Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe

Izabella Majcher, Clément de Senarclens

1 Introduction

Legal scholars and researchers describe immigration detention as "deprivation of liberty under administrative law for reasons that are directly linked to the administration of immigration policies" (Cornelisse, *Immigration Detention and Human Rights* 6).[1] Immigration detention is thus a form of administrative detention that, to the contrary of criminal incarceration, refers to deprivation of liberty ordered by the executive branch of government—rather than the judiciary—without charges or trial (ICJ 10). Immigration detention constitutes one of the permissible exceptions to the right to liberty under article 5 of the European Convention on Human Rights (ECHR). Under article 5(1)(f) the ECHR allows "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."[2] In this context it has been usually presented as an inevitable element of the policies aimed at enforcing the return of irregular migrants, in particular by preventing the non-citizen from absconding during the preparation of their removal (Silverman; Noll; Gibney). As a result, immigration detention should constitute a preventive measure that is by no means a punitive one.[3]

The qualification of immigration detention as administrative has far reaching implications on the level of procedural protection offered to detainees. As noted above, administrative detention does not require charges or trial. In fact, the fair trial guarantees set out in or derived from article 6 of the ECHR—such as presumption of innocence, personal hearing, right to legal advice and translation, time and facilities to prepare one's defense, and the right to remain silent—are restricted to criminal law proceedings.[4] Thus it may be convenient for states to label detention of penal nature as administrative in order to avoid respecting these safeguards.

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[1] Immigration detention can be also defined as "deprivation of liberty of non-citizens because of their undocumented or irregular status," see Global Detention Project, Glossary, http://www.globaldetentionproject.org/resources/glossary.html.

[2] Two main kinds of immigration detention derive from this provision: *pre-admission detention* and *pre-removal detention*. Although this contribution will focus only on pre-removal detention, the terms "pre-removal detention" and "immigration detention" will be used interchangeably.

[3] By "preventive" it is understood that such a detention serves merely to prevent the person concerned from absconding during the preparation of their removal. The paper uses the terms "preventive", "administrative" or "non-punitive" interchangeably to distinguish administrative detention from penal incarceration which pursues punitive objectives.

[4] Traditionally, under the ECHR, the due process guarantees under article 6 are restricted to civil disputes and criminal processes; the majority of administrative proceedings, including those concerning return and immigration detention, are excluded from the scope of guarantees under article 6, see ECtHR, *Maaouia v. France*, 39652/98, (October 5, 2000), para. 39–41. As a result, both European states and the EU legislation (the Returns Directive, see below) dealing with pre-removal detention provide for less guarantees than criminal detainees are entitled to under article 6. For a more in-depth discussion on the difference between guarantees afforded to immigration detainees and criminal detainees, see Izabella Majcher, ""Crimmigration" in the European Union through the Lens of Immigration Detention," *Global Detention Project Working Paper* No. 6, September 2013. Likewise, the Court of Justice of the European Union (CJEU) does not require a fully-fledged set of fair trial guarantees to be afforded to immigration detainees under the Returns Directive. In its ruling in the *G and R* case, the Luxembourg judges found that not every irregularity in the exercise of the rights of defence (such as the right to be heard) in an administrative procedure extending pre-removal detention will constitute infringement of those rights, see CJEU, *M.G. and N.R.*, C-383/13 PPU, (September

In its jurisprudence on article 6, the European Court of Human Rights (ECtHR) recognized that states could easily avoid fair trial guarantees by defining an infraction or procedure as administrative rather than criminal in their domestic legislations (*Engel* § 81). It thus acknowledged that there might be proceedings that are formally administrative but that are in fact criminal in nature. In *Engel v. the Netherlands,* the Court established three criteria to distinguish criminal proceedings from administrative ones. These criteria are not cumulative but each of them may reveal the criminal nature of the proceedings at stake. Accordingly, the Court assesses the formal classification of the proceedings under domestic law, the nature of the offence, and the nature, severity, and purpose of the penalty (§ 81-82; Macaluso 252). This contribution will focus more specifically on the last *Engel* criterion (nature, severity, and purpose of the penalty) that has been considered as the most relevant one to determine the penal nature of a penalty. As regards the nature of a penalty, deprivation of liberty most easily represents the criminal character of a sanction.[5] The severity of the penalty has been assessed through the maximum permissible length of detention, rather than the one actually imposed (*Ezeh and Connors* § 120 and 126-129). Finally, regarding the purpose, the Court found, in *Öztürk v. Germany*, that the "the purpose of the penalty, being both deterrent and punitive, [suffices] to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature" (§ 53).[6] Although the Court never acknowledged the penal nature of immigration detention, this paper will apply its line of reasoning in *Engel* by analogy to assess whether immigration detention may be considered as having a penal nature.

Several scholars using the theoretical framework of the "crimmigration system of control" [7] have already highlighted a growing convergence between immigration and criminal law. This

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10, 2013), para. 39 and 46. Arguably, the European Union Charter on Fundamental Rights may trigger changes in this double-standard practice, since the right to a fair trial under its article 47, to the contrary of article 6 of the ECHR, is not restricted to civil and criminal litigations, see Angela Ward et al., "Article 47: Right to an Effective Remedy," in *The EU Charter of Fundamental Rights: A Commentary*, ed. Steve Peers (Oxford: Hart Publishing, 2014), 1197–1275.

[5] According to the Court, "[in] a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration, or manner of execution cannot be appreciably detrimental." European Court of Human Rights, *Öztürk v. Germany*, 8544/79, (February 21, 1984), para. 82.

[6] Legal philosophy identifies deterrence (as the prevention of further crimes) and retribution (the moral principle of retaliation according to which bad deeds have to be negatively rewarded) as two main objectives or functions of penal detention (see i.e. André Kuhn and Joëlle Vuille, *La justice pénale: Les sanctions selon les juges et selon l'opinion publique,* Presses polytechniques et universitaires romandes, 2010, p. 23–25). Other functions such as incapacitation (which consist in neutralizing the threat represented by criminal offenders by isolating them in prisons) or, on a symbolic level, *denunciation* (expressing the society's disapproval of the violation of law) have also been pointed out in the literature, see i.e. Malcom Feely and Jonathan Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and its Implications," *Criminology,* 30.4 (1992): 449-474; Arjen Leerkes and Dennis Broeders, "A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention," *British Journal of Criminology*, 50 (2010): 833.

