

# **An Evaluation of Imprisonment as a Means of Migration Management**

**By**

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## **Abstract**

*Over the years, the management of migration has been a daunting challenge for governments at the points of origin, transit, and destination. This entails the regulation of people across borders and in recent times, especially in the post 9/11 era, the use of both administrative and criminal detentions have been adopted by many countries, particularly in Europe and U.S.A. The theoretical underpinning for the article is the labeling theory, which posits that crime is not intrinsic in the act but in the social reaction to the crime. The theory is also concerned with how the self-identity and behavior of individuals may be determined by the terms used to classify them. The article notes that the use of imprisonment as a means of migration management has not reduced the incidence of irregular migration but has made migrants more vulnerable. Policy adoptions and conventional human rights argument are also at times at variance. The article is an attempt at explorative reflection on "criminality" issues involved in migration management.*

## **1.0. Introduction**

The increasing growing volumes of irregular migration have necessitated the need for various immigration policies across countries over the world, particularly the more advanced countries. Management of migration entails the regulation of people across borders and it involves national, state and local authorities as well as the involvement of international organizations. Of recent, there were documented evidences of punitive measures and at times un-human treatments meted on irregular migrants. The global migration group recent estimates confirmed that over ten million irregular migrants are spread across the world (UN, 2009). Many of these migrants lacked the proper documentation and necessary official documents to work, stay or be integrated in countries of destination. Despite this, the universal human rights accord them the rights and privileges of being human. These rights are denied many of these irregular

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migrants and the state in most cases subjects on them to situations not conducive for human lives. For instance the Amnesty International recently documented the untold hardship unleashed on irregular migrants in Greece and call for a review of policy (Amnesty International, 2010).

According to the report, irregular migrants and asylum-seekers are routinely detained in substandard conditions, many of whom are held in poor conditions in border-guard stations and immigration detention centres with no or limited access to legal, social and medical aid. Such detention prior to deportation can last for up to six months. Greek law also makes irregular entry into and exit out of the country a criminal offence. Other evidences in South Africa (Loren, 2010), Italy, Northern Africa and many European countries attested to the un-human criminal treatment meted on irregular migrants all over the world.

Migration as a phenomenon can be analyzed in three different dimensions. These dimensions are related and are also ways of explaining the effect of migration and they include: security, economic and humanitarian dimensions. The economic dimension explains the basis for most voluntary migrations and entails some economic elements like remittances, under-employment, brain gain among others, thereby leading to the security responses to migration, which could be in terms of securitization or militarization of borders and punishment of offenders. The security aspect of migration management has gained prominence in the literature as most governments have increased security measures to tighten their borders with actions like mounting high security fences (Goldschmidt, 2006); deployment of soldiers; and criminalization of irregular migration among other strict measures (IOM, 2008). The use of imprisonment as an instrument of migration control stems out of the security dimension and is in diverse forms including detaining people in penal institutions, specialized detention centers, restricted movement arrangements as well as in closed camp settings (Amnesty international, 2007). In some countries, the imprisonment in such situations is not optional and the migrants are kept for an indefinite period of time. Unfortunately, children are not spared in some situations and are also subjected to same harsh treatment as adults. However, these measures have invoked lots of humanitarian issues which border on migrant welfare and their Fundamental Human Rights. This article evaluates the use of imprisonment of migrants as a means of migration management, examining the pros and cons as well as suggesting policy implications.

