8th June 1976, paras. 82-83.

limit the right to liberty and security of an individual, while no ground is enumerated in both ICCPR and ACHR. But this is not the only difference. Indeed, the action of the national authorities, beyond the explicit provision of the permitted circumstances, is limited by the eventual provision that the custodial measure in question shall be laid down in domestic law (i.e. the principle of legality), may be necessary in the specific case and proportionate with regard to the aim pursued and thus shall not consist in an arbitrary deprivation of liberty. A brief analysis of European and international legal systems *in parte qua* will then enable the specific features of the IAHRs to be understood.

In particular, it is worth recalling that as per Article 5(1)(f) ECHR, an individual may be deprived of his liberty ‘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’. Whether attempting to enter or being returned from the territory of a Member State, the migrant concerned may be detained merely on the basis of such circumstances, which indeed are a *numerus clausus* but might encompass *prima facie* the most diverse situations. Also, an individual may be detained ‘only in accordance with a procedure prescribed by law’¹¹⁹, this law having to be of a certain ‘quality’¹²⁰ – these aspects will be addressed in the following paragraphs, being part of the ‘principle of legality’ assessment.

Analogously, while Article 6 CFR does not provide for any exceptions to the right to liberty and security, several EU pieces of secondary legislation have outlined a comprehensive list of permissible grounds in order to deprive a foreigner of his liberty for immigration purposes. A distinction has been drawn between irregular migrants and applicants for international protection. The former may be detained if: (i) there is a risk that they may abscond; or (ii) they hinder the relevant return procedures due to their behaviour¹²¹. The latter may be deprived of their

¹¹⁹ See ECtHR. *Ilias and Ahmed v. Hungary* [4th Section]. App. no. 47287/15, 21 November 2019, para. 63 and the case-law cited therein.

¹²⁰ See *amplius* ECtHR. *Z.A. and Others v. Russia* [GC]. App. nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019, para. 161 and ECtHR. *Amuur v. France*. App. no. 19776/92, 25th June 1996, para. 50.

¹²¹ See Article 15(1), of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and

liberty for a wider set of circumstances, which is worth mentioning, albeit briefly: (i) for identity purposes; (ii) if national authorities need to collect the elements on which the application for international protection is based and they cannot be obtained otherwise, in particular when there is the risk that the applicant concerned may abscond; (iii) when national authorities need to decide upon the applicant's right to entry on the territory; (iv) when the foreigner concerned is already detained for the purpose of return and, in the meanwhile, has applied for international protection, but there are reasonable grounds to believe that such application has been presented only to jeopardise the return proceedings; (v) for national security or public order purposes; (vi) for the purpose to transfer the applicant to the competent EU Member State which has to decide upon his application¹²². It has been noted that those circumstances are quite vague and can lead to the detention of almost any migrant arriving on the territory of a EU Member State¹²³.

Yet, in the Americas a partly different approach has been promoted. Article 5(1)(f) ECHR 'has no equivalent in Article 7 ACHR which applies to any detention'¹²⁴. States are therefore not offered a list of circumstances beyond which detention is unlawful. Nevertheless, the failure to provide for such circumstances within the ACHR does not lead to the conclusion that OAS member states are less bound than European ones to implement detention policies towards foreigners. Indeed, the 'principle of exceptionality', namely the duty on Member States to act on the basis of a presumption of liberty—not a presumption of detention—, represents a key point of the IAHRs discipline on the matter¹²⁵, as it

procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.

¹²² See Article 8(1)(a)-(f), Directive 2013/33/EU.

¹²³ See *inter alia* PALLADINO, Rossana. *La detenzione dei migranti. Regime europeo competenze statali diritti umani*. Napoli: Editoriale Scientifica, 2018, p. 275.

¹²⁴ DEMBOUR, Marie-Bénédicte. *When Humans Become Migrants*. Oxford: Oxford University Press, 2015, p. 382.

¹²⁵ See IACHR. Rafael Ferrer-Mazorra et al. v. USA. Report no. 51/01 – Case 9.903, 4th April 2001, paras. 219, 221 and 242, and IACHR. Report on the Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II., Doc. 78/10, 30th December 2010, para. 39. Available at: <https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf>. Accessed on July 9, 2022.

triggers the fact that every custodial measure shall be necessary in the material case, and proportionate to the aim pursued¹²⁶. Thus, the IAHRs has somehow compensated for the lack of definition of the relevant permissible circumstances by providing that, in any event, detention must pursue a purpose compatible with the Convention and must be adequate to achieve that purpose. In other words, both the IACHR and the IACtHR acted ‘in the negative’, excluding certain situations from those lawful *in abstracto* to implement custodial measures against the individual concerned. Notably, the IACHR has specified in *Rafael Ferrer-Mazorra* that the circumstances in which deprivations of liberty may occur within the IAHRs ‘are not limited to those involving the investigation and punishment of crimes, but also extend to other areas in which states may administer authority’¹²⁷.

With regard to immigration detention, and in the absence of a list of permissible situations, the signals coming from the OAS bodies have thus restricted the scope of application of custodial measures. The latter shall, firstly, be taken for legitimate purposes. The regulation and the control of the entry and staying of foreigners ‘could’ be one of them¹²⁸. Nevertheless, being an expression of sovereign punitive prerogatives, the application of custodial measures shall be adopted only in very exceptional cases – here it lies the implication of the inherent punitive nature of imprisonment measures.

Interestingly, the IACHR has highlighted that to be an irregular migrant as such is a circumstance that does hinder no fundamental interests which may trigger the State’s punitive prerogatives¹²⁹. In those cases, the IACHR has somehow argued that custodial measures—which are implemented as a reaction of sovereign countries to a violation of

¹²⁶ IACtHR. *Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 23rd November 2010, para. 166.

¹²⁷ IACHR. *Rafael Ferrer-Mazorra et al. v. USA*. Report no. 51/01 – Case 9.903, 4th April 2001, para. 210.

¹²⁸ IACtHR. *Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 23rd November 2010, para. 169.

¹²⁹ IACHR. *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*. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 381 *et seq.*

administrative rules—might be unlawful *per se*¹³⁰. Since the application of detention measures involves, as a rule, the punitive power of the State (as the IACHR suggested)¹³¹ and since that sovereign prerogative may only be exercised in cases where fundamental legal interests of the State are adversely affected, then the administrative detention of foreigners must also be confined to those exceptional circumstances¹³².

More importantly, the IACHR has denied that the irregular entry, stay and departure of a foreigner may constitute a criminal offence within State Parties' legal frameworks, adding peremptorily that such a circumstance 'must not be the subject of criminal or similar law'¹³³. Here, the nuance between what is 'administrative' and what might be 'criminal' reaches its peak. Notably, the IACHR added that:

'the fact that a migrant is in an irregular situation in a State *does not harm any fundamental legal good that needs protection through the punitive power of the State*. Migrants must be *free from penalties on account of entry, presence or migration status, or on account of any other offense which can only be committed by migrants*. Therefore, punishment of irregular entry, presence, stay or status is disproportionate under criminal law'¹³⁴.

¹³⁰ IACHR. 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. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 384, emphasis added ('... apart from being deprived of their liberty for infringing an administrative rule, *something which in the opinion of the Commission is not a fundamental legal interest that warrant per se deprivation of liberty...*').

¹³¹ IACHR. 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. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 384, in conjunction with para. 383.

¹³² See *supra* § 3.1., *in fine*.

¹³³ See the Preamble of IACHR. Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Resolution no. 04/19, 7th December 2019, emphasis added. Available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>. Accessed on July 9, 2022.

¹³⁴ See the Preamble of IACHR. Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Resolution no. 04/19, 7th December 2019, Principle 67, emphasis added.

It has already been argued that there are many indicia that lead to the conclusion that detention measures as such may be considered to be a ‘penalty’ with punitive purpose within the IAHRs. What is interesting in the wording of the IACHR is that the latter is evidently recalling (and developing) its previous assumptions, drafted in an influential Report of 2010, by which ‘immigration violations ought not to be construed as criminal offences’¹³⁵. In my view, these remarks allow to exclude the adoption of detention measures—whatever might be their classification within domestic law—when a mere violation of immigration law has occurred in the material case. Indeed, under the umbrella of ‘similar law’ even administrative provisions regulating deprivation of liberty ought to be encompassed. By thinking differently, as it currently happens, States may be prevented from providing for custodial measures *vis-à-vis* aliens within criminal proceedings, but not within the administrative ones, although the degree of coercion suffered by the individual is evidently of the same measure – as for me, there might be a blatant mislabelling of reality *in parte qua* which descended, indeed, from the unfortunate wording of the 1951 Geneva Convention, in that the latter prohibited ‘penalties’ to be applied against refugees (and thus, in the opinion of the States, does not prevent national authorities to implement administrative detention measures *vis-à-vis* migrants)¹³⁶.

