WHO MUST BE DETAINED? PROPORTIONALITY AS A TOOL FOR CRITIQUING IMMIGRATION DETENTION POLICY

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Migration-related detention – or the detention of non-citizens because of their status – is intimately associated with incarceration, raising questions about whether this form of detention is proportionate to the administrative aims of immigration policy. Many countries use prisons to hold irregular migrants during deportation proceedings; dedicated migrant detention facilities are frequently housed in abandoned jails; in some countries, purpose-built facilities are modelled on penitentiaries; and rights groups point to the "prison-like" qualities of detention centres to decry the perceived creeping criminalisation of immigration. This paper endeavours to use the legal principle of proportionality as a tool to critique immigration detention practices and policies. To this end, the article proposes a methodology for assessing operations at detention centres that opens the phenomenon up to empirical study and allows for comparative research of detention practices across a multiplicity of cases. It then highlights a discrete set of dimensions that can be used to measure the degree to which States' employment of detention is proportional to the limited ends established in law for this type of deprivation of liberty.

Keywords: detention, proportionality, immigration policy

1. Introduction

The burgeoning phenomenon of immigration-related detention sits uncomfortably on a fault line separating the prerogatives of sovereignty from the rights of non-citizens. States have broad discretion over who is allowed to enter and reside within their borders, but their decision to detain and deport is constrained by a number of widely accepted norms and principles. One of these is the principle of proportionality, which in the context of immigration enforcement provides that

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any decision to deprive a person of his or her liberty must be proportionate to the limited administrative aims established in law.

Proportionality first emerged as a legal principle in 18th-century Prussia to improve the protection of individual rights in the face of traditionally authoritarian legal regimes.[1] The principle has evolved significantly since that time, becoming, *inter alia*, an important tool in international human rights law. The European Court of Human Rights (ECtHR), for instance, routinely evokes proportionality to balance individual rights against public interests.[2]

With respect to immigration-related detention, questions of proportionality are typically raised in the context of individual legal cases to assess the necessity or potential arbitrariness of detention measures. For instance, in a well-known case concerning the long-term detention of a Cambodian asylum seeker in Australia, the United Nations (UN) Human Rights Committee ruled that Australia failed to provide a justification for holding the person in detention for more than four years, arguing that "remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context".[3]

This article endeavours to adopt the logic of the proportionality principle for critiquing immigration detention policies as these are manifested in the operations of facilities that are used to confine irregular migrants and asylum seekers. Although a firmly rooted legal principle, proportionality can serve as an effective tool for assessing whether various detention practices have been properly balanced to serve public interests while ensuring respect for detainees.

This article focuses particular attention on the intimate association between immigration detention regimes and criminal incarceration as well as the institutional framework of detention estates, both of which raise a number of questions about whether detention practices are proportionate to the administrative aims of immigration policy.

However, before we can begin to deploy proportionality in its role as policy assessor, it is critical to establish systematically what it is that we intend to critique. Thus, the opening sections of this article provide a detailed discussion of immigration-related detention as well as of the facilities used to carry out this practice. The article then advances a model for constructing data on detention centres that can assist the study of detention estates. It concludes by assessing a discrete list of variables within the proportionality framework.

[1] M. Cohen-Eliya & I. Poraat, "American Balancing and German Proportionality", *International Journal of Constitutional Law*, 8(2), 2010, 263–286.

[2] Cornelisse provides an extensive list of ECtHR cases in which the Court incorporated the proportionality principle in its deliberations on whether "the reasons given by authorities for the restrictive measure are relevant and sufficient." See G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Leiden, Martinus Nijhoff Publishers, 2010, 302.

[3] UN Human Rights Committee, *A. v. Australia*, UN Doc. CCPR/C/59/D/560/1993, 3 Apr. 1997, para. 9.2.

2. Defining immigration detention

Defining immigration-related detention[4] is a complicated undertaking, in part because a comparison of domestic laws reveals that States do not generally provide the exact same reasons in their immigration legislation for confining non-citizens in administrative detention. Likewise, historically, the internment of non-citizens has been justified on an array of differing grounds, including both criminal and administrative.

In his assessment of the history of the legal provisions for detaining foreign nationals in several countries [his main cases are Australia, the United States (US), France, and the United Kingdom], Wilsher identifies four categories for defining the "legal status" of immigration detainees: as (1) enemies during a state of war; (2) criminal suspects; (3) "emergency detainees" during crises that fall short of war, like during surges in irregular border crossings; or (4) "unauthorized persons" – or "outlaws" – who do not have a clear legal status under national or international law.[5]

While this approach reveals the historical antecedents to contemporary immigration detention laws and highlights the particular legal vulnerabilities migrant detainees can face, this article aims to find a more precise definition of the phenomenon that hones in on strictly immigration-related phenomenon. Thus, for instance, we can eliminate from consideration detention of foreigners that is specifically related to war, even if contemporary immigration detention laws in some countries appear to have emerged from earlier provisions for interning non-citizens during times of war. Similarly – and of particular relevance to today's international environment – we can disregard detention of foreign nationals on terrorism-related suspicions. For example, Canadian immigration law provides for administrative detention on the basis of the issuance of "security certificates" to non-citizens suspected of terrorism activities. But the mere fact that people subject to this certificate are non-citizens and that the certificates are provided for in immigration law does not make such detentions immigration-related.[6]

With these considerations in mind, this article proposes the following definition for immigration detention: "the deprivation of liberty of non-citizens

[4] This article uses the terms immigration detention, migrant detention, and immigration-related detention interchangeably.

[5] D. Wilsher, *Immigration Detention: Law, History, Politics*, Cambridge, Cambridge University Press, 2011, xvii–xviii.

[6] In the report on its 2005 visit to Canada, the UN Working Group on Arbitrary Detention (UN WGAD) argued that Canada should remove "security certificates" from its immigration legislation and instead reframe it as a criminal law issue. According to paragraph 92 of the report: "The Working Group recommends that [. . .] (d) The Government reconsider its policy of using administrative detention and immigration law to detain persons suspected of involvement in terrorism and particularly the use of security certificates. The Working Group recommends that detention of terrorism suspects be imposed in the framework of criminal procedure and in accordance with the corresponding safeguards enshrined in the relevant international law, in particular articles 9, paragraph 3, and 14 of the International Covenant on Civil and Political Rights, to which Canada is a party." See UN WGAD, *Report of The Working Group on Arbitrary Detention: Visit To Canada (1–15 June 2005)*, UN Doc. E/CN.4/2006/7/Add.2, 5 Dec. 2005, para. 92.

because of their status". This definition's focus on "status" helps circumscribe what we mean by the modifier "immigration-related". Generally, unless they have committed unrelated breaches of the law, detained non-citizens have been taken into custody as a result of complications stemming from their residence status vis-à-vis the country in question. Some States systematically detain asylum seekers until their claims to refugee status can at least be initially reviewed; migrants are confined at ports of entry when they do not appear to have proper authorization to either permanently or temporarily reside in the country; and irregular immigrants (including "criminal aliens" who lose their residency status as a result of convictions for particular crimes) are subject to detention pending deportation when authorities deem them to lack authorisation to reside in the country.[7] While some States provide for mandatory detention of people who are in one of these situations, most countries detain only if there are aggravating circumstances, such as when there are grounds to believe a person will abscond if he/she is denied entry or released. However, in all these cases, central to the decision to take the person into custody is a perceived or alleged problem with his or her status.

There are a number of other aspects of this definition that require unpacking. For instance, it does not distinguish between asylum seekers, irregular migrants, stateless people, or refugees. Instead, the definition intentionally fits all of these categories into a single box – "non-citizen". To some extent, this definition runs contrary to efforts by many States and rights experts to analytically separate asylum from other forms of migration.[8] Further, in some parts of the world – notably the European Union (EU) – asylum seekers are segregated from other migrants with respect to their places of housing or confinement: asylum seekers are supposed to be housed in "open" "reception centres", while undocumented migrants are confined in "closed" detention centres.[9]

However, in many countries there is little effort to separate asylum seekers from irregular migrants within detention regimes. What is more, "reception centres" and so-called shelters can sometimes resemble detention centres in all but name.[10] Thus, while there is a clear rationale for assessing differences in the legal frameworks that treat asylum seekers and undocumented migrants, when analysing migrant detention regimes it is preferable to view all non-citizens as a single cohort. Such an approach is better suited to capture all the types of

[7] Cornelisse provides a similar categorisation of grounds for immigration-related detention. See Cornelisse, *Immigration Detention and Human Rights*, 8–22.

