

Mass Immigration Detention: Thorny Pathologies and Large-Scale Impact

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Abstract: This paper explores the phenomenon of mass immigration detention in Europe through the conceptual and analytical lens of perpetrator studies. It argues that both EU migration law and the ECHR legal framework show a tendency to prioritise state control and border management policies over migrants' right to liberty, revealing four distinct structural pathologies: marginalisation, normalisation, minimisation, and invisibilisation. These trends – rooted in colonial legacies and enhanced by legislative vagueness and judicial restraint – picture migrants as outsiders, routinise detention policies, weaken procedural safeguards, and obscure detainees from public scrutiny. This paper ultimately argues that this regime may constitute state-sponsored perpetration, disproportionately targeting vulnerable groups. As a partial, first step to address the *status quo*, it suggests recognising detention's punitive nature to afford detainees stronger protections, like the presumption of innocence, fair trial rights and a stronger judicial review in order to challenge its legal exceptionalism.

Keywords: immigration detention, marginalisation, normalisation, minimisation, invisibilisation

Introduction

This paper explores the phenomenon of mass immigration detention through the conceptual and analytical lens of perpetrator studies. In doing so, it interrogates the extent to which the legal and institutional frameworks governing immigration detention in Europe may be understood not simply as mechanisms of border control, but as structures capable of enabling, perpetuating, and legitimising harm.

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This approach helps identify a gap in existing research – namely, that immigration control measures in liberal democracies have seldom been examined through the prism of perpetration theory. It invites questions about culpability and systemic violence. Who or what is the ‘perpetrator’ when harmful outcomes (e.g. prolonged arbitrary detention, degrading treatment of migrants, lack of judicial oversight, etc.) result from ostensibly lawful policies? Answering this question requires looking beyond individual bad actors to the institutional structures and cultural narratives that enable such harm. In this vein, while not traditionally applied in this field, perpetrator studies fit exceptionally well as the analytical lens, offering a framework to examine how Europe’s immigration detention policies reflect state perpetration against vulnerable groups like irregular migrants and asylum seekers. I ultimately argue that such a lens reveals a pathologic trend with global parallels, aligning with the field’s focus on institutional violence and challenging the normalisation of detention as mere border control.¹

The analysis proceeds from the following core question: could the systemic implementation of mass immigration detention policies amount to an act of perpetration by states against vulnerable categories, such as irregular migrants, asylum seekers and stateless persons?

1 At a conceptual level, this paper draws upon the insightful contributions of, *inter alia*, Salvador Santino Regilme, ‘State Violence in Narcotic Drug Governance: A Call for Harm Reduction and Human Rights Protection’, *Journal of Perpetrator Research*, 5.1 (2023), pp. 65–76; Christian Gudehus, ‘Some Remarks on the Label, Field, and Heuristics of Perpetrator Research’, *Journal of Perpetrator Research*, 2.1 (2018), pp. 3–8; Christophe Busch, ‘Some Remarks on the Complexity of Collective Violence: Understanding the Whole’, *Journal of Perpetrator Research*, 2.1 (2018), pp. 26–32; Timothy Williams, ‘Agency, Responsibility, and Culpability: The Complexity of Roles and Self-representations of Perpetrators’, *Journal of Perpetrator Research*, 2.1 (2018), pp. 39–64; Juliane Prade-Weiss, Dominik Markl and Vladimir Petrović, ‘Mass Violence as Tragedy: Analyzing the Transmission of Discourses’, *Journal of Perpetrator Research*, 5.1 (2023), pp. 29–62. It is also important to acknowledge that this perpetrator-studies perspective on immigration detention is being developed beyond the European context as well. Scholars have examined analogous patterns in other regions – for instance, the United States’ detention and deportation system has been critiqued as a form of oppressive, racialised state violence, often hidden behind a facade of legality and necessity. Recent research on US practices describes a ‘violence of invisibility’ in immigration enforcement, where new surveillance and detention methods are presented as meaningful reforms yet inflict serious harm that is ‘hidden in plain sight’. Cf. Sarah R. Sherman-Stokes, ‘Immigration Detention Abolition and the Violence of Digital Cages’, *University of Colorado Law Review*, 95.1 (2024), pp. 219–66. Likewise, perpetrator-focused analyses of arbitrary detention policies elsewhere (e.g. under the guise of counterterrorism or public health emergencies) have noticed how discourses of national security, state sovereignty, or exceptional emergency can normalise the suspension of ordinary legal protections, enabling systematic abuse *vis-à-vis* certain groups.

Immigration Detention in Europe: The State of the Art

This section offers a brief overview of the legal framework governing immigration detention in Europe. My analysis will be focused on the standards developed at the European level, namely under the European Convention on Human Rights (ECHR) and European Union (EU) law. These frameworks not only laid the groundwork for national lawmaking in this domain, but – especially in the case of EU law – have come to define those standards *directly*. It is for this reason that the ECHR and EU law are taken here as the primary analytical frame for the main research question of this Section, namely – *what are the driving forces behind the development of European immigration detention's normative standards?*

I begin by noting that immigration detention is not a novel legal tool within the European context.² As early as the 1970s, France had already established a functioning immigration detention regime, and the first dedicated facility of this kind in Europe – the Harmondsworth Detention Centre – opened in the United Kingdom. Yet the practice has even deeper roots: shortly after the Second World War, international legal instruments had already recognised the legitimacy of depriving asylum seekers of their liberty, reflecting the weight traditionally accorded to States' interests in the domain of border control.³

However, it was only with the drafting of the ECHR that Europe saw, for the first time, the articulation of regional standards specifically addressing immigration detention. The inclusion of a provision concerning immigration-related deprivation of liberty, though ultimately supported by a majority of delegates, was not a foregone conclusion, particularly in light of the 'universal vocation' and aspirations behind the Convention's genesis.⁴ While this is not the place to explore the his-

2 For a legal and sociological perspective, see Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers, 2010); Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press, 2012); Giuseppe Campesi, *La detenzione amministrativa degli stranieri* (Cacucci, 2013). For a comprehensive comparative analysis of European domestic frameworks, see Michael Flynn, Mariette Grange and Izabella Majcher, *Immigration Detention in the European Union: In the Shadows of the 'Crisis'* (Springer, 2020).

3 Article 31 of the 1951 Geneva Convention Relating to the Status of Refugees. See Guy Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', October 2001 <<https://www.unhcr.org/sites/default/files/legacy-pdf/3bcfdf164.pdf>> [accessed 25 March 2025].

4 See the *travaux préparatoires* of the Convention, <<https://www.echr.coe.int/documents/d/echr/echrtravaux-art5-cdh-67-10-bill338906>> [accessed 25 March 2025]. This is evidenced by the Convention's wording, which typically extends the guarantees enshrined therein to 'everyone' and prohibits violations of rights from occurring to 'no one'. See Mattias Guyomar,

torical or cultural dynamics behind that choice, it is nonetheless clear that state interests in border management were taken in due consideration by the drafters. States were, in consequence, provided with a robust, specific and *ad hoc* legal mechanism through which to regulate deprivations of liberty in the immigration context.⁵ This device, I would anticipate it here, raises concern as to whether its widespread application might transform a legitimate, international law-based and long-acknowledged state power into a tool of systemic perpetration, particularly when deployed *en masse* against marginalised groups such as stateless people, irregular migrants and asylum seekers.

Turning to the Convention's text, the benchmark is Article 5(1)(f) ECHR, which reads as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ...

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country

or

of a person against whom action is being taken with a view to deportation or extradition.

'Interpretation and Application of the ECHR: Between Universalism and Regionalism', *Goettingen Journal of International Law*, 12.1 (2022), pp. 145–52. It is thus unsurprising that 'the treatment of the stranger was not uppermost in the minds of the drafters'. See Gina Clayton, 'The Right to Have Rights': The European Convention on Human Rights and the Procedural Rights of Asylum Seekers', in *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*, ed. by Ademola Abbas and Francesca Ippolito (Routledge, 2016) pp. 191–211 (p. 191). While a limited number of provisions apply specifically to non-nationals (e.g., the prohibition of collective expulsions), this does not detract from the Convention's foundational character as a universal legal instrument. This interpretation is further supported by the principle that, as a rule, considerations of nationality, residence, or domicile are irrelevant in determining whether a violation of the Convention has occurred. Indeed, the rights guaranteed by the Convention are to be secured to all persons within the jurisdiction of a Contracting State. The Court's consistent preference for the jurisdictional criterion over that of nationality highlights the emphasis placed by the drafters on the 'principle of universality of human rights' (*GIEM Srl and Others v. Italy* App 1828/06 et al (ECtHR, 28 June 2018) Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para 94).

