

DISCUSSION PAPER

On the Unintended Consequences of Human Rights Promotion on Immigration Detention

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12 March 2012

Two outstanding features of the contemporary immigration detention phenomenon are its gradual institutional entrenchment in destination countries and the spreading of this practice to states that are on the periphery of the international system. Observers have posited a number of explanations for these trends, including the increasing “securitization” of political discourse on migration, the introduction of profit motives into detention regimes, and the impact of globalization.

This discussion paper argues that an overlooked factor in explanations about the growth of immigration detention is human rights advocacy on behalf of migrant detainees. A close look at the evolution of detention policies seems to show that there is a tension between efforts to promote norms related to the right to liberty and campaigns aimed at improving conditions of detention and reforming the state's custodial relationship with detainees.

At first blush—and indeed in most cases of advocacy on behalf of migrant detainees—these two issues appear closely related. However, there is cause for concern that a narrow focus on improving the treatment of detainees can help rationalize the practice of immigration detention, providing states with cover for their continued efforts to deprive non-citizens of liberty and helping ensure the vitality of detention regimes into the foreseeable future.

The United States is a good case in point. At the beginning of the Obama administration there was enormous hope that serious reforms would be undertaken. While some changes have been implemented with respect to the U.S. detention estate, the reforms have been disappointing. For example, instead of working to limit numbers of detainees, the Obama administration has bolstered enforcement strategies that have led to record levels of deportations while placating critics by touting efforts to put in place a “truly civil” detention estate.

A recent conversation with Andrew Lorenzen-Strait, Immigration and Customs Enforcement’s (ICE) first “public advocate,” helps illustrate this point. In discussing recent changes in the overall U.S. detention infrastructure, Lorenzen-Strait highlighted how ICE had made great strides in limiting the use of prisons by gradually replacing these with “civil”

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detention centers. His key exemplar was the Karnes detention center near San Antonio, what he called the first "civil detention facility" in the United States, which recently opened under the operation of the private prison company the Geo Group.

ICE is making an enormous effort to put a comfortable face on immigration detention, and this effort is paying off. Take for example a comment by a UNHCR official in early 2011 describing the Berks County Family Shelter as the embodiment "of the best practices for a truly civil immigration detention model." The official explained that while "UNHCR believes strongly that the vast majority of asylum seekers should not be detained," in the event that families should be detained, Berks was the model to follow.

We absolutely must applaud efforts to improve the treatment of people in detention. But is it a good idea for the international community's premier agency protecting asylum seekers to provide its imprimatur to efforts—even limited ones—to detain them? Likewise, shifting detainees from criminal prisons to dedicated facilities does indeed represent an improvement. But is the creation of new facilities operated by private entities with built-in incentives to keep beds full a positive outcome?

In contrast to the United States, most European countries ceased some time ago to use criminal facilities for the purposes of immigration detention, and the recent EU Return Directive, which aims to harmonize practices in the European Union related to the return of unauthorized third-country nationals, provides that member states must use specially planned facilities for confining people as they await deportation. But the process of shifting from informal to formal detention regimes, which has occurred over the last two decades, has paralleled the growth in immigration detention in this region.

Is there a connection between these two developments? The case of Ireland is illustrative. Until recently, Ireland's immigration detention estate was notable for two main reasons—its exceedingly small number of detainees each year (numbering in the dozens) and the fact that it had no official facility to confine these people. However, in 2006, after an official visit to the country, the Council of Europe's Committee for the Prevention of Torture (CPT) admonished Ireland for detaining failed asylum seekers slated for deportation in prisons. The CPT pointed out that this treatment violated norms established in the European Convention on Human Rights. The CPT then recommended that Ireland build a facility that would be dedicated to this purpose. In its response to the CPT, the government of Ireland promised to do just that, stating that it was in "ongoing discussions with the Irish Prison Service ... with the aim of providing a separate purpose built facility for immigration offenders at the new complex that conforms to best international standards."

Close observers of immigration detention have long realized that if you provide more beds, there will be an inexorable push to use them. As journalist Deepa Fernandes once wrote regarding the U.S. "immigration-industrial complex": "With the increase in prison beds to house immigrants comes the pressure to fill them." Ireland thus represents an important empirical test case for the future: Once the country has a dedicated detention infrastructure in place, will we see a noticeable uptick in the numbers of people detained?

This discussion about the potential unintended consequences of human rights promotion is important to consider when devising advocacy strategies on this issue. The key question to ask is: How can advocates pressure governments to improve their treatment of detainees while at the same time encouraging them to limit their reliance on detention as a tool of immigration control?

Let's consider "alternatives to detention." What are the indicators we should use to measure whether this campaign has been successful? A cornerstone of this campaign is to

convince states to adopt measures—such as increased use of parole, reporting schemes, and use of residential housing—in order to limit “unnecessary detentions.” If many detention cases are in fact disproportionate to the limited aims of immigration policy, then the most important indicator of success for this campaign would be an observable decline in the numbers of people being detained in states that have implemented alternatives. If, on the other hand, we do not see measurable decreases, then we must consider the possibility that alternatives have simply provided the state with additional means to keep increasing numbers of people under surveillance or in custody. Officials can also point to these alternatives as a sign of their progressive immigration control measures, even as they persist in detaining large numbers of people.

