Chapter 7

International Human Rights Law on Immigration Detention

7.1 Introduction

This chapter and the next deal with the way in which the international human rights regime has placed limits on the state’s power to resort to immigration detention. The focus in these chapters is on the international human rights norms and their application by international bodies, instead of on any particular national constitutional discourse because of international human rights’ explicit aim of overcoming the ‘particular universalism’ that one finds in more traditional forms of constitutionalism. That is not to say that national courts do not have an important role to play in this area. On the contrary, especially in the area of human rights law, we have seen that the distinction between national and international law has become blurred and international norms in this field have a decisive impact on individual rights protection at the national level as domestic courts may apply a broad range of international norms pertaining to the protection of human dignity. However, for reasons concerning the length of this study, I do not examine the role of national courts in cases of immigration detention apart from occasional references as illustrations for a particular argument or position.

We have seen that the use of immigration detention by EU Member States can be divided into three categories: detention upon arrival; detention within the asylum system; and detention in the context of removal. In all these three – at times overlapping – instances detention is employed in order to protect and vindicate the presupposed sovereign right of the state to decide on matters concerning the entry and stay of foreign nationals. From the overview regarding state practice that was provided in chapter 1 it transpired that many of the usual constitutional guarantees are not applied by national states to cases involving deprivation of liberty under immigration legislation. Detention seems to be an attractive policy option for national governments that wish to combat irregular immigration and decrease the numbers of asylum applications, precisely because the perceived neutrality and naturalness of sovereignty’s territorial form has made it easy to marginalise the human interests that are actually affected by it.
A good illustration of this position is provided by some of the arguments that sovereign states have put forward in cases with regard to complaints by individuals concerning their deprivation of liberty based upon immigration legislation. Australia, for example, has argued before the HRC that the purposes of mandatory immigration detention reflect the state’s sovereign right under international law to regulate the admittance of aliens, and hence such detention cannot be unjust, inappropriate or improper. If raised in a purely domestic context – dealing with, say, freedom of expression – in which the mere content of sovereignty and not also its territorial form was at stake, the inadequacy of such a line of legal reasoning would immediately be apparent. Nevertheless, when defending their policies of immigration detention it is all but exceptional to find comparable arguments brought forward by national governments and they provide the ultimate illustration of the assumption that territorialised sovereignty is immune to traditional modes of legal correction and forms an “unproblematic and legitimate site of legal violence”. Another, slightly more disguised, illustration of that assumption can be found in the contentions of the Belgium government in the Čonka case before the ECtHR, in which it argued that to employ a ‘little ruse’ in order to arrest irregular migrants and subsequently detain them could not be illegal as they had been served with orders to leave the territory, which expressly stated that they were liable to detention with a view to deportation if they failed to comply.

In the remaining chapters of this book, I will investigate whether the application of international human rights to cases of immigration detention can destabilise such a perception of sovereignty’s territorial form. Due to its unique manner of implementation and the right of the individual to appeal directly to the ECtHR, the case law of this Court is arguably the best place to conduct such an analysis with regard to the situation in Europe. However, before turning to the way in which the Strasbourg Court deals with the questions related to immigration detention (chapter 7), I shall first sketch a general outline of the international legal regime pertaining to immigration detention in this chapter. This will be done by providing a wide overview of the human rights instruments that are applicable to that practice, and by briefly focussing on relevant legal norms that have emerged in the context of EC law-making in the framework of Title IV TEC. It should be noted that not all instruments that are significant for the practice of immigration detention will be discussed in detail. The main focus of my analysis concerns the way in which the right to

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