[7] The term "crimmigration" was used for the first time by Juliet P. Stumpf, see Juliet P. Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review* 56.2 (2006): 367–419. See also Juliet P. Stumpf, "Social Control and Justice: Crimmigration in the Age of Fear: Introduction," in *Social Control and Justice: Crimmigration in the Age of Fear*, ed. Maria João Guia, Maartje van der Woude, and Joanne van der Leun (The Hague: Eleven International Publishing, 2013), 7–16, p. 8. Among many scholars who observed the convergence between criminal law and immigration law, without however explicitly referring to it as "crimmigration", see Teresa A. Miller, "Citizenship & Severity: Recent Immigration Reforms and the New Penology," *Georgetown Immigration Law Journal* 17 (2003): 611–66, p. 619; Daniel

approach can be more generally related to Foucault's "techniques and rationalities of government", defined as "all those more or less calculated and systematic ways of thinking and acting that aim to shape, regulate, or manage the comportment of others" (Inda and Dowling 2). Borrowing from Foucault, Simon developed the concept of "governing through crime" to describe the situation in which "crime and punishment become the occasion and institutional context for shaping the conducts of others" ("Governing Through Crime" 173). Applied to migration control, Miller used this concept to "characterize the recent trend to increasingly construct problems of regulation [of immigration] as problems of crime, and in so doing to make available a whole host of tools and techniques of criminal punishment that would otherwise be inappropriate and unavailable" (5).

Addressed extensively in the doctrine, the convergence between immigration and criminal law embraces two distinct developments. The first one, already amply scrutinized by scholars, is usually referred to as the "criminalization of immigration law".[8] It consists in the use of criminal law to sanction violations of (administrative) immigration law, the most radical form of which is punishing irregular stay with imprisonment.[9] This paper will, however, focus on a second facet of crimmigration, understood as the incorporation of "greater criminal punitiveness" in the formally administrative regulation of migration through the adoption of techniques, mechanisms, practices, and priorities of the criminal law enforcement (Miller 619). This trend has usually been illustrated through the case of deportation with several scholars already stressing that formally administrative removal may pursue criminal law objectives and thus be punitive in practice (Barnes; Pauw; Kanstroom, "Deportation, Social Control and Punishment). While Mary Bosworth considers that immigration detention was a particularly interesting domain to explore this trend ("Subjectivity and Identity in Detention" 125), she also notes that surprisingly few contributions had taken this direction since Simon's work on "Refugees in a Carceral Age" ("Foreigners in a Carceral Age" 102).

Kanstroom, "Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law,'" *North Carolina Journal of International Law and Commercial Regulation* 29 (2004): 639–70, p. 653–655; Stephen H. Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," *Washington and Lee Law Review* 64 (2007): 469–528, p. 471-472; Jennifer M. Chacón, "Managing Migration Through Crime," *Columbia Law Review Sidebar* 109 (2009): 135–48, p. 135–136.

[8] See for example Jennifer M. Chacón, "Managing Migration through Crime," *Columbia Law Review Sidebar* 109 (2009): 135–48; Ana Aliverti, "Making People Criminal: The role of criminal law in immigration enforcement," *Theoretical Criminology* (2012): 417–434.

[9] Interestingly–and in contrast with its implications on the second facet of crimmigration addressed in this paper–the EU pre-removal detention framework appears to restrict the scope of this trend to some extent. The interpretation by the Court of Justice of the EU of the Returns Directive (see below) suggests the Directive provides for some limits on states' prerogatives to punish status-related offences with imprisonment. Although in principle criminal legislation falls under the scope of the states' competence, domestic penal provisions must not jeopardize the achievement of the objectives pursued by EU law. On this basis, the Luxembourg judges found in *El Dridi* (CJEU, *Hassen El Dridi Alias Soufi Karim*, C-61/11 PPU, (April 28, 2011), para. 58–59 and 63.) and *Achughbabian* (CJEU, *Alexandre Achughbabian*, C-329/11, (December 6, 2011), para. 39, 45 and 51.) that imprisonment for the failure to comply voluntarily with the return decision or for irregular stay itself—imposed during or prior to return proceedings—is not compatible with the Returns Directive because criminal prosecution leading to imprisonment would delay removal. While laudable, these rulings only have a limited impact on the criminalization of migration in the EU because states are free to impose a sentence of imprisonment if removal has failed. See also on this subject Valsamis Mitsilegas, "The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law," in *Social Control and Justice: Crimmigration in the Age of Fear*, ed. Maria João Guia, Maartje van der Woude, and Joanne van der Leun (The Hague: Eleven International Publishing, 2013), 87–113, p. 98–110.

The few existing contributions rely on two main methods to stress the punitive character of immigration detention. The first consists in the analysis of the material conditions in places where migrants are detained and the way it is experienced by them. Relying on such data for the UK, Bosworth highlighted striking similarities between the conditions of detention, the staff, and the methods employed in penal jails and in immigration detention centers, reinforcing the interconnection between the criminal and immigration systems ("Immigration Detention in Britain" 163). In a recent contribution addressing the US, García Hernández opted for another approach used by the Supreme Court to determine the penal purpose of a detention. Instead of focusing on the effect on immigration detention, this author analyzed the intent of the legislator in setting up an immigration detention regime. Since immigration detention became completely interrelated with the measures taken in the "war on drugs" during the 1980s and 1990s, he claims that the legislative intent behind the elaboration of the US detention regimes clearly demonstrates that immigration detention has been conceived and employed as a punitive instrument against non-citizens deemed as dangerous for society. Finally, Leerkes and Broeders have relied on evidence from both approaches in order to distinguish between the different functions assumed by immigration detention ("A Case of Mixed Motives?"). As they have observed, besides its explicit objective of enforcement of removals, immigration detention may also tacitly fulfill punitive functions, such as *deterrence* of would-be migrants, *incapacitation* of irregular migrants committing (petty) crimes, and *denunciation* by symbolically reasserted state control.

This contribution will not focus on the effect of immigration detention by examining the conditions of detention and how detainees perceive them. Rather, it will adopt the approach developed by the European Court in the *Engel* case and apply its third *Engel* criterion—the nature, severity, and purpose of the penalty—to the immigration detention regime under the European Union (EU) and Swiss law. In order to do so, the paper will mainly focus on the grounds for detention, its maximum length, and the categories of people subject to this measure. As in the García Hernández's contribution, it will also take into consideration the legislative intent behind the introduction and development of immigration detention. For the EU law, the paper will analyze the Return Directive that regulates pre-removal detention in the Schengen countries.[10] The findings will be deepened by the assessment of the evolution of the domestic law in one specific country—Switzerland.[11] As it will be shown, the evolution of the legal framework on immigration detention since the 1980s, coupled with the debates in the Swiss parliament, provides meaningful insights into the objective pursued by immigration detention. This contribution will thus analyze the evolution of the provisions regulating pre-removal detention in the Federal Act on the temporary and permanent Stay of Foreigners (ASF) of 26 March 1931 and, following its complete revision, in the Federal Act on Foreign Nationals (FNA) of 16 December 2005. Besides the legal provisions, the paper will also examine the specific context and justifications that led to the evolution of these measures, as well as the Swiss Federal Court's rulings.

