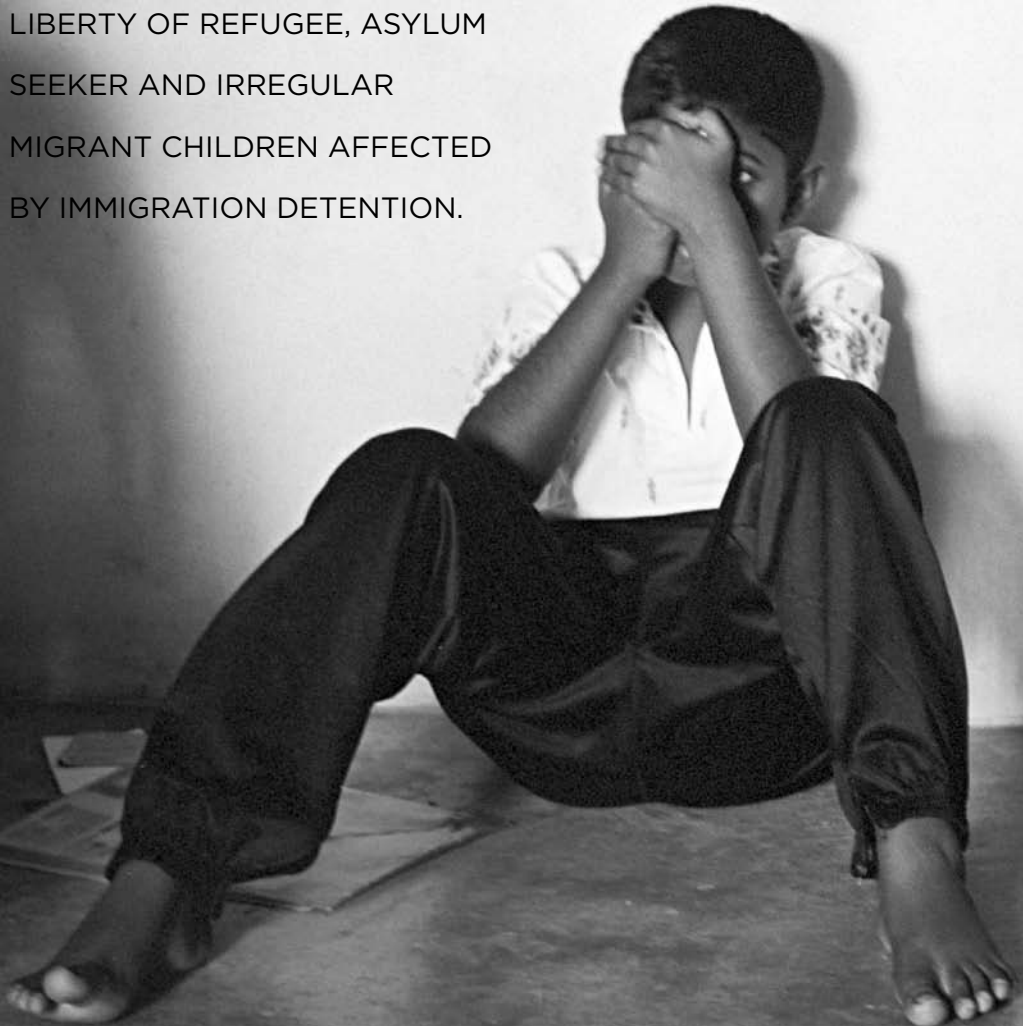


# CAPTURED CHILDHOOD

INTRODUCING A NEW MODEL  
TO ENSURE THE RIGHTS AND  
LIBERTY OF REFUGEE, ASYLUM  
SEEKER AND IRREGULAR  
MIGRANT CHILDREN AFFECTED  
BY IMMIGRATION DETENTION.



## INTERNATIONAL DETENTION COALITION

The International Detention Coalition (IDC) is a coalition over 250 non-governmental groups and individuals working in more than 50 countries to protect the rights of refugees, asylum seekers and migrants in immigration detention around the world through education, networking, advocacy, reporting and research.

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ISBN Paperback: 978-0-9871129-4-1

ISBN PDF version: 978-0-9871129-5-8

Recommended citation: Corlett, D., with Mitchell, G., Van Hove, J., Bowring, L., Wright, K. (2012) *Captured Children*: Melbourne, International Detention Coalition.

Design and layout: Emma Bäcklund

Cover image: A Sri Lankan boy who was separated from his mother in an immigration detention centre in Asia. © JonFrank

The report will be available online at: [www.idcoalition.org](http://www.idcoalition.org)

# ACKNOWLEDGMENTS

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The International Detention Coalition would like to thank our many friends, partners and colleagues who have worked on this policy document over the past two years.

Firstly, to Dr David Corlett for the international research undertaken to complete this report. Many thanks also to the IDC Secretariat staff, Grant Mitchell, Jeroen Van Hove, Lucy Bowring, Katherine Wright and Gisele Bonnici.

Thanks to the IDC Advisory Committee and members of the IDC Campaign Committee, including Adam Stofsky, Carmen Dupont, Chris Goddard, Galya Ruffer, Glynis Clacherty, Jyothi Kanics, Laban Osoro, Lanie Stockman, Jarnah Montersino, Madelyn Hsiao-Rei Hicks, Michael Timmins, Michelle Brané and Veerawit Tianchainan,

Thanks also to Robyn Sampson, Tina Jensen, David Fox and all at Hub Melbourne and to IDC members around the world that assisted with fieldwork.

In addition, we would like to thank King & Wood Mallesons for their assistance.

We gratefully acknowledge the financial support of The Diana, Princess of Wales Memorial Fund and Planet Wheeler Foundation, towards the cost of this research and publication, and also to Oak Foundation, Open Society Foundations, ANZ Trustees and Myer Foundation for their support of the IDC's work with children affected by immigration detention around the world.

Lastly, to the children and families who agreed to share their stories despite extreme hardship and uncertainty, we say, thank you.

# CONTENTS

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Immigration detention centre in Musina South Africa ©IDC

EXECUTIVE SUMMARY	6
GLOSSARY	10
INTRODUCTION	12
METHODOLOGY	14

THE ISSUE OF CHILD DETENTION

THE CCAP MODEL

CONCLUSION OF REPORT

CHAPTER 1	16	CHAPTER 6	58	Conclusion	96
International law and standards.		The child sensitive assessment and placement model: managing refugee, asylum seeker and irregular migrant children and families in the community.		CHAPTER 7	98
CHAPTER 2	20			Summary of Recommendations	
Why children migrate.				Endnotes	103
- Introduction		- Introduction			
- Why children leave their home communities.		- Five-step Child-Sensitive			
- The experiences of children on the move.		- Assessment and Placement Model (CCAP)			
- Conclusion					
CHAPTER 3	32	The solution step by step			
Why states detain children.		Step 1. Prevent			
- Introduction		Step 2. Assess & Refer			
- Policy		- Preliminary age assessment and age determination			
- Politics		- Appoint Interim guardian to unaccompanied and separated children			
- Pragmatics					
- Conclusion		- Appoint case manager			
CHAPTER 4	38	- Intake assessment and referral			
The conditions in which children are detained.		- Community Placement			
- Introduction		Step 3. Manage & Process			
- Physical conditions		- Case management			
- Conclusion		- Best Interest Determination			
CHAPTER 5	48	- Protection needs			
Impacts of detention on children.		Step 4. Review & Safeguard			
- Introduction		- Periodic Review			
- Contributing factors to the psychosocial and developmental problems of children in detention.		- Pre-removal risk assessment			
- Psychosocial and developmental problems linked to children's detention		Step 5. Case Resolution			
- Consequences for resettlement and return					

# EXECUTIVE SUMMARY

THIS POLICY DOCUMENT TELLS THE STORIES OF CHILDREN WHO HAVE BEEN DETAINED IN IMMIGRATION DETENTION AND PROPOSES A MODEL THAT CAN PREVENT THE FUTURE DETENTION OF OTHERS.

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Over the past two years, the International Detention Coalition (IDC) has heard firsthand the stories of children and parents from all over the world who have experienced immigration detention. In total 70 children were interviewed in Malta, Greece, Hungary, Turkey, the United States, El Salvador, Mexico, Israel, Egypt, Malaysia and Australia. The children had travelled from Afghanistan, Sudan, the Democratic Republic of Congo, Somalia, Ethiopia, Honduras, Colombia, El Salvador and Guatemala. We also listened to the experiences of 16 parents of children who had been detained. Consistent with the Convention on the Rights of the Child, this policy document conveys the stories of children who have been in immigration detention. Their experiences highlight the need for alternative approaches to managing the irregular migration of children.

The stories of children and their families are complemented by insights drawn from consultations with 80 professionals from 54 organizations in 11 countries. The IDC has further consulted with 260 professionals and organizations from 62 countries on immigration detention more broadly. Of these, 180 people from 56 countries attended IDC regional workshops, which explored the problem of detaining children for immigration purposes. Further, the policy document is informed by a range of relevant literature, and by the expertise of the IDC staff and associates. An expert committee of advisors also contributed valuable insights.

This policy paper has its genesis in the growing concern on the part of IDC members about the immigration detention of children. The IDC is an international non-governmental organization with 258 members in 50 countries. Members provide legal, social, medical and other services, carry out research and reporting, and undertake advocacy and policy work on behalf of refugees, migrants, and asylum seekers. In 2008, the IDC conducted a survey of its members, which indicated that the detention of children was a key area in which to work.<sup>1</sup> Consequently the organization developed a research project to investigate the experiences of children in immigration detention. The research presented here forms the evidence base for an international campaign to end the detention of children for immigration purposes around the world.

