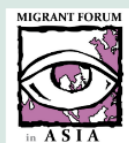


Immigration Detention: Are Alternatives to Detention Alternatives at All?



Immigration detention is a widespread administrative procedure that results in the deprivation of migrants' liberty. Frequently, individuals are incarcerated in confined facilities in conditions often resembling those of criminal prisons, if not in prisons themselves. Immigration detention can be exercised for a variety of reasons, usually left to the discretion of public authorities and border police.¹ These include: whilst awaiting the execution of removal² orders; to establish someone's identity upon arrival; to prevent absconding whilst an immigration or asylum claim is being processed; when non-nationals lack any immigration documents or overstay their visa.³ This means that "asylum-seekers, children, victims of trafficking and stateless persons [who] are recognised as vulnerable groups under international law, and [are] entitled to special protection"⁴ can also end up being detained: individuals who have experienced traumas and abuses can be deprived of their liberty, possibly for an indefinite time⁵ or multiple times during the processing of their immigration case, and forced into degrading conditions that are likely to further exacerbate their mental and physical strain, with long-lasting effects. As highlighted by Dr. Cartwright, for many who had migrated to find refuge, being held in detention in the destination country felt like being tortured once more.⁶

The Universal Declaration of Human Rights recognises the inherent right of all people to life, freedom and security (Art. 3) as well as a right to freedom from arbitrary arrest, detention and exile (Art. 9). The International Covenant on Civil and Political Rights further reinstates the right of every human being to liberty and security, prohibiting arbitrary arrest or detention (Art. 9). This same article, however, allows for the deprivation of someone's liberty when in line with specific grounds established by the national legislation, opening the doors to a legitimate use of detention on migrants: as long as it is correctly executed by states, i.e. in line with procedural guarantees, immigration detention is justified under international law. In other words, "[d]etention [...] is not per se arbitrary, but must be justified as

¹ Tondo, L., ['Black book' of thousands of illegal migrant pushbacks presented to EU](#), The Guardian 2020

² For a definition, see: International Organisation for Migration, [Glossary on Migration](#), International Migration Law, 2019

³ See for example in the UK: Right to Remain Toolkit, [Detention](#), December 2020

⁴ Grant, S., [Immigration Detention: Some Issues of Inequality](#), The Equal Rights Review, Vol. 7, 2011

⁵ Immigration detention should never be indefinite. However, there are countries, such as Great Britain, Australia and Canada, where there is not a time limit on the duration of one's detention.

⁶ Cartwright, S., [Immigration detention and the politics of dehumanisation \(COVID-19 blog no. 16\)](#), Centre for Catholic Social Thought and Practice, 2020

reasonable, necessary and proportionate in the light of individual circumstances and reassessed as it extends in time.”⁷

In line with the revised Deliberation no. 5 on the deprivation of liberty of migrants issued by the Working Group on Arbitrary Detention,⁸ Objective 13 of the 2018 Global Compact for Safe, Orderly and Regular Migration (henceforth the Global Compact) suggests that immigration detention should be used “only as a measure of last resort”, i.e. only when strictly necessary, favouring the application of alternatives to custody whenever possible instead. In practice, this means that states should envision in their national legislation a series of different measures to which to resort, prior to deciding to enforce immigration detention. Recurring to immigration detention should thus be determined on a case-by-case basis and as part of an individual’s procedure. As such, the decision should be clearly justified, including by demonstrating why other measures are not applicable in the given circumstance. This is particularly of paramount importance in the case of asylum seekers, to ensure that their cases have been thoroughly assessed and all avenues exhausted before resorting to the use of immigration detention.