## **2.0. Theoretical Explanation of Imprisonment as a Migration Management Tool:**

In explaining imprisonment as a migration management tool, this article uses a theoretical framework situated in criminology studies known as the labeling theory. Labeling theory, also known as social reaction theory, was developed by Howard Becker (1963). The theory holds that deviance is not intrinsic in the act but in the language of majorities to negatively label minorities or those seen as deviant from others. The theory is also concerned with how the self-identity and behavior of individuals may be determined by the terms used to classify them. The labeling approach takes into account the fact that deviance is whatever those in power define it to be. Unlike most other Criminology theories that focus on the offender, labeling theory concentrates on the control agents that define the actors. Labeling theorists are interested in the processes whereby some individuals come to be tagged as deviants, the psychology of self perception as deviants, leading to subsequent adaptation deviant careers as viable options. Labeling theorists also differentiate between primary deviance and secondary deviance, with the latter being a reaction to the former. Lawmakers define the irregular migrant, and social control agencies enforce these laws (in this case, the use of imprisonment as deterrence). The environment in which this takes place includes other labelers. Becker referred to this group as "moral entrepreneurs" (Becker, 1989). These are the various national and state government officials who determine who the deviants are. One paradoxical character of the labeling process is the fact that the tags are indefinite. In other words, what constitutes a deviant today may be described as acceptable on another day. This explains the fact that irregular migrants are actually subjected to the whims and caprices of the labelers. Today, they may be defined as unwanted and drainers of the economy, while the same group of people may be described as sources of cheap labor and catalysts for economic growth and development on a later date. Hence, those who are referred to as irregular, illegal, or undocumented migrants are not different from those who are legal or regular but the processes involved in the migration is what has been so tagged successfully by the moral entrepreneurs. More interestingly, the institutions where these so called "illegal aliens" are kept have also been given various labels. Hence, the use of such terms as "processing centers", "detention camps" among others, to describe penitentiary institutions which in some cases are prisons where conventional criminals are held, even when some of these migrants have not committed any crime other than overstaying their visa or entering the country without certain documents. This is corroborated by many scholars who have noted that irregular migrants are often locked up with criminals in various parts of the world (Story, 2005; Helton, 1992; Dow, 2004).

## **3.0. The Processes of Migration**

Migration has been traditionally defined as the movement of people from one geographical location to another. Though, there have been various modifications

to this definition over the years but the standard definition is the one given by The Hague Process which defines a migrant as someone who is undergoing a semi or permanent change in residence, which involves a change in his/her social, economic and or cultural environment (THP,2008). Migration or mobility is an integral part of human nature. People have moved for various reasons over the years, and people will continue to move as long as the human races subsist. Scholars have come up with various reasons for human movements which could be reduced to two broad concepts; *push and pull* factors (Adepoju, 2006; De Haas, 2007). The pull factors include forces which attract the individual to certain places and these could include employment, economic prosperity, human security, and others too numerous to mention. On the other hand, push factors in migration include unfavorable forces that tend to repel people from a particular place and these could include; inclement weather, conflict, insecurity, unemployment among other factors. Also another way of delineating migration is in terms of the willingness or otherwise of the individual in embarking on the voyage. In that case, we talk about *voluntary and involuntary* migration. While voluntary migration depicts a situation whereby the individual leaves the place of origin willingly, involuntary migration depicts a situation whereby the individual's movement involves one form of coercion or the other. However, in migration management, there are provisions in the laws to cater for those who must have left their countries of origin in involuntary circumstances like war, natural disasters and other forms of plagues and persecutions. For example, Article 14 of the Universal Declaration of Human Rights states that "everyone has the right to seek and to enjoy in other countries asylum from persecution." Also, Article 31(1) of the Refugee Convention requires States Parties "...not to impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" (cited in Amnesty International, 2010)

#### **4.0. Patterns and trends of Migration in the OECD Countries:**

The migration of people has been delineated according to areas of origin, transit and destination. To this end, global migration patterns have been streamlined along regional levels; south-south, south-north, north-south etc. Migration patterns have actually followed a pattern similar to the osmotic movement in biology determined by development and wealth variations. In other words, the pattern has been in line of movement from poor to rich nations and from rich to richer nations. The global movement is of significance as it is estimated that over 180 million people live outside their places of origin worldwide (UN, 2009).

*Map One: About here.*

In further demarcating migration by regions, Parsons *et al* (2007) noted that in 2005, Europe had the largest stock of immigrants (over 70.5 million), followed by North America with about 45.1 million and Asia with 25.3 million. Europe also had the largest share regarding number of emigrants as per percentage of total population (7.8), followed by Oceania, Latin America and the Caribbean with 5.1 percent each. The immigration stocks invariably include migrants with irregular status, as increasing migration flows have necessitated that countries regulate their borders mostly through strict migration laws. This development leads to the increase violation of these rules by migrants desperate to leave their countries of origin. Over 300,000 irregular migrants were apprehended on EU borders for violating migration laws. This figure has however been queried by scholars (De Haas, 2007) based on the fact that some irregular migrants were recidivists<sup>2</sup>, while the number often declared included asylum seekers as well cases of refugees who were refused entry.