Children leave their homelands for a variety of reasons. Some flee because their fundamental human rights are threatened. Some leave in search of a better life. Some children leave their homes with their families; others travel alone. Some are separated from their families along the way. Some are trafficked for sexual or other forms of exploitation. All children who travel without official approval or documentation, regardless of whether they are refugees, asylum seekers or irregular migrants, are at risk of being detained.

States detain children who are refugees, asylum seekers, and irregular migrants for a number of reasons. Children are detained for health and security screening, to check their identities and to facilitate their removal from the particular territory. There are more effective and humane approaches than detention to achieve these policy goals. Sometimes, states detain children because it is more convenient to detain them than to release them into the community. Further, states use detention to deter others refugees, asylum seekers and irregular migrants from seeking to make the journey. Such justifications for detaining children are unacceptable.

The detention of children is a denial of their fundamental right to liberty. Children around the world are detained in a range of physical conditions. Some are kept in purpose built facilities, the amenity of which is better than what they may have experienced in their countries of origin or on their journeys. Others, however, are incarcerated in squalor, placing them at risk of illness and disease. Some are kept in jail cells or in circumstances that are hurriedly constructed and makeshift. Some are kept in circumstances that seem designed to isolate and humiliate them. Some children are kept with their families; in other instances, families are separated. Children are sometimes detained in facilities specifically designated for children. Others, however, are detained with unrelated adults.

Regardless of the conditions in which they are kept, detention has a profound and negative impact on children. It undermines their psychological and physical health and compromises their development. Children are at risk of suffering depression and anxiety, as well as from symptoms such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can manifest as acts of violence against the self or others. Further, detention erodes the functioning of families, meaning that children can lose the support and protection of their parents, or take on roles beyond their level of maturity. The detention environment can itself place children's physical and psychological integrity at risk.

## RECOMMENDATIONS

THE IDC BELIEVES THAT REFUGEE; ASYLUM SEEKER AND IRREGULAR MIGRANT CHILDREN SHOULD NEVER BE DETAINED. THIS DOCUMENT PROVIDES THE EVIDENCE FOR THE IDC'S POSITION. KEY RECOMMENDATIONS FOR ALL STATES INCLUDE:

As it is never in the best interests of a child to be detained for immigration purposes, States should ensure that a minimum level of protection and support for children is in place in the community.

States should articulate in their legislation and policies that:

- Children who are refugees, asylum seekers and irregular migrants are, first and foremost, children.
- The best interests of the child must be the primary consideration in any action taken in relation to the child.
- The liberty of the child is a fundamental human right.

States should develop legislation, policies and practices to ensure that refugee, asylum seeker and irregular migrant children are free to reside in the community during the resolution of their immigration status.

WHILE STATES DETAIN CHILDREN IN IMMIGRATION DETENTION FOR A HOST OF REASONS, THERE ARE MORE EFFECTIVE AND LESS HARMFUL WAYS TO MANAGE THE IRREGULAR MIGRATION OF CHILDREN AND THEIR FAMILIES.

THE MODEL, PRESENTED IN THIS DOCUMENT TO ENSURE THAT CHILDREN ARE NOT DETAINED FOR IMMIGRATION PURPOSES, INVOLVES THE FOLLOWING FIVE STEPS:

**- Step 1 -**

Is a presumption against the detention of children. It applies prior to the arrival at a state's territory of any children who are refugees, asylum seekers or irregular migrants.

**- Step 2 -**

Takes place within hours of a child being discovered at the border of, or within, a state's territory. It includes screening the individual to determine age, the assignment of a guardian to unaccompanied or separated children, the allocation of a caseworker to children who are travelling with their families, an intake assessment and the placement of the child or family into a community setting.

**- Step 3 -**

Is the substantive component of the child-sensitive assessment and placement model. It involves 'case management,' including an exploration of the migration options available to children and families, a best interest determination, and an assessment of the protection needs of children and/or their families.

**- Step 4 -**

Involves ensuring that the rights of children and their best interests are safeguarded. It includes legal review of various decisions taken regarding children and their families - including decisions about where they are accommodated and about their legal status. It also includes an opportunity on the part of states to review the conditions accompanying the child or family's placement in the community following a final immigration status decision.

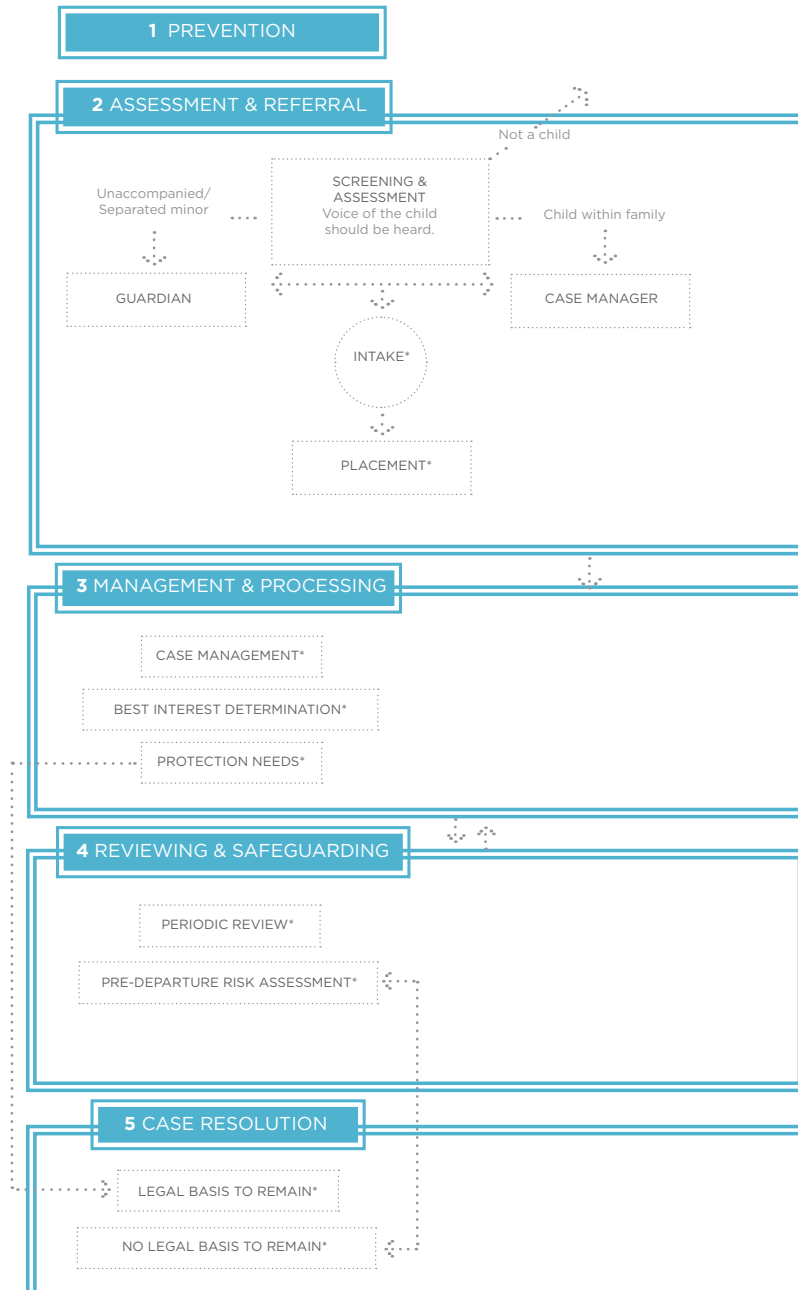
**- Step 5 -**

Is the realisation of sustainable migration solutions.



# CHILD-SENSITIVE CAP MODEL

THE CHILD-SENSITIVE COMMUNITY ASSESSMENT AND PLACEMENT (CCAP) MODEL  
A 5-step process to avoid the detention of refugee, asylum seeker and irregular migrant children.



\* The asterisks in the diagram above represent places within the model where the voice of the child should be heard.

# GLOSSARY

PLEASE NOTE: WE HAVE CHOSEN THROUGHOUT THIS DOCUMENT TO USE THE TERM 'REFUGEE, ASYLUM SEEKER AND IRREGULAR MIGRANT CHILDREN' TO DESCRIBE THE CHILDREN ABOUT WHOM WE REFER.

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## UNACCOMPANIED CHILD

*(also called Unaccompanied Minor):*

Children who have been 'separated from both parents and other relatives' and are 'not being cared for by an adult who, by law or custom, is responsible for doing so.'<sup>7</sup>

## CHILD

A 'child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'<sup>3</sup>

## REFUGEE

A person who has been recognized by the authorities of a state or by the UNHCR to be in need of international protection.

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## CASE MANAGEMENT

A comprehensive and coordinated service delivery approach widely used in the human services sector as a way of achieving continuity of care for clients with varied complex needs. It ensures that service provision is 'client' rather than 'organization' driven and involves an individualized, flexible and strengths-based model of care. Case managers are often social workers and welfare professionals, but are also people who are skilled and experienced in the particular sector where the case management approach is being used.

## GUARDIAN

'The legally recognised relationship between a competent adult and a child or disadvantaged person who does not have the legal capacity to exercise some or all of her or his rights. A guardian has a range of powers, rights and duties,' including exercising rights on behalf of the child and protecting the interests of the child.'<sup>5</sup>

## DETENTION

'Confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory or where legal right to remain is granted.'<sup>4</sup>

#### MINOR

A person under the age of 18, see definition of a child above.

#### ASYLUM SEEKER

A person who is seeking to be recognized as a refugee.<sup>2</sup>

#### PARENT

The lawful (and/or biological) father and mother of a child.

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#### ALTERNATIVES TO DETENTION

Any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country.

#### SEPARATED MINOR

A child 'separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members'.<sup>6</sup>

#### IRREGULAR MIGRANT

A migrant who does not fulfil or who no longer fulfils the conditions of entry, stay or residence within a state.

