



## ***Exploring a Global Initiative to End Child Immigration Detention*** ***Discussion Paper***

September 2016

*In recent years there has been growing acknowledgement that the detention of a child for reasons related to their or their parents' immigration status is never in the best interests of a child and represents a clear child rights violation. The following discussion paper outlines global development and options available to States, UN and civil society partners seeking to work together to end the immigration detention of children.*

### **Introduction**

Every day, all around the world, millions of children are affected by immigration detention. Whether detained themselves or impacted by the detention of their parents or guardians, children are particularly vulnerable to abuse and neglect when subject to immigration detention.

In practice, States often detain child refugees, asylum seekers, and migrants for a number of reasons which are completely avoidable, such as to conduct routine health and identity screening; to maintain family unity; or to facilitate engagement with on-going asylum or migration procedures. Sometimes, children are detained without the knowledge of State authorities, for example because there is a failure to properly conduct age assessments, or due to a lack of appropriate child screening and identification. At other times children are knowingly detained, for example when they are detained together with their parents or guardians on the basis of maintaining family unity.

Regardless of the reasons for immigration detention, a number of studies have shown that detaining children has a profound and negative impact on child health and well-being. Refugee and migrant children deprived of liberty are exposed to increased risks of physical and sexual abuse, acts of violence, social discrimination and denial of access to education, health care, and family life. Even very limited periods of detention in so-called “child friendly” environments can have severe and lifelong impacts on child psychological and physical well-being and compromise their cognitive development.

For these reasons, the immigration detention of children represents a serious threat to children, and a growing body of UN, regional, and domestic human rights experts have called upon States to “expeditiously and completely” end the practice. As a result, over the past five years the issue of child immigration detention has risen in importance on the global human rights agenda. United Nations, intergovernmental and civil society actors have undertaken significant research and reporting which finds that immigration detention is never be in the best interests of a child, and have lobbied State policy makers to end the immigration detention of children as a matter of priority.

However, despite this growing attention and international consensus, significant gaps remain. Refugee and migrant children continue to be detained on the basis of their or their parents' migration status every day, in nearly every country in the world. There remains a virtual lack of effective prevention, monitoring, and reporting on the issue by States, and there are no validated statistics on the number of refugee and migrant children in immigration detention at any one time.

### **Legal Framework**

It is increasingly clear that depriving a child of liberty on the basis of his or her immigration status—or that of her parents or guardians—violates international law. Under existing fundamental rights obligations, detention of any kind is only allowed as an exceptional measure of last resort, and when reasonable, necessary, proportionate, and based upon a legitimate State aim in each individual case.<sup>1</sup> Indeed, the rights to liberty and security of person are some of our most deeply held fundamental rights and represent cornerstones of international law. The prohibition on arbitrary detention, in particular, is one of the few absolute and non-derogable human rights standards, a peremptory norm of customary international law or *jus cogens*. This right applies to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.<sup>2</sup>

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<sup>1</sup> Article 9, ICCPR.

<sup>2</sup> UN Human Rights Committee (HRC), General Comment No. 18: *Non-discrimination*, 10 November 1989, para. 1.

In the context of migration and border management, it has been noted that the detention of refugees and asylum seekers should be avoided altogether<sup>3</sup> and that States should never criminalize the act of migration, even in cases of irregular entry and stay.<sup>4</sup> Such practices frequently lead to arbitrary detention and may negatively impact the right to seek and enjoy asylum.<sup>5</sup>

Furthermore, the United Nations Convention on the Rights of the Child (CRC) requires States to take all appropriate measures to ensure that children are protected against all forms of discrimination and punishment on the basis of their or their parents', legal guardians', or family members' migration status.<sup>6</sup> And the CRC provides that in all actions concerning children, the best interests of the child should be a primary consideration.<sup>7</sup> After all, children are children first and foremost, irrespective of their asylum or migration status. The protection of children and children's extreme vulnerability to abuse or neglect should be the decisive factor and, according to the European Court of Human Rights, the child's best interests must take precedence over State considerations relating to migration management.<sup>8</sup>

Taken together, and given the well-known detrimental effects that immigration detention and family separation have been shown to have on refugee and migrant children, the United Nations Committee on the Rights of the Child (CRC Committee) has found unequivocally that:

*"The detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status."*

UN Committee on the Rights of the Child  
Report of the 2012 Day of General Discussion<sup>9</sup>

This position has now been adopted by – among others – UNHCR, UNICEF, the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Human Rights Commissioner for the Council of Europe, and the United Nations Working Group on Arbitrary Detention (WGAD) who has stated that "given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of [a child] would comply with the . . . Convention on the Rights of the Child."<sup>10</sup>

Most recently, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, found that:

*"Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children."*

UN Special Rapporteur on Torture, Juan E. Méndez  
Thematic Report on torture and ill-treatment of children deprived of their liberty<sup>11</sup>

## There are alternatives

The good news is that there are alternatives. More effective and humane approaches to migration management exist that allow States to achieve legitimate policy goals without harming the health and well-being of children or violating child rights. Research shows that alternatives to immigration detention, when implemented properly, are

<sup>3</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

<sup>4</sup> UN Working Group on Arbitrary Detention, para. 53, A/HRC/7/4.

<sup>5</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 13, A/HRC/20/24.

<sup>6</sup> CRC, article 2.

<sup>7</sup> CRC, article 3(1).

<sup>8</sup> Popov c. France, Requête nos 39472/07 et 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012, para. 91.

<sup>9</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, 78-79, available at: [http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGDChildrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGDChildrens_Rights_InternationalMigration.pdf).

<sup>10</sup> U.N. G.A., Human Rights Council, 13th Sess., Report of the Working Group on Arbitrary Detention, Chairperson-Rapporteur: El Hadji Malick Sow, U.N. Doc. A/HRC/13/30 (Jan. 15, 2010) at pp. 24-25, paras 58-61.

<sup>11</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, 78-79, available at: [http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGDChildrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGDChildrens_Rights_InternationalMigration.pdf).

more effective, cheaper, and better respect the human rights of refugees, asylum-seekers and migrants.<sup>12</sup> Building trust, respecting and valuing the dignity of the child, and providing a fair, transparent process are key elements to preventing arbitrary immigration detention and implementing effective alternatives, particularly when concerning children and families.<sup>13</sup>

Recognizing the harms to children implicit to immigration detention, a number of States have begun to implement alternative care and support models specifically tailored to meet the protection needs of children and families. A variety of States have legislated that children be protected from immigration detention and that alternatives are sought. Other States have piloted or systematized more comprehensive case management and community support models with individuals living freely in the community while their immigration status is resolved.

The human rights and social benefits of these types of programs are significant. The latest research indicates that such alternative care models not only better protect children, but can also result in significant benefits for the efficient functioning of migration governance systems.<sup>14</sup> Avoiding unnecessary cases of detention, or reducing the length of time someone is detained are key strategies for reducing detention costs, and community-based alternative to detention programs have been found to be both more efficient and significantly less costly than custodial detention models.

Furthermore, alternative to detention programs have been found to maintain high compliance rates—between 80% and 99.9%—for a variety of populations.<sup>15</sup> Evidence shows that refugees, asylum-seekers and migrants are significantly more likely to comply with migration decisions, even in cases of return, if they believe:

- They have been through a fair visa determination or refugee status determination process;
- They have been informed and supported throughout the process, including the ability to meet their basic needs;
- They are able to explore all options to remain in the country legally, including the provision of legal advice and access to information about their case.<sup>16</sup>

It is therefore clear that upholding the human rights of children and families at risk of immigration detention is not at odds with effective migration governance, but rather an essential element of it. Not only will ending the practice of child immigration detention fulfill existing State human rights obligations, it will lead to long-term social benefits. Child and family appropriate alternatives can facilitate cooperation and adherence to immigration procedures, allow States to save precious resources, and safeguard children from negative, physical and mental health impacts.

### **The Inter-Agency Working Group to End Child Immigration Detention**

Given these developments, a number of key stakeholders have agreed that ending child immigration detention is an urgent matter of priority and that coordinated collaboration can assist States to end the practice of child immigration detention “completely and expeditiously”, consistent with existing human rights obligations. The parties agreed to form an Inter-Agency Working Group (“IAWG”) in order to more effectively collaborate on ending child immigration detention.