⁵ Ian Bryan, Peter Langford, 'The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights', *Nordic Journal of International Law*, 80.2 (2011), pp. 193–218.

This provision therefore authorises two specific forms of detention: first, that effected with a view to preventing an unauthorised entry into the territory of the State (pre-admittance detention); and second, that pursued with a view to deportation or extradition (pre-deportation detention). Article 5(1)(f) ECHR thus reflects a kind of structural dichotomy. So long as return proceedings are being actively pursued with due diligence, detention for the purpose of deportation remains lawful under the Convention. By contrast, in the absence of any ongoing expulsion process, detention must be justified, if at all, by recourse to the first limb of Article 5(1)(f) ECHR which is based solely on the individual's unauthorised presence at the border.⁶

The European Court of Human Rights (ECtHR) has consistently held that, provided the requirements of legality and protection against arbitrariness are respected, only measures falling within these two categories may be regarded as compliant with the Convention.⁷ This is the so-called principle of exhaustiveness. On its face, the principle would appear to operate as a stringent constraint: detention, it seems, is permissible only in the circumstances expressly envisaged. Yet the Court's own jurisprudence illustrates a markedly broad construction of the provision's requirements. Detention 'with a view to preventing an unauthorised entry' has been interpreted broadly so as to encompass all individuals who have not been formally admitted to the State's territory – thus *a priori* including both asylum seekers and irregular migrants, regardless of the grounds upon which entry was sought or refused.⁸ Similarly, the principle of necessity (*extrema ratio*) of detention – a well-established benchmark in international law – has been deemed inapplicable in the context of detention.⁹ Moreover, pre-deportation

6 Cf. *MB v. the Netherlands* App 71008/16 (ECtHR 23 April 2024) para 1 of Partly Dissenting Opinion of Judge Schukking.

7 See, among others, *Nur Ahmed and Others v. Ukraine* App 42779/12 *et al.* (ECtHR 18 June 2020) para 79, citing *Khlaifia and Others v. Italy* App. 16483/12 (ECtHR 15 December 2016) para 88.

8 See Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016) pp. 287–92, commenting on *Saadi v. The United Kingdom* App. 13229/03 (ECtHR, 29 January 2008) para 64.

9 See *Chahal v. The United Kingdom* App. 22414/93 (ECtHR 15 November 1996) para 112 and *Saadi* (n 8) para 73. On the implications of both judgements, see Helen O'Nions, 'Exposing Flaws in the Detention of Asylum Seekers: A Critique of Saadi', *Nottingham Law Journal*, 17 (2008), pp. 34–51; Violeta Moreno-Lax, 'Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible under EU Law', *Human Rights and International Legal Discourse*, 5 (2011), pp. 97–117; Cathryn Costello, 'Immigration Detention: The Ground Beneath Our Feet', *Current Legal Problems*, 68 (2015), pp. 143–77; Maria Pichou, 'Reception or Detention Centres? The Detention of Migrants and the EU "Hotspot" Approach in the Light of the European Convention on Human Rights', *KritV*, 99 (2016) pp. 114–31. For an international comparative

detention has been upheld as compatible with the Convention even in cases where no active deportation proceedings were pending.¹⁰ Finally, the Court has, in some instances, declined to recognise certain forms of border detention as constituting a deprivation of liberty, thus excluding the individuals concerned from the safeguards ordinarily accorded to detainees.¹¹ Collectively, these elements contribute to a tangible erosion of the (fundamental) right to liberty.¹² My argument here is that this judicial leniency could be seen as enabling a form of collective state perpetration, where the *systematic* deprivation of liberty becomes a *normalised* act of harm against migrants, masked as lawful governance.¹³

In light of the foregoing, it is no secret that immigration detention is a measure progressively used by states – a trend that the Convention has not managed to halt. Socio-criminological studies highlight how detention has become a normalised tool of migration governance that reflects a securitisation paradigm where migrants are increasingly framed as risks to public order rather than rights-bearing individuals.¹⁴ Political analyses further suggest that this trend is fostered by domestic pressures, including populist rhetoric and electoral incentives, which push states to adopt restrictive measures.¹⁵ Far from hampering this trajectory, the deference shown by the ECtHR to domestic frameworks might have even enhanced it.

perspective, see Lorenzo Bernardini, “Criminal or nay?": Migrants' Administrative Detention within the IAHRs: Lessons (not) Learned by Europe', *Revista Brasileira de Direito Processual Penal*, 8.3 (2022), pp. 1537–1604 (pp. 1580–1591).

- 10 *Nabil and Others v. Hungary* App. 62116/12 (ECtHR 22 November 2015) para 38 (considering that ‘an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders’).
- 11 *Ilias and Ahmed v. Hungary* App. 47287/15 (ECtHR 21 November 2019) and subsequent case-law.
- 12 For a convincing analysis of the notion of ‘arbitrary detention’, including immigration detention practices at the international and European level, see Carla Ferstman, *Conceptualising Arbitrary Detention* (Bristol University Press, 2024), pp. 126–35.
- 13 Cf. the Section about the ‘normalisation’ trend in the employment of immigration detention in Europe.
- 14 Maria Bosworth, *Inside Immigration Detention* (Oxford University Press, 2014).
- 15 Andrew Geddes, *The Politics of Migration and Immigration in Europe*, 2nd edn (SAGE Publications, 2016) and, for an interesting analysis of the Italian legal framework, Stefano Zirulia and Giuseppe Martinico, ‘Criminalising Migrants and Securitising Borders: The Italian “No Way” Model in the Age of Populism’, in *Migrants' Rights, Populism and Legal Resilience in Europe*, ed. by Vladislava Stoyanova and Stijn Smet (Cambridge University Press, 2022), pp. 259–79.

Among other features, I note that the ECtHR's reluctance to impose strict necessity or proportionality tests – unlike in other Article 5-related contexts – shows a normative prioritisation of state sovereignty over individual liberty in immigration matters.¹⁶ This trend is also enhanced by the low degree of guarantees provided to detained migrants: not the robust criminal law-related safeguards, such as the presumption of innocence or stringent judicial oversight, but a set of milder guarantees, though important, which are of softer strength compared to their criminal counterparts.¹⁷ For instance, the requirement of due diligence in deportation proceedings lacks the teeth of mandatory time limits or automatic review, leaving migrants vulnerable to prolonged detention.¹⁸ This disparity in safeguards might suggest a deliberate *weakening of protections*, positioning mass detention as a perpetration act that disproportionately targets and marginalises a vulnerable population, with states as the primary actors and judicial bodies as complicit enablers.¹⁹

The standards set into the Convention are fundamental for European countries, as they represent minimum standards that states must comply with. They are not the only standards, though. EU law has developed a florid body of legislation concerning immigration detention but adopted a different drafting methodology. While the Convention applies to 'everyone' (albeit this universalistic approach seems downplayed by the *ad hoc* approach that the ECtHR adopts in cases of immigration detention), EU law differentiates the discipline depending on the status of the migrant concerned. The so-called 'Return Directive', for instance, governs the detention of irregularly staying third-country nationals pending removal,²⁰ while both the 'Reception Conditions Directive' and

16 On the ECtHR's 'statist assumption'-influenced approach in immigration cases, see Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', *Indiana Journal of Global Legal Studies*, 19.1 (2012), pp. 257–303.

17 On the *punitive* nature of immigration detention, see Lorenzo Bernardini, "Beyond the Façade": A Pragmatic Approach on Immigration Detention That Paves the Way for Fair Trial Rights Recognition', *Refugee Law Initiative* (School of Advanced Study, University of London), 18 September 2024 <<https://rli.blogs.sas.ac.uk/2024/09/18/beyond-the-facade-a-pragmatic-approach-on-immigration-detention-that-paves-the-way-for-fair-trial-rights-recognition/>> [accessed 25 March 2025].

18 *JN v. The United Kingdom* App. 37289/12 (ECtHR 19 May 2016) paras 83–88.

19 See *infra* my analysis on the 'marginalisation' and 'minimisation' trends in implementing immigration detention in Europe.