# INTRODUCTION

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Everyday, all around the world, children are detained for immigration purposes.

Children migrate for a host of reasons: because they fear for their lives and liberties, because they are sent outside their countries of origin by parents or relatives fearing for their safety, because they live in soul-destroying poverty, or because they are seeking opportunities for a better life. Sometimes children are trafficked for sexual or other labour services. Sometimes they leave their homes and homelands on their own and of their own volition. Others leave with their families, having no idea about why or where they are going or the nature of their journey.

The journey of refugee, asylum seeker and irregular migrant children is often characterized by fear and a lack of state protection. Crossing borders without documentation and official authorization is particularly precarious. Frequently, children, like adults who are refugees, asylum seekers or irregular migrants, engage people smugglers some of whom have links to organized crime. Sometimes they fall into the hands of traffickers or others who prey on their vulnerability.

The increase in numbers of undocumented migrants around the world has facilitated ongoing interest on the part of states wanting to control migration. This has included an increased use of detention for migration purposes. Children who are refugees, asylum seekers and irregular migrants are not spared detention. Some are detained with their parents.

Some are detained alone, including, as documented in this research, children as young as eight. Some are kept in purpose-built detention centres, others in jails or makeshift holding facilities. Some are detained with adults, some with other children. The detention of children for migration purposes is against international human rights laws and conventions. It is also damaging to children's physical, developmental, emotional and psychological health.

The IDC has found the detention of children is a global practice, even if it is difficult to quantify. Children themselves speak of the hardship they endure in immigration detention, as highlighted in this document. Yet the goal of immigration control can be better achieved and with fewer detrimental effects by seeking not to detain children. This policy document concludes with a step-by-step guide on how to avoid detaining children. This involves recognising three core principles:

- Undocumented child migrants are, first and foremost, children;
- The best interests of the child must be a primary consideration in any action taken in relation to the child and the child's family;
- The liberty of the child is a fundamental human right.

At the same time as detention of children has been increasing, there has also been a move, in some countries and regions, away from detaining children. Some governments are seeking innovative ways in which to limit or prevent refugee, asylum seeker and irregular migrant children from being detained. This paper details some of these good practice examples. It does so while describing a model for states to use to prevent child detention. The model, which we call the Child-sensitive Community Assessment and Placement (CCAP) model, involves five steps:

- STEP 1. PREVENTION;
- STEP 2. ASSESSMENT & REFERRAL;
- STEP 3. MANAGEMENT & PROCESSING;
- STEP 4. REVIEWING AND SAFEGUARDING;
- STEP 5. CASE RESOLUTION.

This model presents states with concrete means to manage immigration and their borders but also to implement legal, policy and practical measures to prevent the detention of children.

# METHODOLOGY

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The research for this document used qualitative methodology to explore the experiences of children in immigration detention and the laws, policies and practices used by states both to detain and to ensure that children are not detained for immigration purposes. Qualitative methods were chosen in particular because the IDC wanted to ensure that its research captured the ‘lived experiences’ of children in immigration detention and decided that informal, semi-structured interviews are most effective for elucidating this. The research involved several components.

## 1. International survey

In 2008, the IDC conducted a survey of its members<sup>8</sup>, which showed that the detention of children was practiced widely around the world. The survey indicated which countries detained children for immigration purposes and highlighted the need for further research to be undertaken into the problem.

## 2. Literature

A range of literature was reviewed over the course of the research project. This included academic papers, reports from national and international non-governmental organizations, and the work of international quasi-governmental organizations. The literature covered country and region-specific reports on immigration policy and practice (including detention), children’s experiences of migration and detention, the dynamics of migration movements

in different regions, and the impact of detention on children.

## 3. International fieldwork

The survey findings, a review of the relevant literature – most particularly in this instance, country reports – and advice from IDC members informed the specific countries chosen for the international fieldwork component of the research.

Over the course of 2010 and 2011, the IDC conducted four field trips involving 12 countries: Malta, Italy, Greece, Hungary, Turkey, the United States, El Salvador, Mexico, Israel, Egypt, Malaysia and Australia.

The focus of the fieldwork was on the experiences of children and families who had been in immigration detention. A total of 70 children and 16 parents were interviewed as part of this research. Participants were from Afghanistan, Sri Lanka, Burma, Sudan, the Democratic Republic of Congo, Somalia, Ethiopia, Eritrea, Zimbabwe, Honduras, Colombia, El Salvador and Guatemala. They were interviewed in Greece, Malta, Turkey, the United States, El Salvador, Mexico, Malaysia, Israel, Egypt, South Africa and Australia<sup>9</sup>.

Participants were recruited through the IDC’s local members, and after informed consent was given, participants were engaged in an informal interview. Interviews were loosely structured to cover the children’s experiences in detention, as well as their

reasons for leaving their homelands. It was made clear from the beginning that the participants' involvement was entirely voluntary, that they could withdraw their consent at any time during the interview and that they did not need to talk about or disclose anything that they did not want to. Depending on the participants' wishes, interviews were either video recorded, audio recorded or were recorded via handwritten notes. The voices of these young people are prominent throughout this policy document. This is deliberately so as the IDC wanted to ensure that the experiences of young people both informed its policy position and because the organization wanted decision makers and others to be cognisant of the lived-experiences of children in immigration detention. Giving the voices of young people a prominent position in the policy document is consistent with Article 12 of the Convention on the Rights of the Child, which emphasises the right of children to have their views heard and their opinions taken seriously<sup>10</sup>. Identifying details of the young people interviewed, unless specific permission was given to the contrary, have been obscured. In a very small number of places throughout the text, the voices of young people from other research are quoted and the sources cited.

The fieldwork component of the research also involved more informal research gathering techniques. For example, the researcher met with Somali young people on the streets of Athens, and Afghan young people in a field in Patras. In Malta, the researcher spoke with asylum seeker mothers in a family centre. In Mexico, the researcher met with a group of women who had been sent back from the USA, some without

their children, after being detained. And in Israel, the researcher attended a youth group meeting attended by a number of minors.

As well as children and their parents, professionals who work on migration, detention and children's issues were consulted during the overseas fieldwork. These included lawyers, social workers, activists and community workers. In total, 80 professionals, including representatives from 54 organizations were consulted specifically during the fieldwork. Further, the research is informed by the IDC's consultations regarding immigration detention with 260 professionals and organizations from 62 countries. This includes 180 people from 56 countries who attended IDC regional workshops, which dealt with the problem of detaining children for immigration purposes.

#### **4. IDC expertise**

Finally, the research drew on the depth of knowledge within and associated with the IDC. IDC staff assisted with country and regional knowledge. Robyn Sampson, researcher on the IDC's alternatives to detention research, provided a wealth of information. Many of the case studies of good practice noted in Chapter 6 come from this expertise. The Campaign Committee also provided invaluable insights.

## CHAPTER 1

# INTERNATIONAL LAW AND STANDARDS

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Children who are at risk of immigration detention are vulnerable at three levels: as migrants, as individuals without documentation and as children<sup>11</sup>. Unaccompanied and separated children are vulnerable at a fourth level in that they are without the support normally provided by parents or relatives. But prior to being labelled refugees, asylum seekers or undocumented migrants, children are children<sup>12</sup>. Central to upholding their rights as refugee, asylum seeker and irregular migrant children, states must recognize them, in the first instance, as children and act with their ‘best interests’ being a ‘primary consideration.’<sup>13</sup>

Liberty is a fundamental human right<sup>14</sup>. Its denial is a particularly grave limitation on the rights and dignity of human beings. The removal of liberty can only be justified with good reason and according to the rule of law. According to the Universal Declaration of Human Rights, ‘no one shall be subjected to arbitrary arrest, detention or exile<sup>15</sup>.’ Similarly, the International Covenant on Civil and Political Rights asserts: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’<sup>16</sup>

This general prohibition against detaining individuals except in accordance with the law applies to all children as well as adults. According to the

United Nations Convention on the Rights of the Child (CRC), ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily.’<sup>17</sup>

The CRC states that children should be ‘protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs’ of their parents, legal guardians, or family members.<sup>18</sup> Children should not be detained because they, their parents or caregivers or other family members do not have legal status in a country.

Those children who are deprived of their liberty must be detained in compliance with the law and only ‘as a measure of last resort and for the shortest appropriate period of time.’<sup>19</sup> Consistently with the International Covenant on Civil and Political Rights, the CRC provides that they must have the right to challenge the legality of any such detention, and have the right to legal assistance.<sup>20</sup>

Such children ‘shall be treated with humanity and respect for the inherent dignity of the human person’ and treated in accordance with their age<sup>21</sup>. Children should, in general, not be separated from their parents against their will unless it is in child’s best interests to do so<sup>22</sup>. However, detained children ought to be separated from adults (other than their parents) unless it is in their best interests not to do so<sup>23</sup>. Every child should have the right to maintain contact with their family through correspondence and visits, save



in exceptional circumstances<sup>24</sup>. Detained children have the right to prompt access to legal and other assistance, including the right to challenge the basis of their detention in a court of law<sup>25</sup>.

Further, the international community has more definitively prohibited depriving certain vulnerable groups of children of their liberty. For example, the United Nations Commission on Human Rights has stated, 'unaccompanied minors should never be detained.'<sup>26</sup> Similarly, but with specific regard for children who are seeking international protection, the United Nations High Commissioner for Refugees asserts that 'minors who are asylum-seekers should not be detained.'<sup>27</sup>

Consistent with other international human rights laws and norms, the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD) stipulates that states 'shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children,' and that '[i]n all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.'<sup>28</sup> Further, the UNCPRD asserts that states ensure the 'right to liberty and security of person' of people with disabilities on an equal basis with others.<sup>29</sup>

In addition, the Joint UN Commentary on the EU Trafficking Directive states that there should be a presumption of the person being a child in case of uncertainty about age.<sup>30</sup>

Yet notwithstanding clear direction from the international community, there is no single international legislative authority articulating the rights of refugee, asylum seeker and irregular migrant children deprived of their liberty. This means it is possible for states to overlook rights to liberty.

