



PICUM BRIEFING

NON-DETENTION OF MIGRANTS: SOME FACTS AND FIGURES



PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

Under international and European Union law, alternatives to detention should be the norm, rather than the exception. Detention should be the exception.

- The right to liberty is protected by several international and European legal instruments,¹ and every restriction needs to be established by law and comply with the principles of **necessity and proportionality**.²
- Under the EU Directive on Returns, States have an obligation to carry out a case-by-case assessment of individuals' needs and vulnerabilities and the effectiveness of **less coercive measures** before applying detention.³ The European Commission's revised Return Handbook provides a list of examples of alternatives to detention including open houses for families and caseworker support.⁴
- Based on the principles of necessity and proportionality, migration detention may only be considered if a **reasonable prospect of removal exists**.⁵
- With the adoption of the **Global Compact on Migration**, governments across the world committed to **work towards alternatives to detention** and to take a human rights-based approach to any detention of migrants.⁶ Governments also agreed to work towards **ending child detention** and promoting community-based care arrangements,⁷ to assist migrants with situations of vulnerabilities and review existing policies with a view **not to create or exacerbate vulnerabilities**.⁸
- Despite the clarity of the legal framework, most European Union countries resort to detention in a systemic way, often for repeated or prolonged periods.⁹

Migration detention is harmful, ineffective and expensive

- Detention has a severe **impact on mental health**, with studies indicating higher incidence of anxiety, depression and post-traumatic stress disorder than among the rest of the population.¹⁰
- Detention **undermines trust in the migration system** and in the country where the migrant is living, deprives migrants of the ability to **meet their basic needs** and decreases their **ability and motivation to cooperate** with the government.¹¹
- Solid evidence shows that longer periods of detention are **ineffective towards case resolution**:
 - The Italian Senate Commission for Human Rights found that if a migrant was not identified in the first 45 days, longer detention periods proved unhelpful.¹²
- The UK Home Office reported that less than 40 per cent of migrants who were detained for more than six months were returned.¹³
- Eurostat data confirm the lack of correlation between member States' maximum detention periods and return rates.¹⁴
- Detention has **no "deterrence effect"** on future migrants. There is **no proven link** between strict border control and reception policies and the number of arrivals. On the contrary, restrictive measures can force people to undertake more hazardous journeys and heighten the incidence of exploitation, trafficking and unsafe travel methods.¹⁵
- Detention can be up to **10 times more expensive** than alternatives.¹⁶

Children and people with vulnerabilities should never be detained

- UN experts agree that detaining children based on the children's or their parents' migration status is a **human rights violation** and is **never in the best interest of a child**.¹⁷ Care arrangements and community-based projects should always be applied, both in cases of unaccompanied minors and families.
- There is well-established evidence that detention has a **long-lasting impact** on children's physical and mental health and their development.¹⁸ This can include behavioural dysregulation, post-traumatic stress, depression and suicidal thoughts.¹⁹ Independent of facilities' conditions, detention causes mental and emotional distress that exacerbates children's vulnerability and may amount to **inhumane, degrading treatment** or torture.²⁰

- › Detention **exacerbates** people's level of **vulnerability, disproportionately affects individuals with pre-existing vulnerabilities** and can cause **long-lasting damage**.²¹ Thereby, any detention decision must be preceded by a **thorough, individual vulnerabilities assessment**. Such assessments should be **regularly repeated**, taking into particular account the impact that detention itself can have on an individual's level of vulnerability.
- › Research shows that detention can trigger past traumas suffered by victims of torture and other forms of violence, leading to **mental health disorders** such as depression and anxiety.²²

There are alternatives: case-management based alternatives to detention are more effective, inclusive and humane

- › Alternatives to detention that **actively engage migrants** in immigration procedures help build their **trust in the system** and boost individuals' ability to work towards **a permanent or temporary migration outcome** (case resolution).²³
- › Individuals are more likely to comply with migration decisions if they feel that they are treated fairly, that they can **meet their basic needs** and that **all available options** are being considered.²⁴
 - › In three pilot projects in Bulgaria, Cyprus and Poland, **97 per cent of the participants remained engaged** or achieved case resolution. In 94 per cent of the cases, the pilot project had increased individuals' ability to participate in informed decision making, and in 93 per cent of the cases it had improved their coping and well-being.²⁵
- › **Holistic and individualised case management** is key to the success of the programme. Case managers, who are not responsible for making decisions on people's immigration cases, represent an essential link between the individual, authorities and the community. They help clients to work towards case resolution and ensure that their fundamental rights and basic needs are met.²⁶
- › **Civil society organisations** play a crucial role in designing, piloting and advocating for alternatives to detention. **Governments** should engage in the development of case management-based pilot projects which best fit the national context. There is no one-size-fits-all model of alternatives: successful projects will have to meet the specific needs of the client group. **Exchange of best practices and evaluation of pilot projects** are crucial to build further capacity and solid evidence.²⁷

CONCLUSIONS

- › International and European law clearly states that detention may only be used as a last resort. In practice, this means that alternatives to detention must be in place, and that there must be an individual assessment of each case. The legal framework stipulates that detention should only be applied if there is no other effective measure, and for the shortest time possible.
- › Detention always has a harmful impact on individuals' health and vulnerability. People with pre-existing vulnerabilities and children are disproportionately affected and should never be detained.
- › There is solid evidence that alternatives to detention based on case management and migrants' engagement in migration procedures are more humane, effective and inclusive than detention.
- › Governments and civil society organisations should engage in the promotion of pilot projects targeted at the local context with a view to limit recourse to detention and increase case resolution.