Whilst there is no evidence of the effectiveness of the use of immigration detention in reducing undocumented immigration and there is evidence instead of its counterproductivity for case resolution, removal and immigrants’ integration⁹ as well as of it having a negative physical and mental health impact on those who experience it,¹⁰ many states are adopting immigration detention as a first strategy to manage immigrants’ presence on their territories and deter more to come.¹¹ A 2020 position paper of the Red Cross, for instance, suggests that “[c]urrently, the implementation of EU migration management strategies is standardising the use of detention at borders. Rather than a measure of last resort, detention is increasingly used as a first response in border procedures and the “hotspot approach”, and as a sanction for secondary movements.”¹² As a result, instead of upholding the duty to protect and fulfil human rights, migration governance is increasingly eroding them.

Not only among European Member States, but across the globe, “detention has become an established modus operandi that counts on dedicated facilities and burgeoning institutional bureaucracies.”¹³ In particular, over the past 20 years the use of immigration detention has increased significantly across the world, in line with a rise of the politicisation of immigration and a growing public discourse centred around the idea of the need for the securitisation of borders.¹⁴

⁷ United Nations Human Rights Office of the High Commissioner, [The Criminalisation of Irregular Migration](#), n.d.

⁸ Working Group on Arbitrary Detention, [Revised Deliberation No. 5 on deprivation of liberty of migrants](#), Office of the United Nations High Commissioner for Human Rights, 2018

⁹ International Detention Coalition, [Reframing immigration detention in response to irregular migration Does Detention Deter?](#), 2015

¹⁰ Red Cross Eu Office, [Immigration detention should only be a last resort](#), 2020

¹¹ Ibid.

¹² Red Cross EU Office, [Reducing the use of immigration detention in the EU](#), Red Cross EU, Position Paper, 2020; and see New proposed EU pact on Migration.

¹³ Flynn, M., [How and Why Immigration Detention Crossed the Globe](#), Global Detention Project Working Paper No. 8, 2014

¹⁴ Campesi G., [La detenzione amministrativa degli stranieri in Italia: storia, diritto, politica](#), Academia.edu, n.d.

The use of immigration detention is thus often “justified on the basis of state sovereignty and the right of the state to control its borders and safeguard its citizens [... and it can] have political appeal as part of a state’s immigration policy that reflects a “tough” approach to migration control.”¹

Whilst exact numbers of people in immigration detention are difficult to collect, according to the Global Detention Project, there are currently 503 detention centres in use worldwide, the United States by far the largest retainer (148), followed by Mexico (51), Switzerland (34) and Libya (22).¹⁵

The increased use of immigration detention as a migration management solution has also led to a growing involvement of the private sector in running specialised facilities, tying up lucrative business opportunities with the definition of public policies. In a 2017 article, for example, Skodo highlighted that in the United States, “there has been a congressional mandate to fill 34,000 immigration detention beds each night. More than half of these beds are placed in privately run detention facilities, run by companies such as CoreCivic (formerly the Corrections Corporation of America), who lobbied for the passing of this mandate.”¹⁶ Already in 2012, Nyberg Sørensen and Gammeltoft-Hansen were denouncing that

“the pervasiveness of neoliberal governance has resulted in the outsourcing and privatisation to NGOs and private contractors of everything from guest worker schemes to the running of asylum centres and the carrying out of forced deportations. [...] Last but not least, the use of private security companies, contractors and NGOs to carry out anything from border security to running asylum [or detention] centres not only significantly blurs the line between public and private but also raises a number of questions as to the impact of the migration industry on government policies through knowledge, standard-setting, lobbying and lock-in effects.”¹⁷

Not only governments have been fuelling the growth of migration as an industry per se, but the increased involvement of private actors in the management of processes and facilities has negatively influenced the reshaping of migration management, as we witness today.

Migration and Criminalisation

In presenting immigration detention as a solution to protect states’ borders and exercise their sovereignty, a blind spot in the protection of migrants’ rights has been created, reducing states’ obligation to their fulfilment. Even though immigration detention is not formally a form of punishment, but rather presented as a preventative solution reinforcing the idea of a state’s duty to protect, it “is accomplished through the adoption of techniques, mechanisms, and logics from the criminal justice and penal systems.”¹⁸ The deprivation of someone’s liberty itself is, for example, a typical tool of the

¹⁵ Global Detention Project, [Detention Centres](#), accessed December 2020.

