

Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?

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ABSTRACT

This article aims to critically examine the development of alternatives to immigration detention policies. In the European Union, the emergence of alternatives to detention in the immigration framework is a relatively new phenomenon, strongly inspired by the criminal framework and enshrined in a movement of increased regulation of the immigration detention regime. Through promoting this notion, civil society has sought to engage in a constructive dialogue with States on the use of detention and the possibility to use less coercive and more human rights compliant approaches when dealing with migrants. In Europe, while these campaigns have yielded some positive results, one can question whether, when implemented, they have led to a humanisation of migration policies or, on the contrary, to an increase in the criminalisation of migrants. In view of the above, this article introduces briefly the different understandings of what are alternatives in the framework of immigration detention. Secondly, it analyses their current state of implementation in the EU European Union, both from the legal and political perspective. From this analysis, some opportunities and risks associated with such developments are presented. Finally, possible ways forward are proposed to support civil society's positioning on this issue.

KEYWORDS: alternatives to immigration detention, criminalisation, control, collaboration

1. INTRODUCTION

In the last decades, international organizations, such as the United Nations High Commissioner for Refugees (UNHCR),¹ and civil society organizations² in a number of countries have expressed concerns about the increasing use of immigration detention. In parallel, the United Nations (UN) has stepped up its advocacy efforts to urge States to respect international law requirements and resort to the detention of migrants only in exceptional cases. The involvement of civil society in these

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1 UNHCR, "UNHCR Concerned at Detention of Asylum-Seekers, Releases New Guidelines", *UNHCR Press Release*, 21 Sep. 2012, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=505c33199&query=detention> (last visited 7 Dec. 2015).

2 One of the main coalition of non-governmental organizations working in this area is the International Detention Coalition (IDC), a global network of over 300 civil society organizations and individuals in more than 70 countries, that advocate for, research and provide direct services to refugees, asylum-seekers, and migrants affected by immigration detention. For more information, please refer to the organization's website: <http://idcoalition.org> (last visited 7 Dec. 2015).

campaigns has increased in recent years, notably through the creation in 2006 of the International Detention Coalition (IDC), a global network of organizations advocating for, and researching and providing direct services to migrants affected by immigration detention.³ Last year, UNHCR, in collaboration with IDC, launched a 5-year *Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees*.⁴ One of the three priorities outlined in the document is to ensure that alternatives to detention (ATD) are available in law and implemented in practice.

The promotion of ATD is, therefore, at the heart of these campaigns. Yet, as they are a fairly new concept, many questions remain as to their scope. Indeed, there is currently no single legal definition of what constitutes an “alternative to detention” at international level. In fact, there are different understandings of the concept: a range of practices can be observed on the ground, depending on the context and the regional or national legal frameworks.

Beyond the conceptual discussion about the definition, I will attempt to show that, in the European context, this lack of both a clear framework and a set of guidelines can be problematic and lead to unintended consequences. Indeed, in a context in which migrants are at risk of criminalisation, civil society should critically examine the implementation of ATD. Defining clear policy objectives, beyond the implementation of ATD, and developing indicators of success are crucial to enable civil society to position itself on this issue.

In this article, I take a policy rather than legal perspective and examine this question in the European Union (EU) context only. My analysis builds on desk research and empirical legal findings from six EU Member States (Austria, Belgium, Lithuania, the Netherlands, the United Kingdom (UK), Slovenia, and Sweden)⁵ and semi-structured interviews conducted with non-governmental organizations in France, Greece, the Netherlands, Slovakia, Slovenia, and the UK.⁶

2. WHAT ARE ALTERNATIVES TO DETENTION?

Cathryn Costello and Esra Kaytaz describe the two prevailing approaches to this concept:

ATD is not a term of art, but rather refers to a range of different practices. It is used in at least two distinct senses. In the narrow sense, it refers to a practice

- 3 “Immigration detention” is understood as referring to the detention of migrants (in the broadest sense, to include all individuals entering or present in the territory of a State other than their own, be it as refugees, asylum-seekers, stateless persons, irregular migrants, or regular migrants) either upon seeking entry to a territory or pending deportation, removal, or return from a territory.
- 4 UNHCR, *Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees*, Geneva, UNHCR, 2015, available at: <http://www.unhcr.org/53aa929f6.pdf> (last visited 7 Dec. 2015).
- 5 P. De Bruycker (ed.), A. Bloomfield, E. Tsourdi & J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU – Time for Implementation*, Brussels, Odysseus Academic Network, 2015, available at: <http://odysseus-network.eu/made-real/made-real-final-report/> (last visited 7 Dec. 2015).
- 6 A survey was conducted by email in Sep. 2015 with non-governmental organizations in different EU Member States. The persons interviewed were: Pritha Belle from Justitia et Pax (Netherlands), Alexandros Konstantinou from the Greek Council for Refugees (Greece), Nadia Sebtaoui from France Terre d’asile (France), Sasa Zagorc from IPRIS (Slovenia), Peter Devinsky from the Slovak Humanitarian Council (Slovakia), and Celia Clarke from Bail for Immigration Detainees (UK).

used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State's disposal and should therefore be used. In the broader sense, ATD refers to any of a range of policies and practices that States use to manage the migration process, which fall short of detention, but typically involve some restrictions.⁷

UNHCR has adopted the following definition underlining the legal principles underpinning the concept of ATD:

Any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. Alternatives to detention must not become alternative forms of detention, nor imposed where no conditions on release or liberty are required. They should respect the principle of minimum intervention and pay close attention to the specific situation of particular vulnerable groups. The liberty and freedom of movement for asylum-seekers is always the first option.⁸

Another understanding of ATD for asylum-seekers can be advanced on the basis of EU law.⁹

The IDC, however, adopted a broad definition of ATD, followed by a number of civil society organizations: "Any law, policy or practice by which persons are not detained for reasons relating to their migration status."¹⁰ As explained in IDC's position paper, the latter definition serves the purpose of initiating a constructive dialogue with States on their migration policy in general, putting forward the advantages of moving away from detention. Indeed, through its discussions with States on ATD, it seeks to trigger a change of approach from enforcement to early engagement and collaboration with migrants. According to the organization:

The phrase "alternatives to immigration detention" ("alternatives") is not an established legal term nor a prescriptive concept, but a fundamentally different way of approaching the governance of migration. Alternatives shift the emphasis away from security and restrictions to a pragmatic and proactive approach focused on case resolution. An alternative approach respects asylum seekers, refugees and migrants as rights holders who can be empowered to comply with immigration processes without the need for restrictions or deprivations of liberty.¹¹

7 C. Costello & E. Kaytaz, *Building Empirical Research into Alternatives to Detention: Perception of Asylum Seekers and Refugees in Toronto and Geneva*, Geneva, UNHCR, Legal and Protection Policy Research Series, 2013, 10–11, available at: <http://www.unhcr.org/51c1c5cf9.html> (last visited 7 Dec. 2015).

