



IMMIGRATION DETENTION AND DE FACTO DETENTION: WHAT DOES THE LAW SAY?

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The purpose of this briefing is to reply to frequently asked questions on the existing legal framework and case law on immigration detention and *de facto* detention. This briefing draws from the evolving and recent jurisprudence from EU and international bodies. It is addressed to policy-makers working on legal reforms as well as civil society organisations advocating for migrants' rights.

Even though the current legal framework and jurisprudence may allow for the use of immigration detention in specific circumstances and as measure of last resort, detention is always harmful, disproportionate and ineffective.¹ For this reason, an increasing number of international bodies have stated that detention for immigration control purposes should be progressively ended.²

PICUM is against the use of immigration detention in all circumstances, and calls on Member States and the European Union to put an end to it.

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Acronyms

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| CJEU | Court of Justice of the European Union |
| CoE | Council of Europe |
| CMW | Migrant Workers Committee |
| CRC | Committee on the Rights of the Child |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| HRC | UN Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| UNHCR | United Nations Higher Commission for Refugees |
| WGAD | Working Group on Arbitrary Detention |

1. What is immigration detention?

Immigration detention is understood as the deprivation of liberty for reasons related to a person's migration status.³

In the EU, states typically apply immigration detention in four contexts: to prevent entry to their territory, to carry out return/deportation procedures, during asylum procedures and in the context of Dublin transfer procedures (see Question 9). Nonetheless, this measure interferes with one of the most fundamental human rights – the right to liberty of person protected under Art. 5 of the European Convention on Human Rights (ECHR),⁴ Art. 6 of the EU Charter of Fundamental Rights,⁵ and Art. 9 of the International Covenant on Civil and Political Rights (ICCPR).⁶

2. What is *de facto* detention?

As analysed below in Question 5, when states decide to place a person in immigration detention, they need to comply with a number of requirements. To avoid these safeguards, states sometimes refuse to acknowledge that a person is detained. Rather, they argue that the measure is merely a restriction on the person's freedom of movement (discussed in Question 3), or that someone is not detained because they could decide to leave the country instead, even though, in practice, this often means going to a country in which their life and security would be at risk.

De facto detention can be understood as a measure which in practice amounts to deprivation of liberty but which states do not formally qualify as such. *De facto* detention is not based on a detention order nor is it usually subject to a judicial review.⁷ It also tends to be carried out in places which are not recognized as places of deprivation of liberty (e.g. border premises, reception or registration centres, boats).⁸

Irrespective of terminology used by states, any placement of a person in custodial settings which that person is not permitted to leave at their will is considered as deprivation of liberty under the Optional Protocol to the Convention Against Torture.⁹ The key element of this definition, which is the impossibility to leave the facility, was also included in the definition of immigration detention by the UNHCR¹⁰ and the UN Migrant Workers Committee (CMW).¹¹ The European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) also place an emphasis on whether persons are allowed to leave the premises¹² and on the level of restrictions on movement within the facility.

In one case¹³, the ECtHR found that keeping persons for nine days at a centre which was formally denominated by the Italian government as a “identification and registration centre” amounted to detention because their freedom of movement was limited inside the facility and they were not allowed to leave it.

A note on detention in transit zones

In different cases, the ECtHR stated that holding persons at airport transit zones, beyond short-term restrictions at entry points to check identity or verify the right to enter the country, would also amount to deprivation of liberty.¹⁴ In these cases, the ECtHR was not satisfied with the claim advanced by states that applicants could leave the transit zone by leaving the country, as this would typically involve practical and legal difficulties.¹⁵

With regard to land border transit zones, the ECtHR did not exclude such possibility, however, it also clarified that several conditions need to be met, including that the neighbouring country from which the person entered should be a party to the ECHR and Geneva Refugee Convention and that there is no immediate danger for the person’s life and health (in the specific case, this was demonstrated by the fact that the person spent a few months in the previous country before crossing the border).¹⁶

In contrast, the CJEU does not consider that the applicants have a possibility to leave the transit zone by leaving the country if the entry to the neighbouring country would be irregular and could lead to penalties.¹⁷

Even if the ECtHR considers that the above conditions are met in the specific case and the person could leave the land border transit zone by going to the neighbouring country, this does not mean that the person is not subject to detention. The Court assesses also other elements, in particular the length of the stay in the transit zone.

In one case, the Court found that the applicants' stay in the transit zone amounted to de facto detention because of the lack of any domestic legal provisions fixing the maximum duration of the applicants' stay, the "excessive duration" of that stay (almost four months) and the considerable delays in the domestic examination of the applicants' asylum claims. The Court also pointed at the conditions in which the applicants were held during the relevant period, notably severe restriction on freedom of movement within the transit zone and one-and-half-month stay in the isolation section of the transit zone where the conditions violated Art.3 of the ECHR.¹⁸