[8] P. Oberoi, *The Enemy at the Gates and the Enemy Within: Migrants, Social Control, and Human Rights*, Research Paper, International Council for Human Rights Policy, 2009, 3–6, available at: http://www.ichrp.org/files/papers/171/migrants_and_social_control_pia_oberoi.pdf (last visited 25 May 2012).

[9] Jesuit Refugee Service (JRS), *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)*, JRS European Regional Office, Jun. 2010, available at: http://www.jrseurope.org/publications/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_FULL%20REPORT.pdf (last visited 25 May 2012).

[10] A. Gallagher & E. Pearson, "The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking", *Human Rights Quarterly*, 32, 2010, 73–114.

facilities used to detain people on status-related charges or procedures. It also provides a pithy analytical category for encompassing the broad range of people subject to this form of deprivation of liberty.

Additionally, this definition encompasses both criminal incarceration and administrative detention. Human rights and scholarly discourses on the subject of immigration-related detention tend to focus on administrative detention because in most countries immigration violations are considered "civil" rather than criminal matters, and thus detention for status-related reasons usually takes the form of an administrative process. A narrow focus on administrative detention, however, fails to capture a critical aspect of contemporary detention regimes: that many countries – from Malaysia to Lebanon to Italy to the US – charge irregular migrants with criminal violations stemming from their status.

Nevertheless, although it seems clear that any definition of migration-related detention should include both criminal and administrative forms of detention, this article focuses generally on administrative detention. Despite trends in some countries to formally criminalise irregular immigration, the vast majority of people confined for status-related reasons are placed in civil detention.

This definition also implies a carefully circumscribed meaning of "deprivation of liberty". Some scholars have sought to define detention broadly to include "restriction of movement or travel within a territory in which an alien finds him or herself", as Helton framed it.[11] This concept, however, is patently too broad to facilitate a sharp analytical focus on detention facilities and the realities detainees face behind bars.

On the other hand, some States have sought to apply a minimalist concept of migrant detention, and thereby remove certain types of confinement from the debate over the issue. Germany's Constitutional Court, for example, ruled in 1996 that the confinement of asylum seekers for nearly three weeks in secure airport facilities did not constitute deprivation of liberty.[12] Likewise, Turkey has refused to acknowledge, despite successive rulings by the ECtHR against it that its confinement of irregular migrants in so-called "guesthouses" amounts to deprivation of liberty (see *Abdolkhani and Karimnia v. Turkey* and *Z.N.S. v. Turkey*).[13]

Similarly, in the landmark – and much debated – case *Amuur v. France* (1996), the ECtHR offered a minimalist interpretation of the concept of deprivation of liberty in its ruling on whether the confinement of Somali nationals in a French airport "international zone" violated their right to liberty as provided in Article 5 of the European Convention for Human Rights. The Court held

[11] A. Helton, "The Detention of Refugees and Asylum Seekers: A Misguided Threat to Refugee Protection", in G. Loescher & L. Monahan (eds.), *Refugees and International Relations*, Oxford, Oxford University Press, 1989, 135–140.

[12] Decision of the Second Senate of the Federal Constitutional Court of 14 May 1996, 2 *BvR* 1938/93 and 2 *BvR* 2315/93. Cited in G.S. Goodwin-Gill, "International Law and the Detention of Refugees and Asylum Seekers", *International Migration Review*, 20(2), 1986, 194–219.

[13] ECtHR, *Abdolkhani and Karimnia v. Turkey* (Judgment) (2009) Appl. No. 30471/08; and ECtHR, *Z.N.S. v. Turkey* (Judgment) (2010) Appl. No. 21896/08.

that "[h]olding aliens in the international zone does indeed involve a restriction upon liberty, but one which is in every respect comparable to that which obtains in centres for the detention of aliens pending deportation."[14]

More recently, the Optional Protocol to the Convention against Torture, adopted in December 2002, provides a definition of deprivation of liberty that avoids some of the pitfalls in the formulations discussed above, if not wholly resolving the various complications that these raise. Article 4(2) of the Protocol states that "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority".[15]

What these competing definitions underscore is the confusion that often surrounds discourse on immigration detention. From a policy analysis – and indeed, social scientific – perspective, it is critical to carefully carve out the phenomenon from these competing ideas in such a way as to allow for comparative assessment. This article thus proposes defining deprivation of liberty as "forcibly-imposed confinement within an enclosed space for any length of time." Put another way, it means being locked up against one's will.

This formulation of deprivation of liberty has three key components: time, space, and coercion. Regarding time, ECtHR case law appears to support the notion that there is no minimum amount of time during which custody should not be considered deprivation of liberty. In *Gillan and Quinton v. The United Kingdom* (2009), which dealt with the stop and search powers of police, the Court found that:

> [A]lthough the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1 [of the European Convention on Human Rights].[16]

However, while deprivation of liberty should be viewed as having no minimum period of time, in the context of immigration detention, time becomes complicated. As we will explore in more detail later in this article, when assessing a country's overall immigration-detention estate, there are both practical and theoretical reasons for excluding facilities that are used for only very limited periods of time (for example, for no more than 48 or 72 hours).

[14] ECtHR, *Amuur v. France* (Judgment) (1996) Appl. No. 19776/92, para. 43.

[15] Art. 4(2) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237, 18 Dec. 2002 (entry into force: 22 Jun. 2006).

[16] ECtHR, *Gillan and Quinton v. The United Kingdom* (Judgment) (2010) Appl. No. 4158/05, para. 57.

The other key element of our definition of deprivation of liberty is coercion – or physical compulsion – a point underscored in the ECtHR ruling on *Gillan and Quinton v. The United Kingdom*.[17] Some jurists have questioned the applicability of this concept in situations where migrants can be released if they agree to immediately return to their home countries. But as one scholar writes, "detention by the state should never be considered consensual because to do so introduces an unwelcome and unworkable subjective element into the protection of the liberty of detainees".[18]

As we will see later in this article, incorporating the concept of physical imposition or coercion into our definition of deprivation of liberty provides an important marker or sign for identifying sites of detention. In other words, only facilities that physically prevent people from leaving ought to be considered detention centres; any site that does not carry such a mark is *not* a detention centre.

Lastly, deprivation of liberty involves space, or the delimiting of space. As the ECtHR held in *Gillan and Quinton v. The United Kingdom*, the limitation of freedom that occurred when police apprehended and briefly held in custody a person on the street amounts to deprivation of liberty as this is articulated in Article 5(1) of the European Convention on Human Rights.[19] Applying such a concept to immigration detention can raise thorny questions. For instance, should we include in our definition confinement on a tiny deserted island whose only infrastructure is a nominally "open" detention centre? What about cases in which people are forced to remain indefinitely in an airport terminal where other people (*passengers*) are free to come and go? Or the Israeli "alternative" detention practice of sending asylum seekers to a kibbutz from which they are prevented from leaving?[20]

Returning to our earlier critique of Helton's argument that detention is "restriction of movement or travel within a territory in which an alien finds him or herself", we arguably should dismiss the kibbutz case as a form of detention *per se* because it fails to communicate the distinct realities of incarceration and, from a normative perspective, can be viewed as a humane – if imperfect – substitute

[17] *Ibid.*

[18] D. Wilsher, "The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives", *International and Comparative Law Quarterly*, 53(4), 2004, 905.

[19] ECtHR, *Gillan and Quinton v. The United Kingdom*, para. 57.

[20] According to the GDP profile on Israeli detention practices: "While there is no official government policy mandating finding alternatives to detention, [the Israeli NGO] Hotline for Migrant Workers successfully campaigned to get some asylum seekers released from detention and sent to alternative sites, including kibbutzim, Moshavim cooperative villages, and hotels. According to an HMW legal adviser, these cases 'can be partially viewed as a success and partially as a failure'. He said that these so-called alternatives amounted to severe limitations of freedom because the migrants were not allowed to leave the circumscribed space of the kibbutz they were sent to." See GDP, *Israel Detention Profile*, Geneva, Switzerland, Feb. 2011, available at: http://www.globaldetentionproject.org/countries/middle-east/israel/introduction.html (last visited 25 May 2012).

for detention. The other two cases – the small island and airport terminal – also present challenges.