Despite the unequivocal position of the international community, many states across the world continue to detain child migrants in contravention of international law and good practice. Although the IDC maintains that children should never be detained, it recognises the reality that large numbers of children are currently in immigration detention and in some places will continue to be detained for the foreseeable future. States must ensure that international minimum standards are upheld in regards to the conditions and treatment of children deprived of their liberty for migration-related purposes, outlined in detail in: Legal framework and standards relating to the detention of refugees, asylum seekers and migrants, Melbourne: The International Detention Coalition, 2011. Available at: [www.idcoalition.org](http://www.idcoalition.org)



## RECOMMENDATIONS

### Recommendation 1.1:

States should articulate in their legislation and policies that:

- i. Refugee, asylum seeker and irregular migrant children are, first and foremost, children.
- ii. The best interests of the child will be a primary consideration in any action concerning the child.
- iii. The liberty of the child is a fundamental human right.

### Recommendation 1.2:

That the international community works toward the establishment of a binding international instrument articulating the right to liberty of refugee, asylum seeker and irregular migrant children.

### Recommendation 1.3:

Consistent with the spirit of existing international law, States should articulate in law a prohibition against the detention of children for immigration purposes and legislate and develop policies and practices designed to avoid the detention of children for immigration purposes.

### Recommendation 1.4

States should sign, ratify and implement international human rights treaties (CRSR, CRC, ICCPR, ICESCR, CAT, CEDAW, CERD, etc.) in order better to protect and fulfil the rights of the refugee, asylum seeker and migrant children.

### Recommendation 1.5

States that have not signed the United Nations 1951 Convention relating to the Status of Refugees or its 1967 Protocol should do so as well as undertake to provide domestic legal remedies to those in need of international protection.

### Recommendation 1.6

States should share best practices on the alternatives to detention of refugee, asylum seeker and migrant children and families.

## CHAPTER 2

# WHY CHILDREN MIGRATE

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### INTRODUCTION

Hundreds of millions of people are on the move around the world. In 2010 international migrants made up 3% of the global population.<sup>31</sup> While this is a relatively small proportion, it equates to about 214 million people.<sup>32</sup> The majority of these people travel via official channels with valid documentation. However, about one third of all migration from developing countries could be irregular,<sup>33</sup> including people who may be refugees and asylum seekers, as well as economic and other migrants. Typically, these people do not have appropriate documentation and cross borders without official authorization.<sup>34</sup>

Mixed flows of refugees, asylum seekers and other irregular migrants, rising in number since the late 1980s<sup>35</sup>, represent a challenge to states. Significantly, they are seen to undermine states' sovereign right to control who enters and remains within their borders. Refugees, asylum seekers and other irregular migrants also represent a challenge to effective policy design and implementation, because different categories of people invoke different obligations on states. Some will require international protection as refugees. Others may not be 'refugees' according to the 1951 Convention definition, but may have other protection concerns. Others may not be able to return to the countries from which they have come. Some may not invoke a state's international obligations at all, but their presence within a state can make their removal challenging.<sup>36</sup>

Refugees, asylum seekers and other migrants who travel via unofficial channels are particularly vulnerable to human rights violations, discrimination and exploitation because of the circumstances that give rise to their irregular status (i.e. the situations that prompt them to leave their home communities) and because of the nature of the journeys they must undertake.

Mixed flows of refugees, asylum seekers and other migrants often elude easy categorization. Such people leave their homes for complex, often inter-related factors, including environmental and economic reasons and due to conflict. As well as refugees and asylum seekers, these mixed flows comprise other vulnerable migrants including:

victims of trafficking, smuggled migrants, stranded migrants, unaccompanied (and separated) minors, those subject to violence (including gender-based violence) and psychological distress and trauma during the migration production process, vulnerable individuals such as pregnant women, children, the elderly and those in need of medical treatment, and migrants detained in transit or upon arrival. In addition, mixed flows may include migrant workers [including children employed as crew and cooks on people smuggling boats], cross-border traders and migrants moving for environmental reasons.<sup>37</sup>

Given this complexity, we have chosen throughout this report to use the term 'refugee, asylum seeker and irregular migrant children' to describe the children to whom we refer.

## WHY CHILDREN LEAVE THEIR HOME COMMUNITIES

Although exact numbers are impossible to know, children are crossing international borders via irregular means in large numbers. According to one study, children represent around a quarter of all migrants.<sup>38</sup> In some situations, children make up an even higher proportion of those on the move. For example, it is estimated that 42 per cent of people crossing the Cambodian-Thai border are children.<sup>39</sup> Nearly half the refugees and others of concern to the UNHCR are also children.<sup>40</sup>

Like their adult counterparts, children who are refugees, asylum seekers or irregular migrants leave their home communities for a complex range of reasons and in a diversity of circumstances. Some children are forced from their homes. They may flee due to war, conflict or other situations involving serious human rights violations as the stories below from interviews with some of the 70 children held in immigration detention around the world demonstrate.

Girls and young women are at particular risk of gender based violence and sexual abuse.<sup>41</sup>

### YUSUF FROM SUDAN, DETAINED IN MALTA, AGED 16

Yusuf fled his village because of the conflict in Darfur. 'The war is compelling us to leave the country, to leave the people who we never wish to leave in our whole lives. And we have already faced a lot of things, so cruel, so bad things,' Yusuf said. 'When I left Darfur... in front of me, around 10 o'clock in the morning, they raped my sisters. At that time, I was 16 years. But I will never forget this. I will never forget it. They killed my father and two brothers in front of me.'

### ARUN AND CHIT FROM MYANMAR, DETAINED IN MALAYSIA, AGED 8 AND 6

Arun and Chit fled Myanmar with their mother. Their father had already fled the country after being jailed and tortured by the junta. The children's mother was also jailed by the military. When Arun and Chit left Myanmar with their mother, they left behind two other siblings because they didn't have the money to bring them. They paid an 'agent' to get them to Malaysia where their father was.

#### JUAN, FATHER OF JOSE & MARIA, FROM COLOMBIA, DETAINED IN MEXICO, AGED 14 AND 16

'We decided to come here because the fact that one of my brothers' daughters was raped,' Juan said. 'He has three children. After the rape, then we moved to another village, where someone raped two of my nieces, and after that we moved to another village where I got the message that my daughter would be the next, so we decided to go. We decided to drive to Guatemala. From Honduras we drove to the border between Honduras and Guatemala and then we just went all the way down to Guatemala, and after that we went to Tapachula (in Mexico). In Tapachula we were detained because we asked about how to get asylum in Mexico, and we have no idea that it was a crime to cross borders without documents. So they said that we were able to ask for asylum in Mexico City. We were detained on the southern border [a long way from Mexico City].

Children may leave their homes and communities for environmental reasons, whether sudden natural disasters such as floods or cyclones, or slow onset environmental change such as drought. Poverty may also be a cause for children to migrate.

#### CARLOS FROM HONDURAS, DETAINED IN THE USA, AGED 16

Carlos is from a poor family in a poor village in Honduras. In 1998, when he was barely a teenager, Hurricane Mitch, the deadliest Atlantic hurricane in more than 200 years, devastated Honduras, killing at least 7000 Hondurans and costing the country US\$3.8 billion. Wind, rain, flooding and landslides – worsened by the country's slash and burn forestry practices – 'virtually destroyed the entire infrastructure of Honduras', according to the US Department of Commerce's National Climate Data Centre. As much as 20 per cent of the population was rendered homeless. The agricultural industry was crushed. In the immediate term, parts of the population were threatened with starvation, and there were outbreaks of malaria, dengue fever and cholera. In the longer term, the country's development was thrown backwards. According to the Honduran President, Hurricane Mitch destroyed fifty years of the country's progress. According to Carlos, 'I decided to come here [to the US] because I felt that there weren't any other good options. After Hurricane Mitch destroyed most of the town where I am and work was really hard to get. It was really difficult times for my family and myself. So I decided to come here.' He was 16.<sup>42</sup>

Like Rafael and Marcos, children may flee their homes because of neglect, abuse or violence at home or school.

#### RAFAEL FROM HONDURAS, DETAINED IN THE USA, AGED 17

Rafael only went to school for a year because his father would not allow him to continue. Instead, his father made Rafael work with him. 'He didn't love us,' Rafael said. 'That's why he didn't give us schooling and that's why I decided to come here [the USA].'

#### MARCOS FROM EL SALVADOR, DETAINED IN THE USA, AGED 17

Marcos had a number of reasons for leaving his homeland. But one stood out. 'My problem was the gang. Some of them wanted to use me,' he said. 'The gang members are really bad. They don't think twice before killing you. They're like controlling the country.'

El Salvador's youth gang violence is remarkable. Partly exported from the USA and spread throughout Central America, and partly home grown, El Salvador's youth gangs 'demand that you help them to do crimes, to move drugs, light buses on fire, collect fees, many things,' Marcos said. And because he failed to comply, Marcos said, 'my life runs risk, my family's life is in danger...it is their decision what they can do.' Marcos's parents arranged for him to travel to the USA.

Because insecurity and violence is a major cause of children leaving their homelands, states of origin, receiving states, and the international community should work to establish conditions where children can be safe and secure in their home communities to reduce pressures on children to migrate. This includes ensuring that children are free from the threat of violence of any form (consistent with the Report of the Independent Expert for the United Nations Study on Violence Against Children )<sup>43</sup>, and from the threat of extreme poverty through the implementation of the United Nations' Millennium Development Goals.<sup>44</sup>

Some children are trafficked for labour or sexual exploitation.<sup>45</sup> Other children, while not compelled to leave for reasons of safety and security, nonetheless

see the decision to leave their home communities as both necessary and worth the risks associated with travelling without official documentation or permission.