Our analysis suggests that the European and Swiss legal framework may leave space for authorities to extend the use of pre-removal detention beyond non-punitive purpose. Formally, preventive detention is allowed not only in order to prevent absconding. Arguably, both the

[10] 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, Official Journal of the European Union L 348, 24 December 2008, p. 98–107. The Returns Directive is applicable in all the EU countries except from the UK and Ireland, as well as in the Schengen Associate countries (Iceland, Liechtenstein, Norway, and Switzerland).

[11] Although Switzerland is not part for the EU, it is subject both to the ECHR (ratified in 1974) and, as part of the Schengen agreement, to the 'Return Directive', that was transposed in the national law in 2010.

European and Swiss legislation fail to preclude that authorities rely on the penal function of deterrence in order to subject non-citizens to administrative orders and to enforce removals. Moreover, in the Swiss context, it can be demonstrated that the deterrent effect of immigration detention is used not only in relation to enforced removals, but also to deter unwanted foreigners from committing crimes. In this perspective, pre-removal detention should not be understood merely as an instrument of immigration control, but rather as a wider instrument of control of "undesirable foreigners". The use of deprivation of liberty with the specific purpose of deterrence in order to control immigration but also, perhaps in a lesser extent, to control crimes, unveils the penal nature of immigration detention. The problem of using immigration detention for deterrence is that it entails much longer periods of detention and a broader use of detention than would be necessary to prevent concrete risk of absconding. Besides confirming the trends already highlighted in the literature on the convergence between immigration and criminal law, this conclusion calls, at a practical level, either for a limitation of the use of immigration detention to the objectives of preventing absconding or a recognition of the whole set of procedural guarantees typical for penal proceedings.

The structure of the article will follow three main grounds for justifying pre-removal detention under EU and Swiss law. First, the risk of absconding will be discussed. As it will be demonstrated, in Switzerland it was originally considered the only legitimate ground for detention that implies a relatively short period of detention and restricted categories of persons concerned. At the EU level it is argued that imprecise terms used in the legislation allow authorities to rely on this ground also for non-administrative purposes. Secondly, the focus will be placed on detention on account of the lack of cooperation of the migrants, as provided for both in Swiss and EU legislation. This ground may allow detention with a deterrent purpose in order to force cooperation and enforce immigration control. Thirdly, the last section will demonstrate that pre-removal detention may also in practice constitute a punitive instrument aimed at preventing crimes committed by "unwanted" migrants. The Returns Directive does not exclude the use of detention for public order objectives and the issues of crime control have been very present in the Swiss debates regarding immigration detention. The article will conclude with some recommendations in order to restrict the use of immigration detention to the administrative purpose of preventing removal or to increase the level of procedural guarantees.

2 Detention as an administrative tool to prevent absconding

Under international human rights law, pre-removal detention is bound by the principles of necessity and proportionality. As the case-law by the UN Human Rights Committee (HRC) indicates, detention must be necessary to execute a removal order taking into account all circumstances of the particular case and proportionate to the ends sought by the authorities (*A* § 9(2); *Danyal Shafiq* § 7(2)). In light of this interpretation, the UN Working Group on Arbitrary Detention (WGAD) and the UN Special Rapporteur on the Human Rights of Migrants (SRHRM) reiterate that immigration detention should only be imposed as a last resort when there are no less coercive ways to achieve the State's objectives (WGAD § 59; SRHRM § 68). In particular, the Special Rapporteur stressed that "[governments] have an obligation to establish a presumption in favor of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure" (§ 68).[12]

[12] See also Ophelia Field and Alice Edwards, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, Geneva, UNHCR, 2006; Alice Edwards, *Back to Basics: The Right to Liberty*

It can be argued that the principles of necessity and proportionality entail that the risk of absconding during return proceedings be the only reason justifying administrative pre-removal detention. Administrative—and thus preventive—detention would only aim at preventing the persons concerned from fleeing. Thus it would be imposed following the issue of a removal order and for the shortest period possible prior to removal. The absence of any punitive rationale would be confirmed by the fact that non-custodial measures have been assessed and discarded as insufficient to prevent absconding. Likewise, Cornelisse considers that the only legitimate aim of pre-removal detention is to enable the immigration authorities to carry out the removals. Pre-removal detention would be unlawful when used for criminal purposes, for deterring other immigrants, or when deportation is impossible even if the impossibility of removal is due to the lack of cooperation on the part of the foreigner ("Detention of Foreigners" 212). The analysis of EU and Swiss legislation reveals that none of them definitively ensures that immigration detention remains a purely preventive measure justified on account of the risk of absconding. By using broad terms, the Returns Directive seems to fail to prevent the misuse of this generally accepted ground for pre-removal detention. The analysis of the evolution of the Swiss legislation shows that this motive was originally the only ground justifying detention and that it is still present in the legislation. However, other motives suggesting punitive and disciplinary objectives were subsequently introduced.

2.1 European Union

The Returns Directive allows for the six-month detention of a non-citizen who is the subject of return procedures on account of a risk of absconding (articles 15(1)(a) and 15(5)). From the beginning of the negotiations on the Directive, the drafters considered the risk of absconding as a justification for pre-removal detention, in line with the principle of necessity. In fact, the European Commission stressed that detention should only be used where necessary to prevent the risk of absconding (*Commission Staff Working Document* 7). While under human rights law the risk of absconding is a justifiable ground for pre-removal detention, the principles of necessity and proportionality entail several conditions for a detention to be a measure of preventive and administrative character. Arguably, the Directive does not adequately ensure them.

First of all, a risk of absconding must truly exist in a given case. Yet, the Directive fails to lay down clear safeguards to preclude that authorities use an alleged risk of absconding as an alibi for systematically detaining people in return proceedings. First, the term is not defined in the Directive. The Directive merely describes it as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a person under return procedures may abscond" (article 3(7)). In particular, the underlying concept—"objective criteria"—is to be defined at the domestic level. As a result, in some domestic systems the "objective criteria" are either not defined at all or not enumerated in an exhaustive manner.[13] Such imprecise domestic provisions afford broad discretion to authorities in deciding whether a migrant displays a risk of absconding. It needs to be stressed that if the person concerned is not likely to abscond, then his detention is not necessary to

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and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Legal and Protection Policy Research Series, Geneva, UNHCR, 2011.