Perhaps there is no perfect definition of the space of detention, but one quality seems paramount: confinement within a narrowly circumscribed space. We can argue endlessly over the meaning of "narrowly circumscribed space" but it seems reasonable to conclude that a tiny island and an airport terminal both embody this notion. The larger point is that with an issue like immigration detention exceptions will abound, but even the limit cases should be readily recognizable when subjected to rational scrutiny.

3. Characterising sites of deprivation of liberty

As a principal tool for implementing immigration detention policies, the physical sites of deprivation of liberty are a critical factor in any effort to assess the proportionality of detention practices. But what are immigration detention centres? This question appears to have a self-evident answer: they are the facilities used to confine non-citizens until they can be deported or have their claims assessed. However, this straight-forward definition fails to communicate the extraordinarily diverse range of sites used around the globe or the regimes in place at these facilities.[21] Nor does this definition convey the large array of characteristics that can be applied to a particular facility, which shape the experiences of detainees and can reflect public perception of unwanted migrants.[22]

Despite their critical role in the implementation of domestic control measures, to date there has been little effort to systematically assess immigration detention centres *per se*. Human rights agencies document cases of abuse and mistreatment at facilities, and they endeavour to qualify aspects of detention sites, such as the conditions that prevail at them. Some agencies have developed guidelines for assessing conditions at detention sites based on international norms – for example, the European Committee for the Prevention of Torture's (CPT) standards related to foreign nationals detained under aliens legislation.[23] But these efforts fall short in a number of important areas. For example, *The CPT Standards* – which provides one of the more detailed set of guidelines for assessing detention conditions – holds that "care should be taken in the design and layout of [immigration detention facilities] to avoid as far as possible any impression of a carceral environment".[24] Yet, what is meant precisely by the phrase "a carceral environment"? The CPT does not elaborate.

Likewise, policy discussions and academic discourse on the subject offer little in the way of clear criteria for making systematic distinctions that would

[21] For a detailed look at the variety of facilities in use around the world, see the website of the GDP, based at the Graduate Institute of International and Development Studies: http://www.globaldetentionproject.org/.

[22] For a recent study that highlights the broad divergences in detention operations in the EU, see: JRS, *Becoming Vulnerable in Detention*, 2010.

[23] CPT, *The CPT Standards*, Council of Europe, 2009, 37–55.

[24] *Ibid.*, 38.

enable us to judge whether or to what degree immigration detention resembles incarceration. In Europe, for example, much of the discourse surrounding detention policies narrowly focuses on a distinction between "open" and "closed" centres. In a report to the European Parliament on a typology of migrant detention centres, a well-known immigration scholar writes that detention centres "are considered to be open when the individuals who are required to reside there are able to leave at will or within reasonable confines. [. . .] Closed detention is where the individual required to reside there is not permitted to leave the confines of the camp at will."[25]

This sort of characterisation is also widespread in discussions at the international level as well as in many non-European settings. For instance, in a 2000 report on EU "reception centres" for asylum seekers, the UN High Commissioner for Refugees (UNHCR) describes "detention or holding centres for aliens and asylum seekers" as being "open, semi-open, or closed".[26] And in a May 2010 letter to the UN High Commissioner for Human Rights, the New Zealand Human Rights Commission characterises one of that country's migrant detention centres as an "open immigration facility [. . .] approved for the detention of unaccompanied minors".[27]

Despite its broad use, the open-closed discourse is severely lacking for a number of reasons. For instance, it utterly fails to communicate one of the key aspects of immigration detention discussed above – physical coercion. If a facility is "open" – that is, if it does not physically prevent someone from leaving – than there is little reason to call it a detention centre, even if failure to remain at the centre can have significant legal repercussions, such as abandonment of an asylum claim.

Likewise, the open-closed distinction presents numerous problems when attempting to study the evolution of detention regimes over time or compare national detention estates. If our only data point on state detention regimes is the changing number of "open" and "closed" centres over time, we would completely miss the evolution of the types of centres used to confine migrants. Were they initially criminal prisons? Privately owned detention centres? Dedicated immigration detention facilities?

Lacking data on these details – or the concepts to clearly view these distinctions – could, in turn, blind us to a host of important questions about the social realities in which these facilities operate. Why were certain facilities used at a given point in time? What motivated a change from public to private? Why did States shift from using prisons to dedicated facilities? What impact did this shift have on creating bureaucracies entirely devoted to detaining migrants? And what

[25] E. Guild, *A Typology of Different Types of Centres in Europe*, Report for the European Parliament, Directorate General Internal Policies of the Union, Centre for European Policy Studies, 2005, 3.

[26] UNHCR, *Reception Standards for Asylum Seekers in the European Union*, Report, Geneva, UNHCR, Jul. 2000, 32, available at: http://www.unhcr.org/refworld/pdfid/3ae6b3440.pdf (last visited 25 May 2012).

[27] J. Ngatai, *Letter to Pia Oberoi of the Office of the High Commissioner for Human Rights*, New Zealand Human Rights Commission, 14 May 2010.

role have these dedicated bureaucracies had on state detention policies? These are all questions that can be important to any proportionality assessment.

There are a number of implements we can add to our conceptual tool box to assist our observation of immigration detention regimes. One example would be to apply categorisation standards used for national prison systems, which define the types of facilities that should be used for different kinds of offenders – for instance, the distinction in the US between high-, medium-, and low-security prisons.[28]

Clearly, criminal incarceration involves a distinct set of considerations from those of immigration detention. However, both share a common *modus operandi* – deprivation of liberty. Further, immigration detention in much of the world involves confining non-citizens in jails and prisons. Using prison categorisation schemes could provide us with useful concepts for comparing the treatment of immigration detainees from one country to the next as well as an important indicator of the conditions of confinement in particular detention centres and the evolution of detention regimes over time.

Despite the need for a more detailed and nuanced discussion of the various forms of immigration detention, the predominant idea of the detention centre in much of the scholarly discourse on the subject is the paradigm of the "camp". This discourse appears to be largely informed by the work of the contemporary Italian philosopher Giorgio Agamben and his notions on the production of "bare life" by sovereign States.[29]

While Agamben's work can be useful to broader theoretical debates about sovereignty, citizenship, and migration, when his ideas are applied to the nitty-gritty reality of contemporary migrant "camps" they often seem to lose coherence. For example, discussions of bare life and its relationship to the camp are often prone to overstatement. Thus, one scholar writes that Agamben's paradigm of the camp is "materialized" in the Nazi extermination camps as well as contemporary airport transit zones and the more notorious detention centres in Australia and the United Kingdom.[30]

While it might be possible – indeed, necessary – to draw analogies on the historico-philosophical level between the two within Agamben's thesis on biopolitics,[31] implying that today's migrant detention centres have any sort of equivalence to extermination camps would appear to be a stark

[28] For a detailed discussion of the US prison classification scheme, see J. Austin & P.L. Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies*, Report, NIC Accession Number 019319, Washington, US Department of Justice, National Institute for Corrections, Jul. 2004, available at: http://www.jfa-associates.com/publications/pcras/06_ObjClass2004.pdf (last visited 25 May 2012).

[29] See, for example, R. Ek, "Giorgio Agamben and the Spatialities of the Camp: An Introduction", *Geografiska Annaler: Series B, Human Geography*, 88(4), Swedish Society for Anthropology and Geography, 2006.

[30] W. Walters, "Deportation, Expulsion, and the International Police of Aliens", in N. De Genova & N. Peutz (eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, North Carolina, Duke University Press, 2010.