8 UNHCR, *Options for Governments on Open Reception and Alternatives to Detention*, Geneva, UNHCR, 2015, 1, available at: <http://www.unhcr.org/5538e53d9.html> (last visited 7 Dec. 2015).

9 See De Bruycker (ed.), Bloomfield, Tsourdi & Pétin, *Alternatives to Immigration and Asylum Detention*, as well as the article of L. Tsourdi in this special issue.

10 IDC, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised Edition)*, Melbourne, IDC, 2015, 8, available at: <http://idcoalition.org/publications/there-are-alternatives-revised-edition/> (last visited 7 Dec. 2015).

11 *Ibid.*

From this discussion about definitions, one can conclude that the promotion of ATD appears to serve several purposes. First of all, ATD can be understood as the practical translation of legal principles entrenched in international law. Indeed, according to the principles of necessity and proportionality, less coercive measures should always be sought before resorting to detention. This approach aims to promote the rule of law. Secondly, ATD are discussed as practical solutions for managing migrants in the community. In this case, a more pragmatic approach is adopted, recognizing the needs and challenges met by States in managing migration flows, and proposing a different model of migration management. At the centre of the model is the need to establish ways to deal with migrants in our society that are more humane, efficient, and less costly than detention.

3. ALTERNATIVES TO DETENTION IN THE EU CONTEXT

3.1. The use of detention in the framework of more restrictive migration policies

The recent advocacy push for ATD has emerged in response to more restrictive migration policies and tougher measures against irregular migration in a number of States around the world, of which detention is only one of the symptoms. In this sense, it was built as a reactive rather than a proactive advocacy campaign.

To begin with, the number of migrants detained has increased considerably in recent decades. In that respect, Europe is not an exception. Despite many differences in the EU with regard to detention conditions, numbers of people detained and length of detention, the great majority of Member States currently detain migrants. It is impossible to arrive at a precise figure, but Migreurop¹² has documented the dramatic increase in the number of detention centres in both the EU and neighbouring countries, and reported the existence of 37,000 places in detention centres for migrants in 2012.¹³ These findings are supported by research showing that, for example, the number of people in immigration detention in the UK¹⁴ rose from 250 people in 1993, to 2,260 in 2003¹⁵ and 28,909 in 2012,¹⁶ and in France from 28,220 in 2003 to 51,385 in 2013.¹⁷ As outlined by UNHCR's Global Strategy: "Putting

12 Migreurop, *Mapping of Migrant Camps*, Migreurop, 2014, available at: <http://en.closethecamps.org/2014/03/03/europe-of-camps-deploys-its-web/> (last visited 7 Dec. 2015).

13 Migreurop, *Les principaux lieux de détention*, Migreurop, undated, available at: http://www.migreurop.org/IMG/pdf/Carte_Atlas_Migreurop_19122012_Version_francaise_version_web.pdf (last visited 7 Dec. 2015). This figure only reflects the detention capacity – many centres being either overcrowded or underused. It does not take into account other places where migrants can be deprived of their liberty such as police stations.

14 Official figures do not include migrants detained in prison under Immigration Act powers. A snapshot shows that 1,214 immigration detainees were in prisons on 31 December 2013: House of Commons, *Written Answers to Questions*, Hansard 9 Apr. 2014, c249W.

15 L. Weber & B. Bowling, "Valiant Beggars and Global Vagabonds: Select, Eject, Immobilize", *Theoretical Criminology*, 12, 2008, 355–375.

16 A. Cooke, *Immigration Detention & the Rule of Law, National Report: UK*, London, Bingham Centre for the Rule of Law, 2013, 6, available at: http://www.biicl.org/files/6568_uk_-_final_bc_edit.pdf (last visited 7 Dec. 2015).

17 M.L. Basilien-Gainche, O. Doukouré & F. Tercero, *Immigration Detention & the Rule of Law, National Report: France*, London, Bingham Centre for the Rule of Law, 2013, 4, available at: http://www.biicl.org/files/6843_france_-_final_bc_edit.pdf (last visited 7 Dec. 2015).

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.”¹⁸

In addition to the number of people detained, non-governmental organizations and international organizations documented widespread violations of human rights in immigration detention centres. Member States such as Greece, Malta, Belgium, and France have been repeatedly condemned by the European Court of Human Rights (ECtHR) on the basis of inhuman and degrading treatment in detention (Article 3 of the European Convention on Human Rights (ECHR))¹⁹ and arbitrariness of detention decisions (Article 5 ECHR).²⁰

A mix of factors can explain such developments, the most prominent one being the criminalisation of migration.²¹ Indeed, although immigration detention should remain an administrative and non-punitive measure, thereby distinct from criminal detention, recent research has shown that the reality on the ground is more complex.