[13] For instance, Greek Law No. 3907/2011 on the Establishment of Asylum Service and First Reception Service, article 18; Hungarian Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, section 54; Slovak Act No. 404/2011 on the Stay of Aliens, article 88; Estonian Act on the Obligation to Leave and Prohibition on Entry, section 7(2)(2)(8); Finnish Aliens Act No. 301/2004, section 121.

carry out his removal. As a result, detention in such circumstances can hardly be said to pursue only preventive aims (Wilsher 110; Cole 1007).

In particular, to preclude such situations, there should be a safeguard against the presumption of risk of absconding on account of irregular status. The Directive's preamble vaguely lays down such a presumption. It reminds states that "decisions taken under [the] Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of irregular stay" (preamble, §6). However, the non-binding nature of the preamble points to recommendation rather than an obligation for immigration authorities. As a result, in the legislation of several member states the "objective criteria" include irregular entry and/or irregular stay.[14] The Directive's failure to proscribe detention for the sole reason of irregular entry or stay is regrettable. Immigration detention imposed on account of solely irregular status may easily become automatic, thus breaching the principle of necessity. In particular, it may amount to a disincentive measure, aiming at deterring non-citizens from staying irregularly.[15]

The principles of necessity and proportionality also preclude the punitive use of immigration detention by requiring the assessment of less coercive measures before resorting to detention. This requirement was enshrined in the Commission's original draft. Detention on account of a risk of absconding was justified "where it would not be sufficient to apply less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a designated place or other measures to prevent that risk" (European Commission, *Proposal for a Directive* § 14(1)). Following the negotiations, the language of the final text became weaker. The Directive states that, "[unless] other sufficient but less coercive measures can be applied effectively in a specific case" (article 15(1)) states may impose detention. Unlike the Commission's proposal, the Directive does not enumerate any alternatives to detention. The language suggests that the presumption in favor of liberty is not clearly laid down and, in practical terms, the Directive provides for a mere possibility of choosing less coercive measures. It ensues that where authorities have non-custodial measures at their disposal to prevent a risk of absconding, but nevertheless resort to detention, their objective goes beyond ensuring the non-citizen's presence at the removal. Arguably, detention in such cases may pursue other, not purely preventive or administrative objectives.

2.2 Switzerland

The risk of absconding was the only ground allowing for detention when "detention pending deportation" was originally introduced in the Swiss legislation in 1986.[16] This article was the first administrative form of confinement that explicitly aimed at facilitating the removal of foreign nationals. It allowed the administrative authorities to detain for up to thirty days foreign nationals whose removal order was enforceable, if there was a strong presumption of absconding. It was introduced in the context of a debate regarding an increase in the number of asylum requests and

[14] For instance, Luxembourg Law on free movement of persons and immigration, article 111; Dutch Aliens Decree 2000, article 5(1)(b).

[15] See for instance, a last year UK government-sponsored campaign targeting irregular migrants. In fact London saw a few buses touring the city which displayed the message: "In the UK illegally? Go home or face arrest", Matthew Taylor, "'Go home' campaign creating climate of fear, say rights groups," The Guardian, September 8, 2013, http://www.theguardian.com/uk-news/2013/aug/08/go-home-climate-of-fear-rights-groups (accessed August 25, 2013).

[16] Federal Act on the temporary and permanent Stay of Foreigners of 26 March 1931 (Status as of 26 June 1986), article 14(2-3).

difficulties in enforcing removal orders. The maximum term of detention was subject to important debates in the Parliament. The majority of the Commission of the National Council examining the bill proposed to limit the maximum term of detention to ten days, in opposition to the initial proposal of thirty days from the Federal Council. Numerous voices were raised in the Parliament to oppose the power of administrative authorities to detain foreign nationals for a whole month for the sole reason that they did not want to return to their country of origin. However, the majority of the Parliament finally followed the Federal Council's proposal on the argument that ten days might, in some cases, not be long enough to carry out the procedure of removals.[17] We might consider that the possibility of detaining someone for thirty days is indeed already a harsh measure for enforcing an administrative decision. However, the fact that immigration detention was restricted to persons having received a legally enforceable removal order, for a period not exceeding a month, on the sole ground of concrete risk of absconding suggests that "detention pending deportation" was originally conceived as a way of securing the presence of persons ready to be deported. The title of the provision itself, as well as the context of the debate from which these measures departed, also indicate that immigration detention was then merely thought of as a "practical solution" to facilitate the removal of rejected asylum seekers by securing their presence once their removals were about to be enforced. When detention is ordered to secure the presence of a person, whose removal is about to be enforced, for a relatively short period of time, one may conclude that immigration detention is indeed conceived as an "administrative means" of enforcing immigration control by preventing absconding.

Some elements mitigate this first conclusion. First, the Swiss legislation like its EU counterpart did not—neither at the time when detention pending deportation was introduced, nor ever since—enumerate "specific indications" in an exhaustive way, leaving discretion to the authorities to find the risk of absconding in a broad range of circumstances. Moreover, the Swiss legal framework never required the authorities to consider alternatives enabling them to prevent absconding on a case-by-case basis before ordering detention. This lack of consideration of alternatives to detention suggests that other purposes these alternatives cannot fulfill may well be pursued by immigration detention.[18]

As it will be demonstrated in the following section, the modifications made in the Swiss legislation during the 1990s and 2000s clearly suggest that immigration detention is no longer conceived as a way of solely preventing absconding of foreigners who could be deported but is also aimed at forcing foreigners into cooperation when removal cannot not be otherwise enforced. This evolution is also reflected at the EU level. As a result of negotiations, the final text of the Returns Directive also incorporated grounds for detention explicitly directed toward the lack of cooperation of foreign nationals.

3 Detention as a disciplinary tool to force cooperation

As shown in the previous section, absconding during return proceedings was initially considered the main obstacle to removal which could be overcome by the use of detention. The risk of absconding is still the most commonly accepted ground for pre-removal detention. However, the lack of cooperation during the removal procedure, but also—as will be shown in the Swiss case—during the

[17] See the debates on the article 14(2-3) in the National Council, the 19 March 1986 (BO 1986 337-339). URL: http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=20014173, last consultation 2 June 2016.