[31] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, California, Stanford University Press, 1998, 10.

mischaracterisation of migrant detention centres as well as a disservice to the terrible legacy of the Nazi camps. Levy writes:

> Agamben and his enthusiastic followers lack any proportionality when they distastefully lump together varieties of refugee camps, Auschwitz, and even gated communities. Refugees are not cannon fodder for radical metaphysical arguments and should not be equated to (a historically inaccurate) mass of passive, half-dead inmates of Auschwitz's work camps.[32]

This type of overstatement leads to a second set of problems: the failure to properly distinguish between different types of detention centres and the legal regimes that can apply to each, both of which can inhibit efforts to evaluate detention regimes within the framework of proportionality. The migrant detention camp, according to some Agamben scholars, is a zone of exception where humanity is stripped of rights. But is this true? Perhaps in some facilities on certain parts of the globe, but such a proposition broadly applied does not stand up to even cursory scrutiny. There is in fact a broad spectrum of rights that apply to migrant detainees, even if these rights are sometimes not respected. However, assessing relevant norms and whether detention practices are proportionate to the aims of immigration enforcement requires carefully identifying the particularities of a given detention situation, which would appear to be an inconvenient fact for much of the discourse on Agamben. As one Agamben critic writes, with its "breathtaking historical sweep, the biopolitical paradigm displays a marked loss of specificity in its analyses of contemporary biopolitical phenomena".[33]

4. Coding proportionality

At the heart of the phenomenon of immigration detention is an unresolved tension between two competing though widely accepted international norms: personal liberty and state sovereignty. As one legal scholar writes, "Any human right of non-nationals [. . . with respect to] their liberty conflicts with the broadly unfettered right of states to control the admission and expulsion of non-nationals conferred by both national and public international law."[34]

As the dilemma to this conflict remains unresolved, States have generally emphasised their sovereign rights over those of the non-citizen, leading to what many observers deem the increasing "criminalisation" of immigration.[35] Criminalisation can take many forms, including the adoption of laws providing criminal sanction for irregular residence, making irregular stay an aggravating

[32] C. Levy, "Refugees, Europe, Camps/State of Exception: 'Into the Zone', the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice)", *Refugee Survey Quarterly*, 29(1), 2010, 100–101.

[33] Ek, "Giorgio Agamben and the Spatialities of the Camp", 372.

[34] Wilsher, "The Administrative Detention of Non-Nationals", 898.

[35] M. Samers, *Migration*, New York, Routledge, 2010, 206–222.

circumstance for a criminal offence, or the increasingly strict application of existing laws.[36]

Criminalisation is also frequently linked in contemporary discourse to the broadening use of detention as a means of managing immigration and asylum. Chetail and Bauloz write:

> The criminalization of undocumented migrants and their subsequent forced removals have been a key component of EU migration policy. [. . .] Detention of asylum seekers during their status determination or, if protection is denied, pending their return undoubtedly constitutes the most obvious manifestation of such criminalization.[37]

In a 2010 report to the UN General Assembly on criminalisation, the UN Special Rapporteur for the Human Rights of Migrants stressed this connection, arguing that "detention is a tool that characterises criminal law as opposed to administrative law, which, by nature, should resort to alternative interim measures to detention".[38] Similarly, the UN Working Group on Arbitrary Detention (WGAD) highlighted in its 2010 report to the UN Human Rights Council argued that because detained irregular migrants have not committed crimes, their "criminalization [. . .] exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows".[39]

While a few countries have resorted to criminal sanctions for immigration breaches, the vast majority continue to treat status-related breaches as administrative in nature. To the extent that States exercise their sovereign right to employ administrative detention in their effort to limit or control immigration, they nevertheless are constrained by a broadly accepted norm in both international law and many national legal systems regarding this form of detention, which this paper uses as a key departure point for its effort to propose a model for constructing data on detention centres: the principle of proportionality. That is, detention should only be used to the limited extent necessary to facilitate the administrative ends provided for in law. With respect to most cases of immigration detention, these ends include establishing a person's identity,

[36] During a presentation at the Graduate Institute, Geneva, in March 2012, D. Wilsher provided a compelling counter-interpretation of the use of the term "criminalisation" with respect to immigration-related detention, arguing: "[Immigration] detention is the opposite of criminalisation in the sense that it is putting people in prison without using the criminal process. [. . .] The present system we have is one of administrative discretion that allows a vast amount of detention to go on without any proper rules of law and oversight. If there is going to be detention it should be criminal rather than administrative. That would make it much harder to detain. Governments would have to rethink because the criminal process is just a lot more difficult, and more costly, and more demanding." The presentation is available on the website of the GDP, at: http://www.globaldetentionproject.org/de/publications/newsletter/public-event-8-march-2012.html (last visited 25 May 2012).

[37] V. Chetail & C. Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?,* Background Paper EU-US Immigration Systems 2011/07, European University Institute, 2011, 18.

[38] UN General Assembly, *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Doc. A/65/222, 3 Aug. 2010, para. 9.

[39] UN WGAD, *Report to the Human Rights Council*, UN Doc. A/HRC/13/30, 15 Jan. 2010, para. 59.

carrying out a deportation order, and/or assessing a detainee's residence or asylum claims.

A recent high-profile reference to this principle was provided in the US Immigration and Customs Enforcement (ICE) 2009 stark self-assessment of its detention infrastructure. According to the report,

> With only a few exceptions, the facilities that the ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.[40]

Discussing this report, one immigration scholar has written: "If convergence [of immigration control and criminal enforcement . . .] has given rise to a system of *crimmigration* law, as observers maintain, then perhaps excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*." She adds:

> To facilitate removal – long understood to be a civil sanction, not criminal punishment – detention and other forms of custody are constitutionally permissible to prevent individuals from fleeing or endangering public safety. However, freedom from physical restraint 'lies at the heart of the liberty that [the Due Process] Clause protects,' and if the circumstances of detention become excessive in relation to these noncriminal purposes, then detention may be improperly punitive and therefore unconstitutional.[41]

This brings us back to the discussion of *The CPT Standards* and its declaration that "care should be taken in the design and layout of [immigration detention facilities] to avoid as far as possible any impression of a carceral environment".[42] While there is a clear legal basis for this principle, there has been little discussion on ways scholars and policy-makers can begin to empirically measure adherence to it.

This article proposes a number of discrete dimensions of detention centres that can be used to develop data for analysing the extent to which States appear to be adhering to the proportionality principle in their operation of detention centres. Among the key questions that should be asked: What kinds of facilities are States using? What is the security regime in place at these facilities? Who oversees detention operations? Who has custody of immigration detainees? And how are detainees segregated, if at all?

[40] D. Schriro, *Immigration Detention Overview and Recommendations*, US Department of Homeland Security, Immigration (DHS) & Immigration and Customs Enforcement (ICE), Report, 2009, 2–3, available at: http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (last visited 25 May 2012).

[41] A. Kalhal, "Rethinking Immigration Detention", *Columbia Law Review*, 110, 2010, 43–44

[42] CPT, *The CPT Standards*, 41.

To systematically construct – or "code" – data on immigration detention facilities, this paper proposes assessing facilities according to roughly two dozen distinct dimensions, which can be divided into three broad categories of characteristics: *general*, *operational*, and *bureaucratic*. As we'll see in the following section, there is a fourth, cross-cutting category, *privatisation*, which includes dimensions from the other categories mentioned above.

It is important to note that not all dimensions will apply to all facilities. For instance, "area of authority", a bureaucratic characteristic, is a term of art used by US immigration authorities to describe the specific geographic jurisdiction within which a facility operates. This concept also has relevance in other federal systems, like Germany and Switzerland, where detention facilities fall under the specific jurisdiction of one or more cantons or *Bundesländer*. However, most countries will not have similar bureaucratic or political structures.

First, *general characteristics.* This category of characteristics covers basic, first-level information about detention centres. Among the dimensions included here are facility *name*, *location*, *status* (is it in operation? when did it begin being used for the purposes of migrant detention?), and *contact* information. Additionally, this category includes information about the facility *type*, a critical component of any categorisation scheme. As this paper discusses in more detail below, the types of facilities in use around the world vary greatly and can include everything from federal penitentiaries and *ad hoc* camps to dedicated immigration detention facilities and offshore processing centres. Establishing well defined criteria for identifying the kinds of facilities a country uses can provide us with an important measure of how States treat their immigration detainee population, as well as an important point of comparison with other States.