20 Directive 2008/115/EC.

the ‘Dublin III Regulation’ address the detention of asylum seekers,²¹ imposing distinct conditions and limits.²² Legal scholars argue that this differentiation reflects a pragmatic balancing of humanitarian concerns with enforcement priorities, yet it also entrenches a hierarchy of rights based on legal status.²³ Others pointed to the broader context, noting that EU law’s evolution is driven by a tension between supranational integration, the abolition of *internal* borders, and Member States’ insistence on retaining control over *external* borders, a dynamic exacerbated by crises like the 2015 refugee influx.²⁴ This differentiation, however, could also be critiqued as reinforcing a system where certain groups – irregular migrants and asylum seekers – are singled out for detention, potentially constituting a form of structural violence perpetuated by state policies and legitimised by legal distinctions.²⁵

Elsewhere, I have analysed the EU and the ECHR legal framework under a comparative lens.²⁶ I limit myself, for the purpose of this article, to recall that, in both legal orders, detention is seen as a suitable way to govern borders. Deprivation of liberty is not a taboo outside criminal proceedings – quite the contrary, it can be used in other-than-criminal settings, such as immigration law, justified by a long-standing consensus over the ‘undeniable sovereign right to control aliens’ entry into and residence in their territory’,²⁷ and that immigration detention is a ‘necessary adjunct to this right’.²⁸ This consensus, rooted in internation-

21 Directive 2013/33/EU and Regulation (EU) 604/2013.

22 A salient distinction between the ECHR and EU frameworks lies in the fact that EU law permits detention only where it is *necessary* and *maximum detention periods* are explicitly provided. Nonetheless, detention in the asylum context is expressly regulated (thus accepted). Also, time limits either extends to considerable durations (up to 18 months for irregular migrants) or are absent altogether in the case of asylum seekers. Although the grounds for detention under EU law appear more narrowly defined than under the ECHR, in practice they encompass nearly all conceivable scenarios in which a migrant might find themselves. Provisions on alternatives to detention remain broadly framed, effectively delegating their concrete implementation to the discretion of Member States. Finally, minors and vulnerable individuals may also be subjected to detention, albeit with certain additional procedural safeguards not afforded to the general detainee population.

23 Costello (n 16).

24 Daniel Thym, ‘European Migration Law Between “Rescuing” and “Taming” the Nation State: A History of Half-hearted Commitment to Human Rights and Refugee Protection’, *European Papers*, 8.3 (2023), pp. 1663–1678.

25 This aspect will be encompassed in the analysis on the ‘marginalisation’ trend in employing immigration detention in Europe.

26 Bernardini (n 9).

27 As famously articulated by the ECtHR in *Abdulaziz, Cabales and Balkandali v. The United Kingdom* App 9214/80 et al. (ECtHR 28 May 1985) paras 67–68.

28 Saadi (n 8) para 64. See Cornelisse (n 1), pp. 275–310.

al law and clearly reinforced by political and sovereigntist imperatives, may reveal the driving forces behind these normative standards: a blend of legal tradition, state-centric security concerns, and a cautious judicial approach to challenging sovereign prerogatives.

My point here, more specifically, is that said consensus may in fact reveal a broader perpetration narrative that materialises through four distinct yet interrelated trends. I refer to these trends as *pathologies*, insofar as they appear as *chronic, persistent features of the European immigration detention regime* – features that exhibit no clear signs of reversal.

I intentionally adopt this term to emphasise that these are not isolated legal anomalies or momentary policy lapses; they are *entrenched patterns* through which the immigration detention system perpetuates injustice. This characterisation matters because it highlights a form of structural perpetration. Rather than a single official or agency wilfully committing abuse, it is the ordinary, bureaucratic operation of the system itself that reproduces harm. In this vein, perpetrator studies literature has long noted that great harms can be committed through unexceptional bureaucratic means – what Hannah Arendt famously termed the ‘banality of evil’ – simply by dutifully following roles and rules. In a similar vein, the pathologies of detention are *banal* mechanisms of harm.

These pathologies do not present themselves as isolated anomalies; rather, they are intertwined phenomena, mutually reinforcing and recursively shaped by one another. For the sake of clarity, though, I tried to isolate them in order to highlight their defining features. The four are as follows: (i) the *marginalisation* of migrants as ‘outsiders’ unworthy of full rights; (ii) the *normalisation* of deprivation of liberty as an ordinary means of migration governance; (iii) the *minimisation* of some fundamental guarantees through judicial and legal deference; and (iv) the *invisibilisation* of detained populations from public accountability and scrutiny.

Whether the scale and systemic nature of immigration detention practices rise to the level of perpetration (i.e., an institutionalised infliction of harm upon migrants as such) remains an open yet pressing question that could be framed as follows – *how do the ECHR/EU legal frameworks enable the marginalisation, normalisation, minimisation, and invisibilisation of immigration detention, and can these processes collectively constitute a form of state-sponsored perpetration against migrants?* It is this query that the following sections take up, unpacking each of the four pathologies across both the EU and ECHR legal frameworks and interrogating the extent to which responsibility for the resulting harms can be attributed to states and supranational institutions alike.

Four Trends, One Result: Deconstructing the Pathologies of Immigration Detention

MARGINALISATION

The first pathology is marginalisation. For the purpose of this paper, I intend here *the process of putting somebody in a position in which they have no power, or that:*

make[s] or keep[s] someone powerless and on the margins of activity and decision-making.²⁹

At its core, marginalisation – famously described by Young as one of the ‘five faces of the oppression’ in modern societies³⁰ – involves a fundamental *imbalance of powers*, where certain groups systematically exert authority over others, rendering them powerless.³¹ To being with, I note that this phenomenon is not strictly limited to European migration law, but that it may rather be seen as a common feature of immigration detention regimes across the world. Contemporary border control and immigration detention regimes, indeed, exemplify this pathology clearly. They are typically based on legal frameworks where states dominate decision-making processes concerning detention orders directed specifically against non-citizens who are systematically disadvantaged and deprived of their liberty.³²

At a first glance, this state-driven process mirrors historical colonial methods designed explicitly to manage and control populations deemed undesirable or threatening to established orders.³³ It has been observed that modern detention regimes can thus trace their lineage

29 Gabriele Griffin, *A Dictionary of Gender Studies* (Oxford University Press, 2017).

30 Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990). Young argues that justice must address systemic power imbalances and marginalisation, introducing the ‘five faces of oppression’ (i.e., exploitation, marginalisation, powerlessness, cultural imperialism, and violence) as a framework to reveal how structural inequalities exclude certain groups from full societal participation.

31 Roni Amit, ‘Access to Injustice: How Legal Reforms Reinforce Marginalization’, *City University of New York Law Review*, 27 (2024), pp. 1–36.

32 See the following Sections, especially the ones concerning the ‘normalisation’ and ‘minimisation’ trends at the European level.

33 Cf. Henrietta McNeil, ‘Deportation as a Neo-colonial Act: How Deporting State Influence Extends beyond the Border’, *Political Geography*, 102 (2023), pp. 1–10.

directly back to colonial practices of control and segregation, where deprivation of liberty was strategically used *in situ* – in the colonies – to assert dominance and manage populations.³⁴

Colonialism's enduring legacies are particularly evident in how current immigration policies and detention practices perpetuate racial hierarchies established during colonial eras.³⁵ It has been noted how these hierarchies strengthen what can be termed racialised policies, targeting specifically individuals originating from former colonies or those perceived as racially and culturally distinct.³⁶ Historically, indeed, colonial administrations systematically excluded indigenous populations while fostering the inclusion of settlers, laying down a framework of social stratification that continues to resonate through present-day immigration systems.³⁷

Moreover, colonialism profoundly shaped concepts of *national identity*, rooting them deeply in *exclusionary principles*.³⁸ Modern detention and immigration policies often reinforce these national identities by delineating *who belongs* and *who does not*, effectively turning national borders into instruments of continued colonial exclusion.³⁹ Additionally, a form of neocolonialism persists as the global North systematically asserts control over the global South through *restrictive immigration practices* and the widespread use of *detention facilities*,⁴⁰ thus perpetuating historic

34 See, from a broader perspective, Natsu Taylor Saito, 'Indefinite Detention, Colonialism, and Settler Prerogative in the United States', *Social & Legal Studies*, 30.1 (2018), pp. 32–65; Anaís Angelo, 'Landscapes of Colonial Detention Sites', in *Oxford Research Encyclopedia of African History*, 21 June 2023 <<https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-1266>> [accessed 25 April 2025]; Carrie L. Rosenbaum, 'Crimmigration – Structural Tools of Settler Colonialism', *Ohio State Journal of Criminal Law*, 16.9 (2018), pp. 9–64; Mary Bosworth, 'Penal Humanitarianism? Sovereign Power in an Era of Mass Migration', *New Criminal Law Review*, 20.1 (2017), pp. 39–65; Hindpal Singh Bhui, 'The Place of "Race" in Understanding Immigration Control and the Detention of Foreign Nationals', *Criminology and Criminal Justice*, 16.3 (2016), pp. 267–85.

