



ASK THE EXPERT
POLICY BRIEF

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Towards alternatives to detention

MIGRATION





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The **Ask the Expert Policy Briefs** are **highly informative tools** proposed in the framework of the ReSOMA project. They tap into the **most recent academic research** on the 9 topics covered by ReSOMA and map it out in a way that is **accessible to a non-academic audience**. By doing so, the briefs introduce the **policy-relevant research** conducted by researchers with different approaches and perspectives on the same topic.

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Ask the Expert Policy Brief

Towards alternatives to detention

By Magdalena Lesińska

The excessive use of detention in the immigration framework has been widely criticized in recent years. UNHCR in the [Global Strategy](#) (2014, p.5) concludes it straightforward: “putting people in detention has become a routine – rather than exceptional – response to the irregular entry or stay of asylum-seekers and migrants in a number of countries”. The high proportion of detained individuals released from detention, and the fact that vulnerable individuals (including minors) are regularly found in detention, indicate that the system is inefficient for the authorities and inhumane and alienating for migrants. There is a common call for less intrusive measures, which are usually referred to as alternatives to detention. Although there is a lack of legal understanding of this term, the interpretation provided by International Detention Coalition (IDC) is widely accepted. An alternative to detention is “any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country” ([IDC 2015](#), p. 12). Alternatives to detention should represent a shift from security and restrictions to a more pragmatic and proactive approach focused on case resolution. In practice, however, they are considered by state authorities as additional (not alternative) instruments for migrants' control.

The brief is a summary of the interviews and written exchanges with two key experts specialized in migration law and policy at national and EU level, and in international relations: [Prof. Arjen Leerkes](#) from the Maastricht Graduate School of Governance and Erasmus University Rotterdam and [Prof. Witold Klaus](#) – lawyer and criminologist from the Institute of Law Studies of the Polish Academy of Sciences.



What are the main legal gaps (or key controversies) in the current EU and national legal framework that could increase the resort to detention of migrants?

Both experts agree that the main problem with regard to detention as deprivation of liberty for immigration-related reasons is that it is used by authorities not as a measure of last resort (as it should be according to European law), but as a with systematic migration control measure. There are also at least two other problematic issues related to the current system of detention mentioned by the experts: the conditions of detention (highly criticized, especially in the case of Southern European countries) and the negative socio-psychological effects of separation faced by the detainees.

In the light of the low efficiency characterizing detention systems in the EU, Witold Klaus proposes reconsidering the grounds for placing third-country nationals in detention. He underlines that alternatives to detention are presented in the public debate as positive solutions for foreigners, as less restrictive and offensive mechanisms of control than detention. However, in his opinion, it is "a false perspective", because existing alternatives are used by state authorities not as alternatives but as an additional instrument of control. They are less costly option than placing migrants in a detention centre, more flexible instrument and outsourced to other institutions mechanism of surveillance. The case of Poland shows clearly that after introducing alternatives to detention, there was a steady increase in the number of migrants being under the

government control (these being already in detention centres were joined by foreigners encompassed by the alternative forms of control). He describes detention as a form of institutional violence whose main purpose is to increase the number and speed of successful expulsions by facilitating the administration procedures for voluntary or forced return.

Could you indicate the most significant gaps which need to be addressed in order for alternatives to detention be more effective (what legal and/or political actions should be accomplished at the state and/or EU level to strengthen the effectiveness of alternatives to detention)?

Arjen Leerkes points out that the detention system is representative of the incapacity of the state to control migrants at its territory. Although the authorities are obliged to issue a return decision to any third-country national staying illegally in their territory (if the right to stay is not granted or denied), in practice, the number of unsuccessful return decisions due to practical or legal obstacles is significant. Detention is often used for people who are subjects to a return decision but at the same time they are difficult to expel for various reasons (known as the undeportable or non-removable returnees) as punitive instrument to convince them to choose voluntary return schemes. The academic research clearly shows that the isolation in detention center, especially for prolonged periods of time, seriously affects an individual's physical health and psychological well-being, in the same way as the stay in prison (e.g. [Puthooppambil et al. 2015](#)). He rec-



ommends only using these measures when there is a real perspective of expulsion and to consider less punitive ways to prevent migrants from absconding (including electronic tagging, a reporting obligation to the police, or less coercive reception centres). People who cannot be returned should be able to get a work permit or at least, be given accommodation. They should also be able to obtain a residence permit if return decision cannot be enforced in a reasonable period of time.