Second, *operational characteristics.* This category includes data on the internal operations of detention facilities. Inputs include information about the *security regime* in place within a facility (for example, is it high- or low-security); the *length of time* a person is held in a specific facility; the *demographics* of detainees; whether or to what degree detainees in a facility are *segregated* according to their gender, legal status, and/or age; the official *capacity* of facilities as well as reported and average *populations*; the *management* structure; the amount of *space* provided detainees in their cells; the *provision* of food and other basic necessities; the level of *access* detainees have to family members, doctors, lawyers, or non-governmental advocates; whether the facility employs *armed guards*; the kind of *record-keeping* kept by a facility with respect to admissions and departures; and the degree of *non-state service provisions* in a facility.

Third, *bureaucratic characteristics*. This category involves documenting information on the larger context within which a detention centre operates, including data on which Government agency has *custodial authority* over the detainees; whether the facility is *owned* by the State, a private for-profit or not-for-profit entity, or an international organisation; *budgetary* information (for example, estimates on the daily average cost of holding a detainee at a given facility); whether a facility receives *funding* from a non-national entity, like the

International Organization for Migration (IOM), the EU, or the Government of another country; and *area of authority*, which refers to the specific geographic jurisdiction within which a facility operates.

Clearly, there is a tremendous range of phenomenon that one can measure when assessing operations and conditions at detention centres. Instead of fully exploring all the dimensions proposed above, which would require considerably more space than a single journal article, this article proposes identifying those characteristics that can inform us of the degree to which States' employment of detention is proportional to the limited ends established by authorities to justify taking a person into administrative custody.

Earlier, I suggested a number of questions that one could ask when trying to assess whether operations at a given detention facility would pass a hypothetical proportionality test: What kind of facility is it? What is the security regime in place at the centre? Who oversees operations at the facility? Who has custody of the immigration detainees? And how are detainees segregated, if at all?

The dimensions above that seem best suited to answering these questions include:

- *General characteristic*: facility type;
- *Operational characteristics*: security regime, segregation, management, non-state service provisions;
- *Bureaucratic characteristics*: custodial authority, and ownership.

Obviously, a number of other dimensions could be selected that would tell us a great deal about the treatment of detainees and whether such treatment is merited by the limited purposes of administration detention. However, as this paper endeavours to spell out below, these categories seem particularly well suited to providing measurable and comparable data points that address the specific relationship between immigration detention and incarceration, as well as the degree to which States have endeavoured to meet the requirements of proportionality. In addition, this article emphasises those dimensions that differentiate immigration detention from criminal incarceration.

So, what is proportional? In assessing each of the dimensions listed above, this article employs as a rule of thumb the formulation provided in the UN *Standard Minimum Rules for the Treatment of Prisoners* with respect to the treatment of "civil prisoners". Rule 94 states: "In countries where the law permits imprisonment for debt or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order."[43]

[43] UN Economic and Social Council, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 Jul. 1957 and 2076 (LXII) of 13 May 1977.

5. Proportionality categories

5.1. Facility type

Types of detention facilities vary greatly from one country to the next, as do the official designations used to describe sites and the particular nature of the sites themselves. Where States choose to confine migrants can tell us a great deal about how these people are perceived by those States and whether authorities have taken steps to differentiate between administrative and criminal detention.

This article proposes a facility typology that has three main categories – *criminal*, *administrative*, and *ad hoc* – each of which can be divided into several subcategories. This division into three categories rests on a basic distinction in types of detention centres. *Criminal* designates any facility that confines criminal suspects or convicts. *Administrative* designates facilities that are only used to hold people who are not charged with criminal violations. *Ad hoc* refers to any facility that is improvised to fulfil a role it is structurally or administratively not intended to do so.

Criminal
- Prison
- Police station
- Juvenile detention centre

Administrative
- Migrant detention centre
- Immigration office
- Offshore detention centre
- Reception centre
- Transit zone

Ad hoc
- Detention centre
- Camp
- Hotel
- Military base
- Other structure

5.1.1. Criminal

Many countries – notably, the US, Canada, Switzerland, and Germany, as well as most developing countries – use jails, prisons, and/or police lock-ups as short- or long-term detention sites for administrative detainees held on migration-related charges. This designation can also refer to juvenile detention centres. Administrative detainees confined in prisons are often held alongside criminal detainees.[44]

[44] For detailed discussions of the use of prisons by key immigrant-detaining countries, see: GDP, *Immigration Detention in Canada: A Global Detention Project Special Report*, Geneva, GDP, Mar. 2012, available at http://www.globaldetentionproject.org/fileadmin/publications/Canada_special_report_2012_2.pdf (last visited 25 May 2012); and M. Flynn & C. Cannon, *Immigration Detention in Switzerland: A Global Detention Project Special Report*, Geneva, GDP, Oct. 2011, available at: http://www.globaldetentionproject.org/fileadmin/publications/GDP_Swiss_detention_report.pdf (last visited 25 May 2012).

Although there do not appear to be any hard and fast statistics on this, criminal facilities might be the most widespread form of immigration detention, in part because many countries will likely not dispose of the requisite budget to establish a dedicated immigration detention infrastructure.

As much as any other detention quality discussed here, the use of criminal facilities to hold migrants in administrative detention poses serious questions with respect to whether authorities are endeavouring to confine migrants in an environment that does not resemble incarceration. As *The CPT Standards* state,

> Even if the actual conditions of detention [for immigration detainees] in the establishments concerned are adequate [. . .] the CPT considers such an approach to be fundamentally flawed. A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offense.[45]

Important to note, there is widespread use of police stations for briefly holding migrants who have been arrested on suspicion of breaching immigration laws. As discussed below on transit zone detention centres, facilities used for very short-term detention arguably should not be included in data about a country's immigration detention infrastructure.

There are both practical and legal reasons for this. First, insofar as any police station in a country that authorises police forces to apprehend suspected irregular migrants could potentially be used to briefly hold a migrant before being transported to a designated holding facility, researchers could easily be overwhelmed in massive amounts of marginal data that would tell us very little about the real contours of immigration detention in a country. Secondly, it is a well-established law enforcement practice to briefly detain someone for questioning on suspicion of violating laws. In the context of migration, this form of detention occurs most commonly at ports of entry, where authorities apprehend people who are suspected of not having requisite entry papers.

Nevertheless, to the extent that there is evidence that a police station (or transit zone detention centre) is being used to hold people for a length of time exceeding 48 hours (the limit imposed in many countries for holding someone before at least a preliminary decision on his/her status must be made), then that facility should be clearly included in data, regardless of whether such detention at the facility is legally sanctioned. Confining suspected irregular migrants in police stations for lengthy periods of time raises two key questions with respect to proportionality: (1) migrants will likely be confined alongside criminal suspects in such facilities; and (2) such facilities are generally not designed for the purpose of facilitating the limited aims of immigration detention.

[45] CPT, *The CPT Standards*, 38.

5.1.2. Administrative

This category can include any facility used exclusively to hold (or intern) people on non-criminal grounds. It is important to note, however, that while the unique focus of this paper are the facilities used to hold migrants, the practice of administrative detention is not limited to this issue. Many other forms of administrative detention exist, including: internment of persons with mental illness; administrative detention or confinement on public or health grounds; detention for security reasons; and administrative detention in the context of an armed conflict.

Domestic legal systems are often not as detailed regarding these detention situations, which can result in administrative detainees facing legal uncertainty. Among the difficulties these detainees can face are lack of access to the outside world, limited possibilities of challenging detention through the courts, and/or lack of limitations on the duration of detention. Such deficiencies, which have been repeatedly denounced by international bodies, raise a number of questions with respect to the issue of proportionality. Highlighting these complications, the UN WGAD said in its 2010 report to the UN Human Rights Council that it "considers that immigration detention should gradually be abolished".[46]

There appear to be five main types of immigration-related administrative detention facilities: migrant detention centres, immigration offices, offshore detention centres, reception centres, and transit zones.

- *Migrant detention centre* is a generic category that can be used to designate any facility that is officially sanctioned to hold only migrants, regardless of whether they are asylum seekers or irregular migrants or whether they are in pre- or post-deportation order procedures. A "migrant detention centre" will *not* have any of the attributes associated with other types of detention sites listed here (for example, it will not be a "prison", nor it will not be located in a "transit zone", nor will it be used for holding exclusively asylum-seekers). These tend to be purpose-built facilities, though in some cases former prisons and rehabilitated hotels have been sanctioned for this purpose.[47]
- *Immigration office* refers to detention sites located inside regional or local offices of a country's immigration authority or border patrol. Although they sometimes carry discrete names or designations – for example, "detention houses" in Japan – these sites share in common that they form part of an office or bureau of an immigration agency. The sites typically encompass a delimited space, usually in the form of a few cells or locked

[46] UN WGAD, *Report to the Human Rights Council*.