That being said, an administrative custodial order may not be compliant with the IAHRs legal framework *per se*, when it is merely based on the status of the individual concerned, in the absence of other relevant factors related to the possible jeopardy *in casu* of fundamental legal interest of the State. As it is apparent, this line of reasoning appears to be very progressive, in so far it aims at improving aliens’ fundamental guarantees from the eventual arbitrariness of national authorities¹³⁷.

Compared to the mainstream approach to immigration detention, which is implemented in a quasi-systematic trend due to its ‘administrative

¹³⁵ IACHR. Report on the Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II., Doc. 78/10, 30th December 2010, para. 38, emphasis added.

¹³⁶ CAMPESI, Giuseppe. *La detenzione amministrativa degli stranieri. Storia, diritto, politica*. Roma: Carocci, 2012, p. 77.

¹³⁷ See *infra* 3.2.3.

convenience¹³⁸, those considerations are disruptive – they might allow to deem unlawful any detention measure based exclusively on the violation of administrative rules and, more broadly, any custodial decision which is not related to the protection of fundamental legal rights from ‘serious attacks’ that may endanger them. This assumption seems redolent of the line of reasoning provided by the HRC which, in the seminal *A. v. Australia* judgement, has pointed out that ‘the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the *likelihood of absconding* and *lack of cooperation*, which may justify detention for a period’¹³⁹. This view allows national authorities to detain a foreigner in contexts in which essential legal interests are effectively harmed by the former’s conduct – it seems to me that the risk of absconding or the alien’s non-cooperative behaviour might be factors which would be capable to compromise the hardcore of States’ legal rights. These circumstances may constitute additional factors to be considered by national authorities, to the point that those situations, in the context of the IAHRs, might be deemed sufficient to justify the adoption of detention measures *vis-à-vis* non-citizens¹⁴⁰. Specifically, the IACtHR has agreed with this approach over the risk of absconding requirement, stating in *Vélez Looz* that ‘the application of preventive custody may be suitable to regulate and control irregular immigration to ensure that *the individual attends the immigration proceeding* or to guarantee the application of a

¹³⁸ CAMPESI, Giuseppe. *La detenzione amministrativa degli stranieri. Storia, diritto, politica*. Roma: Carocci, 2012, p. 94.

¹³⁹ HRC. *A. v. Australia*. CCPR/C/59/D/560/1993, 3 April 1997, para. 9.4. Available at: <https://bit.ly/3FeuCHi>. Accessed on July 9, 2022.

¹⁴⁰ The IAHRs made it clear several behaviors (e.g. to entry without the proper documentation, evading the authorized ports of entry, or to entry with false documents or, finally, to stay beyond the authorized time) do not harm any ‘fundamental legal interests that warrant the protection of the State’s punitive authority’ (IACHR. 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. OEA/Ser.L/V/II., Doc. 46/15, 31st December 2015, para. 381), and thus may not constitute circumstances in which national authorities might lawfully detain a foreigner for immigration purposes.

deportation order¹⁴¹. In those circumstances, nonetheless, one may think that the implementation of alternative measures (e.g. GPS monitoring) may be sufficient to achieve the aim pursued in the material case, in the absence of further factual elements. Thus the prominence of necessity and proportionality principles to be met in the material case and pending the relevant administrative proceedings¹⁴².

Within this framework, it is apparent that the door has been left open to the application of incarceration provisions in all those circumstances, indeed very frequent, in which aliens' detention is ordered on the basis of public order or national security reasons, as it is *expressis verbis* allowed within the EU legal framework *vis-à-vis* applicants for international protection¹⁴³ (but not, surprisingly, in relation to irregular migrants)¹⁴⁴. Indeed, when there is a suspicion—or 'certain indicia'—that the migrant concerned may pose a 'risk for public safety', such circumstance would integrate a *vulnus* to States' fundamental legal interests, in the sense intended by the IACHR¹⁴⁵. Again, in those situations, alien's detention might be justified provided that the principles of necessity and proportionality (and hence freedom from arbitrariness)¹⁴⁶ are complied with in the material case.

To summarise, the IAHRs has clearly been influenced by the ICCPR in regulating the right to liberty of detained foreigners. In doing so, it has rejected the approach proposed by the ECHR and, therefore, has not developed an exhaustive list of grounds for allowing national authorities to deprive a person of their liberty. However, adopting an

¹⁴¹ IACtHR. Vélez Lóor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 169.

¹⁴² See *infra* § 3.2.3.

¹⁴³ See Article 8(3)(e), Directive 2013/33/EU.

¹⁴⁴ CJEU. Case C-357/09 PPU, Said Shamilovich Kadzoev (Huchbarov). ECLI:EU:C:2009:741, para 70.

¹⁴⁵ This aspect has been emphasized by IACHR. Report on the Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II., Doc. 78/10, 30th December 2010, para. 39. See, by analogy, IACtHR. Vélez Lóor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 116.

¹⁴⁶ See *infra* 3.2.3.

original approach, it restricted this power not merely to exceptional situations—as seems might the policy line followed, at least *de iure*, by the EU—but to circumstances where the fundamental interests of states may be adversely affected. Thus, administrative detention is not deemed unlawful or arbitrary *per se* but its implementation shall occur only when it is extremely necessary, being a ‘punitive penalty’. In this respect, the IAHR standard is far higher than that outlined by the ECHR, the EU and the ICCPR, at least on a theoretical level. Yet, by allowing administrative detention on the grounds of risk of absconding or public order, the IACtHR has *de facto* aligned itself with lower EU standards (which, in this respect, are in turn higher than those of the ECHR)¹⁴⁷, in that they allow for deprivation of liberty in the same situations.

3.2.2. THE PRINCIPLE OF LEGALITY: COMMON STANDARDS BETWEEN LUXEMBOURG, STRASBOURG AND SAN JOSÉ?

Beyond the lack of an exhaustive list of requirements, one of the central points of the ACHR discipline on deprivation of liberty lies in the principle of legality (*principio de legalidad*), which embodies one of the most stringent limits imposed on States by the IAHR. It is one of the three ‘central ideas’ which are encompassed in the wide-ranging notion of rule of law (*Estado de derecho*), together with the prohibition of *ex post facto* laws (*irretroactividad*) and the due process (*debido proceso*)¹⁴⁸.

Indeed, Article 7(2) ACHR encompasses the principle of legality in the execution of custodial measures, in setting forth that no one shall be deprived of his personal liberty except for the reasons laid down in the States’ constitutions or by a law established pursuant thereto. This guarantee is *ictu oculi* in line with other general international regulations, such as the aforementioned Article 5(1) ECHR, Article 9 ICCPR and the relevant EU provisions. Again, prior to analyzing the

¹⁴⁷ As seen below, Article 5(1)(f) ECHR allows detention measures even when, for instance, the foreigner concerned is not deemed to be at a risk of absconding.

¹⁴⁸ See CANDIA-FALCÓN, Gonzalo. El Estado de Derecho y la Corte Interamericana de Derechos Humanos. *Dikaion*, v. 24, n. 2, p. 235, 2015. <https://doi.org/10.5294/DIKA.2015.24.2.2>.

IAHRS standards *in parte qua*, it may be useful to glance, albeit briefly, the international framework upon the relevance of the principle of legality in detention proceedings.

As per Article 9 ICCPR, any detention measure shall be ‘in accordance with’ and ‘authorized by law’. Compliance with the legality principle leads two substantial implications – while, on the one hand, custodial measures shall be laid down in domestic law, on the other hand, the latter shall in turn be in accordance with the international human rights standards. Hence, it is not sufficient that a deprivation of liberty be merely implemented under domestic law provisions to define it as ‘legal’, since this is solely one side of the coin to be met in the material case. Having established that there is a domestic rule permitting detention *in concreto*, an analysis of the ‘quality’ of that rule in the light of international law must be rigorously carried out – criteria such as the ‘foreseeability’ or the ‘predictability’ of the law¹⁴⁹ as well as the ‘sufficient precision’ of the latter ought to be assessed¹⁵⁰. Moreover, procedural safeguards are also encompassed within this guarantee, insofar the relevant proceedings for carrying out lawful deprivation of liberty should also be regulated by domestic law in several aspects, such as (i) conditions of detention; (ii) grounds for detention; (iii) the maximum time limit for a custodial measure to be implemented; (iv) the role of the judicial authority¹⁵¹. It is noteworthy that the HRC rightly noted that the notion of ‘unlawfulness’ and that of ‘arbitrariness’ (the latter being dealt with separately in the following paragraph) may overlap, to the point that there might be lawful detentions which are affected from arbitrariness and *vice versa*¹⁵². As will be seen in the next paragraph, the notion of ‘unlawfulness’ is thus narrower than that of ‘arbitrariness’.

¹⁴⁹ EDWARDS, Alice. Back to Basics: The Right to Liberty and Security of Person and “Alternative to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants. April 2011, p. 19.

¹⁵⁰ HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 22.

¹⁵¹ HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 23.

¹⁵² HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 11.