35 Cf. Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield International, 2017).

36 Tendayi Achiume, 'Racial Borders', *The Georgetown Law Journal*, 110.3 (2022), pp. 445–508; Miara L. Bailey-Hall and Emily P. Estrada, 'Private Immigration Detention without the Immigrants: The Subtle Use of Controlling Images in the Contemporary Era', *American Behavioral Scientist*, 66.12 (2022), pp. 1645–1668.

37 Angelo (n 34).

38 Riad Nasser, 'Identity beyond Borders: National Identity and the Post-colonial Alternative', *Social Semiotics*, 29.2 (2019), pp. 145–71.

39 Enrica Rigo, 'Citizenship at Europe's Borders: Some Reflections on the Post-colonial Condition of Europe in the Context of EU Enlargement', *Citizenship Studies*, 9.1 (2005), pp. 3–22.

40 For a both legal and empirical analysis, see Michael Flynn, 'Turning the Global South into an Immigration Detention Gulag', *Global Detention Project*, December 2017 <<https://www.globaldetentionproject.org/turning-the-global-south-into-an-immigration-detention-gulag/>>

power dynamics under new guises.⁴¹ Against this background, scholars concluded that immigration detention operates as a ‘racist practice’ as such, deeply entwined with broader structures of racialised governance inherited from colonial and imperial histories.⁴²

The foregoing arguments, briefly outlined, highlight how practices that appear as neutral and bureaucratic on the surface – such as immigration enforcement via detention tools – are in fact powerful mechanisms for the reproduction of inequality. They do not simply *manage* mobility; they *reflect* and *foster hierarchical relations* embedded in historical systems of domination. My point here is that immigration detention, far from being a value-neutral administrative tool, should be understood as part of a larger apparatus of marginalisation – an apparatus that draws on colonial legacies and is perpetuated through enduring structural power imbalances. It is in this sense that detention becomes not merely a space of legal exception, but the very place where historical injustices are continuously re-enacted. In the Sections that follow, I examine how this framework continues to shape, enable, and legitimise key shortcomings within the European immigration detention regime.

NORMALISATION

The second trend I wish to highlight is that of normalisation. Whereas the marginalisation dynamic engages predominantly with cultural, historical, political and sociological dimensions, normalisation – as it emerges in this context – raises distinctively legal concerns.

In particular, the normalisation of immigration detention operates through a dual process, both discursive and operational, which effectively reconceptualise *what ought to be exceptional* into a *routine administrative response*. Drawing on Foucault’s conception of ‘disciplinary nor-

globaldetentionproject.org/wp-content/uploads/2018/01/Turning-the-Global-South-into-an-Immigration-Detention-Gulag-Michael-Flynn-GDP.pdf [accessed 25 March 2025].

41 See, with reference to labour within immigration detention facilities, Katie Bales, ‘The Immigration Industrial Complex: A Global Perspective on ‘Unfree Labour’ in Immigration Detention’, *Futures of Work*, 30 September 2019 <<https://futuresofwork.co.uk/2019/09/30/the-immigration-industrial-complex-a-global-perspective-on-unfree-labour-in-immigration-detention>> [accessed 25 April 2025]. On a broader perspective, see Bosco Opi, with reference to externalisation of immigration detention by the EU, ‘Borders Recolonised – The Impacts of the EU Externalisation Policy in Africa’, *Journal of Decolonising Disciplines*, 3 (2021), pp. 1–23.

42 For more information on British immigration detention practices, see Sarah Turnbull, ‘Immigration Detention and the Racialized Governance of Illegality in the United Kingdom’, *Social Justice*, 44 (2017), pp. 142–64 (p. 159).

malisation',⁴³ one may observe the consolidation of an 'optimal' model of border control, in which individuals, movements and behaviours are increasingly subjected to a preordained normative order. Within this logic, deprivation of liberty is no longer framed as a measure of last resort but rather becomes the default reaction to the presence – whether at the border or within the territory – of individuals deemed irregular or otherwise undesirable. My argument here is that both the EU and ECHR's normative architecture thus established does not merely tolerate detention; they tend to *institutionalise* it.

The 'norm' at stake here is not therefore merely descriptive but *prescriptive*: it constructs a legal framework in which immigration detention is legitimised *ex ante*, often on the basis of broadly framed or indeterminate grounds such as an alleged risk of absconding or ill-defined public order concerns. This marks one side of the coin of the issue. Where the grounds for detention are formulated in vague or open-ended terms, authorities are afforded a degree of discretion that facilitates the routine imposition of deprivation of liberty. Yet even where the legal grounds are more tightly defined, a similar effect may be achieved through expansive jurisprudential interpretation, that is the other side of the coin. In this respect, I observe a divergence between the ECtHR's case-law and EU law.

The former may be read as a paradigmatic instance of *normalisation through interpretative expansion*. While the text of the Article 5(1)(f) ECHR does envisage certain grounds for detention, these were neither conceived nor drafted to legitimise the *automatic* confinement of migrants *solely on account of their migratory status*. To the contrary, the wording of the provision suggests the necessity of a case-specific assessment. The first limb in particular permits detention 'to prevent an unauthorised entry', a formulation that – if understood in accordance with the principle of narrow interpretation⁴⁴ – ought to limit pre-admission deten-

43 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (Palgrave Macmillan), p. 85 <<https://mirror.explodie.org/Foucault-Security-Territory-Population.pdf>> [accessed 25 March 2025].

44 As the Court famously held, 'the list of exceptions to the right to liberty secured in Article 5 para. 1 (art. 5-1) is an *exhaustive* one and *only a narrow interpretation* of those exceptions is consistent with the aim and purpose of that provision (art. 5-1), namely to ensure that no one is arbitrarily deprived of his or her liberty' (*Quinn v. France* App. 18580/91 (ECtHR 22 March 1995)) para 42, and that 'this insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom' (*El-Masri v. FYROM*

tion to those instances where an individual is in the act of entering, but has not yet crossed, the border. This narrow reading, grounded in the logic of exhaustiveness (i.e., personal liberty as the rule; detention as the exception), would exclude the detention of asylum seekers who lodge an application in accordance with domestic procedure, including at the border. On such a reading, the mere act of seeking international protection – when carried out in a manner compliant with national and international law – cannot by itself serve as a legitimate basis for deprivation of liberty.

In practice, however, the ECtHR has opted for an interpretative trajectory that prioritises state-centric prerogatives and sovereign imperatives, thus departing from such a more restrictive reading of Article 5(1)(f) ECHR. Rather than embracing the logic of exceptionality, the Court has progressively normalised detention by affirming that: (i) even individuals who seek lawful entry – such as asylum seekers complying with procedural requirements – may nonetheless be detained as ‘would-be immigrants’;⁴⁵ (ii) a person remains ‘unauthorised’ for the purposes of the Convention until formal admission is granted, and thus remains detainable;⁴⁶ (iii) the detention of asylum seekers is not, *per se*, incompatible with the Convention;⁴⁷ and (iv) even where a state grants temporary leave to remain pending an asylum application, such presence may still be classified as ‘unauthorised’ unless the state expressly stipulates otherwise.⁴⁸ When these jurisprudential caveats are read in conjunction with the Court’s position that Article 5(1)(f) ECHR does *not* require compliance with principles of *necessity* or strict *proportionality*,⁴⁹ nor the imposition of a *maximum duration for detention* or *automatic judicial oversight*,⁵⁰ the resulting framework permits an extensive – and largely unrestrained – use of immigration detention. I merely observe that it is difficult to reconcile such a regime with the foundational premise that liberty is the rule and detention the exception. The expansive reading adopted by the ECtHR appears therefore to reflect a judicial

App 39630/09 (ECtHR 13 December 2012)) para 230. See, more recently, *MB* (n 6) para 3 of Concurring Opinion of Judge Serghides, and *Merabishvili v. Georgia*, App 72508/13 (ECtHR 28 November 2017) para 298 and the case-law cited therein.