[47] For an exemplary case of a prison being rehabilitated as a dedicated migrant detention facility, see the discussion of the history of the Hutto facility in Texas, in Women's Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families*, Report, New York, Women's Commission for Refugee Women and Children, Feb. 2007, available at: http://www.womensrefugeecommission.org/component/docman/doc_download/150-locking-up-family-values-the-detention-of-immigrant-families-locking-up-family-values-the-detention-of-immigrant-families?q=locking+family+values (last visited 25 May 2012).

rooms located within an immigration or border patrol building, and are typically intended for short-term confinement, until detainees are expelled, released, or transferred to long-term detention centres or other holding facilities (such as "migrant detention centres" or "prisons"). Similar facilities located in immigration offices inside airports or other "international zones" are termed "transit zones" (see definition below). Many of the detention sites in South Korea, like that Masan Immigration Office, are coded "immigration office" because they are described by that country's human rights ombudsman as being immigration offices that have detention facilities within them. Similarly, in the US, many immigration offices are described in official documentation has having "holding rooms", like the Houston Field Office (Houston FO Holdroom).

– *Offshore detention centre* refers to detention sites that a country locates outside its national borders or on territory it has "excised" for immigration purposes. Similar to "transit zone" detention sites, offshore detention centres have sometimes been used to prevent migrants from making asylum claims as well as from enjoying other legal guarantees which would appear to be a breach of proportionality. Although offshore sites are located outside the country in question, detainees held at such sites remain in the custody of authorities of that country. Australia's "Pacific Solution", which came to an end in 2008, was a notorious example of this type of detention.[48]
– *Reception centre*. Sometimes called "accommodation centres" or "shelters", these are facilities that are used uniquely for housing/confining asylum-seekers and other vulnerable groups, like victims of trafficking. While it is common in many countries outside Europe to provide some form of housing to asylum seekers, at least during early stages of the asylum process, to a great extent this category is shaped around the situation in the EU, which has a directive on minimum standards for the treatment of asylum seekers.[49] A key challenge in assessing reception centres is that many States refuse to acknowledge that these facilities are detention centres even when people "housed" in a particular centre are not allowed to leave the facility.[50] Nevertheless, within the framework of the definition of "deprivation of liberty" provided earlier in this article, reception centres that do not allow people to leave should be considered

[48] C. Stevens, "Asylum Seeking in Australia", *International Migration Review*, 36(3), 2002, 864–893; Amnesty International, *The Impact of Indefinite Detention: The Case to Change Australia's Mandatory Detention Policy*, ASA/12/001/2005, London, Amnesty International, 29 Jun. 2005, available at: http://www.amnesty.org/en/library/info/ASA12/001/2005 (last visited 25 May 2012).

[49] Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6 Feb. 2003.

[50] C. Bühle, *Administrative Detention in the Context of the Reception of Asylum Seekers*, publicly available document, JRS Europe, 30 Jun. 2006, available at: http://www.detention-in-europe.org/images/stories/reception%20cb.pdf (last visited 25 May 2012).

detention centres and thus included in data on a country's detention infrastructure. Determining whether a reception centre operates in a way that is in accordance with the limited aims of a States' asylum procedures can be particularly challenging, and depend on the individual case. Article 7 of the EU's Reception Directive provides for detention in some instances, stating: "When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law." EU States diverge considerably in their use of detention for asylum seekers, as well as in their interpretation of the extent to which provisions of the Reception Directive apply to detained asylum seekers.[51]

– *Transit zone*. This article defines as a "transit zone" detention facility any site of deprivation of liberty located at ports of entry into a country. Transit zones could conceivably be located at every port of country in the world, which could present serious methodological difficulties regarding the development of data on a country's detention infrastructure. Additionally, these sites are generally used for very short-term confinement, usually for less than 48 hours. Nevertheless, there have been numerous high profile cases (including, as discussed above, *Amuur v. France*) in which people have been detained in transit zones for periods far exceeding the 48-hour threshold established in this article. To the extent there is evidence of lengthy detention at a particular transit site, then that facility should be clearly identified in detention data. However, lacking that evidence, such facilities should not be considered part of a country's detention infrastructure. A key concern with respect to proportionality is that persons detained in transit zones are considered by many Governments to have not officially entered national territory and are thus unable to access the same procedural rights afforded other detainees and prisoners. Additionally, transit zones can be characterised by lacking proper infrastructure for long-term confinement.

5.1.3. Ad hoc

One of the most prevalent forms of detention for migrants, particularly in developing countries, are *ad hoc* sites. These can include locked rooms or cells in hospitals, hotels, police stations, or Government offices, as well as open air camps. *Ad hoc* sites share in common that they are structurally and/or administratively not designed to serve as immigration detention centres. They also tend to be hastily established facilities that are created to respond to large migration flows.

[51] Academic Network for Legal Studies on Immigration and Asylum in Europe (ANLSIAE), *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States*, Institute for European Studies, Mar. 2006, available at: http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/odysseus_synthesis_report_2007_en.pdf (last visited 25 May 2012).

In many industrialised countries, hotels are a representative type of *ad hoc* site because they are not specifically set up to be used as detention sites. Additionally, many main migrant destination countries, notably Spain, maintain "*ad hoc*" (or, *habilitado*) detention centres that are only meant to be used in exceptional circumstances.[52]

In the developing world *ad hoc* sites can take a variety of forms, including open air camps located near borders (*not* including officially sanctioned refugee camps) and improperly built structures that operate outside the normal migration operations. A case in point is the Soutpansberg Military Grounds (SMG Detention Centre), in Musina, South Africa, located near South Africa's border with Zimbabwe. The facility, which is operated by the police force, confines immigrants awaiting deportation in an indoor basketball court located on the grounds of the military base. It is coded "*ad hoc*" because only the South African immigration authority is authorised to determine whether an immigrant is deemed illegal and thus liable to detention and deportation. The SMG detention centre, however, is operated by the police force in the absence of any agreement with immigration authorities, which ceased operations at the facility in 2008.[53]

Another *ad hoc* site would be the camp located in Bossasso, North East Somalia/Puntland, which operated briefly in 2006 with assistance from UNHCR and the IOM. According to an IOM Field Mission report,

> At the beginning of November 2006 there were approximately 500 Ethiopians residing at a closed centre awaiting the screening process. [. . .] The centre was located a few miles away from the Bossasso airport on a secluded dry piece of land encircled with hills. The authorities had at least four armed officers making sure no one escaped from detention. The weather is extremely hot, dry, and dusty and shelter for the migrants consisted of plastic sheets mounted on wood sticks.[54]

Regarding proportionality, detention in *ad hoc* sites raises serious questions on a number of levels. First, if migration-related detention is meant to be undertaken only to serve limited administrative purposes set out in law, an *ad hoc* site run by a body that is not authorised to service those purposes clearly violates the proportionality standard. Second, detention in *ad hoc* sites can pose problems with respect to the conditions of confinement and whether people held in the facilities are able to enjoy their rights set out in law.

[52] Asociación Pro Derechos Humanos de Andalucía (APDHA), *Centros de Retención e Internamiento en España*, Report, APDHA, Oct. 2008, available at: http://www.apdha.org/index.php?option=com_content&task=view&id=548&Itemid=45 (last visited 25 May 2012).

[53] Lawyers for Human Rights (LHR), *Monitoring Immigration Detention in South Africa*, Johannesburg, LHR, Dec. 2008, 7–10, available at: http://cmr.jur.ru.nl/cmr/docs/South%20Africa.pdf (last visited 25 May 2012).

[54] IOM, *Field Mission Report: Stranded Ethiopian Migrants in Bossasso, North East Somalia/Puntland*, MRF Nairobi, IOM, 2006, 3–6, available at: http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/regulating/ethiopians_stranded_in_bossasso_1106.pdf (last visited 25 May 2012).

5.2. Security level

In place of the "open" or "closed" distinction commonly used in Europe to describe immigration detention facilities, this paper proposes adapting prison classification schemes to characterise detention facilities. Because of the broad array of facilities used around the world to hold immigration detainees, it is necessary to have a more fine-grained classification system to be able to convey the various security arrangements – or levels of deprivation of liberty – that detainees face.