First, many testimonies show that detained migrants and asylum-seekers feel that they are punished for a crime that they have not committed. A recent study in Swedish immigration detention centres indicates that detainees consider detention to be imprisonment and that there are striking similarities between experiences of imprisonment among criminal prisoners and the experience of administrative detention among detainees.²²

Secondly, there is a clear conflation between criminal and administrative law, a phenomenon that has been termed “cimmigration” by some academics.²³ In recent years, immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement, while rejecting the procedural ingredients of criminal adjudication.²⁴ A piece of recent legal analysis has suggested that current EU law allows pre-removal detention to be an instrument of coercion

18 UNHCR, *Beyond Detention*, 5.

19 ECHR, ETS No. 005, 4 Nov. 1950 (entry into force: 3 Sep. 1953). See, for example, ECtHR, *Tatishvili v. Greece* (Judgment) (2014) Application No. 26452/11; ECtHR, *F.H. v. Greece* (Judgment) (2014) Application No. 78456/11; ECtHR, *Aden Ahmed v. Malta* (Judgment) (2013) Application No. 55352/12; ECtHR, *Popov v. France* (Judgment) (2012) Application No. 39474/07; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Judgment) (2006) Application No. 13178/03; ECtHR, *Muskhadzhiyeva and Others v. Belgium* (Judgment) (2010) Application No. 41442/07.

20 See, for example, ECtHR, *Suso Musa v. Malta* (Judgment) (2013) Application No. 22414/93; ECtHR, *Ahmade v. Greece* (Judgment) (2012) Application No. 50520/09; ECtHR, *Amuur v. France* (Judgment) (1996) Application No. 19776/92; ECtHR, *Riad and Idiab v. Belgium* (Judgment) (2008) Applications Nos. 29787/03 and 29810/03.

21 One can find an extensive review of literature on this topic in the following article: J. Parkin, *The Criminalisation of Migration in Europe – A State of the Art of Academic Literature and Research*, Brussels, Centre for European Policy Studies, Paper in Liberty and Security in Europe No. 61, Oct. 2013, available at: <https://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf> (last visited 7 Dec. 2015).

22 S.J. Puthooppambil, B.M. Ahlberg & M. Bjerneld, “A Prison with Extra Flavours: Experiences of Immigrants in Swedish Immigration Detention Centres”, *International Journal of Migration, Health and Social Care*, 11(2), 2015, 73–85.

23 J. Stumpf, “The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power”, *American University Law Review*, 56, 2006, 367–418.

24 S.H. Legomsky, “The New Path of Immigration: Asymmetric Incorporation of Criminal Justice Norms”, *Washington & Lee Legal Review*, 64(2), 2007, 469.

designed to force people to cooperate for the purpose of their own removal, thereby becoming a punitive tool:

Formally, preventive detention is allowed not only in order to prevent absconding. Arguably, both the European and Swiss legislation fail to preclude that authorities rely on the penal function of deterrence in order to subject non-citizens to administrative orders and to enforce removals. [...] In this perspective, pre-removal detention should not be understood merely as an instrument of immigration control, but rather as a wider instrument of control of “undesirable foreigners”. The use of deprivation of liberty with the specific purpose of deterrence in order to control immigration but also, perhaps in a lesser extent, to control crimes, unveils the penal nature of immigration detention.²⁵

In line with what is described above, several European scholars have underlined that, in practice, immigration detention could serve a range of political purposes that go far beyond those explicitly mentioned in the law. In an article published in 2010, Arjen Leerkes and Dennis Broeders explored the “informal” reasons that could explain the increased number of migrants in an irregular situation being subject to detention in the Netherlands.²⁶ According to their research, the “formal” objective of this type of detention – i.e. facilitating expulsion – was largely not being met: while the number of expulsions was going down, there had been a significant rise in the capacity and use of immigration detention.²⁷ They therefore argued that pre-expulsion detention in the Netherlands serves three informal functions in addition to its formal function as an instrument of expulsion: deterring illegal residence, controlling pauperism, and managing popular anxiety by symbolically asserting state control.²⁸

Although detention policies and their development should always be examined in their particular context, this analysis could be applied to other EU countries. Indeed, the deterrence and security arguments are regularly asserted in public discourse as valid reasons to detain, although they are not legally justifiable under international law.

Those supporting the argument of deterrence emphasise that harsh migration policies, of which detention is one of the strongest symbols, will potentially discourage the migrant from violating the laws of country (for example, by remaining on the territory without documentation) but will also give a strong signal to those wanting to migrate to the country.²⁹ The deterrence principle is central in criminal law as it relies on the idea that punishment and the threat of punishment inhibits crime.

25 I. Majcher & C. de Senarclens, “Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe”, *AmeriQuests*, 11(2), 2014, 3–4.

26 A. Leerkes & D. Broeders, “A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention”, *British Journal on Criminology*, 50, 2010, 830–850.

27 *Ibid.*

28 *Ibid.*

29 R. Samson, *Reframing Immigration Detention in Response to Irregular Migration: Does Detention Deter?*, Melbourne, IDC, Briefing Paper No. 1, 2015, available at: <http://idcoalition.org/detentiondatabase/does-detention-deter/> (last visited 7 Dec. 2015).

Criminal behaviour is, therefore, considered to be the result of a reasoned decision in which the potential offender weighs up the costs and benefits of a crime and chooses an action based on this assessment.³⁰ Yet, applying the same approach to migrants disregards the fact that they have very different motivations when making the choice to cross a border without documentation. A number of studies have found that immigration detention did not deter migrants from coming, notably because they saw it as “an inevitable part of their journey”³¹ or because they had a limited understanding of migration policies in the countries of transit or arrival. This is even more the case for refugees seeking safety and protection who often do not have any choice other than to leave or to irregularly cross borders.

Finally, irregular migration is increasingly being associated with security issues.³² In this framework, detention policies are being presented as a legitimate response to protecting national interests and national security. As analysed by Grant Mitchell and Robyn Sampson, in the context of globalisation “[d]etention has increasingly become a preferred means for States to maintain and assert their territorial authority and legitimacy, and respond to mounting political pressures regarding border security.”³³ Making the choice to detain migrants is not exclusively a populist political stance, but the rise of extreme right-wing parties in most European countries has certainly contributed to its expansion. More recently, certain European governments, such as Hungary and Poland, have used the risk of a terrorist infiltration through irregular migration to justify harsh migration policies – which include detention of asylum-seekers.³⁴ This link between migration and terrorism will probably increase such tendencies in the coming years.³⁵

3.2. The practical implementation of alternatives to detention in the EU context

3.2.1. A positive legal evolution

In this rather gloomy context, the push for ATD has, however, yielded some positive results. Although it is still early to evaluate the overall gains of such campaigns, a few points need to be underlined.