*Chart One: About here*

Apart from the US, UK and other OECD countries, where the flow of migration is increasing, other migration hotspots include the Maghreb countries where irregular migrants often use as transit to Spain and Italy, though, Libya is fast becoming a point of destination due to changes in migration policies over the years. This article uses migration to the OECD countries as case studies, particularly, those countries known to have recorded high inflow of foreign born population like the US, Canada, and Australia among others.

### **5.0. Criminalization of Irregular Migration:**

In this article irregular migration means the entering of a country's border without the possession of valid documents or entering a country in violation of the migration laws of such country (De Haas, 2007, Adepoju, 2006). Notably, migrants with irregular status may include those who are in the destination countries in search of asylum or who have been displaced from their places of origin. Hence, for the purpose of this article, asylum seekers and refugees, who are denied entry and those who have either entered the countries of destination in violation of the norms of migration or those who entered legally but have overstayed their visas, are all categorized as irregular migrants. More so, Amnesty International (2010) reported that in some countries, asylum seekers and other irregular migrants are treated the same ways.

Over the years, the phenomenon of irregular migration has been described variously using diverse labels (Batlistella, 2008). Some of such labels include "illegal migration", "undocumented migration", "unauthorized migration", and "clandestine migration" among others. The various conceptual debates arose

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<sup>2</sup> Those apprehended more than once

following different political and ideological point of views in conceiving these concepts. For instance, Koser (2005) criticized the use of 'illegal' to qualify migrants for the following reasons. Firstly, the term illegal connotes criminality and most irregular migrants are not criminals. This was corroborated by the UN Special Rapporteur on the Rights of Non Citizens, which recommended that countries of destination should not treat immigrants (even those without valid documents) as criminals. Secondly, since irregular migrants are humans who have fundamental Human Rights, irrespective of their status, defining them as illegal will therefore amount to denying their humanity (Guild, 2004; Ochoa-Llido, 2004).

In responding to irregular migration, different approaches have been used by different countries, some of which include strict border control and raids in establishments and communities where migrants work and live respectively. Other stiffer punishment like caning have been used in countries like Singapore, forced repatriations have also been used in other countries like Malaysia (2002 and 2004) and Japan in 2004 (Asis, 2005).

The criminalization of irregular migration therefore means that irregular migration is treated like a crime and not just an administrative infraction. In the United States of America, where migration management has posed a serious challenge to various administrations giving the position of the US as the destination for the world's largest number of migrants, different institutions have been established to manage migration and these institutions have been in the spotlight for obvious reasons. For instance, between 1980 and 1990, the task of the Immigration and Naturalization Service (INS), moved from just policing immigration only to enforcement of criminal laws especially the contraband and narcotics laws (Parenti, 1999; Story, 2005). Parenti (ibid) also noted that after the 1996 laws were passed mandating detention and deportation of non-citizens for various crimes, INS agents were incorporated into police units and they helped in tracking and deporting immigrants with criminal records. Weissinger (2003) however noted that the INS, which is now known as the Bureau of Immigration and Customs Enforcement (BICE), puts too much emphasis on the punishment (detention) of low-level visa abusers at the expense of more serious offenders.

#### *Chart Two: About here*

In the United Kingdom, Bacon (2005) observed that despite the government's assurance that detention is used only as a 'last resort', the number of asylum seekers routinely imprisoned is on the increase and they are being detained in "detention centers and prisons all over the UK. There are currently nearly 2000 spaces in UK immigration detention centers (now officially called "removal centers"), an increase from 250 spaces a decade ago (LSE, 2011).