[18] For a more extended version of this argument see Clément de Senarclens, "State reluctance to use alternatives to detention," *Forced Migration Review* 44 (2013): 60-62.

asylum process, came to be seen as another problem that pre-removal detention aims to solve. Both EU and Swiss legislation allow for the detention of non-citizens who allegedly do not cooperate with the immigration authorities. Arguably, such detention amounts to a disciplinary tool aimed at coercing migrants to accept removal decisions and cooperate with authorities to this end. At the same time, the detention of persons perceived as non-cooperative may resemble a punitive form of incarceration that punishes and deters such undesirable behavior.

3.1 European Union

Under the Returns Directive, states may impose a detention up to six months in cases where the person concerned avoids or hampers the preparation of return or the removal process (article 15(1)(b)). Unlike the risk of absconding, this ground was not set forth in the original proposal for the Directive but was inserted in the course of negotiations. The Directive does not explain at all what actions may amount to "avoidance" and "hampering" of return. Arguably, if a non-citizen displays a risk of fleeing, logically he avoids and hampers his removal. Thus the question arises why this second ground was added. Presumably, it is supposed to cover cases where the person concerned is not willing or capable of absconding but nevertheless authorities characterize their behavior as avoiding or hampering return, such as self-injury in order to be taken to hospital or refusal to border the plane. Although detention on this account still aims to ensure successful removal, it also includes retributive elements. It may amount to a sanction to reprimand and deter such non-cooperative behavior (Wilsher 153 and 193).

In the course of negotiations on the Directive, non-cooperative behavior was also inserted in the text as a justification for the extension of the initial six-month detention. As a result, the Directive allows states to prolong detention to up to eighteen months when, regardless of all their reasonable efforts, the removal operation is likely to last longer due to a lack of cooperation by the detainee or delays in obtaining the necessary documentation from third countries (article 15(6)). Like with hampering and avoiding return, the Directive does not establish what constitutes non-cooperation, leaving it to the discretion of executive officers to assess it.[19] Needless to say, such discretion may result in systematic detention for eighteen months. The extension of detention by a year due to a detainee's presumed refusal to cooperate may resemble retribution and deterrence. The authorities may rely on this ground to punish the detainee for their allegedly non-cooperative behavior and to compel them to cooperate.

Moreover, it could be argued that the EU law falls short of adequately enshrining the ECHR's safeguards against continued pre-removal detention. Under article 5(1)(f) of the ECHR, administrative pre-removal detention is justified only for as long as deportation proceedings are being conducted. In cases where expulsion is not feasible due to the detainee's lack of cooperation or failure to issue travel documents by the destination countries, continued detention cannot be said to be effected with a view to deportation. According to the European Court, such situations lack a "realistic prospect of expulsion" and continued detention does not achieve immigration objectives, which makes it unlawful under the ECHR (*Mikolenko* § 64-65 and 68; *Louled Massoud* § 67, 69 and 73-74). Similarly, the Directive lays down the concept of a "reasonable prospect of removal." It provides that detention is no longer justified if a reasonable prospect of removal no longer exists

[19] As Wilsher argues, the non-compliance by the detainee with the obligation to cooperate should be defined as criminal offence subject to due process guarantees rather than be considered within the ambit of administrative detention. This would require clearer standards so that detainees would have certainty as to what is required. Courts could then determine whether a detainee has complied with the obligation and decide on the length of a sentence, Ibid., p. 67, 154-155 and 196.

(article 15(4)). However, under EU law this concept is read together with the maximum permissible length of detention. As interpreted by the Court of Justice of the European Union (CJEU), a reasonable prospect of removal means that removal can be carried out successfully within the eighteen-month period and such a prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country within that period (*Kadzoev* § 67). Such blanket permission to continue detention as long as it does not exceed eighteen months tends to be inconsistent with the above-mentioned Strasbourg case law. Above all, however, it allows authorities to use extended detention as a disciplinary tool to force detainee cooperation.

3.2 Switzerland

The analysis of the introduction of similar grounds of detention in the particular case of Switzerland sheds light on the objectives pursued through these grounds. Lack of cooperation has also appeared as an explicit ground for detention in the Swiss legislation since 1995.[20] As previously mentioned, when introduced in 1986, detention pending deportation could only be ordered for persons whose removal was enforceable on the ground of concrete risks of absconding. Major changes occurred in the Swiss legislation regarding immigration detention following the introduction of the Federal Act on Coercive Measures within immigration law (ACM) in 1995. As a result of these modifications, immigration detention no longer appears only as a mean of securing the presence of foreign nationals when the removal is about to be enforced, but also as a coercive instrument to submit asylum seekers to the administrative injunctions during their whole stay in Switzerland. Arguably, several provisions allow immigration authorities to use detention as a disciplinary tool, during (or even before) ongoing return proceedings.

The first element that suggests this change in the way in which the enforcement of removal is pursued consists in the title itself on the new set of "coercive measures" introduced within the Swiss immigration law. More concretely, the disciplinary rationality of immigration detention is revealed by the introduction of several grounds for detention related to a lack of collaboration during the asylum and/or removal procedure. The ACM of 1995 introduced a new article, entitled "detention in preparation for departure".[21] Under this new provision, detention could be ordered for up to three months against asylum seekers whose requests were still being processed, on several grounds related to their lack of cooperation:

> To facilitate the conduct of removal proceedings, the competent cantonal authority may detain a person who does not hold a short stay, residence or permanent residence permit, during the preparation of the decision on residence status for a maximum of three months if they: a) *refuse during asylum or removal proceedings to disclose their identity, submit several applications for asylum using various identities or repeatedly fail to comply with a summons without sufficient reason or ignore other instructions issued by the authorities in the asylum procedure*; (…) Article 13a(a), Federal Act on the temporary and permanent Stay of Foreigners of 26 March 1931 (Status as of 18 March 1994).

These exact same grounds for detention related to the lack of cooperation introduced in the Swiss legislation in 1995 are still present in the current FNA under art. 75(1)(a). This provision allowing

[20] Federal Act on the temporary and permanent Stay of Foreigners of 26 March 1931 (Status as of 18 March 1994), article 13a and 13b. See further for a detailed analysis of these articles.

[21] Federal Act on the temporary and permanent Stay of Foreigners of 26 March 1931 (Status as of 18 March 1994), article 13a.

for the detention of persons whose asylum procedure is still pending goes beyond what is permitted under the Returns Directive, as the detention of asylum seekers cannot be based on the Directive.

The grounds for detention related to a lack of cooperation were also introduced in the "detention pending deportation", which then allowed "leaving the person concerned in detention if, based on Article 13a, they are already in detention; (…)." Moreover this measure was no longer restricted to persons whose removal order was legally enforceable, but could also be ordered in the case of asylum seekers whose appeal against a first instance decision was still pending[22]. Finally the maximum term of "detention pending deportation" was extended from thirty days to nine months, and could be cumulated with the detention in preparation for departure reaching a maximal term of twelve months.