¹⁶ Skodo, A., [How immigration detention compares around the world](#), The Conversation, 2017

¹⁷ Nyberg Sørensen, N. and Gammeltoft-Hansen, T., [The Migration Industry and Future Directions for Migration Policy](#), Danish Institute for International Studies, April 2012

¹⁸ Turnbull (2016)

criminal justice system rather than the administrative one, which should resort to less afflicting tools to reach their goals instead.¹⁹ The creation of immigration detention facilities, as well as of ad-hoc centres where migrants are hosted, contributes to the reinforcing of a public perception of migrants as criminals, consolidating the link between migration and criminality.²⁰ “[t]he architecture and security features of centres (e.g., high perimeter fences topped with razor wire, daunting entry gates, omnipresent CCTV cameras, etc.) can give the impression that those housed within are dangerous and deserving of exclusion and containment.”²¹

Even though more states attempt to make irregular migration a criminal offence,²² currently many migrants are in effect deprived of their liberty because of their legal status, not because of having effectively committed any crimes: “[i]rregular entry and stay by migrants should not be treated as a criminal offence [and people should not be forced in prison-like conditions ...]. Criminalising people on the basis of their migration status can lead to a number of other human rights violations, including discriminatory profiling, arbitrary arrest and detention, family separation, and the inability to access critical health care, housing, education or other rights.”²³ Whilst the link between the notions of immigration and criminalisation is strengthened, it is thus important to re-instate that refugees, asylum seekers, and undocumented “migrants are not criminals per se and they should not be treated as such.”²⁴ As a result, “[i]t is, of course, axiomatic that – by definition – prisons are not suitable places in which to hold someone who is neither accused nor convicted of a criminal offence.”²⁵ Worryingly, however, in some countries, “the number of non-citizens in administrative detention exceeds the number of sentenced prisoners or detainees, who have or are suspected of having committed a crime.”²⁶ Furthermore, the conditions in which migrants are detained are often worse when compared to those of criminal detainees²⁷ and their rights and safeguards (e.g. access to a lawyer, to a medical doctor and contact with a relative or third party) are reduced.²⁸

According to Turnbull, “[c]ritical scholars link immigration detention to the broader trend of “othering” migrants.”²⁹ In this light, immigration detention can be considered nothing but an overt display of an inherently biased mindset, according to which certain human beings are less deserving than others, often on reasons of race and nationality. As suggested by Rapporteur Stroe, “the term “migrant” retains a degree of stigmatisation vis-à-vis the group or person to whom it is applied.”³⁰ The non-neutral connotation of the term reinforces the idea that migrants are different and, merely because of that, a potential threat to be contained and countered. As a result, the inherent right to life, freedom and security and the enjoyment of overarching human rights guarantees become a privilege for those who meet given criteria and are perceived as belonging in some way. However, as argued by Grant,

¹⁹ Campesi, (n.d.)

²⁰ Ibid

²¹ Turnbull (2016)

²² Stroe, I.-M., [Criminalisation of irregular migrants: a crime without a victim](#), Committee on Migration, Council of Europe, 2015

²³ United Nations Human Rights Office of the High Commissioner, [The Criminalisation of Irregular Migration](#), n.d.

²⁴ United Nations Economic and Social Council, [E/CN.4/2003/85 Migrant Workers - Report of the Special Rapporteur](#), 2002

²⁵ Grant (2011)

²⁶ As quoted in Grant (2011)

²⁷ Gallardo, C., [Tory MP accuses UK Home Office of planning to house asylum seekers in ‘camps’](#), Politico, 2020

²⁸ Turnbull (2016) and Grant (2011)

²⁹ Turnbull (2016)

³⁰ Stroe (2015)