45 *Saadi* (n 8) para 64.

46 *Ibid.*, para 65 and *MB* (n 6) paras 52–54 and 64.

47 *ZA and Others v. Russia* App. 61411/15 (ECtHR 21 November 2019) para 160 citing *Saadi* (n 8) paras 64–65 and *Susa Musa v. Malta* App 42337/12 (ECtHR 23 July 2013) paras 89–90.

48 A recent example is *BA v. Cyprus* App 24607/20 (ECtHR 2 July 2024) paras 55–67 (esp. para 60).

49 See *retro* n 9 for further references.

50 *JN* (n 18) paras 83–88.

deference to statist assumptions rather than a necessary outgrowth of the Convention's text.⁵¹ That a stricter, liberty-enhancing interpretation would have been equally conceivable under the Convention's wording is, in this respect, hard to dispute.

EU law, by contrast, offers a paradigmatic instance of *normalisation through legislation*. I already noted that EU Member States are bound to adhere to both the principle of necessity and a set of exhaustively enumerated grounds for detention – two in the case of irregular migrants and six for asylum seekers.⁵² Although the normative framework is, at a first glance, more textually defined, a key concern still remains: the grounds are articulated in terms so expansive that it is difficult to see how they could operate as effective constraints on the routine use of detention. For example, asylum seekers may be detained on grounds linked to public order or public security,⁵³ and irregular migrants may be deprived of liberty if they are deemed to pose a risk of absconding or are considered to be obstructing return procedures by their conduct.⁵⁴

Given that the necessity of detention must be assessed in relation to these grounds, it is very likely that the former may be interpreted extensively. If, for instance, necessity is understood to encompass the (very vaguely drafted) prevention of absconding or obstructive conduct, the scope of what counts as 'necessary' detention inevitably expands. It becomes, in effect, an elastic clause, allowing a widespread use of detention behind a *façade* of legal constraint. I do not deny that risk of absconding or obstructive behaviour may, in principle, constitute legitimate bases for detention; but I do see that those grounds have been conceived and implemented so broadly that, as many scholars have already pinpointed, immigration detention across Europe is permissible in a wide range of circumstances.⁵⁵

This phenomenon cannot be ascribed *solely* to the interpretive elasticity of domestic courts. Rather, it is also the effect of a vague legislative drafting. One may ask, for instance, why the Return Directive does not require the State to produce concrete indicia to substantiate a risk of absconding, or why the Reception Directive does not impose similar evidentiary standards in cases involving detention on grounds

51 Cf. Costello (n 16).

52 See Article 15(1) Return Directive and Article 8(3) Reception Conditions Directive.

53 Article 8(3)(e) Reception Conditions Directive.

54 Article 15(1)(a) and (b) Return Directive.

55 In addition to articles already cited *retro*, cf. for a broad comparative analysis of EU Member States' immigration detention frameworks, see Majcher, Flynn and Grange (n 2), pp. 451–65.

of public order. Against this backdrop, it seems hard to deny that the absence of such elements exacerbates the risk that detention becomes the norm rather than the exception.

All in all, I observe that the deployment of ‘catch-all’ clauses further entrenches a logic that sees detention as the first tool for border control, allowing for the preventive confinement of individuals without a precise evidentiary threshold. Yet an additional point of concern arises exclusively within the EU context. EU legislation is uniformly accorded an *effet utile* – that is, each instrument is designed to secure its objectives, and Member States are precluded from enacting domestic measures that would undermine those aims.⁵⁶ This principle carries at least one crucial consequence in our analysis.

Member States might, indeed, incorporate additional grounds for pre-deportation detention within their domestic frameworks, provided that such measures do not prejudice the *effet utile* of EU law.⁵⁷ However, the situation becomes problematic when some countries seek to afford *higher guarantees to detained migrants*. For instance, consider a Member State that interprets the ‘risk of absconding’ ground as necessitating *substantive and objective evidence* of a migrant’s behaviour. Alternatively, in a different scenario, some countries might insist on the automatic and mandatory provision of *interpreters* for every detained migrant throughout the whole process – a right neither enshrined in the Return Directive, nor clearly mandated under the Reception Directive and Dublin III Regulation – failing which the migrant must be released. Furthermore, consider other Member States that introduce additional grounds *for release*, such as an automatic release provision when a violation of due process is identified throughout the procedure.

Herein lies the paradox: if the efficiency-driven *ratio legis* underpinning EU immigration law is stretched to such an extent, it becomes questionable whether these examples should be viewed as reinforcing

56 In the field of migration law, see the seminal *El Dridi* Case C-61/11 (CJEU 28 April 2011) ECLI:EU:C:2011:268, holding that the principle of *effet utile* precluded Member States from imposing criminal penalties, such as imprisonment, for irregular migrants refusing to comply with removal orders as this would have undermined the Return Directive and its aim of ensuring an effective return policy. See, on the notion of *effet utile*, Urška Sadl, *The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU*, *European Journal of Legal Studies*, 8.1 (2015), pp. 18–45.

57 Article 15 Return Directive provides that ‘Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, *in particular* when ...’ (emphasis added). This wording suggests that the list of grounds for detention might not be exhaustive.

(or, at least, not hindering) the *effet utile* of the Directive. I nonetheless suspect that it might be quite the contrary – they may well undermine it, as they introduce additional provisions that could, in practice, thwart the uniform implementation of the EU's objectives, namely, effective and harmonised return and asylum (detention) procedures across the Union.

At the same time, judicial review – where envisaged – risks being structurally weakened, either through the downplaying of procedural guarantees or by shielding detention orders from a thorough and effective oversight. Judicial control, after all, is intrinsically linked to the normative clarity of the grounds upon which detention is authorised: where those grounds are drafted in vague or overly expansive terms, the space for meaningful judicial intervention is severely limited. Even where courts attempt to adopt a human rights-based, narrow reading of such provisions, the underlying problem remains unchanged – the normative framework is premised on the normalisation of detention. Within the constitutional logic of the separation of powers, this raises a further dilemma. We can legitimately expect judicial activism to counteract the effects of such a framework without first engaging in a reform of the positive law.

To sum up, I argue that this architecture of normalisation serves to render the exceptional ordinary which gradually transforms administrative discretion into a mechanism of systemic confinement.

MINIMISATION

The third trend I identify is that of *minimisation*. By this, I refer to the tendency to treat certain fundamental rights as bearing implicitly – or at times explicitly – lesser weight when applied to non-citizens. Evidently, this approach runs counter to the universalist foundation of fundamental rights as it gives rise to a *de facto* hierarchy among such guarantees based on the legal or political status of the individual concerned.⁵⁸

My argument is not that citizens and non-citizens must, *in all instances*, enjoy identical protections (there are domains, such as electoral rights, where differential treatment is both expected and justified). Rather, my concern lies with the erosion of those rights that are, by their very nature, intended to be universal. In such contexts, there emerges a strand to qualify or restrict these guarantees by reference to a state-centric logic

⁵⁸ See Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004), pp. 49–70; Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006).

which, though formally irrelevant to the scope of fundamental rights, nonetheless acts as the very *limiting factor* on their practical application.⁵⁹

This is, of course, far from a neutral development; rather, it is a value-laden process. The lowering of guarantees for a particular category of individuals entails, by definition, the construction of a sub-class of persons deemed less worthy of protection solely by virtue of belonging to that category. Minimisation, moreover, operates in a recursive and self-reinforcing manner: certain individuals are afforded fewer guarantees *because* they are part of a given category, yet their very inclusion in that category is justified *because* they are entitled to fewer guarantees.

It is for this reason that this trend is closely intertwined with that of normalisation – the expansion of permissible grounds for deprivation of liberty necessarily entails a reduction in the level of safeguards, thus institutionalising a lowered threshold of protection. But it is equally bound up with the first trend, marginalisation.⁶⁰

I have already addressed certain features of this trend in previous Sections of this paper. Among them, perhaps the most emblematic is the absence of a proportionality or necessity filter in the assessment of migrant detention under the ECHR framework. Apparently, this omission reveals, without any linguistic distortion, that *even detention measures that are not strictly necessary may nonetheless be deemed compatible with the ECHR legal framework*. Indeed, it does not seem that the remaining legs of the lawfulness test applied by the ECtHR carry the same normative weight as the requirement of necessity or proportionality. Why, then, does the Court adopt a different stance in the context of migrants? One might be tempted to view this as a mere anomaly – a bump in the road within its jurisprudence. The pattern suggests otherwise. I am inclined to believe that this is not an incidental departure, but rather a deliberate and structurally embedded differentiation that raises critical concerns with regard not only to migrants' fundamental rights but also to the coherence of the Court's case-law.⁶¹

59 Cf. David Weissbrodt and Stephen Meili, 'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?', *Refugee Survey Quarterly*, 28.4 (2009), pp. 34–58; David Cole, 'Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?', *Thomas Jefferson Law Review*, 25 (2003), pp. 367–88.