The possibility of detaining foreign nationals whose removals are not yet legally enforceable (in the case of "detention pending deportation") or have not even been pronounced (as in the case of "detention in preparation for departure") shows that detention goes beyond the necessary and preventive measures aimed to ensure the presence of the person concerned for the removal. Moreover the grounds of detention related to the lack of collaboration indicate that immigration detention has become a disciplinary tool for forcing the cooperation of persons suspected as having no legitimate motives for seeking asylum in order to accelerate their removals. The extension of the maximum term of detention from one month to one year also goes in this exact same direction consisting in using immigration detention as a disciplinary tool in order to enforce removal.

The disciplinary purpose of immigration detention was further confirmed and reinforced by the introduction of the "coercive detention" during the introduction of the FNA in 2005:

> If a person does not fulfill their duty to leave Switzerland by the appointed deadline and if the legally-enforceable removal or expulsion order cannot be enforced due to their personal conduct, they may be detained to ensure the duty to leave Switzerland is complied with (…). Coercive detention, article 78 §1, Federal Act on Foreign Nationals of 16 December 2005.

This last measure explicitly shows that pre-removal detention in Switzerland may not be employed to secure the removal of persons who can be deported, but to force the cooperation of individuals who could not be deported without it.

During this introduction of the FNA in 2005, the maximum term of detention was once again extended up to twenty-four months[23]. This length was no longer considered as the time the administration would need to actually enforce the removal order, but as a means of pressure that would lead the foreigners to collaborate with the authorities in the removal procedure rather than staying in jail for such long time. A quote from the Federal Councillor Blocher, who was at the time the minister in charge of the Federal Office for Migration, makes this very clear. In spite of an official report commissioned by the Federal Parliament that demonstrated that the probability of enforcing the removal decreased with time of detention (Contrôle parlementaire de l'administration), the Minister Blocher justified the new extension of the maximum term of detention from twelve to twenty-four months stating that:

> The purpose of the exercise is not that they stay here until the end [of the maximum term of detention]. The goal is instead that they leave as soon as possible because

[22] *Ibid*, article 13b.

[23] Following the transposition of the Directive, Switzerland reduced the maximum term of detention to 18 months by introducing in the article 79 the exact same wording as in the article 15(6) of the Return directive. Like the Directive, the FNA does not explain what such a lack of cooperation should involve, thus it leaves discretion to authorities to extend ongoing detention.

> they know that otherwise they will be held for such a long period. Federal Councillor Blocher, National Council, 17 of March 2005, p. 377.

In several judgments, the Swiss Federal Court confirmed the objective of coercive detention as a last-resort measure that can be used to force the cooperation of a person whose removal has not been possible without their consent. The Supreme Court also repeatedly alleged the conformity of "coercive detention" with the ECHR, but showed some hesitation in how to justify this conformity. In effect, in a first judgment of 2 April 2007, the Court states that its conformity did not rely as in the case of "detention in preparation for departure" or "detention pending deportation" on art. 5(1)(f) (detention of a person against whom action is being taken with a view to deportation or extradition), but on article 5(1)(b) of the ECHR allowing for the "detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law" (Federal Court Decision 133 II 97). In a second step, the Court changed its mind and considered that the legality of coercive detention was relying on both subparagraphs (f) and (b) of the article 5(1) (Federal Court Decision 134 I 92, 134 II 201, 135 II 105). In the judgment of 7 July 2007, the Court confirmed the legality of the prolongation of coercive detention after thirteen months, even if the person concerned claimed they would never cooperate with their own removal even if the detention lasted another year. The explicit refusal to collaborate shall not, according to the Court, be taken as a reason to suspend detention since the lack of cooperation is indeed the reason for detaining them. This line of argumentation shows that pre-removal detention is no longer conceived merely as a means of preventing the absconding of a foreign national whose removal is possible, but also as an attempt to enforce the removals of foreigners where it is impossible due to their lack of cooperation. The alleged conformity of this purpose with the ECHR contradicts the stance by Cornelisse that detention became unlawful under article 5(1)(f) in the case where deportation is impossible even "if the impossibility of removal is due to the lack of cooperation on the part of the foreigner" ("Detention of Foreigners" 212). This body of evidence proves that in addition to its initial purpose of preventing absconding, a disciplinary purpose pervades the way in which immigration detention has been conceived and elaborated in Switzerland.

4 Detention as a punitive tool to protect public order

As discussed above, detention under EU and Swiss law may constitute a disciplinary means of migration control. This section will demonstrate that under both legislations, detention may also amount to a punitive instrument for crime control. The Returns Directive does not preclude resorting to pre-removal detention on account of threat to public order or public security. In the Swiss context, it appears that pre-removal detention is conceived as a tool for deterring asylum seekers and irregular migrants from committing crimes. In this respect, immigration detention serves to complement criminal laws that would not be severe enough to deter petty crimes committed by certain categories of migrants.

4.1 European Union

Detention for security reasons is not explicitly permitted under the Directive. This is not an incidental omission, rather a decision taken by the drafters. Already, the original proposal did not contain public order justification for pre-removal detention. It was the European Parliament that proposed a proven threat to public order, public security, or national security as a ground for pre-removal detention (§ 55). Yet, following the negotiations, it was not inserted into the final text. As a

European Commission officer proudly explained, the Commission convinced its co-negotiators that pre-removal detention aims at ensuring the returnee does not abscond during return proceeding and not at protecting society from persons posing a threat to public order. In particular, "[the]—perfectly legitimate—aim to "protect society" should rather be addressed by other pieces of legislation, in particular criminal law, criminal administrative law, and legislation covering the ending of legal stays for public order reasons" (Lutz 69). While the absence of explicit grounds for pre-removal detention on account of public order is welcome, some of the Directive's provisions mitigate the positive outcome of negotiations. First and foremost, the grounds for detention are not listed in an exhaustive manner, thus in practice, states are not prevented from imposing pre-removal detention on account of public order. As noted above, states are free to establish the "objective criteria" for finding a risk of absconding in their legislation. As a result, several domestic legislations provide for criteria related to public order or public security, such as threat to public order, (previous) violations of public order or (previous) convictions.[24] It is difficult to ascertain a direct link between these criteria and the risk that the non-citizens abscond. It appears that these countries make use of immigration detention for purposes not related to enforcement of immigration legislation.