Witold Klaus underlines that detention should in principle be avoided and whenever used, only for short periods of time and after carrying out the individual assessment (consideration of the appropriateness of detention or alternatives to detention should be undertaken in each individual case). He recommends free of charge and obligatory legal advice available for persons placed in detention. In this regard, migrants should be fully informed of their rights and entitlements, as they are not often aware or have a limited understanding of migration law and procedures in the countries of arrival and limited language proficiency. Klaus further pointed out that in many countries vulnerable groups, i.e. children, victims of torture, physical or sexual violence, or traumatized persons, are not sufficiently protected. Even if the law prohibits to detain them, the ineffective assessment of their needs and conditions (or the lack of it) may still result in detention. Although EU law recommends that imprisonment of these groups should be prohibited or possible only in exceptional circumstances, the regulations are not adequately defined and, in consequence, left to the arbitrary decision of the state.

Witold Klaus pays attention to the process of expanding the institutional system of state control. In his opinion, new bodies have been involved in monitoring foreign residents on states' territory. In many countries the employers are obliged to control the legal status of the employees, and the landlords have to examine the resident permits of the tenants. Also, NGOs involved in the implementation of alternatives to detention are indirectly a part of the institutional system designed by the state to control migrants.

Lack of reliable, comprehensive data related to migration detention is a main issue in order to assess the state of play. Are there any plans to make the collection of data at the national level (in your country) more systematic?

Both experts agree that at national level the data on detention are sufficient and easily available. In the Netherlands, data on the numbers of detainees or the length of detention are regularly published by government agencies. In Poland data are provided to interested entities when they ask for them (on the base of the access to public information).

Arjen Leerkes adds that internationally, comparative data and analysis is more challenging. Eurostat publishes data on migration and asylum, but information related to detention, such as the percentage of people being detained who are actually deported, is very limited. In the Netherlands, about half of the detainees are released because of a failed expulsion procedure. Also, figures on the number of people detained then re-



leased without resolution of their case are difficult to find and are not centralized at the EU level. Moreover, the empirical studies conducted directly in migration detention centres are still very rare.

What are the major issues on this topic that need further research to contribute to the policy field?

- There is the need to collect further evidence on the effectiveness of detention and of alternative measures in the context of return policies and international protection.
- The review of current instruments addressed to the non-removable returnees is required.
- The serious debate about the revision of the current system of asylum at the EU level and designing the new global one is needed. The Global Compacts on Migration and Refugee is a step in this direction. The practice shows that the system based on the Geneva Convention is inefficient and outdated, as designed mostly for political refugees in the aftermath of the Second World War and for small numbers of applicants.
- There should be more in-depth investigation into and discussion about the use of detention in the light of widespread violations of human rights in migration detention centres and about the ineffectiveness of the detention system. The analysis of short- and long-term implications of alternatives to detention from the perspective of detained migrants would be valuable.

- The involvement of different non-state actors in the implementation of alternatives to detention needs careful examination in the context of increasing institutional control system.
- The political rhetoric securitizing migration emphasizes the need for effective migration control. In practice, it leads to the normalization of the use of detention of migrants as a central means to achieve this goal. In this context, the role of mainstream narrative on migration as a threat in influencing social perception of migrants requires thorough analysis.

To sum up, the experts agree that alternatives to detention do not prevent the use of detention as a measure of last resort. The discussion on detention has become part of a wider debate related to migration control and security, even if migrants are not necessarily a threat and should not therefore be subject of surveillance or coercive measures. There is a need to further explore less intrusive measures of control and more human rights compliant approaches when dealing with migrants.

ReSOMA

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ReSOMA - Research Social Platform on Migration and Asylum

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