



Submission for the European Commission's Home Affairs Public Consultation "Debate on the future of Home Affairs policies: An open and safe Europe – what next?"

Global Detention Project

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The Global Detention Project (GDP) is a research initiative that tracks the use of detention in response to global migration. Based at the Graduate Global Migration Centre in Geneva, Switzerland, the GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) encouraging scholarship in this field of immigration studies; and (3) facilitating accountability and transparency in the treatment of detainees.

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This submission is provided as a contribution to the public debate initiated by the European Commission in response to the Commission Communication on the New Agenda for Home Affairs. In particular, the submission intends to provide an informed, academic perspective to the discussion over key challenges that will continue to confront EU immigration policies at the end of the Stockholm Programme, which framed Home Affairs policies during the years 2010-2014.

The Global Detention Project (GDP) is a research initiative based at the Graduate Institute's Global Migration Centre in Geneva, Switzerland, that seeks to assess the policies and practices of states with respect to immigration-related detention. A key goal of the project is to develop criteria for measuring whether states adhere to relevant international and regional legal provisions, and to identify gaps in protections by undertaking comparative analysis of detention regimes. Key elements of the GDP's mission include helping facilitate accountability and transparency in the treatment of migrant detainees. Thus our submission focuses on these two issues.

Transparency

Europe lacks a regional mechanism for facilitating up-to-date information on immigration detention. Additionally, many EU Member States and Schengen partners make getting information about immigration detention practices enormously challenging. For instance, national authorities in some countries—particularly two federal states, Germany and Switzerland—have told Global Detention Project researchers that they have no knowledge of where migrants and asylum seekers are being detained, arguing that that is the responsibility of local authorities. However, in a small handful of cases, when GDP researchers contacted local authorities in these countries, we were told that information about where migrants were being detained was sensitive or could not be shared with us.

The need for more transparency with respect to immigration-related detention was underscored recently when the Global Detention Project, working in collaboration with the Madrid-based NGO Access Info, sent information requests to all the Member States of the European Union, following, whenever possible, formal freedom of information procedures. We asked for very basic information, including a comprehensive list of facilities used for immigration detention purposes, and recent statistics on the numbers of people detained annually in each country. These requests were initially sent out in March of last year, and then several reminders were sent out during the course of the year to countries that were not responsive. To date, only about half the countries have provided complete answers. Many countries have simply ignored our requests. Others have said that they do not keep detailed statistics. Malta informed us that you have to be an EU citizen and resident in Malta for the last 5 years to make such a request. Still another country, Bulgaria, claimed that it was unnecessary to respond to our request because it regularly sends the information to Eurostat. When we contacted Eurostat,

however, we were told that this could not be the case because it does not keep such statistics.

This state of affairs needs to be addressed. Any effort to build “a safer and more open Europe for the benefit of all EU citizens as well as third country nationals” requires having easy public access to detailed knowledge about this issue. To be sure, a few countries in the region provide excellent statistical information about immigration detention. Nevertheless, it is important that a regional mechanism be developed to facilitate public access to accurate and up-to-date statistics on immigration detention for every country in the region.

There is a readily available tool that can be used to close this important gap in EU immigration and asylum policies: Eurostat. Eurostat currently provides only a very limited number of statistical measures under its section on the “Enforcement of Immigration Legislation.” To improve transparency in the treatment of third country nationals, Eurostat should be expanded to include comprehensive statistics on where people are detained for immigration-related reasons, how many people are detained under immigration legislation each year, the specific grounds provided for detention orders, the average length of time immigration detainees remain in custody, and the demographic characteristics of each Member States’ immigration detainee population. Additionally, to be truly reflective of each Member States’ detention efforts, Eurostat data on immigration-related detention should also include statistics on the number of asylum seekers that are held in custody pending the outcome of their claims.

Accountability

There has been an important accountability gap in both EU and Member State law with respect to the treatment of immigration detainees. This gap relates to the generally poor procedural standards afforded immigration detainees vis-à-vis people deprived of their liberty as part of criminal processes.

The Stockholm Programme states that the “protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union.” Since 2009, EU institutions have endeavored to establish common minimum standards on the rights of persons in criminal proceedings. In October this year the *Directive on the right of access to a lawyer in criminal proceedings* was adopted, it followed the *Directive on the right to information in criminal proceedings*, adopted in May last year, and the *Directive on the right to interpretation and translation in criminal proceedings* adopted in October 2010. These developments demonstrate that the EU and its Member States are eager to ensure procedural rights of criminal detainees.

Yet, there is another category of detainees whose detention is explicitly sanctioned under EU law but whose procedural guarantees are left aside. Immigration detainees. The reason for the huge discrepancy between the procedural protections offered to criminal detainees and immigration detainees is the formal denomination of immigration detention. It is considered administrative detention, a merely preventive and

bureaucratic measure to fulfill migration policy objectives. This formal label allows states to avoid application of fair trial guarantees to immigration detainees.