60 I observe that the systematic watering down of rights for a legally defined group contributes to their social isolation, stigmatisation and legal 'othering', and reinforce their construction as a population undeserving of full protection. This process, in turn, facilitates their identification – by both the legal order and the general public – as a group for whom diminished safeguards are not only acceptable, but expected.

61 See Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet', *Current Legal Problems*, 68.1 (2015), pp. 143–77. Costello argues that 'immigration detention, as currently

The interpretation of the right to be informed of the reasons for detention, as enshrined in Article 5(2) ECHR, offers yet another illustration of the minimisation trend. It reads as follows: ‘everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him’.

The ECtHR has taken the view that, in the context of immigration detention, the informational requirements under Article 5(2) may be fulfilled even where the information provided is notably *less detailed* than that required in other forms of deprivation of liberty under Article 5(1). The troubling implication is that the Court accepts a differentiated, and substantively diminished, level of protection without offering any convincing justification for such a distinction. But how did we get there?

The first instance in which this lower standard was applied can be traced back to a 1984 admissibility decision issued by the then-European Commission of Human Rights, which concerned detention for the purpose of *extradition* (rather than deportation). On that occasion, the Commission found that:

[t]he applicant (further) complains that he has never been properly informed of the *reasons for his arrest* contrary to Art. 5(2) of the Convention.

The Commission has previously held that Art. 5(2) does not require that a *complete description of all the charges* should be given to the accused at the moment of the arrest (...). The above reasoning applies *mutatis mutandis* to the arrest of persons with a view to their extradition, the meaning Art. 5(2) being that a person should know why he is arrested by the police.

While it is true that insufficiency of information of the charges held against an arrested person may be relevant for the right to a fair trial under Art. 6 of the Convention for persons arrested in accordance with Art. 5(1)(c), *the same does not apply to the arrest with a view to extradition as these proceedings are not concerned with the determination of a criminal charge*.⁶²

practiced in the UK, even if it complies with the outer limits of the ECHR case law, violates the right to liberty and offends the rule of law. It is routinely coercive and preventive. That we need additional safeguards to protect the right to liberty is evident’.

62 *K v. Belgium* App 10819/84 (ECommHR 5 July 1984) p. 231, previously citing *X v. The United Kingdom* App 4220/69 (ECommHR 3 February 1971).

The Court draws a distinction between individuals involved in criminal proceedings and those subject to extradition proceedings. In the latter case, it concluded that the provision of less detailed information does *not* in itself constitute a violation of the right to be informed, as such individuals are not ‘accused’ and thus not entitled to be notified of any criminal charge. This reasoning introduces a *differentiated standard of protection* based on procedural context without fully justifying its normative legitimacy. From a literal perspective, Article 5(2) ECHR itself distinguishes between *two* elements of information: (i) the reasons for the arrest, *and* (ii) the charges brought against the person concerned. While the two grounds may overlap, it is nonetheless unclear why the mere absence of ‘charges’ in extradition cases (an element that, perhaps, is not that crystal clear as the ECtHR suggested) should warrant a lesser degree of information concerning the reasons for detention. On the contrary, if one considers the rationale underlying Article 5(2), that is, allowing individuals to have the lawfulness of detention measures speedily assessed by a court (Article 5(4) ECHR), the lack of formal charges should not justify *per se* any reduction in the information owed to the individual. As the Court has made clear, ‘any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty’.⁶³ If this is the conceptual foundation of Article 5(2), the existence or absence of charges would be immaterial – *a fortiori* where its effect would be to diminish procedural safeguards and to weaken the ancillary right to judicial review of the detention measure.⁶⁴

This approach was reaffirmed and given renewed authority by the Court in 2005 – once again, in the context of an extradition case.⁶⁵ The true turning point, however, is marked by *Suso Musa*, where the Court extended this reduced standard to the field of immigration detention for the purpose of *deportation*; in that case, it held that

63 *Van Der Leer v. The Netherlands*, App 11509/85 (ECtHR 21 February 1990) para 28,

64 The right to be informed, therefore, becomes a crucial pre-condition for the proper exercise of the right to have the lawfulness of one’s detention assessed. However, the existence of a link between those Article 5(2) and (4) ECHR is not unanimously acknowledged. See, in this regard, *X v. The United Kingdom*, App 7215/75 (ECtHR 5 November 1981) Dissenting Opinion of Judge Evrigenis (arguing that the right to be informed is a ‘safeguard of personal liberty whose importance in any system which is democratic and founded on the rule of law cannot be underestimated (...) what is guaranteed is a right that is *autonomous* and *not auxiliary* to the one provided for under paragraph 4 of Article 5 (Article 5-4)).

65 *Bordovskiy v. Russia*, App 49491/99 (ECtHR 8 February 2005) para 56 (‘When a person is arrested with a view to extradition, the information given may be even less complete’).

Article 5 § 2 applies to Article 5 § 1(f) cases, although less detailed reasons are required to be given than in Article 5 § 1(c) cases.⁶⁶

What is troubling here is that the Court appears to extend its more restrictive approach, previously developed in the context of extradition, to cases concerning deportation – yet it does so in the absence of any substantive justification. While one might accept that the application of divergent standards to extradition and deportation could have risked creating interpretive inconsistency within Article 5(1)(f) ECHR – both grounds for lawful detention – the key point is that the Court ended up downplaying the right to information in both scenarios. This position is ultimately crystallised in the following passage from *Suso Musa*:

While it is true that the information provided did not give details as to the method of instituting proceedings challenging the lawfulness of the detention (as opposed to proceedings challenging its unreasonableness or appeals against the orders issued), Article 5 § 2 does not require the State to give such elaborate details, especially where it is not alleged that the applicant requested more information on the procedure (as the applicant in the present case was allowed to do according to the information provided in the booklet) and that this request was refused.⁶⁷

As I illustrated, this line of reasoning is, admittedly, consistent with the Court's previous case-law. But it is still surprising that the lower standard of protection is applied in such a way that even the applicant's ability to challenge the lawfulness of their detention is relegated to the status of a mere 'elaborate details' (!). Such a minimalistic approach, to say the least, seems to refute the idea that Article 5(2) is a 'elementary safeguard',⁶⁸ which constitutes 'an integral part of the scheme of protection afforded by Article 5'⁶⁹ and represents the 'embodiment of

66 *Suso Musa* (n 47) para 113 (note the general reference to 'Article 5 § 1(f) cases'). I look at this jurisprudential shift as an extremely significant step in the ECtHR's case-law. What began as a narrowly framed exception in the extradition context has gradually evolved into a generalised lowering of guarantees for non-citizens in detention, further entrenching the logic of minimisation within the Court's case law.

67 *Ibid.*, para 116.

68 *Fox, Campbell and Hartley v. The United Kingdom*, App 12244/86 12245/86 and 12383/86 (ECtHR 30 August 1980) para 40.

69 *Shamayev and Others v. Georgia and Russia*, App 36378/02 (ECtHR 12 April 2005) para 413 (adding that Article 5(2) ECHR is a 'minimum safeguard against arbitrary treatment').

a kind of legitimate confidence in the relations between the individual and public powers'.⁷⁰

What is more striking, however, is that the ECtHR appears to go further, suggesting that it is incumbent upon the applicant to take active steps to request such information. In doing so, the Court effectively downplays the right to be informed of the reasons for one's detention: not only may the information provided be less detailed than in non-immigration contexts, but the burden seemingly shifts to the individual to obtain it – failing which, the State may be absolved of its duty. The cumulative effect is the construction of a markedly less protective regime for immigration detention, namely, a framework that applies indiscriminately to individuals who have crossed borders irregularly, to asylum seekers (as in *Suso Musa*), and to stateless persons alike.