“[u]nder international human rights law, the rights of irregular migrants must be respected, even if their right to stay is not protected, and to this end most human rights standards apply without distinction between citizens and foreign nationals. [For instance, Grant suggests] the right to liberty must be enjoyed equally and without discrimination: this means, for example, that migrant workers, regular or irregular, who are detained are to enjoy the same rights as nationals in the same situation. [...] There is also a need to recognise that although standards of treatment in principle apply equally to nationals and non-national detainees, the impact on immigration detainees will not necessarily be equal because of their particular vulnerabilities. Equal treatment in this context is not always equivalent to identical treatment.”³¹

An example of discrimination taking place is offered by Dr. Cartwright, who shows how during the COVID-19 pandemic people in immigration detention who were in effect ex-offenders have been discriminated against because of their status and nationality: unlike nationals, non-British ex-offenders that have served their sentence have not been released from detention but are held there indefinitely. This, in her words, “creates a two-tiered criminal justice system that undermines any connection between crime and punishment” and further reinforces the fusion of the concepts of immigration and criminalisation. Dr. Cartwright also argues that among non-nationals that are detained and deported are people that have spent most of their lives in the country. The system “refuses to acknowledge the histories in which [immigrants ...] are rooted and the lives they have lived. It applies a racist double standard to exclude and cast out those who know no other home. This is not justice.”³²

Alternatives to Detention

In parallel with an increased securitisation of states’ borders and criminalisation of undocumented migrants,³³ a stronger debate around the use of alternatives to detention in the immigration context is taking place. In the conclusions of a 2011 paper on the issue of immigration detention at the UN level, the International Detention Coalition recognised that “[t]here has been some encouraging discussion of alternatives to immigration detention at an international level and some countries have established models that demonstrate alternatives can work well and cost less than detention.”³⁴ In addition, “[t]he Working Group on Arbitrary Detention underlines that ‘immigration detention should gradually be abolished’ [...] and ‘alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention’ [...]. States have also expressed support for alternatives to detention in the New York Declaration for Refugees and Migrants.”³⁵

Even though there is not a universal definition of alternatives to detention, they can be described as solutions that limit the deprivation of people’s liberty and guarantee a higher degree of respect for individuals’ fundamental rights. More specifically, the IOM defines them as “[a]ny legislation, policy or practice, formal or informal, aimed at preventing the unnecessary detention of persons for reasons

³¹ Grant (2011)

³² Cartwright (2020)

³³ See, for example, the new EU Pact for Immigration and Asylum.

³⁴ International Detention Coalition, [The issue of immigration detention at the UN level](#): Recent developments relevant to the work of the International Detention Coalition (IDC), 2011

³⁵ International Organisation for Migration (2019)

relating to their migration status. [...] Examples of alternatives to detention include [...] effective screening and identification procedures, community-based or casework-oriented models, bail, bond and surety options, open or semi-open centres, reporting requirements and case resolution options.”³⁶ Electronic monitoring, supervision, and return counselling are also considered alternatives to detention.

One of the key questions that emerges in debates on alternatives to detention is indeed what kind of alternatives should be created.³⁷

Fundamentally, alternatives to detention should be developed on the premises of guaranteeing the respect of human rights, solutions that move away from the idea that depriving human beings of their liberties is, in effect, acceptable.

In the Practical Guide developed by the Council of Europe on Alternatives to detention,³⁸ the institution identifies three overarching benefits of alternatives to detention. Firstly, the adoption of different solutions to detention enables the respect of human rights and the avoidance of suffering, likely to be caused by forced confinement in immigration facilities, especially of vulnerable people. Secondly, alternatives to detention can facilitate compliance with immigration procedures, enabling fair resolution and reducing the risk of absconding. Thirdly, alternatives to detention can be cost-effective, when they are adopted instead of detention. However, if on the one hand any alternatives to detention could be envisaged as better than custody, on the other, there is a risk for a state to construe alternatives that are merely other forms of detention: “[m]easures labelled as “alternatives to detention” can, in effect, amount to a deprivation of liberty if the aggregated impact, degree and intensity of the actions taken constitute severe restrictions on a person’s liberty.”³⁹

One of the risks associated with alternatives to detention is thus the creation of a self-perpetuating system that increases people in incarceration-like conditions or under surveillance, rather than not.