A similar approach has been followed in Europe. As per Article 5 ECHR, no one shall be deprived of his liberty ‘save ... in accordance with a procedure prescribed by law’. Having regard to Article 9 ICCPR, the wording adopted is essentially identical, as its meaning. Indeed the ECtHR has confirmed that, primarily, the principle of legality relates to the conformity of a custodial measure to the relevant domestic law¹⁵³. Accordingly, the latter shall clearly foresee the power to detain an individual¹⁵⁴. A breach of domestic law *in parte qua* triggers in turn a violation of Article 5 ECHR, thus the ECtHR shall have, in any case, the power to verify such a compliance¹⁵⁵. In *Medvedyev and Others*, the ECtHR has broadened the notion of ‘law’ and has notably pointed out that ‘other applicable legal standards, including those which have their source in international law’ may be relevant as to assess the legal basis of a detention measure in the light of Article 5 ECHR¹⁵⁶. Additionally, the law at stake shall be of a certain ‘quality’, as the Court stressed in the landmark judgement *Amuur*, which related to migrants’ administrative deprivation of liberty in airport transit zones, and which is worth quoting:

‘In laying down that any deprivation of liberty must be effected “in accordance with a procedure prescribed by law”, Article 5 para. 1 (art. 5-1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions “in accordance with the law” and “prescribed by law” in the second paragraphs of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2), they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.

¹⁵³ ECtHR. *X. v. The United Kingdom*. App. no. 7215/75, 5 November 1981, para. 42.

¹⁵⁴ See, more recently, ECtHR. *R.R. and Others v. Hungary*. App. no. 36037/17, 2nd March 2021, para. 89.

¹⁵⁵ See, among other authorities, ECtHR. *Benham v. The United Kingdom* [GC]. App. no. 19380/92, 10 June 1996, para. 41 and ECtHR. *Winterwerp v. The Netherlands*. App. no. 6301/73, 24th October 1979, para. 46.

¹⁵⁶ ECtHR, *Medvedyev and Others v. France* [GC]. App. no. 3394/03, 29th March 2010, para. 79.

In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies¹⁵⁷.

Hence, administrative provisions by which a foreigner may be placed in detention (e.g. a decree or an unpublished circular, as well as a border police regulation)¹⁵⁸ or other comparable provisions (e.g. diplomatic notes or bilateral agreements by two States)¹⁵⁹ do not either constitute a 'legal basis' in the sense of the Article 5 ECHR, or have not been deemed to hold a certain 'quality'.

The relevance of the principle of legality within the EU legal framework is slightly equivalent. Specifically, administrative detention provisions are to be laid down in national law, and they have to be clear, precise and foreseeable in their applications, and as the CJEU has plainly set forth in *Al Chodor*:

'According to the European Court of Human Rights, any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness (...) the detention of applicants,

¹⁵⁷ ECtHR. *Amuur v. France*. App. no. 19776/92, 25th June 1996, para. 50.

¹⁵⁸ See, *inter alia*, ECtHR. *Amuur v. France*. App. no. 19776/92, 25th June 1996, paras. 52-53 and ECtHR. *Shamsa v. Poland*. App. nos. 45355/99 and 45357/99, 27th November 2003), para. 54.

¹⁵⁹ See, respectively, ECtHR. *Medvedyev and Others v. France* [GC]. App. no. 3394/03, 29th March 2010, paras 96-100 and ECtHR. *Khlaifia and Others v. Italy* [GC]. App. no. 16483/12, 15th December 2016, paras. 102-105.

constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness (...) only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness¹⁶⁰.

It is worth recalling that *Al Chodor* concerned detention of asylum seekers, whose deprivation of liberty for immigration purposes is specifically regulated by Directive 2013/33/EU, the latter providing for that 'the grounds for detention shall be laid down in national law', as well as the rules concerning alternatives to detention¹⁶¹. Conversely, an analogous and explicit obligation is not provided for by Directive 2008/115/EC which regulates detention measures for the purpose of return adopted *vis-à-vis* irregular migrants¹⁶², albeit it is set forth that 'coercive measures' broadly considered 'shall be implemented as provided for in national legislation'¹⁶³. However, there may be no room to deny that, due to its broad purpose, the findings of the CJEU in *Al Chodor*—which admittedly acknowledged the ECtHR's settled case-law—may be applied, *mutatis mutandis*, also to 'detention for the purpose of return', as per Directive 2008/115/EC.

The constitutional vision of the IAHRs upon the principle of legality is *prima facie* redolent to both the European and the international law framework. This guarantee, enshrined in Article XXV ADHR¹⁶⁴ and Article 7(2) ACHR, shows a subjective aspect, as every individual is *expressis verbis* entitled to a specific prerogative, namely the right not to

¹⁶⁰ CJEU. Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*. ECLI:EU:C:2017:213, paras. 38, 40 and 43.

¹⁶¹ See Article 8(3), last subparagraph and 8(4), Directive 2013/33/EU.

¹⁶² Notably, the Directive aims at obliging Member States to laid down objective criteria in national law upon the notion of 'risk of absconding' (Article 3(7), Directive 2008/115/EC).

¹⁶³ Article 8(4), Directive 2008/115/EC.

¹⁶⁴ This provision reads as follows: 'No one may be deprived of his liberty except in the cases and according to the procedures established by a pre-existing law'.

be detained illegally¹⁶⁵. Undoubtedly, an original aspect *in parte qua* may be represented by the fact that the ACHR provides for the possibility that the limitations on the right to liberty of the individual might also be laid down either in the Constitutions of the States or in ‘laws’ which are in accordance with the latter¹⁶⁶. Indeed, when deprivation of liberty is at stake, the IACtHR has always adopted the aforementioned “double-check assessment”, ruling upon: (i) firstly, the formal existence *in casu* of domestic regulations allowing for detention measures and, secondly, (ii) the quality of such provisions, in the sense envisioned *supra*¹⁶⁷. With some emphasis, the principle of legality (marked as ‘*reserva de ley*’) has been labelled as the ‘*garantía primaria*’ of the right to personal liberty, according to which only by a law shall an individual be deprived of his liberty¹⁶⁸. Remarkably, Article 7(2) ACHR provides for both material and formal requirements which shall be met in the material case¹⁶⁹ – a ‘law’ shall regulate all the

¹⁶⁵ IACtHR. *Usón Ramirez v. Venezuela*, Preliminary Exceptions, Merits, Reparations and Costs. 20th November 2009, para. 148. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf. Accessed on July 9, 2022.

¹⁶⁶ This aspect is highlighted e.g. in IACtHR. *Palamara Iribarne v. Chile*, Merits, Reparations and Costs. 22nd November 2005, para. 196. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf. Accessed on July 9, 2022.

Hence, the IACtHR will also be allowed to rule upon the compatibility between the national provision at stake and the related Constitution. The relevance of the latter in the assessment on an alleged violation of Article 7(2) ACHR is quite evident in the line of reasoning set forth in IACtHR. *Castillo Páez v. Perú*, Merits. 3rd November 1997. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_34_ing.pdf. Accessed on July 9, 2022.

¹⁶⁷ Indeed, such an assessment—which within the ECHR legal framework is encompassed in the control of legality—is also conducted on the light of verifying the absence of arbitrariness, within the IAHRs (see *infra* § 3.2.3.).

¹⁶⁸ See, *inter alia*, IACtHR. *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, Excepciones Preliminares, Fondo, Reparaciones y Costas. 21st November 2007, para. 56.

¹⁶⁹ IACtHR. *López Álvarez vs. Honduras*, Fondo, Reparaciones y Costas. 1st February 2006, para. 60 and IACtHR. *Gangaram Panday vs. Suriname*, Fondo, Reparaciones y Costas. 21st January 1994, para. 47. Available at: http://hrli-library.umn.edu/iachr/b_11_16c.htm. Accessed on July 9, 2022.

grounds and circumstances in which custodial measures are allowed¹⁷⁰ as well as the main features of the relevant proceedings¹⁷¹. Accordingly, it is for the IACtHR to verify, in any case, whether a deprivation of liberty has been implemented in conformity with the domestic legal framework¹⁷². Differently from the other international instruments, the IACtHR has built up a definition of ‘law’, which is worth quoting:

‘norma jurídica de carácter general, ceñida al bien común, emanada de los órganos legislativos constitucionalmente previstos y democráticamente elegidos, y elaborada según el procedimiento establecido por las constituciones de los Estados Partes para la formación de las leyes’¹⁷³.

Such a precise description undoubtedly limits the power of the States to a greater extent than in the European context, because it requires the national authorities to enact general measures that are aimed at the common good, according to the legislative procedure (and thus excluding, at least *prima facie*, any measures emanating from the executive power). A domestic provision, nonetheless, in order to be deemed lawful within the IAHRs, shall also take in due account the ACHR’s general principles. Therefore, national regulations which establish limitations to the right to liberty shall be in accordance with the values enshrined in the ACHR¹⁷⁴, the one of non-discrimination being one of the most relevant. Finally, it is

¹⁷⁰ IACtHR. Chaparro Álvarez y Lapo Íñiguez vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas. 21st November 2007, para. 57. The Court emphasized that the principle of legality always encompasses the principle of exhaustiveness (*principio de tipicidad*).