Children may feel they have obligations to support their families. They may travel as the 'anchor' to establish a passage and a place for their family to follow. They may travel to be reunited with family. Some children may feel there is no viable future in their homelands and migrate seeking educational or employment opportunities. For some children the decision to leave their country is not their own, but is made for them by their parents or other adults in their lives who are fearful for their safety. Some children do not know where they are being sent when they leave.

### DAKARAI FROM ZIMBABWE, DETAINED IN SOUTH AFRICA, AGED 15

Dakarai left his homeland in Zimbabwe at the age of 14 after all his immediate family had died. Someone had told him there were opportunities in South Africa. He felt he had no other options but to be strong and leave.

### OSCAR FROM EL SALVADOR, DETAINED IN THE USA, AGED 17

'It was my dream to go to the US but I couldn't complete that dream. My dream was to get there, meet my family that is living there and to help my family that lives here. My idea was to go and look for a job there, work and help my mum [who remains in El Salvador].'

### FERNANDO FROM GUATEMALA, DETAINED IN THE USA, AGED 16.

Fernando's father lived in the US, but they had never met. Fernando had grown up with his grandparents, 'but at the same time I was growing up alone,' he said. 'There was no future for me to be in Guatemala. I decided to go to Mexico to look for a life. And when I went to Mexico I heard about the United States and opportunities and you can really have the opportunity and the chance to become somebody.'

Given the importance of socio-economic factors in pushing children to leave their home communities, states from which children migrate for socio-economic reasons should seek to implement social and economic policies and practices that allow children to develop fully without the need to leave their home communities. Further, both states of origin and receiving states should establish effective migration channels to facilitate legal migration to ensure the socio-economic needs of child migrants can be met without them having to risk travelling without state-sanctioned protection.

Wherever children's reasons for leaving their home communities and crossing international borders fall on a continuum between forced and voluntary migration,<sup>46</sup> children themselves feel they have strong reasons for leaving their families, friends and communities. Often, as discussed below, they do so at considerable risk.

#### THE EXPERIENCES OF CHILDREN ON THE MOVE

All refugees, asylum seekers and other irregular migrants are vulnerable during transit. Without legal status and the protection this offers, refugees, asylum seekers and irregular migrants are at risk of exploitation by smugglers and traffickers, corrupt



state officials and others who might reap gains from their vulnerability. The 'range of barriers' that states have erected to control migration and the increasing importance of smugglers and traffickers to facilitate cross-border migration have 'contributed to making irregular migration treacherous.'<sup>47</sup>

Children are not protected from these dangers, and indeed can be more vulnerable than adults simply because they are children. As well as being at risk due to their migration status, children are vulnerable because of their stage of development, and societal or cultural limitations on their ability to assert their rights. As they often travel unaccompanied by parents or relatives, they are also often without a primary caregiver, source of protection and comfort. Many states do not have specific mechanisms for responding to the needs of children, or if they do, those mechanisms are not always implemented in practice. However, other states do take account of the needs of children, as demonstrated in chapter 6.

Refugee, asylum seeker and irregular migrant children can be divided into three broad categories:

1. Those who travel with their parents.
2. Those who are separated from their parents or caregivers, but remain with family members. These children are referred to as 'separated minors' or 'separated children.' They may travel with other adult relatives. These relatives may be effective guardians, or they may themselves pose risks to the children in their care.
3. Those who travel without parents or other adult guardians. These children are 'unaccompanied minors.'

Children who migrate with their parents have the protective benefits of travelling with their carers and guardians. But as refugees, asylum seekers or other irregular migrants, the ability of parents to protect children is often extremely compromised by the physical dangers of the journey, through involvement with criminal people smugglers or traffickers, by a lack of effective state protection, and due to financial vulnerability.

#### ABDURAHAM FROM ERITREA, DETAINED IN ISRAEL, AGED 12 MONTHS<sup>48</sup>

Abduraham arrived in Israel with his mother with a cough and a runny nose. They were detained upon arrival. After repeated requests, a physician examined Abduraham and his mother. The physician noticed a strange scar on the boy's leg. Because they did not speak the same language, it was difficult for the physician to understand Abduraham's mother's explanation of the scar. In order to explain, Abduraham's mother, then only 22 years old, lifted her shirt and showed a similar scar. In the Sinai, they had been held captive for three months by the smugglers. The scar on the boy's leg and the corresponding scar on his mother, were from where the chains had been attached to their bodies. The only time they were not chained together was when smugglers unlocked Abduraham's mother to rape her. Only after paying US\$10,000 were they released and taken to the Israeli border.

## CHILDREN AT RISK ON THE JOURNEY

Siev 221<sup>49</sup>

ON 15 DECEMBER 2010, A BOAT CODENAMED SIEV 221 BY AUSTRALIAN OFFICIALS CRASHED INTO THE CLIFFS ON THE REMOTE AUSTRALIAN TERRITORY OF CHRISTMAS ISLAND. SOME 50 PEOPLE, INCLUDING 15 CHILDREN, WERE KILLED. <sup>50</sup> ONLY 30 BODIES WERE EVER RECOVERED. ANOTHER 20 PEOPLE REMAIN MISSING, PRESUMED DEAD. ONLY 39 PASSENGERS SURVIVED, INCLUDING 11 CHILDREN, THREE OF WHOM WERE ORPHANED. ALL OF THE SURVIVORS, INCLUDING THE CHILDREN, WERE

DETAINED ON CHRISTMAS ISLAND.

Separated and unaccompanied minors are often at increased risk, 'especially at... border crossings where they can be vulnerable to physical violence, theft and sexual exploitation.' <sup>51</sup>

### CARLOS FROM HONDURAS, DETAINED IN THE USA, AGED 16

Carlos' journey to the United States took about a year. He spent days in some places and weeks in others. He was caught and detained in Mexico for a few hours. Detention in Mexico 'was pretty ugly, cold, dark. I was really depressed because I was half way through Mexico. They got me and threw me back to Guatemala.' From the Guatemalan border, Carlos resumed his journey north.

He stopped in a range of places to work 'because I didn't have any money, so I needed to get some food or something.' As a child worker, he was easily taken advantage of: 'In my country I was exploited since day one. I studied to be a technical mechanic and I knew my work and I was good, but I never got paid for it. They were always lying to me just because I looked so young in Honduras. I worked a couple of times in Mexico and the same thing: they didn't pay me as they should. Or they say they would. But I always got exploited.'

Carlos attempted to cross the border from Mexico into the US over twenty times. Each time, he was caught. But instead of being sent back to Guatemala or even all the way to Honduras as a minor, he convinced the US border guards that he was an adult. 'I got returned back to Mexico because I told them that I was Mexican and so they just kick you back to the border. And then you try to get in again and again. I wasn't thinking about it too much, that it could affect me. I was just trying to put my mind on getting across. That's why I did it too much, all those times. And plus I didn't have any money to pay people to help me across.' Finally, he made it across the border in Tijuana - from where you can see down town San Diego.

Some children, like Yusuf, become separated from their families en route and become unaccompanied minors.

#### YUSUF FROM SUDAN, DETAINED IN MALTA, AGED 16

Yusuf's whole village fled after it was attacked. 'The people who are dead, are dead. We buried them. And all of us left. Nobody of the village who was still alive stayed in that place anymore,' he said.

Yusuf left with his mother and two sisters. The village was close to the border, so it didn't take long to cross into Chad. He stayed in a refugee camp for 11 days. But 'the camp was not safe. Some people were coming from outside trying to enter the camp and they attack them, they shooting, they come creeping at night, militias and kidnapping the people.' The guides who brought the villagers to the camp insisted they would take care of the mothers, but that the young boys were not safe and that they should leave. 'So we left. We came to Libya. From Libya, we came here [to Malta].'

The boys from Yusuf's village did not leave the refugee camp all together. Yusuf left with four other boys. The group travelled by car for a while before separating. Yusuf then found a Libyan animal trader who agreed to take Yusuf to Libya if he cared for the sheep on the way. The man took Yusuf to Tripoli.

The whole trip lasted 14 days.

Even unaccompanied minors generally do not travel alone. Often, they travel in groups with other children, older siblings and other adults who can help them.<sup>52</sup>  
This was the experience of Yusuf.

Yusuf stayed in Tripoli for three days. 'When I arrived, the Sudanese people told me that now you see in Darfur the war is going on. And you have not any identification. Don't go outside, on the street or anywhere. If the police catch you, they can transfer you to Sudan. They send you back. They give you to the government and the government is going to kill you. Don't go outside from this house because you don't have any identification, no passport, no ID card, nothing.'

'I said to those people, "I have just a little bit of money so, not very much. I have only \$500".' The smuggler who sends people from Libya to Europe told Yusuf that it would cost him \$1000. The other Sudanese raised the extra \$500 so that Yusuf could get a place on the boat, destination Italy.

The boat set out from Tripoli with 12 people on board. Three were Yusuf's age. The others were older. 'But we were lost. Six days on the sea. The water was finished. The fuel was finished, the food was finished. And we just prayed. We have no light. We have not petrol. Nothing.'

'When you turn any direction it was like desert. You see nothing. No light, no people. Nothing. We just prayed. And we said, We have nothing to do. Whatever is going to be, we are ready to die. We are ready to drown. Maybe we can find some shark to eat us. Many things.'

'Finally, the coastguard came and picked us up.'

Sometimes, children travel with smugglers. Their experiences of smugglers can be positive. At other times, however, smugglers exploit children or leave them stranded in dangerous circumstances.

#### CAROLINA FROM HONDURAS, DETAINED IN THE USA, AGED 16

Carolina was 16 when she left Honduras with a friend. 'I just left and I knew I had to come to the United States but I didn't know how,' she said. So I came with my friend and apparently everything went wrong.