In one case, the Grand Chamber of the ECtHR found that a 23-day confinement in a land transit zone during the examination of the applicants' asylum claim with due diligence and in a situation considered a "mass influx of asylum-seekers and migrants," and subject to domestic provisions limiting stay in transit zone to four weeks, did not violate Art.5 ECHR.¹⁹ Conversely, such measure is to be considered detention under EU law. Assessing the same transit zone, the CJEU ruled that the obligation imposed on a person to remain permanently in a transit zone the perimeter of which is restricted and closed, within which the person's movements are limited and monitored, and which they cannot legally leave, should be considered detention under EU law. The Court relied on the definition of immigration detention under relevant pieces of EU legislation, discussed below in Question 9, as confinement of an applicant by a Member State within a particular place, where the applicant is deprived of their freedom of movement.²⁰

3. When is it “detention” and when is it “restriction of movement”?

In practice, there may be cases when it is unclear whether the person is subject to detention or a restriction on their freedom of movement. According to the ECtHR, there is no clear line between these two coercive measures. The difference lies in the intensity of the measure, rather than its nature. The ECtHR analyses the specific facts of each case to determine whether a measure formally qualified by the state as restriction on freedom of movement amounts to detention in practice. To this end, the ECtHR assesses the type of measure, duration of measure, effects on the person concerned, and manner of implementation.²¹ Crucially, the ECtHR assesses these criteria in a cumulative manner. This implies that a series of restrictions, which in themselves would not reach the threshold of detention, together may do so.

In a specific case, the ECtHR found that a situation amounted to detention because the applicant was obliged to stay on a small area of an island for 16 months; was subject to a night-time curfew; was required to report to the authorities twice a day and inform them of the telephone number of his correspondent; and his trips required the consent of the authorities and were supervised by the police.²²

In another situation, a similar compulsory residence lasting seven months was considered a restriction on the applicant’s freedom of movement because the applicant’s residency was not confined to a restricted area but to a district, the night curfew did not prevent him from maintaining relations with the outside world, and he had never sought permission from the authorities to travel away from his place of residence.²³

Whereas the ECtHR considers home arrest as deprivation of liberty,²⁴ it qualified a more lenient form of this measure as a restriction on freedom of movement. This was the Court’s conclusion in a specific case, where the applicant’s initial house arrest was substituted by a measure permitting the person to go to work during week-days and obliging him to stay at home for 12 hours at night during week-days and the whole day during weekends.²⁵

Even if the measure in question does not amount to detention, states’ power to restrict someone’s freedom of movement is held in check. Under international law,²⁶ everyone lawfully within the territory of a state has the right to freedom of movement within that territory. The question of lawful presence is regulated by domestic law, which may place entry and residence conditions. However, these conditions should comply with the state’s international obligations.²⁷ For instance, according to the UN Human Rights Committee (HRC), people who have received a return order but cannot be deported because of risks of persecution are to be considered as lawfully staying in the country for the purpose of the right to freedom of movement.²⁸

Like the right to liberty, the right to freedom of movement may be subject to restrictions.²⁹ To be permissible, restriction on freedom of movement must conform to three requirements:

- **Legality:** restriction must be provided by law, which should be precise and not confer unfettered discretion on the authorities,
- **Legitimate purpose:** restriction should serve one of the listed legitimate purposes, such as the protection of national security, public safety, public order, health or morals, the rights and freedoms of others, or the prevention of crime,
- **Necessity:** restriction should be necessary for achieving the legitimate purpose.³⁰

4. When is immigration detention arbitrary?

Arbitrary deprivation of liberty is prohibited under Art. 9(1) of the ICCPR and Art. 5(1) of the ECHR.³¹ The prohibition of arbitrary detention is absolute, meaning that it is a non-derogable norm of customary international law, or *jus cogens*.³²

While there is no universal definition of arbitrary detention, based on a combined reading of regional and international law and jurisprudence, the following elements should be respected in order for detention not to be arbitrary:

- **Lawfulness:** first of all, in order not to amount to arbitrary detention, immigration detention should have a **clear legal basis** in domestic law (including being closely connected to the grounds of detention used by the government³³) and follow a procedure set out in law. National laws authorising deprivation of liberty must be sufficiently accessible, clear, precise and foreseeable in their application, in order to avoid all risk of arbitrariness.³⁴ They should also be in line with European and international standards. This further requires that the legislation clearly and exhaustively lists the grounds justifying detention.³⁵
- **Necessity and proportionality:** even if detention is in compliance with national law, it can be arbitrary if it is not necessary in light of the circumstances of the case and proportionate to the ends sought.³⁶ International and EU law states that immigration detention should be an exceptional measure of last resort. This means that authorities must conduct an **individual assessment** to be able to justify detention as necessary on

the specific facts of the individual case. For instance, detention is arbitrary if it is imposed solely because of the person's undocumented stay, or if it is applied automatically to a broad category of persons.³⁷ International and EU law also specifies that before detaining someone and also during the person's detention, authorities should evaluate in the individual circumstances of the case if there are no other less invasive means that could achieve the same ends – commonly called **alternatives to detention** (see below Question 7).³⁸

- **Vulnerable persons:** as clarified by the UN HRC, detention is arbitrary if it is inappropriate or unjust.³⁹ This would be particularly the case with regard to the detention of people in situations of vulnerability. Indeed, detention of **vulnerable persons** is neither appropriate nor just, nor meets the requirements of necessity and proportionality. Hence, vulnerable persons should not be detained.⁴⁰ In order to identify vulnerable persons, vulnerability screening and assessment should be carried out.⁴¹ [With regard to the non-detention of children, please see Question 6 below]