This discussion paper argues that any campaign aimed at reforming a state’s custodial arrangements for immigration detainees must have as an integral component working to constrict that country’s detention activities. Absent such a component, immigration detention regimes may become kinder and gentler, but they will likely also continue to grow, in part as a result of efforts to reform.

Of course, in most states, it makes little sense to approach officials with the aim of convincing them to abandon detention as a tool of immigration control. States have demonstrated a stubborn unwillingness to consider ceasing this practice. However, it is conceivable that some states could be persuaded to limit who they think it is necessary to detain (eliminating, for example, children and families from detention rolls) as well as to reduce overall numbers detentions, in part by relentlessly pointing out in public fora the tremendous costs and comparatively meager gains of immigration detention. If in 10 years we observe a decrease in key states, that would be a considerable achievement.

However, as civil society works to restrict detainee numbers in destination countries, it must remain vigilant of how these states endeavor to export detention and interdiction to the periphery. This “externalization” effort has been at least partially motivated by a separate set of human rights norms—those related to the protection of vulnerable non-citizens, like refugees. Australia, the United States, and Europe have all endeavored to externalize the processing of asylum seekers to limit or otherwise circumvent their obligations.

This diffusing of detention regimes merits an advocacy plan of its own. Over the past 20 years, an archipelago of new detaining countries has emerged, from Asia to the Middle East and from North Africa to the Caribbean. These countries are pressured by receiving states to serve as de facto guardians of the border. If current trends continue, transit countries will in 10-20 years be among the most important migrant detaining states in the world, likely having in place detention estates that rival those of main destination countries. To some extent, this is already the case, as the large detention infrastructures of countries like Turkey, Mexico, and Indonesia amply demonstrate.

However, the issue of transit-state detention is an intractable one. Because a majority of irregular migrants and asylum seekers in these countries have no intention of remaining in those countries, there is little reason for authorities there to believe that detainees will not abscond if released. This creates significant complications with respect to alternatives and other efforts to convince states to limit their detention efforts, especially since these countries are being given an assortment of incentives—both carrots and sticks—by their wealthier neighbors to prevent pass-through migration.

Clearly, among the priorities in these countries is to improve the circumstances of migrant detainees, particularly because these countries often lack resources to maintain minimum standards in their facilities and suffer from deficits in the rule of law. Campaigns to reform

laws governing detention to ensure judicial review and other basic legal protections, to allow access by independent actors and civil society groups, and to raise attention about the role destination countries have in encouraging—and often funding—these detention situations seem paramount.

A key tool needed to pursue any of the advocacy agendas discussed above is solid data. How do we identify and define immigration detention situations? Are there standard concepts that we can use to enable us to compare practices across a variety of countries? What criteria, for example, must be met for us to consider that a particular custodial situation for unaccompanied minors amounts to detention? The most effective advocacy campaigns are those that have at their base reliable data. But to date, detention data has been sorely inadequate in all but a small handful of states. And even when we do have solid data, what is being measured in that data can change radically from one country to the next.

In summary, this paper suggests three key agenda items for advocates confronting immigration detention: (1) establish as a mid- to long-term goal achieving an overall decrease in the numbers of people detained in a cross section of major destination countries; (2) develop a comprehensive advocacy strategy for transit states; and (3) assist the construction of rigorous information about this practice to enable us to observe trends and bolster advocacy efforts.

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The Global Detention Project

The Global Detention Project (GDP) is an inter-disciplinary research endeavour that investigates the role detention plays in states' responses to global migration, with a special focus on the policies and physical infrastructures of detention. The project is based at the Graduate Institute's Programme for the Study of Global Migration and receives financial support from Zennstrom Philanthropies and the Swiss Network for International Studies.

To assess the growth and evolution of detention institutions, project researchers are creating a comprehensive database of detention sites that categorizes detention facilities along several rigorously defined dimensions, including security level, bureaucratic chain of command, facility type, spatial segregation, size, among some two-dozen other discrete fields. This data is gradually being ported to the GDP website in the form of maps, lists, and country profiles.

Project researchers also assess the legal frameworks of this practice, in both international and domestic law, and have begun construction of a complementary database that features state-level information on overall policies and practices. A combined detention center and state-level relational database will be accessible through the GDP website during the course of 2012 as part of a longer-term effort to assess the impact of law on detention practices and the degree to which the treatment of detainees conforms with international commitments.

The GDP has three core aims: 1) to provide researchers, advocates, and journalists with a measurable and regularly updated baseline for analyzing the growth and evolution of detention practices and policies; 2) to encourage scholarship in this often under-studied aspect of the immigration phenomenon; and 3) to facilitate accountability and transparency in the treatment of detainees.