Yet, as practice across the EU shows, immigration detention closely resembles criminal incarceration in a number of ways. Often they immigration detainees are kept in custody for periods that are typical of imprisonment for petty crimes and in to prison-like regimes. In many instances the material conditions of detention are worse than those ensured to criminal inmates. And still, governments and immigration authorities maintain that their detention is merely an administrative measure, which should imply that it is more lenient.

Last year, the Global Detention Project researched this apparent paradox (for a detailed assessment of the results of its study, see “[Crimmigration](http://www.globaldetentionproject.org/publications/working-papers/crimmigration.html)” in the European Union through the Lens of Immigration Detention,” September 2013, available at: <http://www.globaldetentionproject.org/publications/working-papers/crimmigration.html>). We analyzed the EU Returns Directive which is the EU instrument that regulates pre-removal detention. We compared detention-related procedural guarantees laid down in the Directive to the purposes for which detention may be ordered under the Directive. The study provided indications that the Directive selectively incorporates criminal justice objectives while rejecting protective features that are provided in criminal processes.

In terms of guarantees, we compared those enshrined in the Directive against relevant fair trial guarantees under the European Convention on Human Rights. Thus, for instance, under the ECHR the person accused under criminal law shall clearly benefit from this principle (art. 6(2)). Read in conjunction with the right to release pending trial (art. 5(3)), it means that authorities are obliged to consider alternatives to detention on remand. Where the risk of absconding may be avoided by bail, for example, the accused shall be released from pre-trial detention. On the other hand, the Returns Directive does not fully obligate states to effectively assess the feasibility of alternatives to detention in each individual case.

Another important example is review of detention. Persons detained under criminal law are entitled to automatic review of their detention, they do not have to apply for it (art. 5(3)). To the contrary, the review of pre-removal detention under the Directive is not necessarily automatic, states may also grant it on request. Additionally, the minimum rights for accused in criminal proceedings – like the personal hearing or access to legal and linguistic assistance free of charge, when needed – are also not ensured immigration detainees under the Directive.

As noted earlier, this discrepancy between procedural protections offered to immigration detainees and those offered criminal inmates is justified by the assumption that immigration detention is administrative in character.

Yet, our research reveals that despite this formal administrative label, detention ordered under the Directive may be punitive in practice. In fact, the punitive practices of some Member States – including lengthy confinement in prison-like conditions – are not necessarily incompatible with the Directive. More importantly, however, the Directive

implicitly allows detention that pursues objectives similar to those of criminal justice – retribution, deterrence or incapacitation.

The purpose of detention may be evinced from grounds on which states may order pre-removal detention. The Directive sets out several grounds, including if a person displays a risk of absconding. The risk of absconding is generally considered a legitimate ground for pre-removal detention. However, the Directive lacks safeguards to preclude misuse of this ground. In particular it does not proscribe that risk of absconding be deduced solely from irregular status of the person concerned. In practice detention imposed on account of solely irregular status may amount to automatic detention aimed at deterrence. Authorities may use detention to deter person from staying irregularly on their territory.

Also, the Directive allows states to extend detention when removal is not possible due to the detainee's lack of cooperation. In practice, detention imposed on this ground would aim to punish such behavior and compel the detainee to collaborate with the authorities. Also, if removal is not possible but detention continues, such detention may resemble incapacitation. Often authorities are inclined to consider persons without regular status and financial means as a potential threat to public order. They would thus prefer to keep the person in immigration detention rather than release him or her.

The Returns Directive allows formally administrative immigration detention to be punitive in nature, while on the otherhand, it does not offer the detainees procedural protection applicable in criminal proceedings. To conform to the spirit--if not the letter--of the Stockholm Programme, this discrepancy should be remedied. In the Commission's Action Plan implementing the Stockholm Programme, it is foreseen that the Commission provide an evaluation of the Directive, which was due at the end of 2013. The Commission may also submit a proposal for an amendment of the Directive. Arguably detention-related provisions of the Directive warrant amendment. Thus, an ideal step forward in this regard would be to ensure that pre-removal detention remains truly administrative and preventive measure. To this end, it should be allowed for the shortest period possible before the removal and only where there exists an unequivocal risk of absconding in an individual case that cannot be avoided by the use of alternatives to detention. The maximum 18-month detention period under the Directive could thus be argued as being too lengthy. Also, the Directive lacks minimum conditions of confinement that are in line with administrative character of pre-removal detention. If these modifications cannot be achieved, then the Directive arguably should lay down procedural rights corresponding to the ones in criminal proceedings—including greater reliance on non-custodial alternatives to detention, automatic review of detention, personal hearings, and legal and linguistic assistance.

However, because the Commission will focus on non-legislative initiatives, the next best approach would be to assist states with the implementation of the Directive in line with their international obligations. As part of this effort, it could commission studies explaining the international legal framework governing immigration detention and providing best practices with respect to the policy goals of immigration detention and the procedural guarantees that should be afforded all people deprived of their liberty.