Additionally, as rights watchdogs like the UN WGAD often note, the use of detention in the case of migrants and asylum seekers must reflect the limited needs of this kind of detention – that is, to facilitate the removal of migrants or the adjudication of their cases.[55] Thus, serious questions about potential mistreatment can be raised if immigration detainees are held in high-security facilities. For this reason, it is critically important to develop a more detailed classification scheme than open-closed.

Further, although a case can be made that "criminal aliens" with records of violent offenses require a high-level security environment as they await deportation, such environments generally appear to be unnecessary to the non-criminal aims of immigration detention, as US ICE pointed out in its 2009 self-assessment, discussed earlier in this paper.[56] Thus, carefully coding a detention facility's security regime can be an important measure with respect to proportionality.

Prison classification systems generally begin with the type of prisoner to be confined in a particular facility. Is he or she a high-security risk, a violent offender, an escape risk? Does the prison in question provide the necessary level of security for this type of prisoner?; Thus, the distinction in many countries between high-, medium-, and low-security prisons.

Immigration detainees, on the other hand, are deprived of their liberty for non-violent offenses – status-related violations (this includes so-called criminal detainees, who enter deportation proceeding and are transferred to immigration custody after serving prison sentences for criminal offenses). Nevertheless, the types of facilities migrants are held in often correspond to differing levels of security used in prisons.

In adapting prison classification schemes to reflect the particularities of immigration detention, the article assesses a combination of factors, including the physical attributes of a detention site (locked cells, armed guards, etc.), its level of surveillance, and/or the degree of liberty allowed detainees both inside and outside the facility. The article proposes coding facilities along a sliding scale:

- High-security,
- Secure,
- Semi-secure,

[55] CPT, *The CPT Standards*, 53–55.

[56] Schriro, *Immigration Detention*, 2–3.

- Non-secure,
- Mixed regime.

Assessing a site's "security" is not scientific and is often based on limited information or unclear descriptions of detention facilities. However, the general rule of thumb is that the less freedom of movement detainees have the higher the level of security.

- *High security*: Complete deprivation of liberty, including confinement to a cell with little or no time to move about the facility or have access to recreation. Examples of high-security detention facilities include many federal prisons and local jails used in the US, Canada, as well as many developing countries. Some dedicated immigration detention facilities can be coded as high security.
- *Secure*: Complete deprivation of liberty, though detainees are afforded a limited amount of movement within the facility during certain periods of time. The vast majority of detention facilities will be classified as secure. Unless there is evidence of a high security environment, "secure" is the proper coding for so-called closed facilities.
- *Semi-secure*: This category reflects a particular adaptation in some immigration detention systems to only partially restrict the freedom of movement of migrants. Some reception centres, for instance allow detainees to leave the facility for certain hours of the day while requiring them to return to secure confinement each evening. This type of confinement should be coded "semi-secure". It is important to note that this category only applies when a facility has physical attributes – such as locked doors, guards, or barbed-wire fences – that prevent people from leaving at will. If, for example, a reception centre allows asylum seekers to leave without penalty during the day to attend classes or visit family, but does not physically restrain them from leaving during hours when they are supposed to be at the facility, it should be coded "non-secure" and not be included in detention data. Semi-secure facilities can have similar attributes as some low-security prisons. Ireland, for example, which does not have a dedicated immigration detention facility and thus makes use of its prisons to confine its very small population of immigration detainees, uses a low-security prison in Dublin whose various attributes warrant a semi-secure designation. All detainees at the facility, which is called the Training Unit, are encouraged to apply for temporary leave for periods that can last up to a week or more. When this period of liberty ends, people must return to low-security confinement at the prison.[57]
- *Non-secure*: This category of facility – which corresponds to what are often termed "open" facilities in Europe – is by definition not a detention facility and should not be included in detention data. A non-secure site is any facility that does not physically restrain a person from leaving

[57] Irish Prison Service, *Training Unit*, undated, available at: http://www.irishprisons.ie/index.php/joomlaorg/training-unit (last visited 22 May 2012).

at will. That an asylum seeker could face serious repercussions for not returning to his or her designated reception centre is not a sufficient condition to warrant classification as a detention centre.

– *Mixed regime*: These are facilities that have both secure and non- or semi-secure sections. An example of such a facility is the Southwest Youth Village in Vincennes, Indiana in the US. This facility is described by US immigration authorities as being used to hold unaccompanied minors under the authority of the Department of Health and Human Services' Office of Refugee Resettlement. According to the Southwest Youth Village website, the facility has two sections, a section for "residential treatment for 148 male and female youth, ages 9–21 years, in gender-specific housing units and activities"; and a detention centre that offers "pre- and post-disposition services for 40 males and females in a self-contained building with sight and sound separation from residential youth".[58] The residential treatment is considered a semi-secure section and the detention centre a secure section, thus the facility is coded "Mixed regime". It is important to note that a mixed regime is only applied when both sections of the facility fall under the same administration. If the sections have separate administrative bodies, then it should be considered two separate facilities.

5.3. Segregation

This category provides information about whether children and adults ("age segregation"), women and men ("gender segregation"), and criminal and administrative detainees ("legal segregation") are given separate areas of a facility or share the same space. It also denotes when a facility provides space for "family units." Designations are provided only when they are applicable to the site in question. Thus, for instance, it is not necessary to denote "legal segregation" in a migrant detention facility, which by definition does not hold criminal detainees. If a facility holds only one gender or one age group, that fact is also noted in this category if it is not already clear from the name of the facility and/or its "facility type" designation.

The issue of segregation raises a number of questions with respect to the human rights of migrants as there are well established norms regarding the treatment of vulnerable groups, like women and children, in detention.[59] The decision to confine an administrative detainee alongside criminal detainees is arguably also a stark form of criminalisation. To hold in a single space administrative detainees and convicted criminals would appear to be a violation of proportionality. This practice also violates recently established hard law

[58] Southwest Indiana Regional Youth Village, website available at: http://web.archive.org/web/20080828213142/http://www.swyouthvillage.net/ (last visited 25 May 2012).

[59] For a detailed assessment of the particular considerations States should take into account when depriving children and women of their liberty, see: CPT, *The CPT Standards*, 72–82.

provisions regarding the separation of criminal and administrative detainee populations provided in the EU Return Directive.[60]

Commenting on established international norms with respect to this issue, one legal scholar writes,

> In current times, the most obvious example [of a non-criminal detainee] is of persons who are detained because they have entered a country illegally or sometimes because they are seeking asylum. Such persons should not be detained alongside persons who are accused of or who have been convicted of criminal offences. If they are delivered to the custody of the prison authorities, they should not be treated in the same way as persons who have been convicted or accused of criminal offenses.[61]

5.4. Privatisation (ownership, service provisions, management)

The privatisation of immigration detention is a growing phenomenon across the globe.[62] Privatisation can include a range of phenomenon, including both operational and bureaucratic characteristics, such as turning over facility management to a private company, hiring private security guards, using a private company to provide basic services in a facility, or selling off detention facilities to private corporations.

There are a number concerns regarding privatisation, including the potential for diminishing basic services in order to increase profits as well as the notion that in deciding to take a person into custody, the State takes on responsibility vis-à-vis that person which should not be handed over to a private entity.

Regarding proportionality, one of the main concerns here is one of political economy: In deciding to privatise detention operations, a State opens the door to the potential that one of the rationales for bolstering detention efforts is not to meet the limited aims of administrative detention, but to satisfy the profit motives of companies. As one private prison expert has argued, "Allowing the private sector to run immigration detention will mean [. . .] an ever increasing number of people coming into the system and staying there longer [. . .] as companies seek to maintain and expand their markets."[63]

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[60] Article 16(1) of the Directive states: "Detention shall take place as a rule in specialized detention facilities. Where a Member State cannot provide accommodation in a specialized detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners." 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.

[61] A. Coyle, *A Human Rights Approach to Prison Management*, 2nd edn., London, International Centre for Prison Studies, 2002, 123.

[62] M. Flynn & C. Cannon, *The Privatization of Immigration Detention: Towards a Global View*, GDP Working Paper, Geneva, GDP, 2009, available at: http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf (last visited 25 May 2012).