- 30 R. Paternoster, “How Much Do We Really Know about Criminal Deterrence”, *Journal of Criminal Law and Criminology*, 100(3), 2010, 766.
- 31 IDC & La Trobe Refugee Research Centre, *There Are Alternatives, a Handbook for Preventing Unnecessary Detention*, Melbourne, IDC, 2011, 11, available at: <http://idcoalition.org/cap/handbook/> (last visited 7 Dec. 2015); UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*, UN Doc. A/HRC/20/24, 2 Apr. 2012, point 8.
- 32 See A. Hammerstadt, “The Securitization of Forced Migration”, in E. Fiddian-Qasmiyev, G. Loescher, K. Lang & N. Sigona (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, Oxford University Press, 2013, 267–275.
- 33 R. Sampson & G. Mitchell, “Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales”, *Journal on Migration and Human Security*, 1(3), 2013, 97.
- 34 G. Szakacs, “Illegal Migration Clearly Linked with Terror Threat: Hungary PM”, *Reuters*, 25 Jul. 2015, available at: <http://www.reuters.com/article/2015/07/25/us-europe-migrants-hungary-idUSKCN0PZ08F20150725> (last visited 7 Dec. 2015).
- 35 For such tendencies in the US, see, for example, P. Matthew, “Resolution 1373-A Call to Pre-empt Asylum Seekers (or ‘Osama, the Asylum Seeker’)”, in J. McAdam (ed.), *Forced Migration, Human Rights and Security*, Oxford, Hart Publishing, 2008, 19–61.

First, the legislative framework is evolving on this topic. At EU level, the obligation to examine “less coercive measures” was introduced in the Returns Directive in 2008.³⁶ Moreover, the recast Reception Conditions Directive, which was adopted in June 2013, explicitly requires Member States to establish national rules concerning alternative schemes, and lists examples of ATD.³⁷ These instruments have the merit of regulating the use of detention and introducing clearly the obligation to use ATD. Consequently, new ATD schemes are being introduced and tested in several European countries (France, Hungary, Slovenia) with varying degrees of success.

One can note that this positive evolution is also reflected in some of the ECtHR jurisprudence. The ECtHR had in the past examined this issue mainly in relation to the arbitrary nature of a detention measure or to the inhuman and degrading nature of detention conditions. This is particularly the case for the detention of children, against which the Court has clearly taken a stance.³⁸ Certain rulings from the ECtHR have already led, in some cases, to substantial policy changes on detention.³⁹ Indeed, the Belgian Government’s decision to set up “open housing units” as an ATD for families in 2008 was partially motivated by several rulings against its policy of detaining children. In recent rulings, this reasoning has been extended to other groups, such as in the *Yoh-Ekale Mwanje* case against Belgium, where the “less severe measures” test had been applied in the case of the detention of an adult.⁴⁰ As both the ECtHR and the EU Court of Justice are increasingly considering the obligation to consider less coercive or severe measures before resorting to detention, more jurisprudence is to be expected in the coming years.

Secondly, the evolution towards the increased use of ATD has benefited certain vulnerable categories of migrants, particularly families and children. For this group, a number of positive developments can be noted. In addition to Belgium, the UK and Austria also have implemented schemes that avoid the detention of families, including in the return procedure. Although there are mixed results in the way they have been implemented, entire groups that were previously being detained are now being submitted to less coercive measures, representing invaluable progress.

3.2.2. *A contrasted practical implementation*

A few other elements on the current practical implementation of ATD in EU Member States, drawn from the Made Real research,⁴¹ show, however, that the

36 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 348/98, 24 Dec. 2008, Recital 16.

37 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 Jun. 2013, Art. 2(4).

38 See the contribution of J. Pétin in this special issue.

39 See, for example, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*; ECtHR, *Muskhadzhiyeva and Others v. Belgium*.

40 ECtHR, *Yoh-Ekale Mwanje v. Belgium* (Judgment) (2011) Application No. 10486/10; C. Costello, “Immigration Detention: The Grounds beneath our Feet”, *Current Legal Problems*, 2015, advanced access.

41 De Bruycker (ed.), Bloomfield, Tsourdi & Pétin, *Alternatives to Immigration and Asylum Detention in the EU*.

situation differs considerably from one Member State to another and that this policy is still being consolidated.

In line with the lack of clear definition mentioned above, alternative forms of detention were sometimes presented as ATD. In Slovenia, for example, national authorities considered that the practice of depriving asylum-seekers of their liberty in a reception centre constituted an ATD. The authorities also considered that tolerated stay – a temporary status that allows an alien who cannot be deported to remain in the country – was an ATD. Some stakeholders also presented voluntary return as an ATD while, in fact, according to the Returns Directive, detention cannot be imposed during the voluntary departure period.⁴² If indeed the return remains “voluntary”, there should not be an automatic link made with detention.

While Austria, Belgium, Lithuania, the Netherlands, UK, Slovenia, and Sweden have included ATD in their national law they are, except for the UK and Belgium, poorly regulated with regard to how to apply the restrictions contained in the ATD. This has led to major differences in application and lack of transparency in the decision-making process. In fact, most of the stakeholders interviewed expressed concerns with regard to the initial quality of decision-making on both detention and ATD, and reported the use of stereotypical and non-substantiated decisions, especially when justifying the risk of absconding. The study also revealed that practical considerations influenced decisions on whether to implement an alternative scheme or not. This included the perceived administrative convenience for processing the claim or the lack of alternative accommodation from an individual’s own resources or through a guarantor. The consideration and imposition of ATD in initial decision-making currently depends largely on the strength of judicial control of such procedures at national level. In some Member States, such as Austria and Lithuania, which already have a robust national judicial system, national courts play a crucial role in applying the proportionality and necessity principles in relation to detention and ATD. In Austria, for example, automatic legal aid for applicants and a strong judicial oversight have resulted in the overturn of about 30 per cent of initial detention decisions taken by the police and, in some cases, in the imposition of an ATD.

