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Detention as Punishment: Can indefinite detention be Greece's main policy tool to manage its irregular migrant population?

By
by Anna Triandafyllidou, Angeliki Dimitriadi, Danai Angeli
Team of the MIDAS Project

MIDAS
MIGRATION & DETENTION ASSESSMENT

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Summary:

The challenges that Europe faces, with regard to controlling irregular migration and providing protection to people in need, are complex. Greece's policy for irregular migration control includes arrest and return (through voluntary, semi-voluntary or indeed forced return schemes) combined with regular detention of apprehended undocumented immigrants and asylum seekers whose case is pending. The present policy brief examines the legality of detention, particularly in light of the recent decision by the Greek Legal Council to extend detention indefinitely for irregular migrants, until they consent to return their home countries.

Keywords:

Detention, irregular migration, Greece, MIDAS

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The problem of detention

The challenges that Europe faces with regard to controlling irregular migration and providing protection to people in need are complex. An effective policy for irregular migration control includes arrest and return (through voluntary, semi-voluntary or indeed forced return) and it may seem to be best served by regular detention of apprehended undocumented immigrants and asylum seekers whose case is pending. At the same time, if this policy is to be in line with international obligations and the European Charter of Fundamental Rights it must provide for adequate services and safeguards so that those apprehended are informed of their rights including the possibility to apply for asylum, and are not routinely detained.

Detention should be an extreme measure used only when there is a fear that the person will abscond and in view of an imminent expulsion, or when there is a well-founded fear that the person will commit a crime. However, detention is currently used in Greece (and in many other European countries) as a **punishment** for having crossed a border illegally or even for having filed an asylum application; without due examination of the specific personal and family circumstances of the irregular migrant or asylum seeker, their probability to commit crimes, neither the harm that detention will do to them and to the minors often accompanying them.

Detention has been a hotly debated issue in Greece. The country was heavily criticized for its detention facilities on the islands[1], particularly in Lesvos. It has also been criticized for detaining asylum seekers[2], a practice which in 2012 not only continued but also was strengthened, through the modification of the Presidential Decree 114/2010 that enables the detention of asylum seekers for 12 months (rather than 3 and under special circumstances 6 months in place until then).

Greece imposes by law the maximum time for detention, which is 18 months (prescribed in the Return Directive, under exceptional circumstances only) for both irregular migrants and asylum seekers. The policy of detention was conceived however not only as a punitive measure and/or as deterrence to future arrivals; it was originally conceived as an effective

[1] For the situation at Greek detention centres see ProAsyl (2007), Human Rights Watch (2008), Frontex (September 2011).

[2] See UNHCR (18 October 2012) 'Η κράτηση των αιτούντων άσυλο δεν πρέπει να αποτελεί γενικευμένη πρακτική αλλά εξαιρετικό μέτρο' ('Detention of asylum seekers should not be the norm but the exception'), URL: http://www.unhcr.gr/nea/artikel/b007e6faf3f8f128db0b7075b5aafe33/ypati-armosteia-i-k.html, 9/2/2013 *in Greek*.

way to curb indiscriminate lodging of asylum claims, as means of legalising one's stay. In relation to the latter, recent findings[3] show that migrants are indeed discouraged from applying, since they are informed that detention time starts once more from zero, once they apply for asylum and until a final decision is reached on their application. Deterrence is not a standalone policy. In fact, it is complimented by return and increasingly linked with "voluntary" return, procedure initiated during detention often with the assistance of IOM, whereby the migrant is presented with the alternative to "go home" or remain in detention while his/her asylum claim is processed or travel documents are issued for removal. Because voluntary return means the migrant cooperates and embassies tend to also be more cooperative (when the individual wishes to return), it is also a more expedient process; however it has raised criticism as to what an extent it is "voluntary" and how "sustainable" is the return (or whether the migrant re-migrates upon return).