Is EU law immune from this trend of minimising fundamental safeguards? Not entirely. While certain judgments have elevated the standards of protection beyond those afforded under the ECHR – thus enhancing the right to liberty⁷¹ – others reveal that, when it comes to migrants, even the CJEU exhibits an inclination to water down core guarantees. A particularly salient example is *G and R*.⁷² In that case, a Dutch court had acknowledged that two irregular migrants had been denied the right to be heard during the proceedings for the continuation of their detention. Nonetheless, the court declined to order their immediate release, on the basis that, under domestic law, such a procedural irregularity did not, in and of itself, render the deprivation of liberty unlawful.⁷³ Referred to the CJEU for a preliminary ruling, the question posed was whether it was compatible with EU law for a national court not to be under a strict obligation to release a detained foreign national upon finding a breach of the right to defence, enshrined in the Charter of Fundamental Rights of the EU.⁷⁴ One might have expected an affirma-

70 *X* (n 64) Dissenting Opinion of Judge Evrigenis.

71 See, e.g., *FMS and Others* Joined Cases C-924/19 PPU and C-925/19 PPU (CJEU 14 May 2020) ECLI:EU:C:2020:367 (finding that placing asylum seekers in a closed transit zone under strict supervision and isolation, preventing them from leaving, constitutes a deprivation of liberty under Article 6 of the EU Charter, triggering strict compliance with EU law) and, more recently, *C and B* Joined Cases C-704/20 and C-39/21 (CJEU 8 November 2022) ECLI:EU:C:2022:858 (holding that EU law requires national courts to review the lawfulness of detention *ex officio*, assessing all grounds of unlawfulness, and to order immediate release if unlawful, per Articles 6 and 47 of the EU Charter).

72 *M. G. and N. R. v. Staatssecretaris van Veiligheid en Justitie* Case C-383/13 PPU (CJEU 10 September 2013) ECLI:EU:C:2013:533.

73 *Ibid.*, paras 7–19.

74 *Ibid.*, paras 20–21.

tive answer: where defence rights are infringed, particularly at the stage of detention extension, the subsequent deprivation of liberty should be considered unlawful, warranting immediate release. The Court, however, adopted a markedly formalistic stance and ruled otherwise.

Indeed, the CJEU held that release cannot follow *automatically* from the mere finding of a procedural violation.⁷⁵ To do so, it reasoned, would undermine the *effet utile* of the Return Directive (here, again, the efficiency-based standpoint).⁷⁶ Instead, the national court must conduct an *ex post*, case-by-case assessment to determine whether the *outcome* of the detention procedure *might have been different* in light of the procedural irregularity. Only if that counterfactual is answered in the affirmative must release be ordered. In essence, the Court's reasoning implies that even detention measures adopted *in breach of the right to adversarial proceedings* may remain *compatible* with EU law. This stands in stark contrast to what would be deemed acceptable in non-migration contexts: it would be difficult, in my view, to uphold the lawfulness of a detention (say, an arrest in the context of criminal proceedings) carried out absent any kind of immediate or subsequent *habeas corpus*-type hearing. Yet in the field of migration control, the Court appears willing to tolerate precisely such outcomes. And while *G and R* may seem like a dated judgment, its influence remains palpable today. Indeed, I note that only a few months ago, the CJEU, expressly referring to *G and R*, reaffirmed its reasoning in a case concerning detention for the purpose of return, finding that

as regards the right to liberty ... a finding that a detention measure is unlawful *does not in every case imply the immediate release of the person concerned* ... allowing that person to have his or her rights re-established, where such re-establishment is no longer practically possible since the further detention of that person has been properly substantiated on another, independent legal basis.⁷⁷

These examples collectively offer a distilled account of a broader trend developing at the European level. They reveal not only a state-centric orientation in the interpretation of the right to liberty, but also the re-

⁷⁵ *Ibid.*, para 38.

⁷⁶ *Ibid.*, para 41.

⁷⁷ *C* Case C-387/24 PPU (CJEU 4 October 2024) ECLI:EU:C:2024:868 (finding that EU law does not require immediate release of a detained third-country national when an initial asylum detention is unlawful, if a subsequent lawful detention under the Returns Directive applies).

markable ease with which European courts justify – or attempt to justify – the erosion of fundamental rights in the context of immigration detention. The justifications advanced are often couched in formalistic terms, yet they reflect a more profound conception of this field, that is, migrants are treated less as subjects of rights than as *objects* of legal and administrative management.⁷⁸ Detention emerges here as a technocratic procedure, embedded within a bureaucratic machinery that oftentimes privileges efficiency over guarantees – where procedural safeguards are viewed as superfluous obstacles rather than essential components of the lawfulness test.⁷⁹

INVISIBILISATION

I will now briefly address the fourth pathology characterising the European immigration detention regime, namely, *invisibilisation*. With this term, I intend to capture the process through which *detained migrants are rendered largely invisible to public scrutiny, judicial oversight, and, more generally, political accountability*. I note, again, that this is a structural feature of the system, not an accidental by-product. Invisibilisation refers not only to the physical seclusion of migrants in remote or inaccessible places of detention, but also to the symbolic and procedural removal of their voices, their rights, and their very presence from the legal and political order.⁸⁰

78 Similar terminology has been adopted in Saadi (n 8) Partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.

79 Commenting on *G and R* (n 34) but providing insightful and more general comments, Philippe De Bruycker, 'Audi alteram partem in Immigration Detention Procedures, between the ECJ, the ECtHR and Member States: *G and R*', *Common Market Law Review*, 52 (2015), pp. 569–90.

80 See, on this topic, and by analogy, César Cuauhtémoc García Hernández, 'Invisible Spaces and Invisible Lives in Immigration Detention', *Howard Law Journal*, 57 (2014), pp. 869–98; Lori A Nessel, 'Externalized Borders and the Invisible Refugee', *Columbia Human Rights Law Review*, 40 (2009) pp. 625–99; ECRE, 'Reception, detention and restriction of movement at EU external borders', July 2021 <<https://ecre.org/wp-content/uploads/2021/07/ECRE-Heinrich-Boll-StiftungReception-Detention-and-Restriction-of-Movement-at-EU-External-Borders-July-2021.pdf>> [accessed 1 April 2026]; Claudia Tazreiter, 'Dignity and the Invisible Spaces of Irregular Migration: Rendering Asylum Seekers Invisible Through Off-Shore Detention', in *Human Dignity*, ed. by Edward Sieh and Judy McGregor (Palgrave Macmillan, 2024), pp. 371–83; Ine Lietaert, Eric Broekaert and Ilse Derluyn, 'The Lived Experiences of Migrants in Detention', *Population, Space and Place*, 21 (2015), pp. 568–79; Nancy Hiemstra, 'You don't even know where you are': Chaotic Geographies of US Migrant Detention and Deportation', in *Carceral Spaces*, ed. by Dominique Moran, Deirdre Conlon, Nick Gill (Routledge, 2013); Alison Mountz, 'In/Visibility and the Securitization of Migration: Shaping Publics through Border Enforcement on Islands', *Cultural Politics*, 11.2 (2015), pp. 184–200;

European immigration detention facilities are frequently located in peripheral zones: at borders, in transit areas, on ships, hotspots, in *ad hoc* centres, or in geographically isolated regions.⁸¹ The consequence is twofold. First, access by civil society actors, media representatives, and even legal professionals is significantly hindered. Second, such spatial marginalisation has the effect of shielding the practice of detention from critical oversight. What takes place within these walls is often inaccessible to the outside world; conditions of detention, duration, and legal procedures remain opaque or undocumented. It goes without saying that this lack of visibility severely limits the capacity for migrants to challenge arbitrary deprivations of liberty and, more broadly, invoke some sort of public accountability.⁸²

The problem is further intensified by procedural shortcomings. As I illustrated, detained migrants may receive incomplete or delayed information regarding the reasons for their detention; access to legal assistance and interpreters is not always guaranteed; judicial review may be formalistic or largely ineffective. In this way, invisibilisation operates on a procedural level as well; migrants are not only isolated *physically*, but also *effectively excluded* from the legal processes designed to protect them.⁸³ This fourth pathology is therefore deeply embedded in both the EU and ECHR legal frameworks.

According to the case-law of the ECtHR – and similarly under EU law – migrants *may*, under certain exceptional circumstances, *be held in prison facilities*.⁸⁴ Moreover, they *may* be detained *alongside individu-*

81 Izabella Majcher, 'The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty', *Border Criminologies*, 21 July 2018 <<https://ssrn.com/abstract=3204379>> [accessed 2 April 2026]; Rodrigo Bueno Lacy and Henk van Houtum, 'Europe's Spectacular Borderlines: On Refugee Camps, Banlieues and Other Spaces of Exception', *Ethnic and Racial Studies*, 47.12 (2024), pp. 2652–2674.