4. RISKS AND OPPORTUNITIES CONTAINED IN THE PROMOTION OF ALTERNATIVES TO DETENTION

4.1. Towards a more humane policy

It is important to underline that ATD, however restrictive, are always less harmful than detention. A number of medical and sociological studies have illustrated that experiencing detention seriously affects individuals’ physical health and psychological well-being in both the short- and long-term, especially when detention conditions are substandard (overcrowding, lack of basic services etc.).⁴³ The psychological impact of detention on migrants can be particularly strong due to previous traumatic

42 Returns Directive, Art. 8.

43 See, for example, Z. Steel, D. Silove, R. Brooks, S. Momartin, B. Alzuhairi & I. Susljik, “The Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees”, *British Journal of Psychiatry*, 58, 2008, 188; Physicians for Human Rights (PHR) & The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*,

experiences both in the country of origin or during their journeys. Furthermore, migrants are particularly vulnerable due to the lack of information they have at hand, a poor understanding of their environment, and uncertainty about their future (and often about the duration of their detention).

Furthermore, the promotion of ATD constitutes an important opportunity to promote a more humane and efficient approach to migrants, taking into account their specificities. Research has shown that detention has a negative impact on the interaction between the individual and state authorities. A link between the experience of detention and the post-detention period is not made for migrants, as it is for those detained under the criminal framework. Even for those who are removed from the country, a detention measure is rarely combined with support to build a life project and enable reintegration in their country of origin. As stressed by Mary Bosworth:

In an inverse of the usual justifications of penal confinement, a period of detention neither changes the detainees nor prepares them for eventual return. Rather, detention merely confirms their identity. They are always, already non-citizens, excludable and deportable.⁴⁴

Authorities too often consider the experience of detention as an unavoidable part of the administrative procedure. This is mostly because, even on arrival, they are considered as potential returnees who should not be staying on the territory, and who are waiting to have their cases adjudicated. For migrants detained in pre-removal centres, they are in the process of being sent back to their country of origin. However, the reality on the ground is different. Many migrants held in detention end up staying on the territory, with statuses ranging from a residence permit for protection grounds to the “tolerated stay” status – or else they remain without a status. This is particularly the case of migrants in return procedures who are “unreturnable” and who are often repeatedly detained without any prospect of their case being resolved.⁴⁵ In the UK, for example, it is estimated that almost 40 per cent of detainees who spent more than 3 months in detention were eventually released into the community with their cases still outstanding.⁴⁶

For those individuals who finally do stay on the territory, the experience of detention will impact both their capacity and willingness to collaborate with authorities and their integration prospects.⁴⁷ Indeed, being deprived of freedom for reasons that

Boston/New York, PHR & The Bellevue/NYU Program for Survivors of Torture, Jun. 2003, available at: https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf (last visited 7 Dec. 2015).

- 44 M. Bosworth, “Subjectivity and Identity in Detention: Punishment and Society in a Global Age”, *Theoretical Criminology*, 16(2), 2012, 123, 134.
- 45 M. Vanderbruggen, J. Phelps, N. Sebtaoui, A. Kovats & K. Pollet, *Point of No Return, the Futile Detention of Unreturnable Migrants*, Brussels, Flemish Refugee Action, 2014, available at: http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf (last visited 7 Dec. 2015).
- 46 K. Marsh, M. Venkatachalam & K. Samenta, *An Economic Analysis of Alternatives to Long Term Detention*, Final Report, Matrix Evidence, Sep. 2012, available at: <http://detentionaction.org.uk/wordpress/wp-content/uploads/2011/10/Matrix-Detention-Action-Economic-Analysis-0912.pdf> (last visited 7 Dec. 2015).
- 47 A. Bathily, *Immigration Detention and its Impact on Integration: A European Approach*, Knowledge for INtegration Governance project, Fondazione ISMU, 2014, available at: http://king.ismu.org/wp-content/uploads/Bathily_DeskResearch.pdf (last visited 7 Dec. 2015).

might not be understood creates a strong feeling of injustice and alienation. This feeling of isolation can impact the detainee after her release, in how she perceives both herself and the “host” society. This is particularly the case for migrants when detained at arrival as they may lose their trust in a system that they initially believed in. The feeling of being treated unfairly when arriving in Europe, contrasts with the largely shared perception of Europe as a land of freedom and democracy. As underlined by Cathryn Costello and Esra Kaytaz in their research,⁴⁸ asylum-seekers are particularly prone to collaborating with the authorities at their arrival because:

First, the refugee predicament and fear of return; secondly, an existing inclination towards law-abidingness; thirdly the desire to avoid the hardship and vulnerability of irregular residence and lastly trust and perceptions of fairness of the host state, in particular its RSD [refugee status determination] process.⁴⁹

Ultimately, the use of detention will, therefore, affect the efficiency of the administrative processes, such as integration or RSD processes put in place by the State. A confrontational approach – such as the use of detention – should therefore be replaced by a collaborative approach based on the engagement of the individual.⁵⁰ One of the key elements of success suggested by recent research by IDC and UNHCR⁵¹ is that compliance with administrative procedures is closely linked to the amount of trust built between the individual and the administration. It is also linked to the individual’s sense of control and his/her ability to make, or contribute to decisions affecting her.⁵²

These recommendations apply to detention primarily but can also prove relevant for those ATD that limit themselves to “restrictions”. Indeed, if the State wants to obtain compliance from migrants, then it should not rely on enforcement such as detention and enforcement-driven ATD. If a range of approaches and strategies to support individuals to meet their administrative obligations does not accompany such schemes, ATD will not constitute an efficient measure. On the contrary, they could set the individual to fail, exposing her potentially to detention as a sanction for non-compliance. Furthermore, those who are the object of ATD should have access to services and support – such as material support, legal aid, and healthcare, even if they are in the community. If not, they risk destitution and exclusion. Access to certain rights, such as legal aid, may be particularly challenging for migrants in the community. In France, for example, for families under the *assignation à résidence* scheme free legal or administrative support is not available, unlike for migrants in detention.⁵³ The discussion about ATD is the occasion to put such points across to the

48 Costello & Kaytaz, *Building Empirical Research into Alternatives to Detention*.

49 C. Costello & E. Kaytaz, “Predisposed to Cooperate”, *Forced Migration Review*, 44, 2013, 44–45.

50 J. Phelps, “Alternatives to Detention: From Enforcement to Engagement”, *Forced Migration Review*, 44, 2013, 46–47.

51 IDC, *There Are Alternatives*; Costello & Kaytaz, *Building Empirical Research into Alternatives to Detention*.

52 UNHCR, *Second Global Roundtable on Reception and Alternatives to Detention – Summary of Deliberations*, Toronto, UNHCR, 20–22 Apr. 2015, available at: <http://www.unhcr.org/55df05769.pdf> (last visited 7 Dec. 2015).