The IAWG to End Child Immigration Detention is a consultative process seeking to build consensus among States on the need to end the practice of child immigration detention; to share positive practices regarding rights-based alternatives to child immigration detention; and to assist States to track progress and achievements of efforts to end child immigration detention. It is comprised of 22 prominent UN bodies, intergovernmental organizations, and civil society representatives who collectively represent stakeholders in every country of the world.

### **Why now?**

Over the past five years, a number of key supporters, including States, UN bodies, and leading civil society organisations have agreed that ending child immigration detention is an urgent priority and have taken positive steps to support ending the practice “expeditiously and completely.”

Prior to 2012, little attention had been focused on the issue of child immigration detention and indeed, little was

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<sup>12</sup> International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, 51-53, available at <http://idcoalition.org/cap/handbook/>.

<sup>13</sup> *Id.* at 16-18.

<sup>14</sup> Sampson, R., Chew, V., Mitchell, G., and Bowring, L. *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*, (Melbourne: International Detention Coalition, 2015).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

known about the phenomenon. In an important 2011 global report on “administrative detention of children”, the United Nations Children’s Fund (UNICEF) noted “a significant increase” worldwide in the use of immigration detention for children.<sup>17</sup> Yet, despite the increase in child immigration detention practices, the report noted that “little information is available [from States] on the numbers of children administratively detained for immigration reasons”, and that there may be “as many as one million children” affected by immigration detention policies worldwide.<sup>18</sup>

From 2010-2012, the International Detention Coalition (IDC) similarly undertook a two-year programme of research to document the first-hand experiences of children and families who had suffered from immigration detention practices. In total, 70 interviews were conducted with formerly detained refugee, asylum seeker, and irregular migrant children, and further consultations were held with 260 child rights professionals across 62 countries. The report, entitled *Captured Childhood*, found that “the detention of children for immigration purposes has *profound and far-reaching implications*” for children’s physical and psychological health and development.<sup>19</sup> The report recommended that States *urgently develop legislation, policies and practices to ensure that children are never detained* for reasons related to their migration status.<sup>20</sup>

To raise further awareness of this emerging human rights issue, during the 19th Session of the UN Human Rights Council in 2012, child and migrant rights advocates, with the support of the International Detention Coalition (IDC), the UN High Commissioner for Human Rights (OHCHR), and with initial funding from the Diana, Princess of Wales Memorial Fund, launched a Global Campaign to End the Immigration Detention of Children.<sup>21</sup> This Global Campaign has now been endorsed by over 100,000 supporters across all regions of the world, including key UN agencies, regional human rights experts, UN treaty bodies and special mandate holders. The Global Campaign has coordinated international, regional and national awareness-raising activities with the goal of highlighting the detrimental impacts that immigration detention has on children, and of encouraging States to implement human rights-based alternatives to detention in order to urgently end the practice.

The 19<sup>th</sup> Session of the UN Human Rights Council also saw the UN Special Rapporteur on the human rights of migrants, Mr. François Crépeau, highlight the issue of child immigration detention in a thematic report on “detention of migrants in an irregular situation”. His report noted that children subjected to immigration detention “will often be traumatized and have difficulty understanding why they are being ‘punished’ despite committed no crime”.<sup>22</sup> The report concluded that detention can never be justified solely on the basis of a child’s migration or residency status, or lack thereof, and that children should never be criminalized or subject to punitive measures for reasons relating to their irregular migration status.<sup>23</sup>

Building on this previous research and reporting, in September 2012, the UN Committee on the Rights of the Child (CRC Committee) held an important and seminal Day of General Discussion on “the rights of all children in the context of international migration”. This event explored in-depth the many human rights challenges faced by refugee, asylum seeker and irregular migrant children, including the increasing use of immigration detention as a tool for managing child and family migration.<sup>24</sup> In the landmark recommendations from their 2012 Report of the Day of General Discussion, the CRC Committee found that the immigration detention of children can *never be in the best interests of the child* and will therefore *always* constitute a child rights violation.<sup>25</sup> Accordingly, the CRC Committee urged States to “expeditiously and completely” cease the practice and to implement non-custodial, community-based alternatives to detention to protect the rights of children and members of their families.<sup>26</sup>