Endnotes

- 1 International Covenant on Civil and Political Rights, 1966, art. 9; European Convention on Human Rights 1950, art. 5; Charter of Fundamental Rights of the European Union, 2000, art. 6.
- 2 According to the Working Group on Arbitrary Detention “The criminalization of irregular migration **exceeds the legitimate interests of States** in protecting its territories and regulating irregular migration flows. [...] If there has to be administrative detention, the principle of proportionality requires it to be the last resort. [...] Detention must be **ordered or approved by a judge** and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case.” [emphasis added] (Report of the Working Group on Arbitrary Detention, A/HRC/13/30, para. 58-61).
- 3 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 L 348, 24.12.2008, art. 15.
- 4 Annex to the Commission recommendation establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks, p. 68, available [here](#).
- 5 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, art. 15(4); CJEU, judgment of 30 November 2009, C-357/09, Said Shamilovich Kadzoev, available [here](#). In *El Dridi* the CJEU (2011) stated that “**the Member States may not**, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, **provide for a custodial sentence**, such as that provided for by Article 14(5b) of Legislative Decree No 286/1998, **on the sole ground that a third-country national continues to stay illegally on the territory** of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired”, available [here](#).
- 6 Resolution adopted by the General Assembly on 19 December 2018, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, para. 29, available [here](#).
- 7 Ibid.
- 8 Ibid., paras. 7 and 23(a).
- 9 For instance, in 2017, 7,105 individuals were detained in Belgium, 46,800 in France, 25,810 in Greece, and 4,087 in Italy. Source: Global Detention Project, Country Profiles, available [here](#). While most countries do not collect data on the actual length of detention, most national legal frameworks permit detention up to 12 or 18 months. Source: Evaluation on the application of the Return Directive (2008/115/EC) Final Report European Commission – DG Home Affairs 22 October 2013, pp. 44-46, available [here](#).
- 10 M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason and C. Katona Email author View ORCID ID profile, 2018, “The impact of immigration detention on mental health: a systematic review” in *BMC Psychiatry*, available [here](#).
- 11 A. Edwards, 2011, “Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants”, pp. 81-85, available [here](#); International Detention Coalition, 2015, “Reframing immigration detention in response to irregular migration. Does Detention Deter?”, available [here](#).
- 12 Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani, 2014, “Rapporto sui Centri di Identificazione ed Espulsione in Italia”, available [here](#).
- 13 <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2016/list-of-tables#detention>
- 14 “[I]n 2017, Spain (60 days maximum detention period) had a return rate of 37.2 %, 15 and France (45 days, although a change was introduced in 2018), of 15 %. Among Member States with maximum periods of detention matching the maximum permitted by the Directive (6 months plus 12 months), for example, the Czech Republic had a return rate of 11.2 %, Belgium of 18.2 %, Greece of 39.5 %, and Germany of 46.3 %.”. See EU Parliament, 2019, “Recasting the Return Directive”, available [here](#).
- 15 International Detention Coalition, 2015, “Reframing immigration detention in response to irregular migration. Does Detention Deter?”, available [here](#).
- 16 International Detention Coalition, 2015, “There are alternatives. A handbook for preventing unnecessary immigration detention (revised edition), pp. 11-12, available [here](#).
- 17 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
- 18 Australian Human Rights Commission, “The forgotten children: National Inquiry into Children in Immigration Detention”, 2014, available [here](#).
- 19 A. Lorek, K. Ehntholt et al, ‘The mental and physical health difficulties of children held within a British immigration detention center: A pilot study’, 2009.
- 20 See ECtHR, ‘A.B. and others v France’, Application no. 11593/12, 2016, available [here](#).
- 21 Jesuit Refugee Service- Europe, 2011, “Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union”, available [here](#).
- 22 P. De Bruycker, A. Bloomfield, E. Tsourdi, J. Pétin, 2015, “Alternatives to Immigration and Asylum Detention in the EU”, available [here](#).
- 23 International Detention Coalition, 2015, “There are alternatives. A handbook for preventing unnecessary immigration detention (revised edition), p. 10, available [here](#).
- 24 A. Edwards, 2011, “Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants”, pp. 81-85, available [here](#); International Detention Coalition, 2015, “Reframing immigration detention in response to irregular migration. Does Detention Deter?”, available [here](#).
- 25 EPIM, 2018, “Alternatives to Detention: from theory to practice. Evaluation of three engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland”, available [here](#).
- 26 Ibid.
- 27 European ATD Network, 2018, “NGO info sheet: alternatives to detention as a strategy for reducing immigration detention in Europe”, available [here](#).

DECEMBER 2019

This publication was made possible with kind support from:



This publication has received financial support from the European Union Programme for Employment and Social Innovation “EaSI” (2014-2020). For further information please consult: <http://ec.europa.eu/social/eaasi>



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