53 Email exchange with Nadia Sebatooui, responsible for the Detention Program of France Terre d’Asile, 30 Sep. 2015.

authorities and provide important indications on how to avoid pitfalls and successfully apply ATD.

4.2. Alternatives to detention and the potential further criminalisation of migrants

The risks in the implementation of such schemes, therefore, stem from the different perspectives on what ATD are, and what they aim to achieve. For civil society, problems will arise if the State does not shift to a collaborative approach with migrants from the start, or if it seeks to achieve other objectives through detention than those specified in the law.

This is particularly a risk in Europe, as authorities have interpreted ATD narrowly to mean schemes involving a certain number of restrictions or conditions. In fact, most of the existing alternatives to immigration detention in Europe have been largely inspired and transposed from the criminal framework;⁵⁴ the only clear legal and practical framework that already existed. The schemes mentioned in the Reception Conditions Directive – reporting, bail, designated residence – have long been used in pretrial criminal detention.⁵⁵ Very few schemes – and most notably the family units in Belgium – were specifically developed and designed for migrants. This direct transfer of schemes creates a number of problems.

4.2.1. Alternatives to detention and the perception of crime

First, applying measures used in the criminal framework that are highly symbolic can lead to migrants being perceived and treated as criminals by the society in which they live. This is particularly the case for electronic tagging, a measure used extensively in the criminal context but seldom used in immigration control. Many consider it as an alternative form of detention, because of the lower level of coerciveness it entails. Interestingly, in the pretrial criminal framework in France and Belgium, it is an adjusted sentence that enables the execution of a given sentence outside prison.⁵⁶ It is not considered an ATD. Beyond the legal characterisation of this measure, it has been criticised widely for its stigmatising effect and the psychological distress it creates.

In the UK, which is the only EU country that uses electronic tagging on migrants, many testimonials show how an electronic bracelet can be a source of stress and social exclusion. Bail for Immigration Detainees (BID) found that the tagging of

54 As listed by UNODC, alternatives to incarceration in this framework are the following: to appear in court on a specified day; not to engage in particular conduct, leave or enter specified places or districts, or meet specified persons; to remain at a specific address; to report on a daily or periodic basis to a court, the police or other authority; to surrender passports or other identification papers; to accept supervision by an agency appointed by the court; to submit to electronic monitoring; or to provide or secure financial or other forms of security as to attendance at trial or conduct pending trial (bail). UNODC, *Custodial and Non-Custodial Measures: Alternatives to Incarceration*, Vienna, UNODC, 2006, available at: https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf (last visited 7 Dec. 2015).

55 Recast Reception Conditions Directive, Art. 2(4).

56 Ministère de la Justice (France), *Le placement sous surveillance électronique*, 13 Feb. 2013, available at: <http://www.justice.gouv.fr/prison-et-reinsertion-10036/la-vie-hors-detention-10040/le-placement-sous-surveillance-electronique-11997.html> (last visited 7 Dec. 2015).

parents “had a detrimental effect on their children” because the parents could not “attend school sports games or birthday parties with their children, and could not take their children outside the vicinity of their home because” they had to stay nearby so as “to be in the house at certain hours. [...] Parents also reported that the stigma and restrictions of electronic tagging had contributed to their social isolation [and] that they suffered from stress and anxiety as a result of being tagged”.⁵⁷ While electronic tagging enables the person to avoid detention, it was found to be particularly damaging at both the individual and collective level.

Other alternative schemes could potentially create psychological distress, but little research and evaluation has been conducted on this topic. In the UK, the Refugee and Migrants’ Forum published a research in 2007 on the implementation of reporting obligations in Manchester and found that “some people who were reporting monthly felt reporting was just a part of the law and no problem”.⁵⁸ However, the research also revealed that: “[m]any people recounted experiences of depression, anxiety and fear as a result of going to report at Dallas Court particularly because of the possibility of being detained”.⁵⁹

This example shows that ATD need to be examined closely. Both the level of coerciveness contained in an alternative scheme and the psychological impact it has on the person, can vary considerably depending on the profile of the person and how the measure is applied. For the reporting scheme, for example, important factors include: the environment (if reporting takes place at administrative facilities, or at a police station); the frequency (daily reporting poses greater challenges than weekly or monthly); and how the authorities impose sanctions for non-compliance. For designated residence, the creation of a non-carceral environment and the provision of services by external actors are essential to create an atmosphere conducive to dialogue. In this respect, building an open centre next to a detention centre, with the threat of being transferred there at any moment, is counterproductive.

4.2.2. *The possible extension of control*

ATD have been presented as addressing key human rights concerns voiced against detention, while simultaneously preserving States’ interests in ensuring that migrants can be “traced”, thereby acknowledging one of their core objectives. Although the criminal and administrative frameworks are distinct, in both contexts the function of state control over those on its territory during a given procedure remains the only “authorised” purpose of both pretrial and immigration detention, as well as ATD. The grounds for immigration detention in EU law revolve mainly around the right of the State to temporarily maintain control over the migrant to facilitate or enable an administrative procedure (identification and screening, or return) and if there is a risk of absconding. In criminal law, the justification for submitting people to

57 S. Campbell, M. Baqueriza & J. Ingram, *Last Resort or First Resort: Immigration Detention of Children in the UK*, BID and The Children’s Society, 2011, 89–90, available at: http://www.biduk.org/sites/default/files/LastResortFirstResort_FULL%20REPORT%20WEB%20VERSION.pdf (last visited 7 Dec. 2015).