The 2012 Report of the Day of General Discussion marked a turning point in the focus on child immigration detention and its incompatibility with State obligations under international law. Indeed, following the report of the CRC Committee in 2012, ending child immigration detention was named an “achievable priority” by the UN Secretary General during the 2013 High-Level Dialogue (HLD) on International Migration and Development,<sup>27</sup> and again by the Special Representative to the Secretary General (SRSG) on Migration and Development, Mr. Peter Sutherland, during the 2014 Global Forum on Migration and Development (GFMD).<sup>28</sup> At a side-event sponsored by the Permanent Mission of Sweden and the Permanent Mission of Belgium to the United Nations, and supported by OHCHR and the UN Special Rapporteur on the human rights of migrants, participants highlighted the damaging and unnecessary nature of child immigration detention and called upon States to

<sup>17</sup> UNICEF, *Administrative detention of children: a global report*, p. 60, February 2011.

<sup>18</sup> Id. at 62.

<sup>19</sup> David Corlett with Grant Mitchell, Jeroen Van Hove, Lucy Bowring, and Katherine Wright, *Captured Childhood*, International Detention Coalition, p 57, 2012.

<sup>20</sup> Id.

<sup>21</sup> <http://www.endchilddetention.org>

<sup>22</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 38, A/HRC/20/24;

<sup>23</sup> Id. at para 41.

<sup>24</sup> <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2012.aspx>

<sup>25</sup> UN Committee on the Rights of the Child (CRC), *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, para 78, 28 September 2012.

<sup>26</sup> Id. at paras 78-79.

<sup>27</sup> <http://www.un.org/en/ga/68/meetings/migration/>

<sup>28</sup> <http://www.gfmd.org/docs/sweden-2013-2014>

urgently end the practice, consistent with the recommendation of the CRC Committee.

In March 2014, a side-event was held during the 25th Session of the UN Human Rights Council to explore “A Global Strategy to End Child Immigration Detention”. This side-event was organised by the International Detention Coalition and supported by OHCHR, UNICEF, and the UN High Commissioner for Refugees (UNHCR). It highlighted the increasing prioritisation of the issue by a number of key UN actors, civil society organisations, and States, and led to the formation of an Inter-Agency Working Group (IAWG) to End Child Immigration Detention, which was envisioned as a platform for key UN and civil society actors to more effectively collaborate and advocate for an end to the immigration detention of children.

Since 2014, members of the IAWG have achieved considerable success in sharing and supporting the 2012 recommendation of the CRC Committee that children should never be detained for reasons related to their or their parents’ migration status, and in some regional and national contexts the effects of this collective work have already had a tangible impact.

For example, two key regional mechanisms have transposed the CRC Committee’s standard into their own norms and recommendations. In August 2014 the Inter-American Court of Human Rights (IACtHR) delivered Advisory Opinion (OC-21/14) on the “Rights And Guarantees of Children in The Context of Migration and/or in Need of International Protection” which reaffirmed the CRC Recommendation when it asserted that “States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives.”<sup>29</sup> Similarly, in 2014 the Parliamentary Assembly of the Council of Europe (COE) adopted a series of resolutions and recommendations explicitly stressing that COE Member States “which practice the immigration detention of children contravene the principle of the best interests of the child and violate children’s rights”<sup>30</sup> and calling on COE Member States to “introduce the prohibition of the detention of children for immigration detention into legislation . . . and ensure its full implementation in practice” consistent with the recommendations of the CRC Committee.<sup>31</sup>

At the national level, in July 2014, the CRC Committee relied upon its 2012 Day of General Discussion findings to recommend that Mexico end the immigration detention of children and instead establish non-custodial, community-based alternatives.<sup>32</sup> On December 2, 2015, the Mexican government took an important step forward in guaranteeing refugee and migrant children’s right to liberty by directly prohibiting immigration detention of children in the official regulations for their National Child Rights Law, which now states:

*Article 111. At no time will migrant children or adolescents, regardless of whether or not they are traveling with adults, be deprived of their freedom in Immigration Stations or in any other immigration detention center.*<sup>33</sup> (unofficial translation)