Nonetheless, the possibility for states to detain on account of threat to public order has been circumscribed to some extend by the CJEU. One of the questions addressed to the Luxembourg judges in the *Kadzoev* case was whether the Directive allows states not to release the detainee, when the Directive's maximum period of detention has expired, on the grounds that they have no valid documents, their conduct is aggressive, or that they have no means of supporting themselves. The Court responded in the negative. It pointed to the Directive's text which does not allow the maximum eighteen-month period to be exceeded. More importantly, the Court also noted that "[the] possibility of detaining a person on grounds of public order and public safety cannot be based on [the] Directive […]. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive" (§ 68-71). The *Kadzoev* ruling is not free from ambiguities. However, it is submitted that the ruling may not have such far reaching consequences as to outlaw pre-removal detention on public order grounds, i.e. detention in situations where return proceedings are underway and where the person concerned supposedly threatens public order.[25] It has to be borne in mind that in the *Kadzoev* case, the prospect of removal did not exist due to refusal of third countries to accept the detainee and the expiry of the Directive's maximum permissible length of detention. Without return proceedings underway, his continued detention would be justified only by public order considerations. It is not clear whether the Court would reach the same conclusion if the return proceedings are still ongoing and detention has not yet reached the eighteen-month period. Thus, it appears that only detention that aims solely at the protection of public order, when there are no return proceedings underway, is not justified under the Directive.

[24] For instance, Bulgarian Law of the Foreigners, Latvia Immigration Law, Malta Regulations on Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals, Dutch Aliens Decree, Swedish Aliens Act, Norway Immigration Act.

[25] For a more optimistic reading of this judgment, see Galina Cornelisse, "Case C-357/09 PPU, Proceedings Concerning Said Shamilovich Kadzoev (Huchbarov), Judgment of the European Court of Justice (Grand Chamber) of 30 November 2009," *Common Market Law Review* 48.3 (2011): 925–45, p. 938-940.

4.2 Switzerland

Prior to the Federal Act on Coercive Measures in immigration law (ACM) of 1995, the Federal Act on the temporary and permanent Stay of Foreigners (ASF) of 1931 already contained in its article 14c a provision allowing for the "internment" of foreign nationals who could *not* be deported *if* they represented a threat to national security or a serious threat to public order. Internment thus clearly amounted to the incapacitation of foreign nationals who were considered to represent a threat but could not be deported. This provision was suppressed from the Swiss legislation with the introduction of the ACM in 1995 because it was not compatible with the article 5(1)(f) of the ECHR that allows the detention of persons "against whom action is being taken with a view to deportation",. However, the coercive measures were reintroduced and allegedly made compatible with the ECHR by subsuming them into the overall objective of enforcement of removal.

The punitive nature of immigration detention may first be deduced from the particular context in which the changes regarding immigration detention occurred in the mid-1990s in Switzerland. The point of departure for these new measures was indeed clearly oriented by a debate related to the criminality of asylum seekers in relation to drug trafficking, against whom harsh measures needed to be urgently taken. The bill on 'Coercive Measures in Immigration Law' was elaborated as a political answer to the public debate, which took place in 1993, on the involvement of asylum seekers in criminal activities, and especially in drug trafficking[26]. The importance of these controversies was clearly stated in the bill, where the Federal Council states: "It is the controversies raised by the issue of asylum applicants guilty of offenses in connection with the drug scene that triggered the development of the present bill."[27]

The issue of the criminality of asylum seekers not only appears as a justification for new measures, but also emerges as a new ground for detention in the provisions that were finally adopted. Following the introduction of the coercive measure in immigration law, article 13a(e) ASF (concerning detention in preparation for departure) and article 13b(b) ASF (regarding detention pending deportation) allowed for the detention of persons who "seriously threaten other persons or considerably endanger the life and limb of other persons and are therefore being prosecuted or have been convicted." These grounds are still present in the current FNA under articles 75(1)(g) and 76(1)(b)(1). Moreover, following its introduction in 2005, a new ground for detention concerning foreigners convicted for felony was introduced for detention in preparation for departure (art. 75(1)(h) FNA) and detention pending deportation (art. 76(1)(b)(1) FNA).

The introduction of security- and criminality-based grounds for immigration detention was strongly criticized by the MPs of left wings parties as being in clear contradiction with the ECHR mixing up immigration and criminal law objectives. However, the Federal Council followed by the majority of the Parliament, justified the introduction of these grounds and their compatibility with the European framework, claiming that introducing such grounds did not aim at fighting the criminality of certain categories of foreign nationals, but at increasing the means provided to administrative authorities for deporting persons whose presence was particularly problematic due to their involvement in criminal activities.

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[26] These controversies emerged more precisely in relation to the particular case of the 'open drug scenes' in the city of Zürich, and the publication of statistics of the Zürich city police regarding the overrepresentation of asylum seekers in drug related offenses.

[27] Orginal quote: "Ce sont les polémiques suscitées par le problème des requérants d'asile coupables d'infractions en rapport avec les milieux de la drogue qui ont déclenché l'élaboration du présent projet de loi." Message from the Federal Council (1993: 317), Message supporting the Federal Law on Coercive Measures in Immigration Law of 22 December 1993, p.317

While this rationale clearly appears as the major justification for the introduction of such grounds, it transpires from some declarations that immigration detention was also conceived as an instrument to deter asylum seekers and irregular migrants from committing crimes. This view is disclosed in several statements made by the Federal Council and by Members of Parliament, where criminal law is considered as not being harsh enough to deter these particular categories of migrants from committing crimes.

> It is not possible to replace the criminal law or overcome the inefficiency of criminal sanctions by providing special provisions in immigration law. (...) But we should not delude ourselves: the small foreign criminals are not impressed by the repressive arsenal of our criminal code.[28]

If once again the Federal Council denies that it is willing to use immigration law as a substitute for criminal law, it suggests, however, that measures have to be taken to compensate for the inefficiency of such a system in the case of foreign criminals. The necessity of using these measures to complement the penal code in the case of specific categories of migrants was also supported within the Parliament by the speaker of the Commission who stated that "the proposed measures relate exclusively to administrative sanctions, which will not in any way replace criminal law, but should complement it."[29] So migration detention is not only aimed at facilitating removal, but also serves as a means of deterring asylum seekers from committing crimes by providing authorities with administrative tools that are more flexible and more severe than the one existing in criminal law and that can be used for specific categories of foreign nationals. There are striking similarities between the context of the "war on drugs"—highlighted by García Hernández —in which the legal amendments related to immigration detention were made in the US, and the debate related to the "open drug scene" from which the modifications of immigration detention in Switzerland departed. These findings for the Swiss case confirm similar observations made by Leerkes and Broeders ("A Case of Mixed Motives?") who argue that immigration detention tacitly aims at controlling (petty) crimes committed by asylum seekers and irregular migrants.