Because we didn't know anybody, we don't have any food, we had to cross the desert and in the end we were kidnapped. It was really bad people and they had us locked up for a long time. They beat us, they didn't give us food and they had us locked up for two months until the money, the ransom was paid.

And then they took us out and they tied us up.'

'We didn't know when it was day or night time because it was dark, and they would hit us with a bat in case we made any noise. So when we went to the bathroom, they didn't let us go to the bathroom. Someone had to go with us. Someone had to go watch us. And then they'd take us again and then they asked us for our mothers' numbers so that they can be called and they asked them for a lot of money. And then they tell my mum that if she didn't send the money they would kill me or sell me. Like I don't know what you call those places, where women, where prostitute women are sold.'

#### CONCLUSION

Children leave their homes and homelands for a number of different reasons and in a variety of circumstances. In some instances they are forced to flee, including for human rights or environmental reasons. Other children may not be so compelled, but nonetheless feel their options in their homelands are limited. Such children migrate in search of a better life or with the task of earning money to support their families back home. They may desire a better education, the prospect of a better job or a life that is not curtailed by desperate poverty. Often children's motivations for leaving their homelands are complex and inter-related. Whatever their reasons for leaving their homelands, many millions of children travel across state borders without official documentation or

approval. Sometimes they do not want to leave but are sent by parents or relatives.

On their journeys to a new country and a new life, children are particularly vulnerable. Sometimes they travel with family and friends. Sometimes they travel alone. Often, they must use people smugglers with links to organized crime. Sometimes they are victims to criminals who prey on their lack of familial and state protection. Girls and young women are particularly at risk of harm due to their sex.

Throughout their journeys, children are also at risk of being detained by state authorities. The reasons that states detain migrant children are discussed in the next chapter.

## RECOMMENDATIONS

### Recommendation 2.1:

That Governments and the international community work to establish conditions where children can be safe and secure in their home communities, thereby reducing pressure on children to migrate. This includes ensuring that children are free from the threat of violence of any form (consistent with the Report of the independent expert for the United Nations study on violence against children),<sup>53</sup> and from the threat of extreme poverty through the realisation of the United Nations' Millennium Development Goals.<sup>54</sup>

### Recommendation 2.2:

That States from which children migrate for socio-economic reasons seek to implement social and economic policies and practices that allow children to develop fully without the need to leave their home communities.

### Recommendation 2.3:

That Governments establish effective migration channels to facilitate legal migration to ensure that the socio-economic needs of child migrants can be met without them having to risk travelling without State-sanctioned protection.

### Recommendation 2.4:

That States employ policies and practices to ensure that their border control methods remain sensitive to the needs of refugee, asylum seeker and irregular migrant children. Such measures include screening of new arrivals to assess whether they have particular vulnerabilities, including due to their age, streamlining protection procedures for children, and adopting a child welfare-based approach to the reception of child migrants.

### Recommendation 2.5:

That States develop policies and practices that acknowledge the particular vulnerabilities of separated and unaccompanied children, children who are seeking asylum, and children who are refugees.

## CHAPTER 3

# WHY STATES DETAIN CHILDREN

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### INTRODUCTION

The increase in mixed flows of refugees, asylum seekers and other irregular migrants over recent decades has precipitated a heightened interest on the part of states in migration management. This has been further reinforced since 2001 as states have become concerned about migration as a national security issue.<sup>55</sup> States have implemented a range of mechanisms designed to enforce their control over who enters and remains within their territories. These mechanisms include visa requirements, the posting of immigration officials overseas, 'turnarounds' at the border, interdiction and offshore processing.<sup>56</sup> A significant and increasingly widely used immigration control mechanism has been the use of immigration detention.<sup>57</sup> Sometimes destination states have negotiated with transit or other states to detain refugees, asylum seekers and irregular migrants intercepted before they are determined to have reached the destination state's territory.<sup>58</sup>

Immigration detention is used by states to manage refugees, asylum seekers and other irregular migrants at the point of entry or interception in the community, during the process of status determination, and in preparation for the removal of non-citizens who are deemed not to be entitled to remain within a state.<sup>59</sup>

The increasing frequency of detaining refugees, asylum seekers and other irregular migrants, and the rise of detention throughout the whole process from arrival to removal means that people are detained

around the world, on a routine basis. Included in this population of detained refugees, asylum seekers and irregular migrants are children. It is, however, not possible to know exactly how many children are detained largely because most states do not collect, collate and/or release information regarding the number of children they detain for immigration purposes, nor the length or reasons for their detention.<sup>60</sup> This is a significant barrier to developing policies and practices to prevent the immigration detention of children because, as the US Refugee Council has asserted, 'if children are not counted, then they just do not figure in policy discussions.'<sup>61</sup>

Like their adult counterparts, children who are refugees, asylum seekers and irregular migrants, can be detained as a matter of course. In essence, children are classified according to their migration status prior to being seen as minors. As noted above, children ought to be treated as children, with all the potential vulnerabilities that accompany childhood, before they are classified as migrants of any type.

States detain children who are refugees, asylum seekers and irregular migrants for a variety of reasons. Immigration detention serves policy, political and pragmatic purposes. These different purposes will be discussed in turn throughout this chapter. It is important to understand the pressures that states face in the management of irregular migration, and therefore the factors that lead states to detain children. It is only by taking the challenges of states



seriously, and designing responses that may convince political leaders and policy makers, that alternatives to detaining child refugees, asylum seekers and irregular migrants will gain currency.

## POLICY

The detention of irregular migrants, including children, seeks to achieve a number of policy ends. These policy objectives range across the migration experience – from deterring irregular migrants before they arrive, to ensuring identity, health and security checks can be completed on arrival, and to prevent absconding and facilitate the removal of non-citizens who have no right to remain within a state.

Children are also detained on the premise that it is not in their best interests to separate them from their detained parents. The primary focus should however be on the child's dual rights to not be detained and their right to have their parents and family reside with them in the community. Importantly, this requires that states focus on the needs and rights of children (and not just their adult caregivers), and not treat the children as mere appendages of their parents or families.

### **Identity, Health and Security assessment**

Immigration detention is justified by states as a necessary means to check the identity of irregular migrants and to ensure they do not pose a health or security threat to their citizens. These are important functions of states.

It is not always easy for states to verify the identity of refugees, asylum seekers and irregular migrants. There are a number of general reasons for this: because individuals may have come from situations of protracted conflict where identity documentation was unavailable, or from situations where, because of the need to leave in undue haste, it was not possible to obtain identity papers, or because smugglers ordered them to destroy their documentation. In the case of minors, or people claiming to be minors, there is an added complication for states in determining their identity, namely assessing whether or not they are the age that they purport to be. Age assessment

is discussed in chapter 6. But it is noteworthy that detention for identity assessment ought not to be an assumed requirement. As the IDC has documented elsewhere, '[m]any countries house asylum seekers in open accommodation centres while undertaking identity confirmation.'<sup>62</sup>

Similarly, health and security assessments can be complicated and resource intensive activities for states to undertake. However, it is possible to conduct these assessments without recourse to detaining children. Some states have developed robust screening mechanisms, including vulnerability, need and risk assessments, to ensure accurate decision making while keeping children out of detention. These are discussed in greater detail in chapter six.

### **Absconding and return**

Immigration detention is further justified by states as a means of ensuring that non-citizens do not abscond and that they are available for removal if they are found to have no right to remain within the state. It is reasonable for states to expect that non-citizens who enter their territories without prior approval will not 'disappear' into the community. Likewise, it is reasonable for states to expect those who have no entitlement to remain, do leave the territory, while ensuring that all protection, humanitarian and best interest considerations are weighed up.

While the data is limited, there is evidence that refugees, asylum seekers and irregular migrants who are in supported alternatives to detention processes are very unlikely to abscond.<sup>63</sup> The common factors contributing to higher compliance rates of asylum seekers and other migrants outside of detention include:

- treating asylum seekers and other migrants with dignity, humanity and respect throughout the entire status determination procedure;
- the provision of clear, concise information regarding asylum seekers' and other migrants' rights and duties under alternatives to detention and the consequences of non-compliance;
- referral to legal advice at an early stage and

throughout the entire status determination procedure;

- access to material support, accommodation and other reception requirements; and
- individualized coaching or case management.<sup>64</sup>

This is the case in both 'destination' and 'transit' countries. As the IDC has noted elsewhere, 'there is some evidence to suggest irregular migrants and asylum seekers appear less likely to abscond in a country of 'transit' if they can meet their basic needs through legal avenues, are not at risk of detention or refoulement and remain hopeful regarding future prospects.'<sup>65</sup>

Similarly, more failed asylum seekers and other migrants who are within a supported alternative to detention process chose to leave a state voluntarily compared with those who are not involved in such processes.<sup>66</sup> There is also evidence to suggest that detaining refugees, asylum seekers and irregular migrants does not guarantee their removal or return.<sup>67</sup>

Ideally suited to destination countries, the IDC has documented a case management model, based on extensive research into states' practice, and has determined detention is largely unnecessary for ensuring non-citizens leave a state. Rather, the IDC's Community Assessment and Placement (CAP) model provides a more humane, cost effective approach to assessment and removal of irregular migrants deemed to have no right to remain within a particular state's territory .

### **Deterrence**

The logic of deterrence, imported from a criminal justice mindset, is that if irregular migrants face harsh treatment at the hands of the receiving state, others who might follow them will be deterred from making the journey.<sup>68</sup> The detention of children as a means by which others may be deterred, especially given the negative psychosocial and physical impacts of detention on children as documented in chapter 5 of this paper, is an unacceptable reason for immigration detention. Detention for deterrence is clearly in contravention of international law.