[63] S. Nathans, *The Politics of Privatised Immigration Detention*, Presentation, Geneva, The Graduate Institute for International and Development Studies, 2010, available at: http://www.globaldetentionproject.org/publications/newsletter/public-event-2-march-2010.html (last visited 25 May 2012).

Although it can be difficult to observe a direct causal relationship between the lobbying efforts of private contractors and worsening and/or expanding detention practices, the establishment of deeply rooted private incarceration regimes can engender an institutional momentum that takes on a life of its own, leading to what one author, Deepa Fernandez, calls the creation of an "immigration-industrial complex". Discussing the US experience with privatised immigration detention, Fernandes writes, "With the increase in prison beds to house immigrants comes the pressure to fill them" and "given the tight connections between the private-prison industry and the federal government" efforts to expand bed space will likely increase.[64]

Among the main variations of privatisation that should be coded in detention data are whether a facility is owned or managed by a private company or other non-state actor, and whether certain services have been outsourced.

Management refers to the entity that operates the facility in question. Facility operators can include state agencies, for-profit companies, not-for-profit groups, and international or inter-governmental institutions. Sometimes, management of a site is shared by official and non-official entities, in which cases both should be listed. It is important to note that "management" is a distinct category from both "ownership" and "custodial authority."

Non-state service provisions is a category of information that covers everything from facility security personnel to food services, and from social counselling to healthcare. Non-state service providers can include for-profit companies, not-for-profit agencies, and international organizations. This paper proposes highlighting the following types of non-state services: security, food, social, and health.

5.5. Custodial authority

This bureaucratic category refers to the official body – typically a ministry and the agency within the ministry – that has ultimate custody over the non-citizens detained at a given site. While this category will overwhelmingly involve state agencies, in some instances researchers may find that international organizations like UNHCR or supra-national institutions like the EU appear to share custody with state agencies.

Ministries

- Interior
- Justice
- Immigration
- Social Affairs
- Foreign
- Ombudsman or similar
- Security

[64] D. Fernandes, *Targeted: Homeland Security and the Business of Immigration*, New York, Seven Stories Press, 2007, 199.

- Labour
- Health

Sub-ministries

- Immigration agency
- Correctional agency
- Border police
- National police
- Gendarmerie

International or inter-governmental institution

- EU
- UNHCR
- IOM

This category aims to provide evidence of how migrants are perceived by States as well as the kind of custodial environment they are likely to be subjected to. For instance, if a State gives custody of migrant detainees to a national security agency, it is a clear sign of what some scholars call the "securitisation" of immigration. Securitisation can be an important indicator of whether immigration detention in a given country is proportionally grounded, particularly in situations where national discourse surrounding immigration is feeding the hardening of policies.[65]

A case in point is the US Department of Homeland Security, Immigration (DHS), created in wake of the 9/11 terrorist attacks. The DHS sub-unit ICE is a partially militarised agency that describes itself as DHS's "principal investigative arm" and the "second largest investigative agency in the federal government".[66] It was created in 2003 through a merger of the enforcement elements of the US Customs Service and the Immigration and Naturalization Service, the former an agency of the Treasury Department and the later of the Justice Department. The treatment of immigration detainees in the US has been consistently denounced by rights groups as well as by its own oversight agencies, who accuse authorities of using detention in a quasi-punitive manner instead of as a means to achieve the limited aims of immigration procedures.[67] This is not to argue that there is a monocausal link between custodial authority and the treatment of immigration detainees in the US (or in other countries), but it is a sharply focused piece of evidence worth taking into account when assessing the level of adherence to the proportionality principle.

A very different case is that of Sweden. Immigration detention in that country is the responsibility of a specialised body, the Swedish Migration

[65] For a discussion of securitisation in the context of immigration, see: O. Waever, B. Buzan, M. Kelstrup & P. Lemaitre, *Identity, Migration, and the New Security Agenda in Europe*, New York, St. Martin's Press, 1993.

[66] US ICE, website available at: http://www.ice.gov/ (last visited 25 May 2012).

[67] See, for example, the quote from former ICE official Dora Schriro cited earlier in this paper: "ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population." Schriro, *Immigration Detention*, 2–3.

Board (*Migrationsverket*), which is part of the Ministry of Justice. The Migration Board endeavours to emphasise that administrative detention of irregular immigrants is a process that is separate from criminal procedures and that migrant detention centres are not prisons.[68] This approach to immigration detention is a result of a policy evolution that began in the 1990s. Until 1997, the Swedish police, which was then charged with overseeing immigration detention, contracted detention services to private contractors. However, in the mid-1990s reports of mistreatment surfaced, accompanied by detainee protests and public indignation. Following public debate, officials ceased contracting detention services to the private sector and shifted responsibility for the practice to the social services sector.[69] After a 2009 visit by the CPT, Sweden received a favourable review of its detention infrastructure, which has led to its characterisation as a European role model.[70]

Documenting custodial authority can sometimes be unobvious. For instance, although the US Federal Bureau of Prisons oversees all federal prisons in the US, immigration detainees confined in those prisons fall under the authority of DHS ICE. In another case, UNHCR jointly operates with the Government of Romania an "Emergency Transit Centre" for people in need of urgent evacuation from the their country. The facility operates as a semi-secure site. Those housed in the facility appear to be under the joint custody of UNHCR and Romania's Ministry of Home Affairs. Thus, the coding for this facility would be Ministry of Home Affairs / UNHCR.

6. Conclusion: Who must be detained?

As this article has endeavoured to demonstrate, migration-related detention – or the detention of non-citizens because of their status – is an extraordinarily diverse phenomenon whose close association to criminal incarceration raises a number of questions about whether or to what degree this form of detention adheres to the limited aims of immigration policy. To the extent that detention operations are deemed excessive in relation to the ends set out in a State's immigration policies, questions of proportionality become paramount.

Nevertheless, while a number of national and international entities have highlighted this problem, to date little effort has been made to propose a methodology for systematically assessing detention regimes. This article argues that to do this, it is critical to establish criteria for constructing data at the level of the individual detention centre. This article proposes an overarching framework for

[68] M. Winiarski, "Rymningar ökar från låsta förvar av asylsökande", *Dagens Nyheter*, 16 Oct. 2004, available at: http://www.dn.se/nyheter/sverige/rymningar-okar-fran-lasta-forvar-av-asylsokande (last visited 25 May 2012).

[69] Flynn & Cannon, *The Privatization of Immigration Detention*, 12.

[70] "Des prisons modèles en Suède", *Le Figaro*, 24 Jul. 2009, available at: http://www.lefigaro.fr/flash-actu/2009/07/24/01011-20090724FILWWW00391-des-prisons-modeles-en-suede-ue.php (last visited 25 May 2012).

constructing data on detention sites, and then assesses a number of variables relevant to the question of proportionality.

There seems little reason to think that the clash between state sovereignty and the rights of non-citizens will be resolved any time soon. As migratory pressures grow, so will States' use of detention to respond to these pressures. Because it is a global phenomenon, migration-related detention should be assessed from a global perspective that can provide rights advocates and policymakers with a solid basis for comparatively assessing detention regimes. This paper aims to encourage this process by providing some initial guideposts for how such a global view can be developed.

A final word of caution: As immigration detention regimes continue their apparently inexorable growth around the world, there will likely be increasing tension between efforts to roll back this growth and attempts to improve the conditions in which migrants are detained. At first glance, these two endeavours seem mutually compatible. However, there is cause for concern that the process of imposing normative standards on detention regimes will institutionally embed this practice in the standard operating procedures of States, thereby ensuring its continued vitality into the foreseeable future.

This article has confined its employment of the proportionality principle to the conditions and contexts in which non-citizens are detained for status-related reasons. Nevertheless, we should not lose sight of the broader implications of proportionality vis-à-vis immigration-related detention: That is, the logic inherent in this principle leads to serious questions about the necessity of most detention cases. If detention practices fail to deter international migrants from coming; if evidence shows that non-custodial means are adequate to ensure that most immigration and asylum cases can be resolved without depriving people of their liberty; and if, as a growing body of evidence appears to show, the free movement of people encourages economic development, both in sending and receiving countries; then the inevitable question arises: who exactly must be detained?