> As introduced at the start of this section, Switzerland has long been relying on the administrative detention of foreigners for national security reasons. The ECHR has lead the Swiss government to abandon this form of detention aimed at incapacitating foreign nationals who cannot be deported but who are considered as dangerous. However, evidence suggests that immigration detention is being employed to prevent petty crimes committed by asylum seekers and irregular migrants, which represent a much smaller threat than national security issues. The intrinsic combination of the objective of removal enforcement and the relatively implicit objective of deterring crimes makes it difficult to contest the lack of legitimacy in using immigration law in that respect.

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[28] Orginal quote: "II n'est pas possible de remplacer le droit pénal ou de pallier l'inefficacité de sanctions pénales en prévoyant des états de fait spéciaux dans le droit des étrangers. (…) Mais il ne faut pas se faire d'illusions: les petits criminels étrangers ne se laissent guère impressionner par l'arsenal répressif de notre code pénal, " Message supporting the Federal Law on Coercive Measures in Immigration Law of 22 December 1993, p. 311-312.

[29] Original quote: „Bei den vorgeschlagenen Massnahmen handelt es sich ausschliesslich um verwaltungsrechtliche Sanktionen, die in keiner Art und Weise das Straf recht ersetzen, sondern dieses allenfalls ergänzen sollen, " T. Heberlein, speaker for the Commission, 2 March 1993, p.76.

5 Conclusion

As Section 2 has demonstrated, human rights standards circumscribe pre-removal detention to an administrative and preventive measure. In line with the principles of necessity and proportionality and the preventive nature of administrative detention, immigration detention should only be used when necessary to prevent returnees from absconding where less coercive measures cannot be applied in specific case. It should also be ordered for the shortest period prior to removal. The Returns Directive appears to contain weak safeguards against the misuse of detention on account of risk of absconding. In particular, it does not preclude that the risk of absconding be deduced solely from the irregular status of the non-citizen. In practice, detention imposed on account of solely irregular status may amount to automatic detention aimed at deterrence. The introduction of pre-removal detention in Switzerland in 1986 provides an example of the type of measure—regarding the ground for detention (concrete risk of absconding), its relatively short maximum term (thirty days) and the limited scope of the categories of persons concerned (persons with an enforceable order of removal)—restricted to the purpose of preventing absconding.

Section 3 has argued that formally administrative pre-removal detention under EU and Swiss legislation may be employed to deter non-citizens from refusing to cooperate with authorities for the purpose of return. In such cases, immigration detention amounts to a disciplinary tool used for migration control purposes. The disciplinary purpose of immigration detention can be deducted from grounds for ordering (avoiding or hampering the preparation of the return or the removal process) and extending (lack of cooperation) pre-removal detention under the Returns Directive, as well as from its maximal permitted length. Such punitive purposes are even more apparent when looking at the evolution of the Swiss legislation, notably the titles of the measures introduced, their grounds, the increasing length of detention, as well as their justification in Parliament and by the Federal Court. This evidence suggests that pre-removal detention is increasingly used by governments as an apparatus for control aimed at coercing asylum seekers and irregular migrants to collaborate, where removal would be otherwise impossible.

Finally, section 4 has demonstrated that pre-removal detention also fulfils security and crime control related objectives. The Returns Directive, although not laying it down explicitly, does not outlaw pre-removal detention ordered on account of threat to public order or security. In the case of Switzerland, our analysis suggests that besides its main objective of enforcing removals, the modification in the law concerning pre-removal detention was also motivated by the deterring effect it may have on asylum seekers and irregular migrants involved in petty criminality, in particular related to drug dealing.

Two interrelated implications may be drawn from the paper's analysis. First, from a theoretical perspective, it shows that pre-removal detention under the EU and Swiss legislation may not only be employed as an administrative tool to prevent absconding. Rather, it may also include deterrent purposes that are traditionally restricted to (punitive) criminal sanction. Arguably, immigration detention should no longer be described as a merely administrative tool of immigration control. In fact, in practice it is often used as a deterrent to facilitate migration control. Secondly, the control of migrant populations is not only aimed at immigration control but also at crime control. Immigration detention thus constitutes a disciplinary and punitive instrument designed to shape the conduct of a category of migrants in terms of both immigration and crime control objectives. In that respect, it shall be considered not only as a measure to enforce removal but more generally as an apparatus designed to "discipline and punish" migrants considered "unwanted" while they cannot be expelled. "Unwanted migrants" are those who have no legal authorization to stay or persons who

received a removal order but also—in the Swiss case—asylum seekers, pending examination of their asylum request. These conclusions regarding the EU and Swiss immigration detention regimes support the observations put forwards by several scholars that immigration and criminal mechanisms and objectives become increasingly intertwined.

Secondly, in practice, immigration (administrative) detainees whose detention aims at deterrence or retribution, are in fact subjected to a punitive sanction, while being deprived of broader procedural guarantees that criminal detainees benefit from. To remedy this situation, pre-removal detention should either be restricted to purely administrative measures, or its penal character should be explicitly acknowledged in order to afford stronger procedural protection to immigration detainees. With respect to the first option, several amendments to the Returns Directive would be needed in order for the detention it sanctions to remain a purely administrative and preventive measure. To this end, detention should be allowed only on the ground of the risk of absconding, which should be clearly defined and not be deduced from the irregular status of non-citizen concerned. In terms of Swiss legislation, the legal basis of detention should not go beyond what was allowed under the Swiss legislation in 1986. Thus, the risk of absconding should be the only justification for pre-removal detention and criteria for assessing this risk should be exhaustively enumerated. Moreover, detention should only concern persons with an enforceable order of removal and should not exceed one month. Finally, legislation should ensure that detention be employed as a last-resort measure once other less coercive measures appear insufficient. If immigration detention were used as a purely administrative measure to prevent absconding, the authorities would be more inclined to replace it more often with less coercive and cheaper "alternatives to detention." In its recent and long-awaited report on the implementation of the Directive, the European Commission did not propose any amendment (*Communication from the Commission*). Likewise, no amendments aiming to restrict the use of detention in Switzerland are foreseeable in the actual political context. Thus, the second above mentioned remedy could be imagined. Arguably, if the deterrence of non-cooperative behavior or punishment of public order threats by returnees are explicitly recognized as one of the objectives of immigration detention, detention on such grounds would shift to the penal area. Persons subject to this (punitive) sanction would benefit from broader procedural rights, such as a personal hearing, time and facilities to prepare one's defense, and legal and linguistic assistance free of charge, when needed.

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