## **6.0. Migration Management in the Post 9/11 Era:**

There are debates among migration scholars on the impact of the 9/11 attacks in the US in September 2001, on migration policies (especially, securitization of borders). Schlentz (2010) divides the opinions of scholars into two schools of thoughts. The first school of thought expressed the opinion that the 9/11 attacks had significant impact on migration policies, especially in the EU (Baldaccini, 2008). It was opined further that there is "an important connection between the war on terror and the mounting challenge to asylum since the events of 9/11" (Crisp cited in Schlentz, 2010). On the other hand, the opposing group is of the opinion that the 9/11 attacks had no significant impact on securitization of borders either in America or elsewhere in the EU (Bigo, 2005; Huysmans, 2006; Boswell, 2007). However in the wake of the 9/11 attacks in the US, there were many changes in migration management policies across the world. Most countries had to review their border management strategies, even developing countries and countries traditionally known as points of origin. The government of the United States of America made some spontaneous changes in response to the 9/11 terrorist attacks, for example holding foreigners who violate immigration laws 48 hours without charge from the usual 24 hours as well as review of processes of issuing visa to foreigners among many other changes. The Patriot Act was also promulgated and it has generated a lot of controversies, giving some excesses in the Act. Also in Canada, the Immigration and Refugee Protection Act (IRPA) was passed in 2001. The IRPA has been criticized for its negative stereotyping of new immigrants and refugees and too for much emphasis placed on enforcement like expanded inadmissibility and exclusion provisions and detention powers (Pratt 2005). The effect of the 9/11 attacks also shaped the relationships between the EU and many countries, especially some countries which were labeled as "haven for terrorists". Some countries which were mostly affected included most of the middle east and Maghreb an countries. The readiness of the EU to grant access to these countries in European markets was linked with their readiness to control their shores and land borders (Bauch, 2010).

In all, these policies meant that tough times await most undocumented migrants as they faced stiffer punishments, most commonly imprisonment in detention centers and other penitentiary institutions.

### **6.1. Imprisonment as a Form of Migration Management:**

The use of imprisonment as a control measure for irregular migration is common among many destination countries. Imprisonment of migrants, particularly irregular migrants has been a way of deterring migrants from entering into some countries. However, there is enough evidence to show that most of these efforts aimed at reducing migration only contribute to making migrants more vulnerable (IOM, 2008). In a world where the penal policy of most countries is tending more towards the rehabilitative philosophy, imprisonment as a form of punishment in migration management could best be described as *anti climax*. In particular,

when the migrants have not committed any crime other than violating or overstaying their visa, which could otherwise be considered as an administrative infraction.

At this juncture, it is pertinent to differentiate between the types of detention used in migration management. Detention in migration parlance generally refers to the restriction of movement of migrants and could either be in form of criminal detention (imprisonment) or administrative detention (THP, 2008). On one hand, criminal detention or incarceration is usually invoked upon the conviction of a migrant after a trial must have carried out, while administrative detention is a form of arrest and detention of people by the state without trial and it is usually done for security reasons. This form of detention has gained prominence after the post 9/11 attacks on the United States and most countries have resorted to administrative detention as a means of combating terrorism and control of irregular migration. The objective of administrative detention is to guarantee that another measure, e.g. deportation or obtainment of legal documents can be implemented. Though administrative detention is meant to be a form of preventive detention, it has come under heavy criticisms by human rights groups such as UNHCR, OHCHR, among others as a breach of the rights of migrants.

It has been observed that though the legal regimes of administrative detention differ from imprisonment, the conditions under which detainees are subjected are usually similar and even worse than the prison system. To this end, it may be proper to tentatively conclude that the demarcation between administrative detention and imprisonment actually exists only in theory but in reality, they are almost the same. More so, when there are evidences that some migrants are held for more than necessary and are treated as if they had been convicted of crimes already (Dow, 2004, Helton, 1992). The use of imprisonment as a migration management tool witnessed a mirage of criticisms from human rights activists and other related bodies.

## **6.2. Criticisms of Imprisonment as a Form of Migration Management Tool**

With growing awareness and activities of human rights organizations, the use of imprisonment as a form of punishment in migration management has been criticized at various levels and in different countries. In Armenia, during the 2003 presidential elections, the Armenian Police arbitrarily applied the Code of Administrative Offenses, under which administrative detention is authorized, to lock up dozens of opposition activists and supporters for periods of up to fifteen days (HRW, 2003). Also in Australia, the Human Rights Watch criticized the Australian policy of administrative detention claiming that it seriously contravenes Australia's obligations to non citizens, refugees, and asylum seekers under the international human rights and refugee law. In Ireland, the Council of