As clarified by the Working Group on Arbitrary Detention, individuals in situations of vulnerability should not be detained.⁴² Specific safeguards also apply to the following individuals in situations of vulnerability: victims of torture⁴³, victims of trafficking in human beings⁴⁴, women in detention⁴⁵, pregnant women⁴⁶, lesbian, gay, bisexual, transgender and gender-diverse persons⁴⁷, people living with a mental illness⁴⁸, people with disabilities⁴⁹ and stateless people⁵⁰. To learn more, see: PICUM (2021) [Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies](#)

- **Length of detention:** beyond the initial detention order, authorities should provide appropriate justification as detention continues⁵¹ and the length of detention should not exceed the time-period which is reasonably required for the purpose pursued by authorities.⁵² Excessive length of detention is arbitrary.⁵³ This requirement, alongside with the requirement that immigration detention be the last resort, imply that detention should be for the **shortest time possible**.⁵⁴

5. Which procedural safeguards apply?

When states place a person in immigration detention, they have an obligation to respect specific procedural safeguards as well as the right to an effective remedy. Lack of access to an effective remedy can make detention arbitrary in itself.⁵⁵

- **Notification of detention:** knowing the reasons for one's detention as well as the available channels to appeal it is the basic precondition for seeking a remedy. Everyone who is arrested should be informed at the time of detention (or at latest promptly thereafter) of the reasons in fact and in law for their detention⁵⁶ and the available remedies.⁵⁷ The information should be conveyed in simple, accessible and non-technical language, in a language they understand.⁵⁸

The ECtHR has clarified that an information brochure indicating that the person has entered the territory in an undocumented manner, can hire a lawyer, speak to a police officer for further information and appeal detention before an administrative court *cannot* be interpreted as the required information on the legal and factual reasons for the person's detention.⁵⁹

- **Review of detention:** everyone in detention has the right to request the speedy review of the lawfulness of their detention by a court, which should lead to their release if the court finds detention unlawful.⁶⁰ If immigration detention extends in time, it should be subject to automatic, periodic review to reassess its lawfulness, necessity and proportionality.⁶¹ For the remedy to be both accessible and effective, authorities should ensure that individuals in detention have a realistic opportunity of using the remedy.⁶² The scope of the review should extend beyond the mere compliance of detention with domestic law and include an assessment of other requirements flowing from the prohibition of arbitrary detention (see Question 4).⁶³
- **Legal and linguistic assistance:** to be able to avail themselves of the right to effective remedy, migrants should have access to legal representation and advice and interpreters. Every time this is necessary, states should ensure access to free legal aid.⁶⁴ People in immigration detention who do not adequately understand or speak the language used by the authorities responsible for their detention should be entitled to the assistance of an interpreter in connection with the legal proceedings, free of charge.⁶⁵

6. Can children be detained for immigration purposes?

As detailed in a Joint General Comment of the UN Committee on the Rights of the Child (CRC) and the UN Migrants Workers Committee (CMW), detaining children for reasons related to their or their parents' migration status conflicts with the best interests of the child. Immigration detention is *never* in the child's best interests and hence should always be forbidden.⁶⁶ A growing number of international bodies have stipulated that children should never be placed in immigration detention and states should end child immigration detention.⁶⁷ Consistent evidence shows that even short periods of detention have a long-lasting impact on children's physical and mental health and their development.⁶⁸ The European Parliament has called for the end of child immigration detention in four different resolutions.⁶⁹

In line with the position of the UN expert bodies, unaccompanied children should be integrated in national child protection and welfare systems without any discrimination. Child protection and welfare authorities, rather than immigration authorities, should have responsibility over migrant children. Hence, like any other children deprived of their family environment, unaccompanied children should receive special protection and assistance and be placed in alternative care system and accommodation. Families with children should be accommodated in non-custodial reception facilities and be offered community-based solutions.⁷⁰

Detention of a child may also amount to inhuman or degrading treatment prohibited under Art.3 of the ECHR if the age of the child, duration, and conditions of detention, taken cumulatively, exceed the threshold of seriousness required under this provision. This threshold is set relatively low.

In several cases, the ECtHR found that the detention of families with children in centres offering generally adequate conditions of detention violated Art. 3. This was, for instance, the case in relation to the eight-day detention of two siblings (aged four months and 2 ½ years) with their mother in a centre where the internal yards of family and male zones were only separated by a net and there was a significant noise level due to frequent announcements via loudspeakers.⁷¹ In another case, the Court found that the seven-day detention of a seven month-old child with his parents, in proximity to the runway of an airport producing high noise levels, amounted to a violation of Art. 3.⁷²

7. What are alternatives to detention and when can they be applied?

As highlighted above in Question 4, in order not to be arbitrary, immigration detention should not only be lawful but also necessary in the specific circumstances of the case and proportionate to the ends sought,⁷³ meaning that it should be an exceptional measure of last resort. This entails that detention can only be used if in the individual circumstances of the case there are no other less invasive means (e.g. alternatives to detention) that could achieve the same ends – for instance preventing people from absconding.⁷⁴