¹⁷¹ See IACtHR. Herrera Espinoza y Otros vs Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas. 22nd November 2005, para. 133. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_316_esp.pdf. Accessed on July 9, 2022

¹⁷² See e.g. IACtHR. Yvon Neptune v. Haiti, Merits, Reparations and Costs. 6th May 2008, para. 96 *in fine*. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_180_ing.pdf. Accessed on July 9, 2022

¹⁷³ IACtHR. Chaparro Álvarez y Lapo Íñiguez vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas. 21st November 2007, para. 56.

¹⁷⁴ IACtHR. Servellón-García et al. v. Honduras, Merits, Reparations and Costs. 21st September 2006, para. 89. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_152_ing.pdf. Accessed on July 9, 2022.

worth emphasising that in *García y Familiares* the IACtHR has enhanced the guarantees of the individual deprived of his/her liberty in a way that was unprecedented in the international and European approach to the matter – in order to avoid unlawfulness (and even arbitrariness) of the custodial measure at stake, every detention order shall be duly registered in the relevant ‘document’, which in turn shall plainly ‘stating, at the very least, the reasons for the detention, who executed it, the time of detention and the time of release, as well as a record that the competent judge was advised’¹⁷⁵.

Several cases have addressed the issue of the respect of the principle of legality in immigration detention-related cases. In the vast majority of the latter, the Court reiterated the principles already expressed above. However, there are some peculiarities worth mentioning. In *Nadege Dorzema and Others*, the Court emphasized that, especially within police centers, ‘a record of detainees must be kept that permits monitoring the legality of the detentions’¹⁷⁶. While this assumption might be considered as an aspect concerning practical conditions of detention, it has been deemed relevant within the legality assessment of a custodial measure. Moreover, it was established that administrative detention tools shall be adopted ‘in order to implement formal immigration proceedings’¹⁷⁷, otherwise they may be in breach of Article 7(2) ACHR – even the justification at stake might thus be relevant for the assessment of legality within the IAHRS. It should be noted that none of these considerations have ever been developed, at least explicitly, in the European legal framework. That confirms that, although starting from a shared theoretical basis, the American standards partly seem to raise the threshold of protection *vis-à-vis* foreigners placed in detention, especially—as it appears slightly

¹⁷⁵ IACtHR. *García y Familiares v. Guatemala*, Merits, Reparations and Costs. 29th November 2012, para. 100 *in fine*. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_258_eng.pdf. Accessed on July 9, 2022.

¹⁷⁶ IACtHR. *Nadege Dorzema y otros vs. República Dominicana, Fondo, Reparaciones y Costas*. 24th October 2012, para. 131.

¹⁷⁷ IACtHR, *Caso de personas dominicanas y haitianas expulsadas Vs. República Dominicana, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 28th August 2014, para. 368.

evident—with reference to the fact that it will be for the national authorities to register every deprivation of liberty which occur within their facilities.

3.2.3. THE NOTION OF (MIGRANTS') ARBITRARY DETENTION IN THE AMERICAS.

The last aspect to be analysed on a substantive level concerns the issue that custodial measures shall never contain elements of arbitrariness. O'Nions has rightly observed that the principle of freedom from arbitrariness related to the detentions tools is 'well rehearsed in international human rights and refugee law'¹⁷⁸. Interestingly, the 'challenge of arbitrariness'—which involves a harsh tension between the individual's rights and the authority's coercive powers—has been dealt with through the 'rule of law formula', in contraposition to that of the 'rule of man'¹⁷⁹. Nevertheless, the notion of 'arbitrariness' as such, thanks to its inherent broadness, might lead to misunderstanding as to its content, to the point that political scholars are still wondering 'what is an arbitrary power'¹⁸⁰. Hence, from a legal point of view, the definition of what arbitrariness is may be one of the most problematic aspects of our analysis, *a fortiori* when deprivation of liberty carried out for immigration purposes is at stake. To this purpose, it has already been pointed out that when international courts are called to verify *in concreto* the compliance with the principle of legality, their assessment over the 'quality' of the 'law' at stake might overlap with some features which relates, in turn, to the respect of the principle of non-arbitrariness.

International bodies are clearly aware of the blurred characterization of the latter. While, for instance, Article 9 ICCPR and

¹⁷⁸ O'NIONS, Helen. No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience. *European Journal of Migration and Law*, Leiden, v. 10, n. 2, p. 156, 2008. <http://dx.doi.org/10.1163/157181608X317336>.

¹⁷⁹ ASTA, Francesca. Arbitrary Decision-making and the Rule of Law. The Role of the Jurisdictions' Detention Proceedings – Between Discretion and Arbitrariness. *Etikk I Praksis – Nordic Journal of Applied Ethics*, Trondheim, v. 14, n. 2, p. 109 *et seq.*, 2020. <https://doi.org/10.5324/eip.v14i2.3491>.

¹⁸⁰ See ARNOLD, Samuel; HARRIS, John. What is arbitrary power? *Journal of Political Studies*, London, vol. 10, n. 1, pp. 55-70, 2017. <https://doi.org/10.1080/2158379X.2017.1287473>.

Article 7(3) ACHR unambiguously provide for that any limitation of the right to liberty shall be implemented without elements of arbitrariness¹⁸¹, on the other hand, neither Article 6 CFR nor Article 5 ECHR address this feature *expressis verbis*. However, both in Europe and in the Americas, the definition of ‘arbitrariness’ has been brought through a case-law approach. For instance, in the already quoted *A v. Australia* case, the HRC has broadly set forth what follows:

‘the Committee recalls that the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context’¹⁸².

Subsequently, the HRC has specified that a custodial measure is not arbitrary as long as the State concerned shall offer an appropriate justification for that measure¹⁸³. A ‘conservative approach’¹⁸⁴ is thus advocated by the HRC, in that it emphasises that several principles shall be met as they are encompassed within the notion of non-arbitrariness: (i) necessity; (ii) proportionality; (iii) reasonableness¹⁸⁵. Concretely, it means that, in any case, deprivation of liberty shall be the *extrema ratio* – States shall thus verify whether less coercive tools are available in the material case, being allowed to implement detention measures only as long as they are necessary *in concreto* through a continuous

¹⁸¹ Notably, they share the same wording: ‘No one shall be subjected to arbitrary arrest or detention’.

¹⁸² HRC. *A. v. Australia*. CCPR/C/59/D/560/1993, 3 April 1997, para. 9.2.

¹⁸³ HRC. *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*. CCPR/C/79/D/1069/2002, 6th November 2003, para. 9.2. Available at: <https://www.refworld.org/cases,HRC,404887ed0.html>. Accessed on July 9, 2022.

¹⁸⁴ EDWARDS, Alice. *Back to Basics: The Right to Liberty and Security of Person and “Alternative to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. April 2011, p. 21.

¹⁸⁵ See HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 12, and the references cited therein.

proportionality assessment. The HRC reiterated that, while, on the one hand, administrative custodial measures may present ‘severe risks of arbitrary deprivation of liberty’¹⁸⁶, on the other hand, non-criminal immigration detention is not deemed arbitrary *per se* but it must comply with, as a rule, all the aforementioned principles¹⁸⁷, adding that the absence of a maximum time limit in conjunction with the lack of an effective remedy to challenge the lawfulness of the detention constitute inadequate guarantees against an arbitrary deprivation of liberty¹⁸⁸.

Differently, the ECtHR has astonishingly excluded that detention measures taken under the umbrella of Article 5(1)(f) ECHR shall be necessary *in concreto*¹⁸⁹. The discrepancy is quite striking since for other cases of deprivation of liberty, namely those provided for by paragraphs (a)-(e) of Article 5 ECHR, the ECtHR always operates a necessity test on the measure under consideration (e.g. detention after conviction, on remand or for medical or social reasons)¹⁹⁰, being the very aim

¹⁸⁶ HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 15.

¹⁸⁷ HRC. General Comment No. 35. Article 9 (Liberty and security in person). CCPR/C/GC/35, 16th December 2014, para. 18. See *amplius* UNHCR. *Detention Guidelines*. 2012, paras. 18-41. Available at: <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>. Accessed on July 9, 2022.

¹⁸⁸ UNHCR. *Detention Guidelines*. 2012, para. 17. Upon the maximum period of detention as a safeguard against arbitrariness see EDWARDS, Alice. Back to Basics: The Right to Liberty and Security of Person and “Alternative to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants. April 2011, pp. 23-24.

It is noteworthy that the UNHCR recalled ECtHR. *Louled Massoud v. Malta*. App. no. 24340/08, 27th July 2010, para. 71, where the Strasbourg Court set forth that the applicant’s deprivation of liberty was arbitrary considering, in conjunction, (i) the absence of a time limit for detention; (ii) the lack of effective safeguards.