A more overarching risk associated with the notion of alternatives to detention is the consolidation of the very idea of the existence of a need to manage migration and control people’s movements by restricting their mobility and limiting access to non-origin countries. Latin American states, where immigration detention is not a widespread practice, show that a guarding approach is not necessarily a solution. As highlighted during a 2020 panel discussion on immigration detention, held in occasion of International Migrants Day,⁴⁰ even during the biggest migration crisis faced by the South American

³⁶ Ibid.

³⁷ Migrant Forum in Asia, [Webinar on GCM Objective 13](#) (full length), YouTube, 2020

³⁸ Council of Europe, [Alternatives to immigration detention: fostering effective results](#), Council of Europe, 2019

³⁹ Steering Committee for Human Rights, [Legal and practical aspects of effective alternatives to detention in the context of migration](#), Council of Europe, 2017

⁴⁰ Diaspora Transnationalism, [International Migrants Day: Global Celebration of Our Rights and Our Struggle for Justice](#), YouTube, 18 December 2020

continent, with more than 4 million Venezuelan moving to other countries in the region within three years, no country responded to the situation by resorting to immigration detention. Ceriani, who intervened in the debate, particularly stressed the fact that the current debate in South America is not about how to control and limit migrants' movements but rather about how to facilitate regular entries and address problems of irregularity when they do exist, as these are more often a consequence of inadequate immigration policies rather than migrants' willingness be undocumented.

Lack of documentations for many migrants, in fact, is rather the result of difficulties faced in destination countries, such as loss of their jobs to which their visa is tied, or of the economic interests of business owners, who take advantage of migrants' vulnerabilities and engage them in exploitative jobs, from where they cannot move away without putting themselves in danger. This is, for instance, the case of many Asian migrant workers who engaged in Gulf countries where leaving one's job without the employer's permission may result in arrest, detention and subsequently return to one's country of origin. Migrants thus often find themselves in dangerous situations where they are forced to choose between keeping being exploited, absconding, or facing charges and being returned to their country of origin, potentially after serving a sentence. Once back home, people may face equally dire conditions, unable to re-pay their migration-related costs and, ultimately, live in poverty due to lack of employment opportunities.

The absence of easily accessible solutions for the regularisation of one's status and the lack of protections for migrants who find themselves in abusive, dehumanising, and exploitative conditions in the host country, is thus often the reason behind undocumented situations. The systematic use of detention to respond to migration management is not only inappropriate but can also become a trigger for a perpetuating cycle of abuses and breach of human rights. This is well exemplified by the 2020 case of a number of Bangladeshi migrant workers who had overstayed their visa/permit or committed minor offences in Gulf countries and, as a result, were detained: once obtaining the host state's pardon, these people were returned to Bangladesh and there they were detained again, accused of staining their country's reputation by having been convicted for a crime.⁴¹ This shows how migration management and returns management, in particular, can have extreme consequences for migrants and should be enforced only after careful reassessment of individuals' circumstances and potential risks in countries of origin.

The Future of Immigration Detention

Considering that there is little evidence of the efficacy in the use of immigration detention as a practice to reduce immigration and immigrants presence on a territory; taking into account that its use often results in the breach and reduction of migrants' rights; and that the legitimacy of the use of immigration detention is drawn on the increasingly consolidated but erroneous idea that immigrants are criminals, the urgent question that needs to be asked is why detention is a tool in migration management at all.