Europe and human rights organizations have criticized the overcrowded conditions in which detainees are held and the fact that those who are supposed to be “detainees” are usually held together with convicted criminals. In the United States of America, after the 9/11 attacks, and in the subsequent years, many asylum seekers were detained at various airports and borders in the U.S. and transferred to jail. These arrests were often effected with the use of handcuffs and without the asylum seekers having any clear idea of the offense they had committed (Human Rights First, 2004). Also the passage of the USA Patriot Act expanded the authority of law enforcement agencies to use administrative detention for the overt purpose of fighting terrorism in the U.S and abroad (Cited in Story, 2005). This act has been criticized based on the fact that the decision of the Attorney General is not subjected to any judicial review, unlike what obtains in other democratic countries with similar laws. In different parts of the world, especially in a number of European countries (giving their economic buoyancy in the last couple of years), the use of imprisonment as a form of migration management has been most prominent in the fight against irregular migration. All these were mostly underpinned by the retributive philosophy of punishment with the main aim of deterring prospective migrants. But paradoxically, these punitive measures have failed to serve as deterrent to other prospective migrants, with some engaging in more risking behaviours in attempts to cross especially, European border towns through the Mediterranean seas and the like.

### **6.3. Effects of Imprisonment as Punishment in Migration Management**

The effects of imprisonment as a tool of migration management are actually two folds, viz., the direct effects on the migrants, and the cumulative effects of these on the State. Imprisonment affects migrants both physically and psychologically. Physically, most detained migrants have limited access to medical assistance and hygiene products and are often subjected to conditions akin to those meted out to criminals. Many migrants have also been victims of police brutality, which often have cumulative negative effects on their self worth and self esteem. Also the long periods spent by migrants in detention camps or prisons in the countries of destination or transit may cause existential insecurity, leading to stress reactions with negative health impacts. On the part of the state or enforcers of these laws, imprisonment of irregular migrants may have both moral and legal implications. In most cases, irregular migrants are incarcerated with their children and all subjected to degrading and excruciating living conditions. Importantly, the cost of maintaining the detention camps has been described as heavy drain on government resources. This is more so considering the growing “army” of irregular migrants entering into Europe and North America on a daily basis.

The use of imprisonment as migration management tool could best be described as a massive and costly exercise considering the effects on both the state and

individual migrants. Also, indefinite detention without criminal conviction is incompatible with Article 9 of the International Covenant on Civil and Political Rights, which states that no one should be subjected to arbitrary detention and emphasized that withdrawal of anyone's freedom must be based on established legal grounds and processes.

### **7.0. Policy Implications of Imprisonment as a migration management tool:**

In view of the enormous effect of imprisonment on migrants and the countries of origin and destination, there are a number of implications to inform policy in terms of finding alternatives to imprisonment as a means of migration management.

Firstly, it is important to identify and deal with the major drivers of migration. Most of the migrants who enter another country illegally are driven by either poverty, political persecution or the need to find what is now globally referred to as 'greener pastures'. It is therefore important to redress factors which continue to put developing countries (which in this case, often serve as countries of origin for migrants) in economic and political dilemmas. Many factors have been identified in the literature for the present stagnancy in most developing countries, including bad governance (Adepoju, 2006); bad management of natural resources; structural inequalities including gender inequality in the distribution of assets and resources; corruption, and lack of transparency in governance (Nwajiuba, 2005); and in the recent times, the backlash of globalization (which continues to put these countries as consumer rather than producer countries).

The world itself must face and tackle elements which continue to put some countries permanently on a receiver end, rather than a 'giver', and a producer of economic goods. No true reform could take place in the less developed countries without revisiting the peripheral position of these countries in relation of good production, and the production of knowledge. It is also important for the developing countries to embrace the principles of equity, social justice and rule of law across sectors, and in particular in handling of governance issues. Many factors continue to bedevil development in the so called Third World nations, especially, in the Sub-Saharan Africa – governance improprieties; corruption; lack of accountability and transparency in governance; social exclusions and social injustice, gender inequalities; unemployment; lack of basic infrastructures – potable water; sanitation; motorable roads and the like. Problems of irregular migration will remain a daunting problem as long as youths are neglected and are thrown at the periphery of national development.