First of all, if there is no legal ground for detention (for instance, no risk of absconding), detention is not lawful, hence the person should not be detained at all and, if they are detained, they should be immediately released. In this regard, alternatives to detention must not be considered as alternatives to unconditional release and persons eligible for release should not be channelled into alternatives to detention.⁷⁵ Alternatives to detention are only legitimate as far as the reason justifying detention remains valid.⁷⁶ In particular, when detention no longer has a legal basis because there is no reasonable prospect of removal, alternatives to detention are no longer applicable.⁷⁷

If there is a legal ground for detention, and the other elements listed in Questions 4 and 5 are respected, states should examine whether alternatives to detention can be applied instead of detaining the person. In fact, detention can only be applied if no alternative to detention can achieve the same ends.

As the obligation to apply alternatives to detention stems from international law (specifically the principles of necessity and proportionality), the release of the person to an alternative to detention measure should be realistic and not depend, for instance, upon their financial ability to pay for bail⁷⁸ or other conditions such as having a fixed address.

Alternatives to detention should not impose onerous requirements on the person. Excessively restrictive measures could in fact amount to *de facto* detention.⁷⁹ They should be reviewed by a judicial authority and be subject to independent monitoring and evaluation.⁸⁰

Governmental practices of alternatives to detention take various forms, ranging from enforcement-based alternatives (such as regular reporting to the authorities, release on bail or other securities) to community-based solutions.⁸¹ The least intrusive measures should be used.⁸² In the past years, several governments have adopted policies and laws implementing community-based alternatives to detention.⁸³ Community-based solutions allow people to live in the community while working on their migration procedures. Contrary to enforcement-based solutions, which aim to control, restrict and deter migrants, community-based solutions are grounded in engagement and holistic support. As underlined by the Council of Europe's "Legal and practical aspects of effective alternatives to detention in the context of migration," provision of case management is one of the key components of effective alternatives.⁸⁴

In some cases, governments have co-opted the term "alternative to detention", to implement programmes with expand control and surveillance, rather than actively contribute to reduce detention.⁸⁵ These programmes impose restrictions on freedom of movement in absence of a legal ground for detention and without respecting the safeguards listed above in Question 4, and contradict the very same purpose of alternatives.

To learn more about case management and community-based solutions, see: <https://picum.org/endingdetention/> and PICUM (2020) [Implementing case management based alternatives to detention in Europe](#)

8. Is immigration detention part of criminal law?

Immigration detention is usually of administrative character. This means that, unlike detention for criminal reasons, it does not require criminal charges nor a trial. Given its administrative form, immigration detention should never be used as a punitive measure. In practice, however, the underlying objectives of immigration detention are often in fact punitive (such as deterrence and incapacitation),⁸⁶ as are the conditions and regime of detention (such as carceral layout of detention centres, uniformed guards, and limited freedom of movement inside the facility).⁸⁷ In some instances, procedural rights afforded to people in immigration detention are even lower than for criminal detention. For instance, the period of detention is often prolonged while the person is already in detention. The period can be prolonged several times, meaning that when someone enters detention, they do not know when, and if, they will be released or deported.

Although administrative in nature, immigration detention is thus often punitive in practice or perceived as such by those who are detained. From a legal perspective, it should thus be accompanied by fair trial guarantees, such as intertwined principles of equality of arms (meaning a fair balance between the prosecution and defence, with each party being able to present their case under conditions that do not place them at a substantial disadvantage compared to the opponent)⁸⁸ and adversarial proceedings (meaning that both the prosecution and defence have the opportunity to know and comment on the evidence provided by the other party),⁸⁹ and free legal and linguistic assistance.⁹⁰

9. Does EU law allow for immigration detention?

Under EU law, states may apply immigration detention in four contexts: to prevent entry to their territory, to carry out return/deportation or intra-European transfer (so-called Dublin) procedures, and during asylum procedures. These circumstances are regulated in the Schengen Borders Code,⁹¹ the Return Directive,⁹² the Dublin Regulation⁹³, and the Reception Conditions Directive,⁹⁴ respectively. However, the (perceived) need to carry out one of these four procedures is not a sufficient legal reason to detain someone. On the opposite, as analysed in Questions 4 and 5, there are individual grounds, procedural steps and important safeguards which should apply. If these conditions are not met, detention is considered arbitrary under international and EU law and against specific EU law rules.

IN FOCUS

How is detention considered in the EU Pact on Migration and Asylum?