¹⁸⁹ See, *inter alia*, ECtHR. *Saadi v. The United Kingdom* [GC]. App. no. 13229/03, 29th January 2008, para. 72, and ECtHR. *Chahal v. The United Kingdom*. App. no. 22414/93, 15th November 1996, para. 112.

¹⁹⁰ See e.g. ECtHR. *Enhorn v. Sweden*. App. no. 56529/00, 25 January 2005, para. 36 *in fine* and the case-law cited *mutatis mutandis* therein.

of Article 5 ECHR to protect the individual from the arbitrariness of public authorities¹⁹¹.

Thus, in the face of a rather vague list of situations permitting the detention of a migrant, national authorities are free to adopt even custodial measures that might not be necessary in the material case, in the sense that, for instance, they are not obliged to verify beforehand the existence of less coercive measures to be adopted in the concrete case. Nevertheless, such a measure shall be proportionate but only for time-related issues, *rectius* it shall not be implemented in ‘an arbitrary fashion’¹⁹². With the words of the ECtHR, it has been highlighted that:

‘To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country”; and the length of the detention should not exceed that reasonably required for the purpose pursued’¹⁹³.

In *Chahal* the ECtHR has made it clear that ‘the principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time’¹⁹⁴. However, it is arguable that an unnecessary detention might be very eligible to become, almost instantly, an arbitrary deprivation of liberty – indeed, we could agree with O’Nions in highlighting that ‘detention cannot satisfy the absence of arbitrariness criteria simply

¹⁹¹ ECtHR. *Simons v. Belgium* (dec.). App. no. 71407/10, 28th August 2012, para. 32 and the case-law cited therein.

¹⁹² ECtHR. *Guzzardi v. Italy*. App. no. 7367/76, 6th November 1980, para. 92.

¹⁹³ ECtHR. *Chahal v. The United Kingdom*. App. no. 22414/93, 15th November 1996, para. 74. See also ECtHR. *A. and Others v. The United Kingdom* [GC]. App. no. 3455/05, 19th February 2009, paras. 162-164.

¹⁹⁴ ECtHR. *Chahal v. The United Kingdom*. App. no. 22414/93, 15th November 1996, para. 72. The Court further set forth that the same proportionality test is to be applied both to pre-admittance detention and detention for the purpose of return (*ibid.*, para. 73).

because it is comparatively brief¹⁹⁵, being understood *a fortiori* that Article 5 ECHR, differently from the international law approach, does not require to indicate a maximum time-limit for a detention measure to be implemented¹⁹⁶.

Unlike the ECHR legal framework, administrative detention taken under the EU law shall be necessary in the material case¹⁹⁷. Accordingly, Member States has to verify, on a case-by-case basis, whether less coercive measures are available in order to reach the aim pursued¹⁹⁸ - in other words, necessity and proportionality principles somehow overlap during this assessment, as national authorities shall verify, in the meanwhile, whether such detention is proportionate to the aims which it pursues¹⁹⁹. Here, proportionality relates not only to the duration of the deprivation of liberty but also to the purpose of the measure and thus to the possible implementation of the custodial tool through other less coercive means. However, this topic is addressed in a blurred way – while there is no specific obligation to laid down alternatives to detention tools in domestic law with regard to the deprivation of liberty of irregular migrants²⁰⁰, such a specific requirement for the ‘lawfulness’ of the measure at stake is explicitly provided for when the administrative custodial measures are implemented *vis-à-vis* applicants for international protection²⁰¹. Analogously, the issue of maximum period of detention is puzzled – while irregular migrants may be detained for at last eighteen months²⁰², asylum seekers may be deprived of their liberty *ad libitum*, no time

¹⁹⁵ O’NIONS, Helen. No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience. *European Journal of Migration and Law*, Leiden, v. 10, n. 2, p. 182, 2008.

¹⁹⁶ ECtHR. J.N. v. The United Kingdom. App. no. 37289/12, 19th May 2016, para. 90.

¹⁹⁷ CJEU. Case C-36/20 PPU, Ministerio Fiscal v VL. ECLI:EU:C:2011:268, para. 39.

¹⁹⁸ CJEU. Case C-61/11 PPU, Hassen El Dridi, alias Soufi Karim. ECLI:EU:C:2020:294, para. 39.

¹⁹⁹ See CJEU. Joined Cases C-924/19 and C-925/19 PPU, F.M.S. et al. ECLI:EU:C:2020:294, paras. 258-259 and CJEU. Case C-18/19, WM v Stadt Frankfurt am Main. ECLI:EU:C:2020:511, para. 38.

²⁰⁰ See Recital 16 and Article 15(1), Directive 2008/115/EC.

²⁰¹ See Article 8(4), Directive 2013/33/EU.

²⁰² See Article 15(5)-(6), Directive 2008/115/EC.

limit being laid down in the relevant EU law²⁰³, being understood that, in any case, the principles of necessity and proportionality shall be met throughout the whole implementation of the custodial measure at stake. It is worth recalling that Article 6 of the Charter protects the individual against arbitrary deprivation of freedom, the importance of the right to liberty being ‘paramount’ within EU law²⁰⁴. As will be explained in the next paragraph, to provide an external control—namely, a judicial one—that those grounds continue to be satisfied in the material case aims at discouraging ‘arbitrary infringement of the applicant’s right to liberty’, the AG Sharpston clearly pointed out in *D.H.*²⁰⁵. Whilst there is a little research on the notion of ‘arbitrary’ immigration detention within the EU legal framework²⁰⁶, in *J.N.* the AG Sharpston has already observed, recalling the findings of the ECtHR on the matter, that an administrative deprivation of liberty can only be deemed to be free from arbitrariness whether its implementation is necessary *in concreto* and proportionate with regard both to the aim pursued, to the means adopted and, finally, to the length of the measure at stake²⁰⁷.

The composite picture brought both by the ICCPR and the European legal framework allow us to see several similarities in the IAHRs’ approach on the matter. As already mentioned, Article 7(3) ACHR prevents States from implementing arbitrary custodial measures

²⁰³ See, *inter alia*, VELLUTI, Samantha. *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Court*. Heidelberg: Springer, 2014, p. 68.

²⁰⁴ See, *mutatis mutandis*, CJEU. Case C-310/18 PPU, Criminal Proceedings against Emil Milev, Opinion of AG Wathelet. ECLI:EU:C:2018:645, para. 60.

²⁰⁵ See Case C-704/17, *D.H. v Ministerstvo vnitra*, Opinion of AG Sharpston, ECLI:EU:C:2019:85, para. 52.

²⁰⁶ It is noteworthy that none of the provisions of the relevant EU legislation mentions expressly that detention shall not be arbitrary, albeit the AG Sharpston acknowledged that *de facto* Reception Directive ‘clearly contains guarantees against arbitrary detention’ (CJEU. Case C-601/15 PPU, *J.N. v Staatssecretaris van Veiligheid en Justitie*, View of AG Sharpston. ECLI:EU:C:2016:85, para. 129).

²⁰⁷ CJEU. Case C-601/15 PPU, *J.N. v Staatssecretaris van Veiligheid en Justitie*, View of AG Sharpston. ECLI:EU:C:2016:85, para. 128. There is nothing in the AG’s line of reasoning that precludes one to think that the same might hold true with regard to the relevant provisions of the Return Directive.

against every human being. Moreover, as per Article XXV ADHR, every individual is entitled to a ‘right of protection from arbitrary arrest’, even though the latter provision seems to deal exclusively with the respect of the principle of legality²⁰⁸. In this regard, the IACtHR has emphasized that a deprivation of liberty may be lawful but still arbitrary within the meaning of the ACHR, giving importance to the ECtHR’s settled case-law on the matter²⁰⁹. The IACtHR specified that:

‘no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality’²¹⁰.

Thus, the fact that the adoption of a detention tool may breach the fundamental rights enshrined in the IAHRs (with regard to both a substantial and a procedural point of view), and hence not only that of liberty and security, is tantamount to its ‘arbitrariness’ *tout court* – a definition which might seem broader than those provided by the other relevant international and regional instruments.

Among the conditions of arbitrariness, the lack of proportionality is intended in a wide sense, as it refers essentially to the balance to be established between the sacrifice imposed on the individual and the achievement of the aim pursued. Indeed, the Court enumerated the grounds by which a custodial measure—be it criminal or administrative—may be deemed to hold an arbitrary character. Notably, these conditions were firstly drafted by the Court in *Chaparro Álvarez y Lapo Íñiguez*, a judgement concerning criminal proceedings – the findings therein are worth quoting at some length on this point:

²⁰⁸ See *supra* note 164.

²⁰⁹ See, *inter alia*, IACtHR. *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, Excepciones Preliminares, Fondo, Reparaciones y Costas. 21st November 2007, para. 91.

²¹⁰ IACtHR. *Gangaram-Panday v. Suriname*, Merits, Reparations and Costs. 21st January 1994, para. 47. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_16_ing.pdf. Accessed on July 9, 2022.