Although the UN has taken a big stride with the introduction of the Millennium Development Goals (MDGs), giving specific targets and timeline for accountability

(Asa, *et al*, 2008). MDGs data from the sub-Saharan African still appear very gruesome with high poverty indices and unacceptable gender gaps in health statistics; school enrolment among other indices with specific country level data, and if possible provide a comparative data to show countries with marginable progress.

Existing policies on irregular migrants tend to be gender blind, and the absence of sex-disaggregated data makes it quite difficult to have an accurate gender analysis of migration policies and programmes., Consequently, there is less concern for the needs of women and children. Hence, conditions under which women and children, and in particular pregnant women live in detention camps and/or prisons remain very gruesome and yet mostly undocumented.

#### Forward Looking Strategies:

The following strategies are suggested to improve the present status and rate of irregular migrants, especially from the developing to the developed countries –

1. It is important to reduce the phenomenon of labeling the victim. Each migrant should be treated on his/her own merits and the decision to detain a migrant should be based on individual assessment. The situation whereby all migrants with irregular status are treated as criminals should be avoided and efforts be made to respect the humanity of migrants.
2. Also at the commencement of the migration process, visa operators need to carry out their duties with 'a human face'. The usual complaint against embassies located in the developing countries is the tendency to treat applicants as sub-humans or as liabilities to the countries of destination.
3. There must be developmental efforts targeted at school age, and school leavers in the less developed countries, especially in the area of employment, vocational training, and opening up of markets for local innovations and entrepreneurship.
4. Efforts should be made to address these challenges from countries of origin and this can be facilitated by more cooperation with identified countries of origin (mostly developing countries) while political interventions can be made in countries plagued with political imbroglio. Likewise, the funds spent on border control could be rechanneled to developmental aid in form of support to major countries of origin.
5. Furthermore, more efforts should be made to speed up the attainment of the millennium development goals in major countries of origin as the Global Commission on International Migration have demonstrated that achieving the MDGs will have a reducing effect on migration (Duvell, 2006).

6. Also, more non custodian measures should be used in addressing the problem of irregular migration. Since, it is established that the cost of imprisonment is so enormous that it costs so much to detain irregular migrants, the use of non custodian measures like house arrest, monitoring, electronic tagging and others will reduce the cost of enforcing migration laws and also reduce the infringements on the rights of migrants.
7. Migration policies should also be on regional basis rather than the present trend based on national interests, this will encourage dialogue between identified sending and receiving countries as well as transit countries and agreements would be reached on more sustainable approaches to migration management.
8. The present migration management approaches which are migrants focused should be reviewed and more attention should be paid to employers and industries in the destination countries where these migrants are employed.
9. Finally, immigration officers and other officials involved in the enforcement of migration policies should be trained and retrained to handle migrants with respect to their human rights and address the issue of irregular migration in a more professional manner.