As Claire de Senarclens argues[4] immigration detention is usually thought of as a way to facilitate the removal of illegally staying foreign nationals. However it is useful to distinguish between **administrative detention**, mainly aiming at guaranteeing that the individual is present when it comes to the execution of their removal, and **the disciplinary function of detention**, when it is thought of as an instrument of coercion for forcing people to cooperate for the purpose of their own removal. Indeed the distinction may be subtle but is real.

There is a third type of detention: **detention as sanction** for having crossed the border unauthorized and/or for seeking asylum. This punishment dimension is used by governments to deter prospective irregular migrants from entering their territory or asylum seekers from applying for international protection. The latter is related to the view that applying for asylum actually stalls the removal procedure until the application is processed (which in countries like Greece for instance may take several years).

There is a common agreement among scholars and NGOs that using detention in its disciplinary and punishment dimension is increasingly common in European countries. Relevant studies and NGO experiences documented in Forced Migration Review (fall 2013) note that there is a pressing need for assessing the costs (both direct in terms of lodging and policing detained people, and indirect in terms of the damage inflicted to these people whose only crime is to have crossed the country's borders unauthorized and/or having applied for asylum) of detention.

In addition, the costs of detention need to be examined more closely. Recent studies[5] have shown that Italy is spending a minimum of 55 million Euros per year for the functioning of its CIE centres (Centres for Identification and Expulsion). In the period between 1998 and 2012 nearly 170,000 individuals have been "hosted" at CIE but only 46.2% of them have been effectively removed from the Italian territory. In addition the Italian government has invested in the period 2005-2012 a total sum of 1.668 billion Euros (of which 1.3 billion contributed by the Italian state and 281.3 million from EU funds) with a dubious success in limiting the phenomenon of irregular migration. In addition the studies show that there is a lack of transparency on how policies are implemented and how money is spent. There is a lack of evaluation and assessment of the activities conducted and the expenses sustained.

[3] See interviews with migrants in detention facilities, October-December 2013, in the framework of the IRMA project (http://irma.eliamep.gr/).

[4] See Forced Migration Review, fall 2013, Issue 44, page 60.

[5] For more details see http://www.lunaria.org/wp-content/uploads/2013/05/SINTESI_COSTIDISUMANI_def.pdf and http://www.wiss-lab.dirpolis.sssup.it/files/2013/06/Libro-dirpolis-ita.pdf

In addition under the current Spending Review, the funds available for the CIE have been reduced further jeopardising the quality of life and the respect of the basic human rights of people detained there.

The Greek authorities have so far failed to consider let alone implement **alternative measures such as community integration of asylum seeking or irregular migrants awaiting proceedings**. Such community integration schemes at their more restrictive version can involve house arrest and electronic surveillance with daily or weekly reporting requirements and/or curfews which are still better than custodial detention. Instead, in early 2014, Greek authorities have reinforced the use of detention against both irregular migrants and asylum seekers.

Extending detention indefinitely in order to force migrants to co-operate on return

On 24 February 2014, the Greek Legal Council published Advisory Opinion no 44/2014, in which it held that it was legal for the Greek authorities to detain irregular migrants beyond eighteen (18) months – the maximum time allowed under Greek law – and prolong their detention indefinitely, until the latter consent to return to their home countries. The Opinion had been initiated by a police query concerning the fate of 300 migrants out of a total number of 7,500 detainees, who were about to be released as their removal had not been carried out in time. According to the Council such a measure was justified by the need to prevent "*a rapid increase in the number of irregular migrants in the country and its undesirable consequences in public order and safety*" that the timely release of the 300 migrants as well as any future ones would "*with certainty*" cause. This would also serve the best interests of irregular migrants, "*who are vulnerable people*" and destitute, but can enjoy a dignified living inside the detention centre.[6] Even though Advisory Opinions are not binding, the police authorities accepted it unconditionally and are already issuing decisions that inform detainees about this newest development. At the same time, Greece has undertaken a significant financial investment in detention centres[7].