‘Consequently, without prejudice to the legality of a detention, it is necessary in each case to assess the compatibility of the legislation with the Convention, understanding that this law and its application must respect the requirements enumerated below, in order to ensure that the measure is not arbitrary: i) that the purpose of measures that deprive or restrict a person’s liberty is compatible with the Convention; ii) that the measures adopted are appropriate for complying with the intended purpose; iii) that the measures are necessary, in the sense that they are absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists, in relation to the right involved, to achieve the intended purpose. Hence, the Court has indicated that the right to personal liberty assumes that any limitation of this right must be exceptional; and iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or unreasonable compared to the advantages obtained from this restriction and the achievement of the intended purpose. Any restriction of liberty not based on a justification that allows an evaluation of whether it is in keeping with the conditions set out above will be arbitrary and, therefore, will violate Article 7(3) of the Convention’²¹¹.

This section is written *à la* Strasbourg – a list of parameters by which it may be inferred that a certain custodial measure is affected by arbitrariness is drafted. Nevertheless, the line of reasoning is evidently that of Luxembourg: the paramount importance given to the principle of necessity to be *in concreto* as well as the impact of less coercive measures are redolent of EU law (and, accordingly, of international law standards). Interestingly, the IACHR has offered a non-exhaustive list of alternatives to detention, such as GPS monitoring, bond or release²¹², which is similar to the catalogue provided for by relevant EU regulations²¹³. It is worth recalling that in 2019, the IACHR—while urging OAS Member States to abolish *in toto* ‘the detention of migrants’ from domestic law—has upheld

²¹¹ IACtHR. *Vélez Lóor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 23rd November 2010, para. 166.

²¹² IACHR. *Report on the Immigration in the United States: Detention and Due Process*. OEA/Ser.L/V/II., Doc. 78/10, 30th December 2010, para. 41.

²¹³ Article 8(4), Directive 2013/33/EU.

these very high standards to be met in the implementation of custodial measures *vis-à-vis* non-citizens, which is worth quoting:

‘No migrant shall be arrested, detained, or deprived of liberty in an arbitrary manner.

States shall take measures to eradicate the detention of migrants in law, public policy and practice. Until then, States shall ensure that detention is used only in accordance with and as authorized by law and only when determined to be necessary, reasonable in all the circumstances, and proportionate to a legitimate purpose. Detention shall occur only as a measure of last resort and shall last no longer than required by the circumstances²¹⁴.

The IACtHR has issued several decisions in which the notion of arbitrary detention has been concretely shaped. Importantly, and in addition to the aforementioned criteria, the topic of the ‘quality’ of the domestic provision concerning the issuing of custodial measures is embodied within the ‘freedom from arbitrariness’ test (and not, as happened within the European legal framework within that of legality). Here, the approach endorsed by the IACtHR appears to be similar to that of the international law standards, where an overlapping between the two notions is well acknowledged. Some examples may be useful to understand the blurred approach *in parte qua*. For instance, the absence *in toto* of grounds or purposes for detention is a circumstance that, differently from the European *espace juridique*, leads to the conclusion that deprivation of liberty is arbitrary in the material case²¹⁵. Analogously, a custodial measure is affected by arbitrariness where the relevant detention order is not adequately substantiated, to the point that it is impossible to ascertain the compliance with the principles of necessity and proportionality in

²¹⁴ IACHR. Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking. Resolution no. 04/19, 7th December 2019, Principle 68, first and second paragraph.

²¹⁵ See, amongst other authorities, IACtHR. Torres Millacura y otros v. Argentina. 26th August 2011, para. 78 and the case-law cited therein. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_229_esp.pdf. Accessed on July 9, 2022.

the material case²¹⁶. Finally, the Court has highlighted in *Yvon Neptune* that the blatant lack of competence of the judicial authority issuing the detention order may result in a deprivation of liberty which is, at once, ‘unlawful and arbitrary’²¹⁷.

With regard to administrative detention, the IACtHR, as was to be expected, adopted the aforementioned principles *in casu*. Nevertheless, a higher standard has been set in several areas. In *Vélez Loor*, the Court argued that the lack of a maximum time limit for detention in the relevant domestic law is not keeping *per se* with Article 7(3) ACHR, as the provision at stake *de facto* may encourage foreigners’ prolonged detention, which becomes thus inherently arbitrary²¹⁸. It seems, to me, according to the wording adopted, that this does hold true regardless of the fact that the applicant may have had access to an effective legal remedy to challenge the lawfulness of his deprivation of liberty²¹⁹ – when domestic law applies no limit to detention, the arbitrariness of the related custodial decisions is automatically acknowledged. This approach is evidently disruptive – detention of asylum seekers as designed by EU law might be deemed arbitrary as such, in the light of the IAHR standards, due to the lack of a maximum period of detention clearly provided for. Furthermore, an individual assessment upon the necessity *in concreto* of the measure at stake shall be conducted *before* the latter is implemented, thus avoiding the foreigners’ automatic deprivation of liberty²²⁰. This aspect is indeed implicitly mentioned in the Reception Directive²²¹, while it has been

²¹⁶ IACtHR. *Barretto Leiva v. Venezuela*, Merits, Reparations and Costs. 17th November 2009, paras. 115-116. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_206_ing.pdf. Accessed on July 9, 2022. See, by analogy, with regard to preventive detention, IACtHR. *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, Excepciones Preliminares, Fondo, Reparaciones y Costas. 21st November 2007, paras. 105 *et seq.*

²¹⁷ IACtHR. *Yvon Neptune v. Haiti*, Merits, Reparations and Costs. 6th May 2008, para. 100.

²¹⁸ IACtHR. *Vélez Loor vs. Panamá*, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 117.

²¹⁹ Cfr. *supra* note 188.

²²⁰ IACtHR. *Vélez Loor vs. Panamá*, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 118.

²²¹ Article 8(2), Directive 2013/33/EU.

omitted in the Return Directive²²², but it is noteworthy that such a duty has been cited *expressis verbis* within the IACtHR's case-law as a States' general obligation.

Nevertheless, a part of the arbitrariness test would appear to be more blurred with respect to the European legal framework. Whether detention measures *vis-à-vis* irregular migrants, the IACtHR argued in *Nadege Dorzema and Others*, had not been issued 'in order to carry out a procedure capable of determining the circumstances and legal status of the detainees, or even to conduct a formal immigration procedure for their deportation or expulsion', they will become arbitrary within the meaning of Article 7(3) ACHR²²³. Indeed, those assumptions might be redolent of the second limb of Article 5(1)(f) ECHR, which provides for the detention for the purpose of expulsion or extradition, on condition that the relevant proceedings are in progress and are prosecuted with 'due diligence' by the competent authorities²²⁴. As Costello rightly observed, notwithstanding with the fact that the latter provision does not require detention measures to be necessary *in concreto*, the 'due diligence test' entails that there must be a 'realistic prospect' of deportation of the individual concerned²²⁵. Such aspect is apparently lacking in the IACtHR's case-law on the matter. Yet, albeit indirectly, the fact that the competent authorities should act diligently to implement the relevant immigration proceedings while the alien is deprived of his liberty might be inferred from the requirement that any detention measure shall be necessary in the material case and shall last as short a period as possible. The same might hold true *vis-à-vis* the ground that there must also be a 'realistic prospect' of return/extradition of the person concerned, also considering the relevance of

²²² Nevertheless, the necessity of an individual assessment may be indirectly inferred by the *incipit* of Article 15, Directive 2008/115/EC insofar it provides that an irregular migrant may be deprived of his liberty 'unless other sufficient but coercive measures can be applied effectively *in a specific case*'.

²²³ IACtHR. *Nadege Dorzema y otros vs. República Dominicana, Fondo, Reparaciones y Costas*. 24th October 2012, para. 134.

²²⁴ See, recently, ECtHR. *Shikshaitov v. Slovakia*. App. nos. 56751/16 and 33762/17, 10th December 2020, para. 56 and the case-law cited therein.

²²⁵ COSTELLO, Cathryn. Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law. *Indiana Journal of Global Legal Studies*, Bloomington, v. 19, n. 1, p. 281, 2012.

the proportionality principle – in this regard, the UNHCR Guidelines set forth that ‘where justification is no longer valid, the [individual] should be released immediately’²²⁶.

It is noteworthy that the IACtHR’s line of reasoning differs also with the one of the CJEU in *Kadzoev*, where it was set out that deprivation of liberty under Article 15 of the Return Directive may be implemented by Member States ‘in order to ensure effective return procedures’ and, accordingly, may be ‘only maintained as long as removal arrangements are in progress and executed with due diligence’²²⁷. Otherwise, deprivation of liberty would become *ipso facto* arbitrary within the meaning of Article 6 of the Charter, read in conjunction with Article 5 ECHR. That being said, the poor wording of *Nadege Dorzema and Others* appears as an attempt of the IACtHR to be in keeping with minimum international law standards which do not expressly mention neither the requirement of due diligence, nor the fact that there shall be a realistic prospect of removal when custodial measures for the purpose of return/extradition are imposed.