82 See the comprehensive and recent report drafted by the Jesuit Refugee Initiative, 'Detained and Unprotected: Access to Justice and Legal Aid in Immigration Detention Across Europe', 10 July 2024 <<https://jrseurope.org/en/resource/detained-and-unprotected-access-to-justice-and-legal-aid-in-immigration-detention-across-europe/>> [accessed 1 April 2026].

83 This dynamic may be understood as a *spill-over effect* resulting from the cumulative operation of marginalisation, normalisation, and minimisation. Once migrants are subjected to detention (i.e., a practice that has become both normalised and associated with lower legal safeguards) their position is already shaped by a logic of exclusion rooted in marginalisation. It then becomes difficult to overlook the final consequence, that is, the progressive erasure of migrants from public discourse, rendering their presence increasingly peripheral (as those places in which they are typically detained), if not altogether invisible.

84 See, with regard to EU law, Article 16 Return Directive, and Article 9 Reception Conditions Directive. Similarly, immigration detention in prison facilities is possible under certain circumstances, according to the ECtHR case law. This practice is not inherently prohibited, but

als who are suspects, accused, or already convicted of criminal offences.⁸⁵ The methods, rationales, and institutional logics characteristic of criminal law have been progressively absorbed into the structure of immigration detention.⁸⁶ What is formally presented as an administrative measure takes on punitive contours, both in substance and in practice.⁸⁷ As a result, the boundaries between administrative and criminal detention become progressively blurred. This conflation contributes to the assimilation of migrants subjected to administrative detention with individuals held under an entirely different legal regime. Hence, the distinct legal status and protection needs of migrants are somehow obscured. I argue that such a merging not only *deepens their invisibility* within the broader carceral system but also *hinders public recognition* of detained migrants as a distinct group. It further compromises the migrants' own ability to articulate their identity as rights-holders with specific legal entitlements, expectations, and vulnerabilities.

All in all, my argument here is that invisibilisation – here briefly illustrated in its salient profiles – represents a structural part of the European detention apparatus. It enables the continuation of restrictive and punitive practices while minimising legal resistance and public awareness. To sum up, by rendering migrants invisible, states reinforce a model of detention that is administratively convenient, politically low-cost, and legally elusive.

it must comply with human rights standards, particularly regarding detention conditions. See, for instance, *Thuo v. Cyprus* App. 3869/07 (ECtHR 4 April 2017).

85 Although Article 16(1) Return Directive and Article 10 Reception Conditions Directive clearly impose an obligation on Member States to ensure that third-country nationals detained in prison facilities are kept *separate from ordinary prisoners*, empirical reports reveal that, in practice, this safeguard is frequently disregarded. In several EU Member States, migrants held in immigration detention are nonetheless confined alongside individuals subject to criminal detention. See the recent report by PICUM, 'Between administrative and criminal law: An overview of criminalisation of migration across the EU', p. 7, April 2024 <<https://picum.org/wp-content/uploads/2024/04/Between-Administrative-and-Criminal-Law.pdf>> [accessed 1 April 2026].

86 Cf. Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice', *Social & Legal Studies*, 28.1 (2017), pp. 81–99.

87 I already noted elsewhere that immigration detention should be regarded more as a (criminal) punishment than an administrative tool (cf. Bernardini (n 17)). For a comparative perspective with the US legal framework, see César Cuauhtémoc García Hernández, 'Immigration Detention as Punishment', *UCLA Law Review*, 61 (2014), pp. 1348–1414.

Concluding Remarks

In this contribution, I have identified four interrelated ‘pathologies’: marginalisation, normalisation, minimisation, and invisibilisation. Taken together, they reveal a broader process of pathologisation underlying the European immigration detention regime.

No longer confined to exceptional or last-resort scenarios, detention has become a routine, institutionalised mechanism of migration governance. I have illustrated that its structural features reflect a punitive and exclusionary logic which, if transposed onto citizens, would almost certainly trigger serious concern on grounds of legality, necessity, and proportionality. Yet, in the realm of migration control, such features are not only accepted – they are entrenched and often operate without adequate procedural safeguards or substantive review.

This normative framework – anchored in historical asymmetries and sustained by a case-law marked by widespread formalism and state-based deference – lays bare the ‘divide’ between the universalist aspirations of European human rights law and its practical application to non-citizens. In this light, I showed how immigration detention, as currently configured, is not a neutral administrative tool. It functions as a coercive apparatus, shaped by logics that echo Europe’s carceral and colonial past far more than its professed commitment to liberty and fairness.

Against this background, the use of what turns out to be (at least according to the four pathologies I have identified) *mass* immigration detention in Europe raises profound questions regarding state perpetration against vulnerable categories.⁸⁸ By subjecting migrants to practices that may involve coercion, deprivation of liberty without adequate justification, and exposure to inhumane conditions, states risk being viewed not merely as enforcers of immigration policy but as active agents inflicting harm. In this light, I believe that, *mutatis mutandis*, this perspective may align with insights from perpetrator

88 Official data published by the European Parliament indicate that ‘yearly, approximately 100,000 people in the EU are detained for reasons related to migration’. Yet it remains unclear whether this figure refers exclusively to individuals held in officially recognised detention facilities, or whether it also encompasses those subjected to *de facto* forms of detention – such as migrants confined in border zones, on vessels, or within so-called hotspots – whose legal status is often ambiguous and whose deprivation of liberty is routinely excluded from official statistics. See Maria Margarita Mentzelopoulou and Nefeli Barlaoura, ‘Detention of Migrants’ (European Parliament, 2023) <[http://europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI\(2023\)753926_EN.pdf](http://europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI(2023)753926_EN.pdf)> [accessed 25 April 2025].

studies, which examine how institutional frameworks can facilitate or obscure acts of perpetration, especially against marginalised groups. And I further observe that this dimension – this new perspective to look at this phenomenon – may prove crucial for understanding the full legal and societal implications of current immigration detention practices.

The question posed at the outset of this contribution can, I believe, be answered in the affirmative. As demonstrated through the four interrelated pathologies examined in this paper, immigration detention operates not merely as an instrument of border governance, but as a *state-sanctioned mechanism of harm, disproportionately targeting groups already positioned at the margins of legal protection*. Through its structural design and legal legitimisation, it reproduces and reinforces forms of exclusion, coercion and invisibility that resonate with broader patterns of state violence. In this light, mass immigration detention must be recognised for what it is: a normalised and institutionalised practice of perpetration, obscured by a *façade* of legality, but no less consequential in its effects.

A possible, though partial, corrective lies in recognising the *punitive* character of immigration detention.⁸⁹ Such recognition would unsettle legal fictions, but could serve as a point of departure for extending to detained migrants the *full range of fair trial guarantees* – among them, the presumption of innocence, a rigorous proportionality scrutiny, and meaningful access to judicial review.⁹⁰ Confronting the punitive reality of detention, in other words, may offer the key to, hopefully, dismantling the legal exceptionalism that currently shields it from deeper scrutiny.⁹¹ Whether such a transformation is possible depends not solely on doctrinal argument, but on a broader willingness – political, judicial, and scholarly – to engage with the structural inequalities that

89 Bernardini (n 17).

90 Enshrined by Article 6 ECHR.

91 My point here is that states continue to rely extensively on immigration detention for the sake of institutional expediency and administrative convenience; after all, deprivation of liberty has been normalised, fundamental rights have been minimised, and detained migrants rendered both invisible and marginalised. I am fully aware that extending fair trial rights – by formally acknowledging the punitive nature of immigration detention – may offer a partial remedy. It could address the trends of normalisation and minimisation, and to some extent counteract invisibilisation. But it does not, crucially, confront the foundational pathology of the measure – its marginalising effect. I do not seek to deny this limitation. Nonetheless, I argue that recognising detention for what it is (a *de facto* punitive measure) and recalibrating legal guarantees accordingly is a necessary first step. My hope is that the more procedural safeguards migrants are afforded, the less inclined states will be to resort to detention in the first place – simply because the process, whether linked to return or asylum, would become more resource-intensive, legally complex, and politically less expedient.

immigration detention continues to reproduce. Absent such a reckoning, the pathologies identified here will remain embedded in law, normalising practices that are difficult to reconcile with the foundational principles of justice and human dignity.

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