Furthermore, [there is significant evidence that detention is ineffective as a deterrent, certainly in the case of refugees and asylum seekers.](#)<sup>69</sup> Research has found detention is not an effective deterrent of asylum seekers and irregular migrants in either destination or transit contexts. Detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals. Studies have shown asylum seekers and irregular migrants:

- Are not aware of detention policy or its impact in the country of destination;
- May see it as an inevitable part of the journey; and
- Do not convey the deterrence message to others back to those in country of origin.<sup>70</sup>

In October 2011, Andrew Metcalfe, the head of Australia's immigration department told the Australian parliament that a central plank of Australia's response to onshore asylum seekers, administrative detention, did not deter non-citizens from coming to Australia without authorization. 'Detaining people for years'<sup>71</sup> has not deterred anyone from coming,' he said. Australia's immigration minister had made a similar point a year earlier.<sup>72</sup>

Rather than deterring people who seek international protection, including through the use of detention, it may be better to prevent<sup>73</sup> the need for such people to make dangerous journeys by ensuring their protection needs can be better met closer to their countries of departure – whether through changes in their country of origin, the protection of their rights within countries closer to their point of departure, or by third country resettlement. Such outcomes are more likely to be achieved through regional and international agreements.

### **POLITICS**

States have a sovereign right, and indeed a responsibility, to the nations attached to them, to control who enters and remains within their territories. Yet such a right is not absolute. Even theorists who emphasise states' rights to border control recognize that in certain instances states have obligations to non-

citizens who seek to enter their territories.<sup>74</sup> As an example of this joint right to national sovereignty (and as an exercise of their sovereignty) and the recognition of their obligations to certain non-citizens, 147 states have acceded to the UN Refugee Convention and/or Protocol.<sup>75</sup>

There has been some academic debate over recent years about the declining power of states, including their ability to control immigration, in the face of increasing globalization.<sup>76</sup> In seeking to assert their relevance in circumstances of declining power to control the movement of goods and services across their territorial borders, some governments have sought to use their ability to control migration as a political metaphor of their ongoing power and relevance. At the same time, irregular migrants have been portrayed by some as the cause of the dislocation felt by native-born populations in a world that no longer possesses some of its past securities – economic, social, and existential.<sup>77</sup>

The combination of the emergence of weaker states, and the political manipulation of the anxieties of some native-born populations about irregular migration, has been the context in which the criminalisation of irregular migration has occurred and has reinforced 'border control' politics and practice. The use of detention has been an important feature in the greater emphasis placed on immigration control. Immigration detention can be understood in part as a way of states asserting, and being seen by their populations to be asserting, control in an area where they still have the capacity to exert their authority (as opposed, for example, to financial regulation or information control).<sup>78</sup> The detention of refugees, asylum seekers and other irregular migrants, including children, becomes a powerful message from the government to its constituents – 'we are in control, we are tough!' The evidence, as noted above, is that this message does not reach or influence people who cross international borders in search of safety or a better life.

Governments and other democratic political leaders are bound to respond to the concerns of their constituents and these constituents have legitimate

claims to participate in decision-making about policies governing who should enter and remain within their state. However, it is important that public discourse regarding irregular child migrants, refugees and asylum seekers is not politicized for the electoral purposes of any political party and is based on evidence, international good practice and an awareness that the best interests of children are central.

It is also true that public disapproval of migration is not beyond challenge, particularly when it comes to the detention of children. Civil society groups can play an active role in helping to shape opinion and to engage in strategic interventions that challenge discourses that promote the detention of irregular child migrants. Political pressure, community campaigns and media strategies to draw attention to the experiences of detainees have been used successfully in the UK, Belgium, Australia, the United States and elsewhere. Sharing international good practice models and engaging with government, led to the release of children in immigration detention in Japan in 2010.

#### PRAGMATICS

Beyond politics and policy there are practical reasons states detain refugee, asylum seeker and irregular migrant children. Often, these are of an ad hoc nature. State authorities in some instances detain children because it is easier to do so than to release them. Detention for bureaucratic convenience is not a valid reason for detaining children and has been found to fail the tests of necessity and proportionality.<sup>79</sup>

Children are sometimes detained because there are insufficient resources in the community to ensure the welfare of a child. This gives rise to a mistaken, but sometimes genuinely held belief that detention may be in the best interests of the child. Sufficient protection must be available to children who are released from or who avoid detention. Practically, sufficient guardianship and reception resources must be accessible to children to ensure that detention does not represent the better of a bad set of options, as demonstrated by Abdi's story.

### ABDI FROM SOMALIA, DETAINED IN GREECE, AGED 16

Abdi was detained in the notorious detention centre on Mytilini. It was overcrowded with people from many different countries. The detainees all ate, slept and stayed together in one large room. There was a single toilet. After 16 days Abdi was released on condition that he depart Greece within 30 days.

He travelled to Athens. 'I don't have anything. I don't know where I sleep, what I eat. So I need to get help. The main problem was where do I sleep. If I can get where I sleep, I can get what I eat. I tried to go to speak to some people. After I speak to one Somali guy from a European country and I say, "My life is like this, I am living a very hard life, I need to try to give me some help." And he give me something. You know, and he said, you have to buy a fake passport. He gave me some money and I bought one small passport. I tried to travel. Unfortunately when I arrived at the airport the police arrested me.'

As well as what appears to be an assessment of children's better interests, children are detained because of ignorance on the part of senior state officials. Children may be detained without the knowledge of the authorities or higher officials, for example, because there is no distinction between child and adult migrants, if children do not reveal their real ages, or if officials do not know their age. Children may also be detained because of a lack of awareness of alternatives to detention, because of a culture that errs towards detention, or because of localised corruption.

### CONCLUSION

Children are detained as migrants for several, often inter-related reasons. While it is reasonable on the basis of state sovereignty for states to seek to maintain control over who enters and remains within their territories, including establishing identity and determining health and security risks, the detention of children for these reasons are unjustifiable. There are other more humane and effective ways of maintaining border control than detaining children. Other reasons

for detaining children, such as to demonstrate governments' control, or as a result of convenience or ad hoc practice, are equally unwarranted. Significantly, detaining children as irregular migrants is unacceptable because of its impact on detained children. In part, this impact is a consequence of the conditions in which the children are detained. This is detailed in the following chapter and is followed by a discussion of the consequences of detention for children.

## RECOMMENDATIONS

Recommendation 3.1:

That States collect and release data about the numbers of refugee, asylum seeker and irregular migrant children they detain, the length of time they are detained, and the reasons for their detention in a timely manner.

Recommendation 3.2:

That States do not detain children during health, security or identity screening.

Recommendation 3.3:

That States refrain from detaining children to prevent absconding or for removal purposes. Community-based alternatives to detention must be utilized in the first instance.

Recommendation 3.4:

That the detention of children ought never to be used as an alleged deterrent.

Recommendation 3.5:

That political and civil society leaders ensure that public debate about irregular migration is based on evidence and international good practice and is consistent with the best interests of refugee, asylum seeker and other irregular migrant children.

Recommendation 3.6:

That stakeholders develop a strong evidence base from which to advocate for managing the irregular movement of child refugees, asylum seekers and other migrants without the use of detention, and build strategic alliances with opinion makers in the media and politics in order to help to shape accurate portrayals of migration and its implications for children and to be able to participate actively in policy development.

Recommendation 3.7:

That robust measures, including accountability processes, be established to ensure that children are not detained by local or regional authorities outside of the law.

## CHAPTER 4

# THE CONDITIONS IN WHICH CHILDREN ARE DETAINED

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### INTRODUCTION

Liberty is a fundamental human right. Its denial is a serious infringement of the integrity of the person. This is important to focus on when discussing the conditions in which children are detained. Even in conditions where basic amenity is reasonable, the essential consideration is the denial of liberty and what that means to detained children. As Yusuf from Sudan said of his detention in Malta as a 16 year old:

*They put us in detention for two months and nine days. Detention for me was so surprising. I was so frightened. This was the first time to see the prison or to see the people that are in the prison. For me it was like prison. Because that was the first time to be inside the jail or inside detention. Depriving me of my freedom of movement. It was so surprising for me. It was really bad. I have never been inside a prison so that is the reason that for me it was difficult. The treatment was not bad. The problem is freedom. You want to see some people outside. You want to be just walking outside.*

Notwithstanding the fact that the fundamental problem with detention is its denial of liberty, it is true that across the world, children are held in immigration detention in a range of conditions, some of which represent a greater risk to their safety and well being. In many instances children are detained in conditions

that do not meet minimum standards of health and hygiene.<sup>80</sup> This is unacceptable.

### PHYSICAL CONDITIONS

Children are detained under legislation, policy and as a result of ad hoc practices. Consequently they are subjected to a range of forms of immigration detention including:

- Closed accommodation centres;
- Alternative places of detention;
- Immigration detention centres.<sup>81</sup>

#### **Closed accommodation centres**

Closed accommodation centres house individuals in an accommodation facility that does not allow residents to leave the premises. Many of these accommodation centres are not legally designated as sites of detention but are considered to be a form of detention for the purposes of this report. Closed accommodation centres take a range of forms and include closed facilities within places of transit (such as in airports), closed screening centres used for people awaiting health and security checks and closed reception facilities for asylum seekers.

### DAKARAI FROM ZIMBABWE, DETAINED IN SOUTH AFRICA, AGED 15

Dakarai was working on a farm in South Africa for a while but was exploited and ran away. He was arrested by soldiers because he didn't have the right papers. Adults and children were detained together at the detention centre. More than 300 people were there at the time. 'Sometimes we were sleeping on the floor without blankets, we were staying there for a long time because they were telling us there was no transport to Zimbabwe to deport us. We stayed there for a whole month. The building was made from iron sheets and the food was also another problem, we only received one meal a day, just bread, sometimes with soup. Since we were mixed with thugs and other adults they would take the soup from us. It was very difficult for the children to find a place to sleep.' There was nothing to do in the detention centre: no toys, ball or place to play. The women and girls were kept on the other side of the wall. Dakarai became ill in detention so the authorities took him to hospital. After receiving some treatment, he was released, but had nowhere to go. He slept on the streets.