3.3. ENHANCING HABEAS CORPUS RIGHTS IN THE IAHRs.

The application of a detention measures is not only a matter of substantive requirements, but very often procedural safeguards to control the lawfulness of detention play a key role in guaranteeing the fundamental rights of individuals. The robustness of the architecture of procedural safeguards, therefore, is an important element by which verifying whether, in a given legal system, the control of compliance with the substantive requirements for detention is effectively carried out in the material case. Broadly speaking, several international and regional instruments have devolved the role of overseers to judicial authorities, due to their inherent characteristics of impartiality and independence. Moreover, when it comes to administrative detention, procedural safeguards acquire even greater importance, as the custodial measure is ordered, in the first instance, by an administrative body (commonly, it may be a police or

²²⁶ UNHCR. *Detention Guidelines*. 2012, para. 45.

²²⁷ CJEU. Case C-357/09 PPU, Said Shamilovich Kadzoev (Huchbarov). ECLI:EU:C:2009:741, paras. 38 and 40.

a public security authority), unlike, for instance, what happens within criminal proceedings, where both pre-trial detention and detention following the conviction are imposed by the judicial authority (be it the judge for preliminary investigations or a court of merit).

All international instruments have accepted the importance of the right to judicial review of detention. This prerogative—i.e. the right to *habeas corpus*—is also acknowledged *vis-à-vis* those aliens who are subjected to administrative custodial measures, as it is sufficient that a deprivation of liberty occurs in the material case for this guarantee to be triggered. For instance, the provision of the ICCPR relating to this prerogative is Article 9(4) ICCPR, which reads as follows:

‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful’.

This regulation shares exactly the same wording with Article 5(4) ECHR, except for the expression ‘without delay’. Analogously, neither Article 9(3) ICCPR nor Article 5(3) ECHR are relevant when migrants’ administrative detention measures are at stake, since they only deal with those judicial guarantees to be provided for when a deprivation of liberty has been implemented against an individual on the basis of a criminal charge²²⁸. Briefly, both the ICCPR and the ECHR provisions aim at guaranteeing the possibility to the person concerned to take proceedings in order to have the lawfulness of the detention measure at stake reviewed ‘speedily’ or ‘without delay’ before a court. The latter, which shall be independent from the parties in the material case as well as from the executive, shall decide upon the ‘lawfulness’ of the custodial measure and, whether the detention is found to be unlawful, shall be competent for ordering the release of the detainee. As is apparent, there

²²⁸ In particular, Article 5(3) ECHR recalls, in turn, Article 5(1)(c) ECHR, the latter provision regulating the arrest or detention of a person ‘effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’, which is indeed one of the permissible grounds for detention.

is currently no provision which obliges States to provide an *automatic* system of judicial review, despite the several soft-law instruments which have urged Member States to do so²²⁹. Similarly, the relevant EU pieces of legislation provides for a judicial remedy for both irregular migrants and asylum seekers held in detention, with analogous characteristics, which is not automatic in nature, States having been let essentially unbound on this matter²³⁰.

The IAHRs approach on *habeas corpus* guarantees is very different, albeit it shares the aforementioned minimum standards. The very first provision which dealt with the issue was Article XXV, third paragraph, ADHR which reads as follows:

‘Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody’.

Furthermore, Article 7(6) ACHR—which is the very *habeas corpus* provision of the Convention, similar to Article 5(4) ECHR—set forth that:

‘Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies’.

²²⁹ See, *inter alia*, WGAD. Annual Report 2003. E/CN.4&2004/3, 15th December 2003, para. 86; WGAD. Annual Report 1997. E/CN.4/1998/44, 19th December 1997, para. 33(c); PACE COMMITTEE ON MIGRATION, REFUGEES AND POPULATION. Report on the detention of asylum seekers and irregular migrants. 11th January 2010, Doc. 12105, Appendix 1, para. 12; UNHCR. *Detention Guidelines*. 2012, para. 47.

²³⁰ See Article 15(2)-(3), Directive 2008/115/EC and Article 8(3)-(4)-(5), Directive 2013/33/EU. These provisions constitute the tangible expression of the right to an effective remedy enshrined in Article 47 of the Charter.

So far, despite some differences in the wording adopted, the minimum standards for a judicial review in the IAHRs seem slightly analogous to those ensured within the European legal framework – there shall be a ‘judicial’ control, which must be not only formally laid down in domestic law but it shall be ‘effective’ *in concreto*²³¹. Notably, the IACtHR has specified that the personal comparison of the detainee before the judge is an essential feature of the right to *habeas corpus*²³² as, differently from other legal frameworks, the latter is deemed to protect not only the individual’s personal liberty from the arbitrariness of States but also his physical integrity and his right to life²³³. This circumstance is absent in EU law, as well as in the international legal framework (when this issue is mentioned as a mere advice for States, and not as an obligation), while the settled ECtHR’s case-law has found that the physical presence of the prisoner before the judge is not mandatory in every context²³⁴.

Nevertheless, in the context of immigration detention, two aspects of the matter are profoundly different in respect of European legal systems, as the IACtHR has advocated a progressive approach upon the right to judicial review that every human being shall enjoy where his right to liberty is jeopardised.

A first divergence concerns the effectiveness of the right to *habeas corpus*. Indeed, as it is apparent, the guarantees provided by within the international/European legal framework may be hindered when, for instance, the migrant concerned does not take proceedings within the deadlines, indeed very short-term, which are almost always established in national law. This issue, so far, might prejudice also the whole

²³¹ IACtHR, Caso de personas dominicanas y haitianas expulsadas Vs. República Dominicana, Excepciones Preliminares, Fondo, Reparaciones y Costas. 28th August 2014, para. 376 and the case-law cited therein.

²³² IACtHR. Chaparro Álvarez y Lapo Íñiguez vs. Ecuador, Excepciones Preliminares, Fondo, Reparaciones y Costas. 21st November 2007, para. 129.

²³³ IACtHR. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87, 30th January 1987, para. 35. Available at: <https://bit.ly/3zbn33e>. Accessed on July 9, 2022.

²³⁴ See e.g. ECtHR. Bah v. The Netherlands (dec.). App. no. 35751/20, 22nd June 2021, paras. 37 and 44 and the case-law cited therein, and ECtHR. Derungs v. Switzerland. App. no. 52089/09, 10th May 2016, para. 75.

efficiency of the IAHRS, as Article 7(6) ACHR apparently sets out the same standards of Article 9(4) ICCPR and Article 5(4) – the assessment over the lawfulness of a detention measure is triggered *only at the request* of the migrant involved, provided that he shall be informed about the possibility to challenge the lawfulness of the detention order. In this regard, the evolutive approach of both the IACHR and the IACtHR is very relevant, as it calls into question the first limb of Article 7(5) ACHR which reads as follows: ‘Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...’. Since the second limb of such provision relates to criminal proceedings, one might think that the whole Article 7(5) ACHR applies only in that context, and hence its effectiveness should be excluded in administrative detention proceedings. Against this background, the IACtHR set forth that the ‘*control judicial inmediato*’ or ‘*la pronta intervencìon judicial*’²³⁵—and thus *automatic*, regardless a specific request made by the detainee in this regard—upon deprivation of liberty constitutes a legal mean aiming at avoiding unlawful and/or arbitrary detentions, in the light of the principles of the rule of law²³⁶, to the point that even custodial measures ordered by administrative authorities are subjected to the control foreseen in Article 7(5) ACHR²³⁷. In *Vélez Loor*, the Court clearly pointed out that, differently from European legal framework, an automatic judicial review is provided for *vis-à-vis* those foreigners deprived of their liberty *via* non-criminal means:

‘Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention does not set a limit on the exercise of the guarantee established in Article 7(5) of the Convention based on the reasons or circumstances under

²³⁵ IACtHR, *Caso de los “Niños de la Calle” (Villagrán Morales y otros) Vs. Guatemala, Fondo*, 19th November 1999, para. 135, available at: https://www.corteidh.or.cr/docs/casos/articulos/Seriec_63_esp.pdf. Accessed on July 9, 2022.

²³⁶ IACtHR. *Cabrera Garcia y Montel Florez vs. México, Excepción Preliminar, Fondo, Reparaciones y Costas*. 26th November 2010, para. 93. Available at: <https://www.cndh.org.mx/sites/default/files/doc/Internacional/Casos/1.pdf>. Accessed on July 9, 2022.