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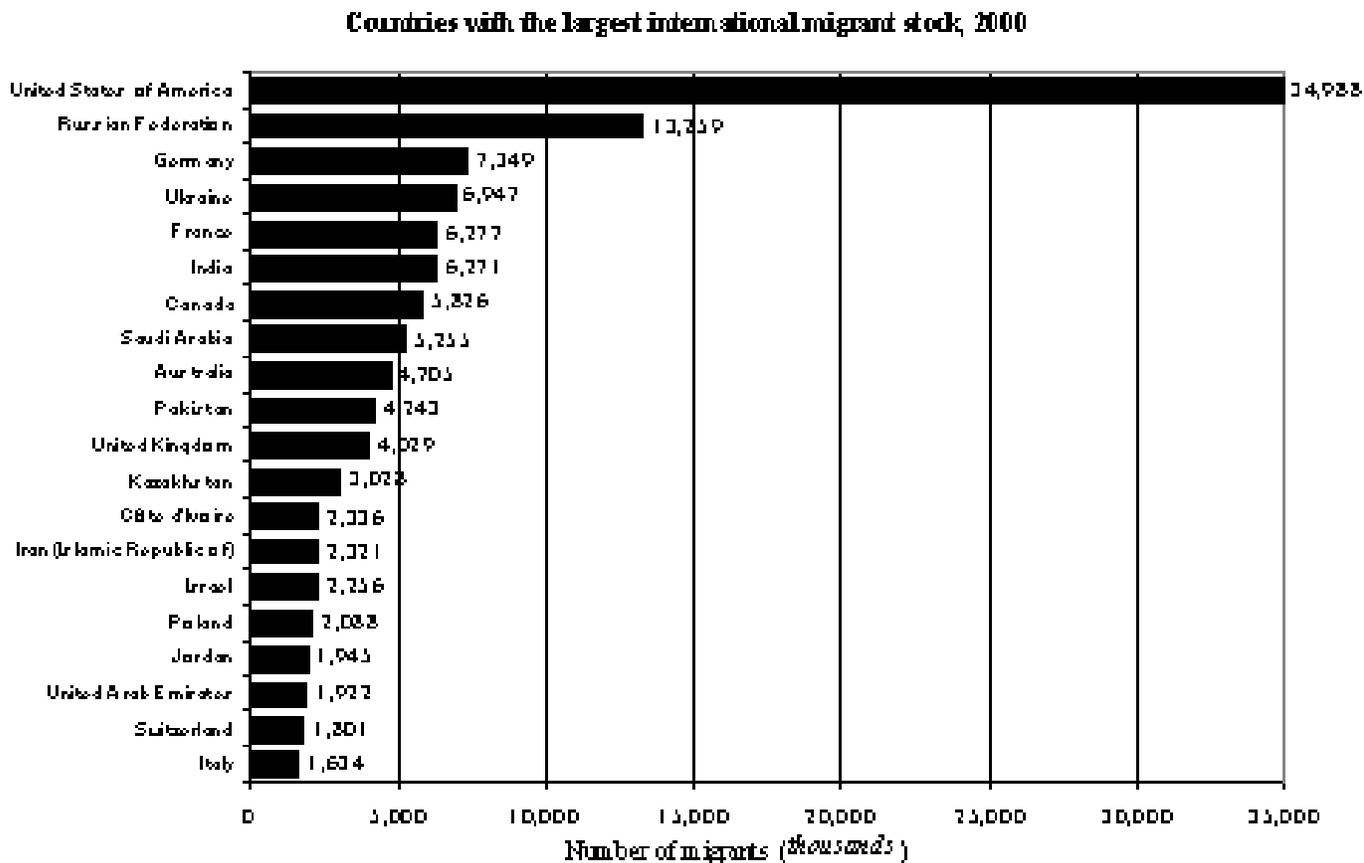
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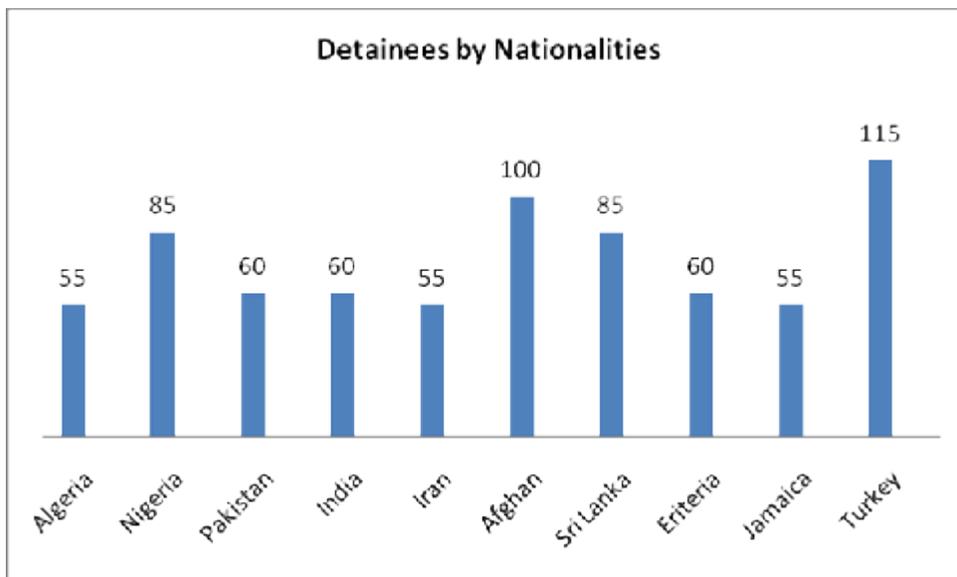
Appendix:

Chart One: Countries with Largest international migrant stock, 2000



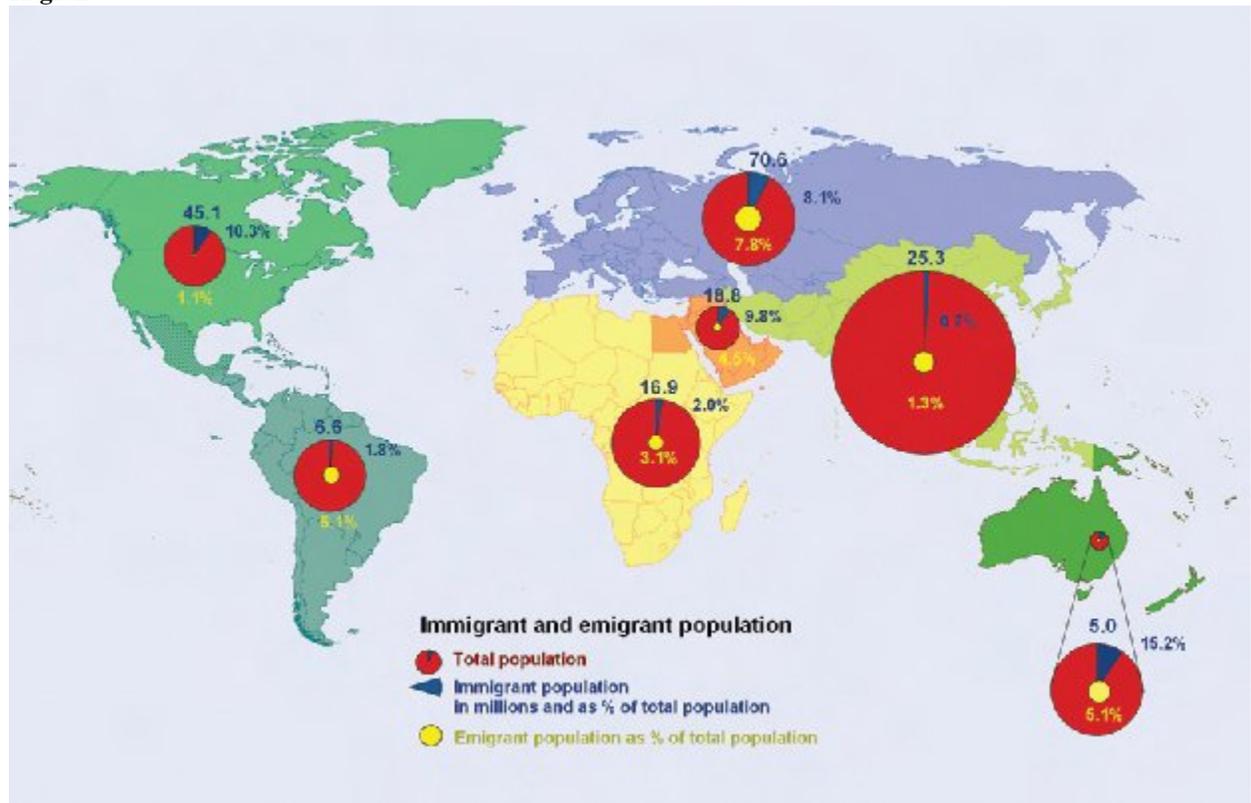
Source : UN International Migration 2002

Chart Two: Detainees in the UK by Nationalities in 2001



**Source:**

**MAP 1: Total Immigrant and Emigrant Population by Region**



**Sources:** Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *Trends in Total Migrant Stock: The 2005 Revision*, New York, <http://esa.un.org/migration>; University of Sussex, U.K., *Global Migrant Origin Database, Dataset 4*, updated March 2007, [http://www.migrationdrc.org/research/typesofmigration/global\\_migrant\\_origin\\_database.html](http://www.migrationdrc.org/research/typesofmigration/global_migrant_origin_database.html)