Released by the European Commission in September 2020, the EU Pact on Migration and Asylum is a multi-annual EU strategy in the area of asylum and migration.⁹⁵ Among its five legislative proposals and four recommendations, there are at least two instruments which, if approved, would have an impact on detention:⁹⁶

Proposal for a Screening Regulation⁹⁷

This proposal introduces a mandatory screening procedure to be carried out at the EU external borders towards persons who do not fulfil the entry conditions under the Schengen Borders Code. The procedure is to be completed within five days, extendable to ten days in exceptional circumstances where a “disproportionate number” of persons needs to be processed. Screening is to take place “at locations situated at or in proximity to the external borders” and persons undergoing screening will not be permitted to enter the territory of the state.⁹⁸

States will thus be bound to prevent the persons’ entry inside their territory. In practice, this will imply detaining the person, or at least restricting their freedom of movement.⁹⁹

The implications of the screening procedure at the external borders can be inferred from the hotspot procedure implemented at the Greek Aegean islands, which the screening procedure resembles.¹⁰⁰ In practice, people placed at Greek hotspots are either deprived of their liberty or have their freedom of movement restricted, although domestic law refers only to restriction of liberty. The functioning of the hotspots blurs the lines between the restriction on and deprivation of liberty and leads to de facto detention practices. Similar concerns have been expressed with regard to the Multi-Purpose Reception and Identification Centre intended to replace the Lesbos hotspot and operationalise the screening procedure.¹⁰¹

The proposal also provides for the mandatory screening of persons found within state’s territory if there is no indication that they have crossed the external border in an authorised manner. Unlike the screening at external borders, screening in this context will be conducted

at any “appropriate location” within the territory of a state and should last maximum three days from the apprehension.¹⁰²

Despite the risk of deprivation of liberty entailed by the screening procedure, the operational part of the proposal does not mention detention. Detention is only mentioned in the preamble, which provides that in individual cases, where required, measures preventing entry may include detention, subject to domestic law of the country. However, in light of previous ECtHR jurisprudence, which found that holding migrants at an identification and registration centre and on ships for nine days amounted to de facto deprivation of liberty because the persons’ freedom of movement was limited inside the facilities and they were not allowed to leave the premises¹⁰³, it is very likely that these measures will amount to detention. The mandatory nature of the screening at external borders and the obligation on states to prevent persons’ entry inside their territory - combined with lack of regulation on the circumstances in which this will be possible and the lack of safeguards such as those mentioned in Questions 4 and 5 - will likely trigger an increase in de facto detention at the EU external borders.

Revised proposal for the Asylum Procedures Regulation¹⁰⁴

This proposal provides for wide circumstances in which asylum procedures can be conducted at EU borders, including three cases in which the border asylum procedure becomes mandatory.¹⁰⁵ If the claim for international protection is rejected in the border asylum procedure, the person is to be channelled to the border return procedure. Each of the procedures should be completed within 12 weeks, extendable to 20 weeks in a “crisis situation.”¹⁰⁶ During this period, the persons are not permitted to enter the territory of the states and should be kept in “locations at or in proximity to the external border or transit zones.”¹⁰⁷

As during the screening, this implies that states will be bound to prevent the person’s entry inside their territory during these asylum and return border procedures, which will typically entail detention.¹⁰⁸ Indeed, as research shows, border procedures tend to involve deprivation of liberty.¹⁰⁹ In contrast to the proposal for the Screening Regulation, the proposal for the Asylum Procedures Regulation does refer to detention. As regards border asylum procedure, detention grounds spelled out in the Reception Conditions Directive are to apply. Concerning the border return procedure, the proposal provides for broad grounds for detention for persons who have been detained during border asylum procedures and refers to the Return Directive for those who have not been previously detained. Overall, the mandatory border procedures risk leading to systematic detention at the EU external borders for up to nine months, which is at odds with the requirement under Art. 8 of the Reception Conditions Directive not to detain a person for the sole reason that they are asylum applicants. As mentioned above (see Question 2), according to the CJEU, holding asylum seekers in a transit zone will amount to deprivation of liberty if the persons are required to remain permanently within a restricted and closed perimeter and thereby are deprived of their freedom of movement and isolated from the rest of the population.¹¹⁰

What legal standards should apply to detention at borders?

In order not to be arbitrary, detention at the EU's external borders during the screening, border asylum and border return procedures will have to comply with the international framework regulating immigration detention. In particular, the principles discussed above in Questions 4 and 5 should apply, such as:

- **Lawfulness:** precise legal basis in domestic law, including grounds for detention which are clearly and exhaustively enumerated.
- **Necessity and proportionality:** detention used as an exceptional measure of last resort, based on an individual assessment and verification whether alternatives to detention can reach the objective of detention.
- **Vulnerable persons and children:** no detention of vulnerable persons and children, and adequate vulnerability screening and age assessment procedures provided.
- **Detention time period:** detention maintained for the shortest time possible.
- **Notification of detention:** notification of legal and factual grounds for detention and appeal channels at the time of the arrest in language the person understands and accessible manner.
- **Review of detention:** speedy judicial review of the lawfulness of detention and if immigration detention extends in time, automatic and periodic review.
- **Legal and linguistic assistance:** access to legal representation and advice and interpreters, if necessary, free of charge.

What legal standards should apply to restriction on freedom of movement at borders?

In cases where the measure to prevent the person's entry inside the state's territory during the screening, border asylum or border return procedure will not amount to detention, it will have to comply with the requirements on restriction on freedom of movement discussed in Question 3 above. The restriction will have to have a basis in domestic law, serve one of the legitimate purposes and be necessary for achieving them.