⁴¹ Abrar, C.R., [Pardoned in host countries, incarcerated in Bangladesh](#), The Daily Star, 2020; and Migrant Forum in Asia, [An Appeal to the Government of Bangladesh to Release the 255 Returned Bangladeshi Migrant Workers Accused of Suspicious Activities](#), n.d

Much of the discussion around sustainable development has been centred around the idea that everyone deserves a better future. In introducing the 2030 Sustainable Development Agenda, states and governments clearly affirm that they “are determined to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment [... They] are determined to ensure that all human beings can enjoy prosperous and fulfilling lives [... and] to foster peaceful, just and inclusive societies which are free from fear and violence.”⁴² The use of immigration detention evidently clashes with such commitments. How can poverty and hunger end, if migrants are denied the opportunity to move to improve their living standards, to escape poverty, war and famines? How can that happen, if people are not given the opportunity to support their families through a fair and safe employment, in which they can stay without suffering exploitation? How can prosperous and fulfilling lives be enjoyed if people are locked up in facilities because of their desire to live better lives and create better futures for their own children? How can peaceful, just and inclusive societies be created, if discrimination, unequal access to opportunities and resources, and institutional pushbacks of non-citizens is the norm in migration management practices?

A major problem resulting from the systematic use of immigration detention, or more broadly of the very acceptance of the idea that using immigration detention is acceptable, is the de-humanisation of migration and of migrants: migration has evolved to be seen a burdensome collection of administrative processes that create problems to everyday societies that do not want to deal with it; whilst migrants are perceived as items to be handled politically and physically. The notion of irregular migration, which strengthens the link between immigration and criminalisation and legitimises the use of immigration detention, is the result of an established objectification of the notion of migration and of migrants, which urgently needs to be reversed. Migration is about people’s lives, dreams and aspirations. It is about living in a connected world where everyone has a right to be and to enjoy opportunities for a better life. When migrants-related issues are discussed, we are talking about issues that pertain to human beings. It goes without saying that when policies and procedures are developed, this aspect must be held at the core of the decision-making process.

The way forward should thus not be the envisioning of ways in which immigration detention is only used as a last resort or the creation of alternatives to detention. The solution should be the affirmation of the idea that depriving people of their liberty is not acceptable and stopping individuals from trying to live with dignity not reasonable. In practice, this idea should be realised through the development of just, inclusive and sustainable policies that facilitate movement and the obtaining of regular status, policies that provide easy access to social welfare and economic opportunities for non-citizens, encouraging integration and enabling self-realisation. We should start re-imagining the current approach to migration management by focusing on the many positive outcomes to which an easier access to regular status and facilitation of international people’s movements could lead: reduced costs of running detention facilities; speedier management of immigration fluxes; greater protection of human rights of migrants during the migration process; greater access for migrants to safeguards in countries of destination; greater involvement of migrants and their families in receiving countries’ societies,

⁴² UN General Assembly, [Transforming our world: the 2030 Agenda for Sustainable Development](#), United Nations, 2015, A/RES/70/1

culturally as well as economically; thriving of new businesses and economic growth; as well as reduced migrants' exploitation and criminal activities currently related to migrants' smuggling and cheap employment, as currently, "the rule against migration breeds crime by making migration a crime which quite often leads to the deaths of many migrants and creates the opportunity for lawbreakers or criminals to benefit from the offence."⁴³

The creation of new, broad and easily accessible regularisation schemes for undocumented migrants and the definition of more options for regular migration as well as the end of immigration detention are first significant steps to guarantee the realisation of a truly sustainable and inclusive development agenda.

During the COVID-19 pandemic, "most European countries have opted for the gradual release of migration detainees, based on a case-by-case evaluation of the individual's health conditions, the hygienic conditions in a given centre and the impossibility to carry out returns in a predictable timeframe [... Spain, in particular, released all immigration detainees within a short timeframe, demonstrating that] a collaborative process involving both institutional and civil society actors in the organisation of a relatively orderly and safe release of migration detainees" is indeed possible.⁴⁴

To conclude with the words of Dr. Cartwright "Much of the discourse and practice around the detention of people [...] is thus rooted in a wider politics of exclusion and dehumanisation. Without this politics, we would not tolerate immigration detention at all. We need a new politics."

⁴³ Stroe (2015)

⁴⁴ Roman, E., [Rethinking Immigration Detention During and After Covid-19: Insights from Italy](#), Blog, Borders Criminology, University of Oxford, 2020