58 Refugee and Migrants’ Forum, *Report on the Refugee & Migrant’s Forum Consultation into People’s Experiences of the UK Immigration Service at Dallas Court Reporting Centre and Short-Term Holding Facility October 2006 – January 2007*, 2007.

59 *Ibid.*

alternatives to incarceration before trial is also to maintain control over a person, and detention can only be justified if there is doubt that the defendant will appear at trial or that the defendant may cause harm to the community.

In view of how ATD were introduced and are currently applied in the migration field, one could argue that these schemes have often been introduced hastily, without necessarily thinking about the specificities of the migrant population. It is, therefore, important to consider whether these new measures constitute an unnecessary burden for the migrant, who may be traceable already. For example, specific reporting sessions to the police may not be justified if an asylum-seeker has regular contact with the administration through other procedures (e.g. to renew documentation, conduct the asylum interview or receive financial allowances). This is particularly the case when the asylum-seeker or returnee resides in a State-managed reception centre. In this case, the State probably would not need to complement this arrangement with a reporting system, since the person is traceable from the outset. The pertinence of these additional measures of control should, therefore, always be critically considered, knowing that a wide array of means is already available to the state apparatus to trace the movements and activities of people on their territory.

More importantly, it would be necessary to evaluate whether the development of ATD leads to the expansion of control measures targeting migrants. This phenomenon is well known in the criminal context where it has been dubbed the “net widening” problem.⁶⁰ It refers to the risk of new criminal reforms, notably through the introduction of alternatives to incarceration, expanding social control over individuals. A report published in 2012 underlines that this has already taken place in the US as:

[M]any ATD programs are used on individuals who have been released from detention or who were never detained in the first place, rather than individuals who would otherwise be detained in a detention facility and for whom the government’s goals of ensuring compliance with removal orders and court appearances could be accomplished with alternative measures.⁶¹

Most civil society stakeholders interviewed for this article identified this issue as a risk in their country. In France, for example, France Terre d’Asile mentioned the possibility that, following the newly introduced designated residence scheme (*assignation à résidence*), more foreigners might have restrictions on their freedom imposed because of the weaker oversight by civil society and the judiciary.⁶² This new provision in French law also applies to certain groups who are not liable for detention (such as asylum-seekers under a Dublin readmission procedure).⁶³

60 This term was first used by S. Cohen in her book: *Visions of Social Control*, London, Polity Press, 1985, 41–42.

61 Rutgers School of Law Newark Immigrants Rights Clinic, *Free but Not Freed: A Report Examining the Current Use of Alternatives to Immigration Detention*, Rutgers School of Law Newark Immigrants Rights Clinic & American Friends Service Committee, Jul. 2012, available at: <http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf> (last visited 7 Dec. 2015).

62 Email exchange with Nadia Sebatooui, responsible for the Detention Programme of France Terre d’Asile, 30 Sep. 2015.

63 *Ibid.*

Finally, civil society advocates have underlined that the necessity to control does not have to be automatically associated with an enforcement approach and could be tackled differently.⁶⁴ However, when detention is initially used as a means to punish, deter, and exclude migrants from society, it is difficult to find avenues to initiate a rational dialogue on ATD. On this point, it has been suggested that, in this framework, one of the reasons why ATD are seldom implemented is that they do not respond to the disciplinary function of immigration detention.⁶⁵ In view of the negative experiences described by those migrants submitted to detention, or highly coercive alternative schemes, it appears that some ATD could have a punitive objective too.

The way ATD are developed at national level will, therefore, be revealing of the general approach to migrants and the aims pursued (hidden or apparent). If the aim pursued through immigration detention is punitive and serves a populist political aim, only the most restrictive ATD will be applied, or no alternatives at all.

5. POSSIBLE WAYS FORWARD

5.1. Promote a strict legal control over detention and alternatives to detention

Adopting a principled approach will not only contribute to ensuring that detention remains an exceptional measure, but also that restrictions labelled as “alternatives to detention” are only applied in a regulated framework. In Europe, many countries do not detain asylum-seekers and often place them in open reception centres, in line with the legal provisions contained in EU and international law. Presenting open reception arrangements for asylum-seekers or any policy other than detention as ATD could trivialise the detention of migrants. As Cathryn Costello reminded us emphatically, depriving someone of his liberty should require the strongest possible justification, as it is inherently harmful:

We have reams of evidence of the particular psychological harms of immigration detention. But in some ways, that discussion of the particular harms shows how we have lost our moral compass here – we should not need evidence of particular harm or trauma to understand that depriving someone of her liberty is harmful *per se*.⁶⁶

In such political context, it is the role of civil society to underline that migrants should not be detained for the sole reason that they do not hold adequate documentation. This means that the standards regulating preventive immigration detention, or its restrictions, should be even stricter “than those governing pre-trial or other forms of preventive criminal detention, as immigration violations ought not to be construed as criminal offenses”.⁶⁷

64 Phelps, “Alternatives to Detention”.

65 C. De Senarclens, “State Reluctance to Use Alternatives to Detention”, *Forced Migration Review*, 44, Sep. 2013, 60–62.

66 Costello, “Immigration Detention”, 5.

67 *Ibid.*, 29.

To avoid the extension of control measures over migrants, civil society should therefore advocate that ATD should only be considered in the framework of detention. Neither detention, nor alternatives to detention should be applied, if detention is not justified in the first place.⁶⁸ When restrictions are involved, the imposition of ATD should, therefore, be closely monitored and benefit from the same procedural safeguards as detention. This includes the right to an effective remedy against a decision imposing an alternative to safeguard control over the quality and legality of the initial decision-making. To support the rule of law in the application of ATD, providing migrants submitted to these measures with legal aid, and strengthening partnerships with lawyers and judges working in this field, are therefore paramount.

Finally, the development of clear guidelines and safeguards for ATD would support fair decision-making and ensure better transparency and consistency in the implementation of such schemes. This need for clearer guidelines applies also at the international level, where the criminal framework is more advanced. Indeed, the UN Tokyo Rules on “Standard Minimum Rules for Non-Custodial Measures”⁶⁹ adopted in 1990 on alternatives to imprisonment in the criminal field contain important elements on access to rights and judicial remedies. The UN General Assembly has not adopted similar guidelines regarding ATD for migrants and asylum-seekers. The promotion of such tools nationally and internationally would be an important avenue to explore.