²³⁷ IACtHR. *López Álvarez vs. Honduras, Fondo, Reparaciones y Costas*. 1st February 2006, paras. 64 and 88.

which the person has been arrested or detained. Therefore, under the principle *pro persona*, this guarantee must be met whenever the person's detention or arrest is based on his or her migratory status, in accordance with the principles of judicial control and procedural immediacy. In order to establish a true mechanism of control in the face of unlawful and arbitrary detentions, the judicial review must be carried out promptly and in such a way as to guarantee compliance with the law and the detainee's effective enjoyment of his rights, taking into account his special vulnerability.²³⁸

The right to be brought promptly, and automatically, before a judicial authority is laid down in both Article 5(3) ECHR and Article 9(3) ICCPR and relates only to detainees involved in criminal proceedings, while the EU Charter does not contain a specific provision in this respect. Thus, the IAHRs—in extending this guarantee also to aliens placed in administrative detention—is *ictu oculi* enhancing their protection from unlawful or arbitrary deprivation of liberty, strengthening a crucial aspect of procedural safeguards.

A second difference may be found in the IAHRs' approach towards the acknowledgement of fair trial rights also to those foreigners whose liberty has been deprived, due to their status. Very briefly, Article 14 ICCPR and Article 6 ECHR deal with the right to a fair trial, but only, for the extent of this article²³⁹, when a criminal charge has been brought against an individual, and hence the latter provisions have never been deemed applicable to administrative detention cases. Differently, Article 8 ACHR, which is similarly labelled as 'right to a fair trial', discloses a universal character which enhances the protection of aliens against national powers. As laid down in Article 8(1) ACHR:

'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent,

²³⁸ IACtHR. Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas. 23rd November 2010, para. 107.

²³⁹ Notably, Article 47(2) of the Charter sets forth the right to a fair trial and, in principle, corresponds to Article 6(1) ECHR, as the CJEU found in *DEB* (CJEU. Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*. ECLI:EU:C:2010:811, para. 32).

and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature’.

The IACHR has set forth that due process guarantees shall be secured to every person, despite his migration status²⁴⁰, without discrimination neither *ratione materiae* nor *ratione personae*²⁴¹. While the other provisions of Article 8 ACHR relate explicitly to criminal proceedings, the wording just quoted provides ‘every person’ with fair trial rights, to the point that ‘Article 8(1) of the Convention also applies to the decision of administrative bodies’²⁴². Thus, as Garcia recently pointed out, due process guarantees encompass those conditions that must be met to ensure the adequate defence of those whose rights are, broadly speaking, under judicial consideration²⁴³. It is noteworthy that the group of guarantees listed in Article 8(2) ACHR—which nominally refers only to criminal proceedings—has been embodied within the minimum guarantees of due process of law, and also applies in the determination of rights and obligations of a civil, labour, fiscal or any other nature, to the point that, in those matters, ‘the individual also has the overall right to the due process in criminal matters’²⁴⁴. *Inter alia*, it is worth mentioning the right to a hearing with due guarantees and without delay by an impartial tribunal, the right to prior notification, the right to linguistic assistance and the right to legal counsel²⁴⁵ – conversely, the ECtHR suggested that

²⁴⁰ IACtHR. *Nadege Dorzema y otros vs. República Dominicana, Fondo, Reparaciones y Costas*. 24th October 2012, para. 159.

²⁴¹ IACtHR. *Condición jurídica y derechos de los migrantes indocumentados*. Opinión Consultiva OC-18/03, 17th September 2003, para. 122.

²⁴² IACtHR. *Vélez Loor vs. Panamá, Excepciones Preliminares, Fondo, Reparaciones y Costas*. 23rd November 2010, para. 108.

²⁴³ GARCÍA, Lila. *Estándares del Sistema Interamericano de Derechos Humanos sobre garantías del debido proceso en el control migratorio*. *Estudios de Derecho*, v. 77, n. 169, p. 124, 2020.

²⁴⁴ See IACtHR. *Tribunal Constitucional vs. Perú, Merits, Reparations and Costs*. 31st January 2001, para. 70. Available at: https://www.corteidh.or.cr/docs/casos/articulos/Seriec_71_ing.pdf. Accessed on July 9, 2022.

²⁴⁵ GARCÍA, Lila. *Estándares del Sistema Interamericano de Derechos Humanos sobre garantías del debido proceso en el control migratorio*. *Estudios de*

it is not always necessary that fair trial rights, as provided for in Article 6 ECHR, are to be guaranteed in non-criminal *habeas corpus* proceedings, albeit the latter shall hold a judicial character and ‘provide guarantees appropriate to the type of deprivation of liberty in question’²⁴⁶. As is apparent, a variable geometry of procedural rights may be foreseen in the European legal framework *vis-à-vis* aliens held in administrative detention, while the IAHRs seems to have circumscribed more precisely the features that every judicial proceeding shall respect.

Summarizing, regardless of his migratory status, every individual shall enjoy fair trial rights as both the IACHR²⁴⁷ and the IACtHR²⁴⁸ explicitly recognised. In administrative detention proceedings, consequently, the individual concerned shall enjoy an automatic judicial review upon his deprivation of liberty within a ‘fair trial’, in accordance with the grounds laid down in Article 8 ACHR.

4. CONCLUDING REMARKS.

Since the end of the Second World War, regional systems have been significant actors within the world political and legal debate. Notably, one of their purposes consists in the effective protection of human rights and, to this end, all of them have shaped specific bodies to deal with this issue, more or less effective in *concreto*. The IAHRs approach on the matter makes no exception. Rejecting the principle of nationality, and reaffirming the universalism of fundamental rights, the ADHR and the ACHR led to the construction of a peculiar legal framework towards the rights of the individual, promoting a *pro persona* paradigm, thus making the latter the very focus of the whole IAHRs. As has been discussed

Derecho, v. 77, n. 169, p. 132 *et seq.*, 2020.

²⁴⁶ See, *inter alia*, ECtHR. A. and Others v. The United Kingdom [GC]. App. no. 3455/05, 19th February 2009, para. 203 and the case-law cited therein.

²⁴⁷ IACHR. Report on the Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II., Doc. 78/10, 30th December 2010, paras. 56-57. Notably, the Commission observed that ‘many of these guarantees are articulated in a language that is more germane to criminal proceedings’ (*ibid.*, para. 57 *in fine*).

²⁴⁸ See, amongst other authorities, IACtHR. Nadege Dorzema y otros vs. República Dominicana, Fondo, Reparaciones y Costas. 24th October 2012, para. 159.

below, both the IACHR and the IACtHR are making efforts to keep human rights standards in the Americas high-level, especially *vis-à-vis* migrants ‘as a vulnerable group’²⁴⁹.

If there is a broad and recognised need to ensure national prerogatives to States in managing migratory flows—a circumstance which is well-acknowledged also at international and European level—, the innovation, and the relevance, of the IAHRs influence in this area may be understood with specific regard to immigration detention discipline. As has been illustrated, administrative deprivation of liberty is ‘structured and understood as a “necessary adjunct” to State sovereignty’²⁵⁰, and OAS Member States have followed this general trend, largely implementing custodial measures through non-criminal proceedings against irregular aliens or applicants for international protection. Nearly always, it is not easy task to distinguish between a criminal detention from an administrative one although they deemed to be penalties implemented through the same means as the degree of deprivation of liberty is *de facto* the same, the punitive character of the latter measure might be apparent. Accordingly, the IACtHR has proved ready to accept that it may equally hold a punitive hue *in rerum natura*, while the European courts are silent on this point.

Overall, the focus of the Inter-American bodies can be said to have been more on the protection of individuals’ right to liberty, as enshrined both in the ADHR and the ACHR, than the preservation of national prerogatives. This may be seen as an unprecedented approach in this matter in the whole world. Among the most important innovations in the IAHRs approach upon administrative custodial measures for immigration purposes is, on the one hand, the firm refutation of routine-based detention systems and, at the same time, the promotion of an effective system of judicial guarantees *vis-à-vis* the prisoner. The consequences of this twofold position should not be under-stated, as they marked the opportunity to emphasise the dissonances among Europe and the Americas legal systems,

²⁴⁹ GIUPPONI, Belen Olmos. Assessing the evolution of the Inter-American Court of Human Rights in the protection of migrants’ rights: past, present and future. *The International Journal of Human Rights*, v. 21, n. 9, p. 1495, 2017.

²⁵⁰ BRYAN, Ian; LANGFORD, Peter. The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights. *Nordic Journal of International Law*, v. 80, n. 2, p. 216, 2011.

through the lens of international law. Among them, the exceptionality principle advocated by IAHR bodies is to be appreciated, in that it reduces the possibility for States to deprive an individual of his personal liberty through a quasi-automatic resort to custodial tools. Analogously, the importance of the principle of legality and the protection from arbitrary detentions have been deemed very sensitive topics for both the IACHR and the IACtHR. Finally, the Inter-American system offers a strong protection of *habeas corpus* and fair trial rights, extending the latter prerogatives also to those individuals not involved in criminal proceedings. Taken together, all these features may render the IAHR an ‘intriguing new model’²⁵¹ for the development of new standards related to administrative detention of migrants. Although the rate of compliance with IACtHR decisions is very low²⁵², there is no reason for European courts and legislatures not to look at the IAHR as a source of inspiration and, at the same time, as the demonstration that a different approach upon aliens’ deprivation of liberty policies is possible and, as a matter of fact, necessary.

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