The idea behind this latest course of action by the Greek authorities is rather straightforward: faced with the prospect of indefinite stay inside a Greek detention centre – often under deplorable conditions – irregular migrants will opt to return to their homelands. Once there, they will warn others and discourage new arrivals. The size of the migrant population will gradually shrink and Greece will have largely addressed irregular arrivals. Yet the systematic use of any detention, let alone an indefinite one, cannot live long as a policy tool to manage the irregular migrant population in Greece, because it is – to put it rather simply – in violation of existing obligations.

Why is the indefinite detention of irregular migrants

6 See Greek Council of State, Advisory Opinion No 44/2014, published on 24 February 2014, pp. 22-23.
7 For the 2014 calls search under "Expenses" approved by the Ministry for the Protection of the Citizen at http://static.diavgeia.gov.gr .

not legal?

1). According to EU Directive 2008/115/EC ('Returns Directive') which Greece has transposed, Member States may place in detention a migrant awaiting deportation in order to carry out his deportation or prepare his return to his home country, in limited cases and if less coercive measures are not sufficient. Given the exceptional nature of such a harsh measure, the Directive sets a maximum detention time of six (6) months. In exceptional circumstances detention may be extended for another twelve (12) months.[8] Thus, the total length of time that the Greek authorities may detain an irregular migrant for the purpose of removal is eighteen (18) months[9]. When asked by the Bulgarian authorities whether it was allowed under EU law to extend detention beyond eighteen (18) months in the case of migrants who hamper their own removal process, the Court of Justice replied that "*It must be pointed out that, [...] Article 15(6) of Directive 2008/115 in no case authorises the maximum period defined in that provision to be exceeded*." Detaining a person on grounds of "*public order and public safety [...] that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means*" cannot constitute grounds for allowing detention to be extended beyond eighteen (18) months[10]. Since the time limit set by the EU Directive is both clear and unambiguous, leaving no space for Members States to differentiate[11], the Greek authorities will be violating the Directive if they do not immediately release migrants upon the expiry of eighteen (18) months.

2) The systematic use of detention as such, let alone an indefinite one as the police authorities seek to enforce, is also unlawful because it violates a number of international and European legal obligations. As mentioned earlier, both the EU Directive and Greek law clearly state that detention of irregular migrants for the purpose of removal is a measure of last resort, the use of which must be limited and can only be maintained as long as removal arrangements are in progress and executed with due diligence[12]. To be justified, there must be a real prospect that the removal can be carried out. Asylum seekers, for instance, cannot be detained on grounds that they have entered or reside in the country illegally[13]. The blanket application of detention towards all migrants and its automatic extension beyond eighteen (18) months finds therefore no basis under Greek and EU law also for this reason.

3. Next to EU and Greek law, Greece is also bound by its obligations under the European Convention of Human Rights (ECHR). In order for the detention of irregular migrants to be "lawful" under Article 5 par 1(f) the Convention, the European Court of Human Rights, which issues binding judgments for the State Parties to the Convention, has developed

8 See 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, available at http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0014_en.htm, Article 15.
9 See Article 30-32 Law No. 3907/2011 and Article 76 Law No. 3386/2005 as amended.
10 See Court of Justice of the European Union(Grand Chamber), Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov) v. Directorate for Migration at the Ministry of the Interior*, Judgment of 30 November 2009, par. 68-71.
11 Ibid. paras 37, 54 and 61.
12 See Returns Directive, Article 15.
13 See also Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2005.326.01.0013.01.ENG; see also Article. 12, presidential decree 113/2013.

certain principles that must be met: detention must be implemented in good faith, the place and conditions of detention must be appropriate, the duration of the detention reasonable and the authorities must process the deportation within a timely manner. Greece has already been repeatedly convicted for failing to meet these principles and for arbitrarily locking up migrants under deplorable conditions in violation of the Convention – even in cases where the detention had only lasted a few weeks[14].

In line with the Court's standards, in a recent judgment a Greek court acquitted from all charges 15 irregular migrants who had escaped from a detention centre, on grounds that the facility did not meet international standards. This by itself rendered the duration and conditions of their detention unlawful[15].