Endnotes

1. See PICUM, *Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies*, 2021, p. 11-12.
2. WGAD, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, A/HRC/39/45, (July 2, 2018); SRHRM, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Detention of Migrants in an Irregular Situation*, A/HRC/20/24, (April 2, 2012), para. 72.
3. CMW, *General Comment No. 5 on Migrants' Rights to Liberty, Freedom from Arbitrary Detention and Their Connection with Other Human Rights*, CMW/C/GC/5, (September 23, 2021), para. 15. UNHCR, APT, and IDC refer to immigration detention as "the deprivation of an individual's liberty, usually of an administrative character, for an alleged breach of the conditions of entry, stay or residence in the receiving country," see UNHCR, Association for the Prevention of Torture (APT), and International Detention Coalition, *Monitoring Immigration Detention: Practical Manual*, 2014, p. 20. Even if the person has breached these conditions, they apply solely to migrants.
4. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 005, (November 4, 1950).
5. *Charter of Fundamental Rights of the European Union*, OJ 2012 C 326/02, (October 26, 2012).
6. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, (December 16, 1966).
7. In some jurisdictions, special procedures (e.g., the habeas corpus remedy) apply to any form of deprivation of liberty, irrespectively of the legal basis.
8. For discussion on the understanding of de facto detention, see also EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, (November 2020) p. 202; ECRE, *Boundaries of Liberty: Asylum and de Facto Detention in Europe*, 2018, p. 8-10; HHC et al., *Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry*, 2019, p. 7-8; Migreurop, *Locked Up and Excluded: Informal and Illegal Detention in Spain, Greece, Italy and Germany*, 2020, p. 4.
9. <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel> Art. 4(2)
10. UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 5.
11. CMW, *General comment No. 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights*, para. 14.
12. ECtHR, *J.R. and Others v. Greece*, 22696/16, (January 25, 2018), para. 86.
13. ECtHR, *Khlaifia and Others v. Italy*, 16483/12, GC, (December 15, 2016), para. 65-72.
14. This was the case of a 20-day holding under close police surveillance (in combination with lack of legal and social assistance and access to judicial review), see ECtHR, *Amuur v. France*, 19776/92, (June 25, 1996), para. 38-49; around 2-week holding (in combination with lack of food provision and proper facilities), see ECtHR, *Riad and Idiab v. Belgium*, 29787/03 and 29810/03, (January 24, 2008), para. 68; during around nine hours (in combination with being placed in a room locked from the outside and constant supervisions), see ECtHR, *Nolan and K v. Russia*, 2512/04, (February 12, 2009), para. 96.
15. ECtHR, *Z.A. and Others v. Russia*, 61411/15, 61420/15, 61427/15 and 3028/16, GC, (November 21, 2019), para. 154.
16. ECtHR, *Ilias and Ahmed v. Hungary*, 47287/15, GC, (November 21, 2019), para. 231-248.
17. CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C-924/19 PPU, C-925/19 PPU, (May 14, 2020), para. 229.

18. ECtHR, *R.R. and Others v. Hungary*, 36037/17, (March 2, 2021), para. 83. More recently, the Court confirmed that finding with regard to almost five month confinement at another land border transit zone, see ECtHR, *H.M. and Others v. Hungary*, 38967/17, (June 2, 2022), para. 32.
19. ECtHR, *Ilias and Ahmed v. Hungary*, para. 220-249.
20. CJEU, *FMS*, para. 223, 225 and 231.
21. ECtHR, *Guzzardi v. Italy*, 7367/76, (November 6, 1980), para. 92-93; ECtHR, *Austin and Others v. the United Kingdom*, 39692/09, 40713/09 and 41008/09, GC, (March 12, 2012), para. 57.
22. ECtHR, *Guzzardi v. Italy*, para. 95.
23. ECtHR, *De Tommaso v. Italy*, 43395/09, GC, (February 23, 2017), para. 79-89.
24. ECtHR, *Buzadji v. Moldova*, 23755/07, GC, (July 5, 2016), para. 104; ECtHR, *Delijorgji v. Albania*, 6858/11, (April 28, 2015), para. 75.
25. ECtHR, *Trijonis v. Lithuania*, 2333/02, admissibility decision, (March 17, 2005).
26. Art. 2 of Protocol 4 to the ECHR and Art.12 of the ICCPR.
27. HRC, *General Comment No. 27: Freedom of Movement*, CCPR/C/21/Rev.1/Add.9, (November 1, 1999), para. 4.
28. HRC, *Ismet Celepli v. Sweden*, 456/1991, (August 2, 1994), para. 4(2).
29. Art. 12(3) of the ICCPR and Art. 2(3)-(4) of Protocol 4 to the ECHR.
30. HRC, *General Comment No. 27: Freedom of movement*, para. 11-18. Art. 12(3) of the ICCPR and Art. 2(3)-(4) of Protocol 4 to the ECHR.
31. Unlike article 9(1) of the ICCPR, article 5(1) of the ECHR does not explicitly speak of arbitrary detention but lists circumstances of lawful detention permissible under the right to liberty. However, according to the ECtHR, the purpose of article 5 is to protect individual from arbitrariness, see ECtHR, *Soldatenko v. Ukraine*, 2440/07, (October 23, 2008) para. 110.
32. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 8.
33. ECtHR, *Mikolenko v. Estonia*, 10664/05, (October 8, 2009) para. 60.
34. ECtHR, *Soldatenko v. Ukraine*, para. 110-111; CJEU, *Policie ČR, Krajské Ředitelství Policie Ústeckého Kraje, Odbor Cizinecké Policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, C-528/15, (March 15, 2017) para. 37-40.
35. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 22; SRHRM, *Detention of migrants in an irregular situation*, para. 69.
36. HRC, *Danyal Shafiq v. Australia*, 1324/2004, (November 13, 2006) para. 7(2).
37. HRC, *General Comment No. 35: Liberty and Security of Person*, CCPR/C/GC/35, (December 16, 2014), para. 18; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 19.
38. HRC, *General Comment No. 35: Liberty and security of person*, para. 18; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 12, 16, 23, and 24.
39. HRC, *Danyal Shafiq v. Australia* para. 7(2).
40. PICUM, *Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies*, p. 13-15. For instance, WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 41. Child detention is addressed below in Question 7.
41. PICUM, *Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies*, p. 22-33.
42. Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", para. 41, available [here](#).

43. Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, available [here](#).
44. Office of the High Commissioner for Human Rights (2003) "Recommended Principles and Guidelines on Human Rights and Human Trafficking", guideline 2.6 and 6.1, available [here](#).
45. Committee on the Elimination of Discrimination against Women (5 December 2008) "General Recommendation No. 26 on women migrant workers", CEDAW/C/2009/WP.1/R, available [here](#); Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, available [here](#).
46. United Nations Higher Commission for Refugees (1999) "UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers", available [here](#).
47. Special Rapporteur on the human rights of migrants (15 April 2019) "The impact of migration on migrant women and girls: a gender perspective", A/HRC/41/38, available [here](#).
48. Human Rights Committee (13 November 2002) "C. v. Australia", CCPR/C/76/D/900/1999, available [here](#).
49. Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", para. 41, available [here](#); United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations", principle 8(3), available [here](#).
50. Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, available [here](#).
51. HRC, *Danyal Shafiq v. Australia* para. 7(2).
52. ECtHR, *Mikolenko v. Estonia* para. 60.
53. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 25.
54. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para 12 and 14; SRHRM, *Detention of migrants in an irregular situation*, para. 68.
55. WGAD, *Report of the Working Group on Arbitrary Detention*, A/HRC/16/47, (January 19, 2011) Annex, para. 8; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 30.
56. Art. 5(2) of the ECHR, Art. 9(2) of the ICCPR.
57. ECtHR, *Moghaddas v. Turkey*, 46134/08, (February 15, 2011) para. 46; ECtHR, *Conka v. Belgium*, 51564/99, (February 5, 2002) para. 44; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 33.
58. ECtHR, *Shamayev and Others v. Georgia and Russia*, 36378/02, (April 12, 2005) para. 413.
59. ECtHR, *J.R. and Others v. Greece*, para. 123-124.
60. Art. 5(4) of the ECHR, Art. 9(4) of the ICCPR.
61. HRC, *Danyal Shafiq v. Australia*, para. 7(2); WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 13-14.
62. ECtHR, *Conka v. Belgium* para. 46; ECtHR, *Nasrulloev v. Russia*, 656/06, (October 11, 2007), para. 86.
63. ECtHR, *A. and Others v. the United Kingdom*, 3455/05, GC, (February 19, 2009), para. 202; HRC, *Bakhtiyari v. Australia*, 1069/2002, (November 6, 2003), para. 9(4).
64. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 35; SRHRM, *Detention of migrants in an irregular situation*, para. 72(a).
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66. CMW and CRC Committee, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, CMW/C/GC/4-CRC/C/GC/23, (November 16, 2017), para. 10-13; SRHRM, *Ending immigration detention of children*, para. 86.
67. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez: Torture and Ill-Treatment of Children Deprived of Their Liberty*, A/HRC/28/68, (March 5, 2015), para. 80; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 11; UNHCR, *UNHCR's Position Regarding the Detention of Refugee and Migrant Children in the Migration Context*, January 2017; SRHRM, *Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales: Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, A/75/183, (July 20, 2020), para. 86(a); Manfred Nowak, *UN Global Study on Children Deprived of Liberty*, 2019, Chapter 11, Recommendation 8.
68. <https://picum.org/faqs-detention-returns/>
69. https://www.europarl.europa.eu/doceo/document/TA-8-2018-0201_EN.html; https://www.europarl.europa.eu/doceo/document/TA-9-2019-0005_EN.html; https://www.europarl.europa.eu/doceo/document/A-9-2020-0238_EN.html; https://www.europarl.europa.eu/doceo/document/TA-9-2021-0090_EN.html
70. CMW, CRC Committee, *Joint general comment on State obligations regarding the human rights of children in the context of international migration*, para. 10-13.
71. ECtHR, *A.M. and Others v. France*, 24587/12, (July 12, 2016), para. 48-53.
72. ECtHR, *R.M. and Others v. France*, 33201/11, (July 12, 2016), para. 71-76.
73. HRC, *Danyal Shafiq v. Australia* para. 7(2).
74. HRC, *General Comment No. 35: Liberty and security of person*, para. 18; WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 16, 23, and 24. The EU legislation regulating immigration detention obliges states to assess alternatives to detention before detaining a person. Under the Reception Conditions Directive (Art.8(2)), “[when] it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.” Similarly, the Return Directive (Art. 15(1)) provides that states may detain a person subject to return procedures when specifically enumerated grounds apply and “unless other sufficient but less coercive measures can be applied effectiveness in a specific case.”
75. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 18; SRHRM, *Detention of migrants in an irregular situation*, para. 73.
76. CJEU, *FMS*, para. 293.
77. CMW, *General comment No. 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights*, para. 48.
78. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 17.
79. CMW, *General comment No. 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights*, para. 48-49.
80. WGAD, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, para. 18; SRHRM, *Detention of migrants in an irregular situation*, para. 73.
81. See: <https://picum.org/endingdetention/> for more information
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83. International Detention Coalition (2022) "[Gaining Ground. Promising Practice to Reduce and End Immigration Detention](#)"
84. Council of Europe, Steering Committee for Human Rights (2018) "[Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration](#)". See https://picum.org/wp-content/uploads/2020/04/Concept-Paper-on-Case-Management_EN.pdf for more information
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88. ECtHR, *Ruiz-Mateos v. Spain*, 12952/87, (June 23, 1993), para. 33.
89. *Ibid.*, para. 63.
90. Izabella Majcher, "The Effectiveness of the EU Return Policy at All Costs", p. 123-124.
91. *Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) (Codification)*, OJ 2016 L 77/5, (March 23, 2016). The Schengen Borders Code is in the process of reform, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders*, COM(2021) 891, (December 14, 2021). The reform raises several concerns, see PICUM, "[The New Draft Schengen Borders Code Risks Leading to More Racial and Ethnic Profiling](#)," February 15, 2022.
92. *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, OJ 2008 L 348/98, (December 24, 2008). The Directive is in the recast process following the publication by the European Commission of the proposal in September 2018, see European Commission, *Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)*, COM(2018)634, (September 12, 2018). The recast would expand the legal basis for detention in the return proceedings, see the commentaries ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, 2018.
93. *Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)*, OJ 2013 L 180/31, (June 29, 2013). The current Dublin system is meant to be replaced by a responsibility sharing system proposed by the European Commission in one of the legislative proposals accompanying the Pact on Asylum and Migration, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, COM(2020) 610, (September 23, 2020). The proposal expands the possibility of detention during the transfer proceedings, see ECRE, *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management*, 2021.
94. *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying down Standards for the Reception of Applicants for International Protection (Recast)*, OJ 2013 L 180/96, (June 29, 2013). In 2016, the Commission proposed recasting the Directive, including by extending the grounds for detention, see European Commission, *Proposal for a Directive of the European Parliament and of the Council Laying down Standards for the Reception of Applicants for International Protection (Recast)*, COM(2018) 465, (July 13, 2016).