This revision to Mexico’s national child rights legislation will have a real impact and creates a unique opportunity to prevent the future detention of children for reasons related to their or their parents’ migration status. There are numerous other examples of positive steps being taken by States at the national level currently being compiled by the IAWG (see Appendix, *a snapshot of positive State pledges and actions*), and indeed UNHCR has recently reported a decrease in the total number of refugee children being detained in the 12 focus countries of the UNHCR global strategy “Beyond Detention 2014-2019”.<sup>34</sup>

## **Conclusion: towards a Global Initiative to End Child Immigration Detention**

A number of options are now being explored by IAWG members and partners to further national implementation of the guidance to end the immigration detention of children. This includes encouraging stronger State commitments at the UN systems level, hosting global roundtable discussions on ending child immigration detention, and exploring the development of a global multi-stakeholder initiative to end child immigration detention.

Ending the immigration detention of children has already emerged as an achievable outcome and point of consensus among UN Member States. In particular, in the *New York Declaration* outcome document for the 19 September UNGA high-level summit on “addressing large movements of refugees and migrants”, States

<sup>29</sup> *Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”*, OC-21/14, Inter-American Court of Human Rights (IACtHR), para. 6, 19 August 2014.

<sup>30</sup> Recommendation 2056 (2014) on “The alternatives to immigration detention of children”, 3 October 2014.

<sup>31</sup> Resolution 2020 (2014) on “The alternatives to immigration detention of children”, 3 October 2014.

<sup>32</sup> Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4).

<sup>33</sup> See <http://idcoalition.org/news/mexico-regulations-for-new-child-rights-law/>.

<sup>34</sup> See <http://www.unhcr.org/en-us/news/press/2016/8/57b55e0e4/unhcr-report-notes-fall-refugee-child-detention-focus-countries.html>

committed to work to end the practice of child immigration detention, taking into account the best interests of the child as a primary consideration and respecting their obligations under the Convention on the Rights of the Child. Moreover, ending child immigration detention is an outcome that is already underway, with a number of States working to end child immigration detention in their own country context, across all regions of the world.

In this regard, the IAWG is seeking to engage and explore with a group of lead States their potential support for a multi-stakeholder process involving relevant UN and civil society partners to advance and monitor the implementation of the requirement to “expeditiously and completely” end the practice of child immigration detention. The *Global Partnership to End Violence Against Children*<sup>35</sup> might provide an example of the kind of dialogue and intergovernmental collaboration that is envisaged, with key UN, inter-governmental and civil society partners lending their support. States who have already explored, developed or implemented alternatives to the immigration detention of children could be targeted as “pathfinders” and asked to showcase their reform efforts in order to encourage others States to follow suit.

IAWG members already have years of experience collaborating together to effect change, and have laid the groundwork for a global initiative to be successful. They are also ideally positioned to help States to develop, support, and operationalise such a global initiative in order to assist States to uphold their commitments to protect the best interests of refugee and migrant children.

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<sup>35</sup> <http://www.end-violence.org>

## Appendix:

Ending the detention of children: a snapshot of positive State pledges and actions		
<b>Japan</b>	2010	Releases all children from immigration detention and establishes a policy to no longer detain children.
<b>The United Kingdom</b>	2010	Announces it will end the immigration detention of children.
<b>Finland</b>	2010	Commits to end the detention of unaccompanied and separated children.
<b>Indonesia</b>	2011	Introduces law permitting the release of children and other vulnerable individuals from immigration detention.
<b>France</b>	2012	Limits the immigration detention of minors to exceptional circumstances.
<b>China</b>	2012	Passes a new law restricting the immigration detention of children under 16 years of age.
<b>The Netherlands</b>	2014	Announces that families with children who seek asylum will no longer be detained at the border, except in exceptional situations.
<b>Turkey</b>	2014	Passes new legislation prohibiting the detention of unaccompanied minors seeking international protection.
<b>Israel</b>	2014	Introduces a new law excluding children from “residence orders” (a requirement to reside at designated detention centres) and directing authorities to place unaccompanied minors and other specified children into community settings.
<b>Malta</b>	2014	Commits to ending child immigration detention.
<b>Taiwan</b>	2015	Prohibits the detention of children under the age of 12 years old.