For the latest measure to successfully pass the Convention test, first the detention conditions must improve and be brought in line with international standards. This by itself would require significant financial investment – way beyond the current budget. Even then, however, Greece would still be in violation of the Convention, because it would fail to meet the rest of the requirements that the Court has set. Greece therefore will be acting in violation also on this ground.

Assessing the Cost and the Benefits

Even though Greece has an undeniable sovereign right to control the number of aliens who enter and stay in its territory, it is also subject to its obligations under national, European and international law. Policy choices that are in violation of those obligations are not beneficial, because once their arbitrariness is judicially established their financial and political costs are higher than any initial short-term benefits.

Until four years ago, migrants could be detained for the purpose of removal for up to three (3) months, while more specific provisions limited the use of detention to particular circumstances where deportation was feasible[16]. In practice however, police authorities systematically detained all arrested migrants and exceeded the time-limit, by issuing consecutively more than one deportation decisions for the same migrant, each one of which set into motion a separate deportation and detention procedure. This meant that a migrant who had just been released because his removal was not feasible, could be arrested on his/her way out of the detention facility, served with a new deportation decision and led back inside to serve another three months – sometimes within less than one hour. The arbitrariness of this practice was criticised by the Greek Ombudsman for seeking to "regularise" a detention that would otherwise find no support under the Greek law[17]. Thus, Greece's very recent past in using detention as a main policy tool and trying to exceed the legal time-limits is a lesson to avoid, especially since there is little evidence that the

14 See ECtHR, *S.D. v. Greece*, Appl. No 53541/07, Judgment of 11 September 2009; *A.A. v. Greece*, Appl. no. 12186/08, Judgment of 22 July 2010; *Tabesh v. Greece*, Appl. no. 8256/07, Judgment of 26 November 2009; *Rahimi v. Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.
15 See Misdemeanour Court of Igoumenitsa, Decision No 682/2012 of 2 October 2012, available at https://docs.google.com/file/d/0BzLLCPJMrNlEbnFDZUdaR3VoTHM/edit .
16 See law No 2910/2001, Art. 44 par. 3; see also Law No 3772/2009 Art. 48 that entered into force on 8 July 2009 raising the limit to 6 months.
17 See Greek Ombudsman, «Πόρισμα: Διαδοχικές Αποφάσεις Απέλασης», September 2006, available at http://www.synigoros.gr/resources/_porisma_apelasi_21_01.pdf .

previous policy discouraged migrants from entering the country[18]. On the other hand, its illegality added substantial political and financial costs for Greece.

The first conviction by the European Court of Human Rights led Greece to pay a symbolic sum of 5000 euros to the victim[19]. Four more convictions led to a total of 48,000 euros in compensations,[20] while more applications kept on arriving. In terms of political costs, Greece was the first State to be publicly condemned by the Committee for the Prevention of Torture for the ways it treated irregular migrants[21] and was obliged to put an end to this migration control policy under the watchful eye of the Council of Europe[22]. Limited funds and absence of adequate facilities, combined with indefinite detention resulted in Greece being the first State towards which returns under the Dublin II Regulation were suspended. In particular, the decision of the European Court of Human Rights (ECtHR) *M.S.S. v. Belgium and Greece*[23] challenged the presumption of safety and of a level playing field in asylum processing within the EU, with the Court arguing against the idea that there is 'per se a sufficient basis for intra-EU transfers of asylum seekers'. It found that the dysfunctions of the Greek asylum system and the inhuman and degrading conditions of detention in the country violated articles 3 and 13 of the European Convention for Human Rights and deprived asylum seekers from their right to an effective remedy. This resulted, for the first time since the implementation of the Dublin II Regulation, in a suspension of transfers of asylum-seekers from other member states towards Greece. The broader implications of this decision were evident soon enough; Greece was pressured to dramatically overhaul its asylum system, reception conditions and broader practices in dealing with irregular migrants, a process that continues to this day.