5.2. Develop clear objectives and indicators of success

To respond to the challenges described throughout this article, civil society should set clear objectives of what it wants to achieve, in the different contexts, through the promotion of ATD. This will ensure a prompt evaluation of the success or failure of their advocacy strategy.

Currently, it appears that the aim pursued by all the organizations interviewed is to reduce or end the use of detention for migrants through promoting ATD.⁷⁰ For BID (UK), ending detention was the final objective but it noted that immigration detention had become an industry that was very difficult to dismantle, notably because of vested interests, including commercial ones.⁷¹ The majority of organizations interviewed considered that a reduction in the number of people in detention would be achieved mostly through the effective implementation of the rule of law that would, in turn, avoid unnecessary and unlawful detention. Possible actions include lobbying for the introduction of a legislative obligation to examine ATD in asylum procedures and improve access to legal representation for undocumented migrants.⁷² Other

68 See also the legal analysis on this point in the article of L. Tsourdi in this special issue.

69 *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, adopted by General Assembly Resolution 45/110, 14 Dec. 1990, available at: <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf> (last visited 7 Dec. 2015).

70 See details of stakeholders interviews, above footnote 6.

71 Interview with Celia Clarke, BID, 24 Sep. 2015. This question was not examined in this article although for certain countries, like the UK, it is a central issue. For further information, refer to the following article: M. Flynn & C. Cannon, *The Privatization of Immigration Detention: Towards a Global View*, Working Paper, Geneva, Global Detention Project, 2009, available at: http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf (last visited 7 Dec. 2015).

72 Interview with Sasa Zagorc, IPRIS, 28 Sep. 2015.

objectives mentioned include the development of a wide range of ATD and an increase in the number of voluntary instead of forced returns.⁷³

Most non-governmental organizations interviewed had not been able to define indicators to evaluate the success of such policies. The main difficulty brought up by all those interviewed was that of obtaining information on the number of people detained and submitted to ATD. These results underline the lack of transparency and the lack of clear data, a problem strikingly shared with detention itself.

When it comes to critically analysing existing schemes and developing indicators of success for policies on alternatives to incarceration, the penal field is much more advanced. In its position paper on this issue, the UN Office on Drugs and Crimes (UNODC) underlines a series of pitfalls and elements contributing to a successful implementation of such measures, which could be useful to take into account in the migration field.⁷⁴ These include the need for a human rights-based approach translated into guidelines, the need to convince the judiciary about the efficiency of such measures, and a fundamental change to the approach to crime. It also highlights that alternatives on their own will have relatively little effect on the size of the prison population. The wider use of alternatives requires a rethink of the whole approach to crime, offenders, and their place in society, changing the focus of penitentiary measures from punishment and isolation to restorative justice and reintegration. Similarly, the following questions for evaluation of successful alternatives to incarceration programmes put forward in the same document⁷⁵ can be adapted slightly to the migration field as follows:

1. Do ATD contribute to the reduction of the number of migrants detained?
2. Are ATD set up in a way that helps the person to meet its obligation?
3. Are they cost-effective?
4. What does the state want to achieve through setting up this ATD? Does this measure contribute to a better cooperation between the migrants and the State?
5. Are there legal safeguards in place protecting the human rights of the migrant under any alternative schemes?

The approach adopted by UNODC in the criminal field is relevant to the migration field. The legislative and conceptual framework, however, is fundamentally different and this should not be ignored. As developed above, alternatives to immigration detention should not increase criminalisation of migrants and the rules in place should

73 Interview with Nadia Sebtaoui, France Terre d'Asile, 30 Sep. 2015.

74 UNODC, *Custodial and Non-Custodial Measures*, 8.

75 *Ibid.*, 2. The questions formulated in the UNODC document are the following: "1. Does the system effectively contribute to a reduction of the prison population? 2. Does it enable the offence-related needs of the offender to be met? 3. Is it cost-effective? 4. Does it contribute to the reduction of crime in the community? 5. Are there legal safeguards in place protecting the human rights of the offender?"

therefore safeguard that, unlike criminals, detention should not be the default position. The following questions could therefore be added to the above list:

6. Is the international legal framework respected – i.e. are migrants detained only as a last resort and do they have only the necessary restrictions imposed on them?
7. Are alternatives only applied when there are valid grounds for detention?
8. Do these alternatives contribute to the criminalisation of migrants in our society?

6. CONCLUSION

In recent years, the development and implementation of alternatives to immigration detention have been presented as advocacy objectives in themselves by both civil society and international organizations. Indeed, the overall perception is that this would constitute an intrinsically positive evolution. However, the promotion of ATD contains certain risks that need to be taken into account from the outset.

If the implementation of ATD reduces the number of people unnecessarily detained and makes the decision-making process on detention more transparent and in conformity with international law, their use represents invaluable progress. However, if ATD are only seen as a new set of enforcement measures, without any support given to the persons concerned, and in a direct transfer of the criminal to the migration framework, they could lead to further criminalisation of migrants. Furthermore, their use could expand the number of restrictions imposed on migrants, without necessarily reducing the number of people in detention. Alternatives can serve to ensure a more humane and efficient policy or not, depending on how they are implemented and what objective is pursued by the State. They cannot be effective in isolation. In order to constitute a positive evolution and translate into the respect of migrants' human rights, they must be accompanied by the rationalisation and humanisation of the migration systems in general and the increased transparency of detention practices.

Consequently, civil society cannot limit its role to the promotion of these policies. It needs to monitor closely their implementation and contribute to ensuring access to rights and safeguarding dignity for the migrants submitted to these schemes. Through reflecting on their own objectives in this field, the different civil society organizations will be able to position themselves meaningfully both on the advocacy and operational side. In cases of direct involvement in the implementation of ATD schemes, they need to make sure that common ground can be found between their objectives and the objectives pursued by the State. To keep their independence as well as gain the trust of migrants, civil society organizations should be careful not to unwillingly become part of a control apparatus.