95. European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609, (September 23, 2020).
96. PICUM, "[More Detention, Fewer Safeguards: How the New EU Pact on Migration and Asylum Creates New Loopholes to Ignore Human Rights Obligations](#)," October 14, 2020; ECRE, *Reception, Detention and Restriction of Movement at EU External Borders* (Heinrich-Böll-Stiftung EU, 2021); International Commission of Jurists (ICJ), *Detention in the EU Pact Proposals*, 2021; EPRS, *The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment*, PE 694.210, (August 2021), p. 95-99.
97. European Commission, *Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*, COM(2020) 612, (September 23, 2020).
98. The relevant provisions of the proposal are Art. 1, 3, 4, and 6.
99. European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, *The European Commission's legislative proposals in the New Pact on Migration and Asylum*, 2021, p. 59.
100. RSA, HIAS, GCR, LCL, DRC, Fenix, ActionAid, Mobile Info Team, *The Workings of the Screening Regulation*, 2021, p. 2.
101. ECRE, *Reception, detention and restriction of movement at EU external borders*, p. 34-38.
102. The relevant provisions of the proposal are Art. 5 and 6.
103. ECtHR, *Khlaifia and Others v. Italy*, para. 65-72.
104. European Commission, *Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU*, COM(2020) 611, (September 23, 2020).
105. These circumstances are if the person 1) poses a risk to national security or public order, 2) has misled the authorities by presenting false information or documents, or by withholding relevant information or documents with respect to their identity or nationality, or 3) is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 per cent (Art.41(3)).
106. The crisis situation is understood as an exceptional situation (or an imminent risk of such a situation) of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in Asylum and Migration Management Regulation, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum*, COM(2020) 613, (September 23, 2020), Art. 1(2).
107. The relevant provisions are Art. 41 and 41a.
108. European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, *The European Commission's legislative proposals in the New Pact on Migration and Asylum*, 2021, p. 76.
109. EPRS, *Asylum procedures at the border: European Implementation Assessment*, p. 76; ECRE, *Reception, detention and restriction of movement at EU external borders*, p. 23-24.
110. CJEU, *FMS*, para. 216, 223 and 225.



PLATFORM FOR INTERNATIONAL COOPERATION ON
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