Given the profound arbitrariness of the latest policy measure, its short viability in terms of legality, the doubtfulness of its outcome, the big financial investment involved and the political risks of any new convictions, it is beyond doubt that this is not an effective and sustainable policy for Greece to manage its irregular migrant population.

18 For arrests in the period 2006- 2013 see http://www.astynomia.gr/images/stories//2014/statistics14/allod2014/statistics_all_2014_01_all&dia_apo2006.JPG .
19 See ECtHR, *John v. Greece*, Appl. No 199/05, Decision of 10 May 2007.
20 See ECtHR, *S.D. v. Greece*, Appl. No 53541/07, Judgment of 11 September 2009; *A.A. v. Greece*, Appl. no. 12186/08, Judgment of 22 July 2010; *Tabesh v. Greece*, Appl. no. 8256/07, Judgment of 26 November 2009; *Rahimi v. Greece,* Appl. No. 8687/08, Judgment of 5 April 2011.
21 See Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment, "Public Statement concerning Greece", 15 March 2011, available at http://www.cpt.coe.int/documents/grc/2011-10-inf-eng.htm
22 See Council of Europe, Committee of Ministers Adopted by the Committee of Ministers on 6 December 2012 at the 1157th Meeting of the Ministers' Deputies, "Resolution CM/ResDH(2012)183, *Mohd and John against Greece*, Execution of the judgments of the European Court of Human Rights", available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116545 .
23 ECtHR (GC), *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 Jan. 2011.

Recommendations

1. Greece must explore its alternatives before resorting to a measure that entails huge financial and political risks and cannot bring the desired outcomes, even by the mere fact that it cannot survive legally for long.
2. Greece can invest in setting higher incentives for migrants to return to their home countries and pursue a closer co-operation with the International Organisation for Migration that carries out voluntary return programmes.
3. The authorities can reduce the overall financial costs of their policy framework by assessing on a more individualised basis the status of irregular migrants in particular of those that are currently in detention, by taking into account that:
    - In view of the recent crisis, many migrants who have lived in Greece legally for over ten years lost their residence permits over the past months. The authorities should seek to regularise their stay, in particular since many of these people have developed ties with the country that would entitle them to a residence status.
    - Asylum seekers and other persons whose removal is not feasible must not be held in detention for as long as their removal cannot be carried out.

Supplementary measures can also include

- Surveillance schemes alternative to detention. Pilot schemes have been tried in Belgium, Germany, Sweden and the United Kingdom but also Australia and the USA[24]. While state authorities have been often reluctant to adopt such schemes, the overall assessment is positive.
- Avoid detention from the start, particularly when minors and families are involved.
- Screen and assess individual cases, presuming that detention is used in exceptional circumstances.
- Provide legal counselling and regularly updated information on the progress of their case.
- Offer social and psychological support to adults and families.
- Enroll children to school.

Supervise regularly especially when the time comes when removal is imminent but seek to resort to detention only in exceptional circumstances.

[24] Forced Migration Review, fall 2013, Issue no. 44, pages 40-62.

Το ΕΛΛΗΝΙΚΟ ΙΔΡΥΜΑ ΕΥΡΩΠΑΪΚΗΣ ΚΑΙ ΕΞΩΤΕΡΙΚΗΣ ΠΟΛΙΤΙΚΗΣ (ΕΛΙΑΜΕΠ) ιδρύθηκε το 1988 και λειτουργεί ως ένα ανεξάρτητο, μη κερδοσκοπικού χαρακτήρα ερευνητικό και επιμορφωτικό Ίδρυμα. Μέσω του πολυετούς έργου του έχει αναδειχθεί σε σημαντικό φορέα πληροφόρησης, μελέτης και σχεδιασμού θεμάτων εξωτερικής πολιτικής, και θεωρείται ένα από τα πιο έγκριτα σε διεθνές επίπεδο κέντρα μελετών της Ελλάδας στον τομέα των Ευρωπαϊκών υποθέσεων και των διεθνών σχέσεων.
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