#### **Alternative places of detention**

Alternative places of detention are sites within a community setting that have been temporarily or permanently named as sites of detention by authorities to enable them to continue to detain an individual in an environment outside of a detention centre. For instance, a hospital may be designated as an 'alternative place of detention' to allow a detainee who is seriously ill to access appropriate medical treatment. Individuals in an alternative place of detention are usually accompanied by a guard, immigration officer or designated individual at all times. Such alternative places of detention can include private houses, medical facilities, foster homes for unaccompanied minors and hotel rooms. For more details on alternatives to immigration detention, see the IDC Handbook: There are Alternatives - Preventing unnecessary immigration detention. [www.idcoalition.org/handbook](http://www.idcoalition.org/handbook)

Some countries have developed 'community detention' options by applying the status of detention to individuals who are located in the community. Such a status allows authorities to permit selected individuals to live in the community at a particular location with some freedom of movement. Persons

in community detention are usually not guarded or accompanied by an immigration officer, but placed under intensive supervision. This form of detention has been used with vulnerable groups, such as families, to retain a severely limited legal status that permits immediate removal or deportation while allowing them to reside in a less harmful environment. For example, Australia introduced community detention in 2005, primarily for children and families, which allowed for their freedom of movement and living assistance while awaiting a final decision. A review of the model after four years and involving 244 detainees found that less than 1% had absconded, with no other serious violation of conditions.<sup>82</sup> Community detention has been a positive development in immigration detention policy, however a number of concerns remain. Individuals are still held in administrative detention, experiencing extended periods of uncertainty with associated mental health implications.<sup>83</sup>

#### **Immigration detention centres**

Immigration detention centres are institutions that house designated irregular migrants in a secure facility. Detention centres vary considerably from small scale facilities that operate and feel like a hostel or

residential care facility, to large scale institutions that are built and operate like medium to high security prisons. In all cases, detainees are not allowed to leave the premises and are guarded by staff at all times.

It is important to note the use of jails and other sites of criminal incarceration is inappropriate as a site of detention for migrants who are awaiting the outcome of an administrative procedure. Further, states often contract the operation and management of immigration detention centres to private corporations. These companies frequently also run correctional

facilities and prisons; where this occurs there is a danger that the policies and procedures across the two separate types of facilities may at times intersect with the immigration detention centres being managed along the lines of prisons despite the fact that in the case of most countries, asylum seekers have committed no criminal offence by entering the state's territory in order to seek asylum.

In some instances, unaccompanied minors are held with adults as were Yusuf in Malta (above) and Hamdan in Turkey.

#### HAMDAN FROM SOMALIA, DETAINED IN TURKEY, AGED 14

Hamdan was 14 when he was detained for 18 days in Turkey. He described the prison in which he was detained: There were two rooms off a corridor. Each room had a toilet inside it. And inside each room was a mass of people from all different countries. There were 23 people in the room, which was then divided by bars - 'like a cage.'

Initially, Hamdan was detained with a group of Nigerians. The pipes in the cell were broken and the place smelt. The people smelt. People had to wash in the bathroom, but the bathroom was terrible. The toilet was 'very smelly, very bad.' He said that it was a 'very bad situation.' He said that he 'cannot describe' how poor the conditions were. He said that he 'felt disgusting' and reflected that if you don't have your own house, then you cannot feel comfortable. He slept on the floor, sometimes with a blanket. He said that most of the prisoners were adults.

Hamdan felt 'threatened' and 'scared'. The other prisoners were arguing. There was no freedom. He also felt fearful of being deported to Somalia. This was a particularly poignant fear given that he had already been forcibly separated from the rest of his family. He said that the story of his separation from his family is 'horrible' and he didn't want to 'go through', to 'talk about' his family's separation.

After a week of detention, Hamdan was transferred from where the group of Nigerians were being kept to where Afghans were being kept. The room in which they were kept was overcrowded and the Afghans were treated poorly by the police. He said that something disgusting happened to him, although he would not say what it was. He felt so alone in detention. Lots of people were smoking and there was only a small window, so the room was full of smoke. It was so smoky that if you stood up, you would feel dizzy. The toilet was so disgusting, it smelt so badly, that it was impossible to stay in their longer than was absolutely necessary.



Some children like Grace, are separated from their families in detention.

#### GRACE FROM SOUTH SUDAN, DETAINED IN ISRAEL, AGED 15

Grace travelled with her mother and sister to Israel. They were immediately detained. Then, after two weeks, 'there was a judge in that prison who talked to my mother. He told me that I cannot stay there with people who are older than me. I have to go to the under age prison. Actually he didn't tell me that I was going to prison. He told me I was going to boarding school because I can study. And my mum think about it and she say it's a good idea because I wanted to study, so she say, if it's a boarding school so I can go. And then we tell him, 'OK, I will.' But it was too hard for me to leave my mum and my sister because I never left them before. We were always together, wherever we go, we are together.'

'So they bring me to that place called Hadera, it's in the city in Israel. There was a prison there. I didn't expect it to be a prison at all. I thought that maybe it's a boarding school. I've arrived there

and the first day when we got there, I got out of the car... I see there's a lot of police everywhere and the place is closed and then they took me, it was like a building, there was two buildings in this place, one for boys and one for girls, and they took me to the side of the girls, so they told me this is where you will stay. I didn't say anything in the first day, then after two days afterwards I didn't see anything. So I asked the police, like, what am I doing here? The judge told me I was going to a boarding school but this is - it doesn't look like a boarding school at all. And then he say, yes, right, this is not a boarding school, this is a prison for under 18, for under age. So I didn't expect it. I tell him how come, but he [the judge] told me we were going to a boarding school. He say he doesn't know. This is where I am supposed to be.

I lived there for eleven months.'

Some minors separated from their families have been placed in physical, sexual and emotional danger, as demonstrated by the following two vignettes.

#### ARUN AND CHIT FROM MYANMAR, DETAINED IN MALAYSIA, AGED 8 AND 6

Arun, Chit and their mother were arrested as they crossed from Thailand into Malaysia. The Malaysian immigration authorities moved them to a camp where they remained for the following five months. The children's father, also in Malaysia, did not know that his wife and children were in detention.

Arun was separated from his mother and sister. For the whole period they were detained, Arun only saw his mother once, when they were visited by the UNHCR. Arun said that the food in the camp was insufficient. He also remembers that at night, 'older people were asking him for a massage.'

#### JUAN, ANA, AND THEIR CHILDREN JOSE AND MARIA FROM COLOMBIA, DETAINED IN MEXICO, AGED 16 AND 14

After travelling through Honduras and Guatemala, the family was captured and detained on a bus in Mexico. They were subsequently detained in Mexico City and were separated from each other within the detention centre. According to Juan, 'They sent my son to the minors' area, they sent my wife and daughter to the female section and they sent me to the male one.'

'The detention centre seems to be like a jail.'

When Ana became ill due to stress she was transferred to hospital for three days and Maria stayed on her own in the detention centre.

A recent UNICEF report highlights accounts from around the world of children being subjected to acts of violence, some of which were attributed to detention authorities. Some minors are held in jails or police cells.<sup>84</sup>

'We were apart for more than a month,' Juan said, 'and just three weeks before they released us, they placed my wife and my son and my daughter in the same section, all together. They kept me apart.'

Jose, aged 16, was deeply affected by his detention experience. He was kept in a location where other boys were using drugs. 'I feel bad because I didn't get a chance to see my family. We were supposed to have a schedule where we all should be together, but they sent us to that area late or earlier so we just get a chance to see each other for half an hour instead of an hour every day. I used to be mad, mad at the agents, because they never took us on time. I was mad because I wasn't understanding the whole situation. Sometimes I was just crying by myself.'

According to Juan, the impact of detention on Jose has been hardest. 'It was very difficult to leave Colombia,' he said. 'I ran away from danger and I jeopardised my family along the way. I spoil my son's future because of the decision I made. I'm very frustrated because I have seen all the damage this situation has caused. I'm really sad because now my son is saying that he will not go back to school when I think that one of the most important things for him is to go to school and study because if want to succeed in life, you have to learn. We never realised if we came to Mexico that we'd end up without opportunities. I feel bad being in the detention centre apart from my son for almost two months. I just missed him. I just lose him.'

Jose feels a sense of hopelessness associated with leaving his homeland and ending up in Mexico. 'I don't want to go to school anymore. I don't feel like it. I don't know why. I don't know for what to go to school. I've missed two years.'

ABRINET AND HER CHILDREN CHEKOLECH, ABDUL, HABIBA AND FASSIL FROM  
ETHIOPIA, DETAINED IN EGYPT, AGED 7, 4, 3 AND 6 MONTHS

Abrinet, her husband and their children fled Ethiopia to Sudan for 'political reasons'. But their woes continued in Sudan so they moved on to Egypt.

'We were arrested at the border. So the crime was like, really, crossing the border illegally,' Abrinet said. Her four young children aged 7, 4, 3 and six months were kept with Abrinet in a prison cell, together with Egyptians who had been convicted of crimes, while her husband was kept elsewhere.

'There was a town called Aswan and they arrested me with my children for fifteen days. It was a really terrible and difficult situation. Without any food, without any mattress. And I cannot tell you now - it makes me feel really bad when I talk about it.'

'They locked us in a dark room, we couldn't see even the sunlight. There was not enough room for us to lie down.'

'They only gave us a small piece of bread once a day through that hole. The bread they gave us, they put some, what do you call this, cheese. It's very bad, it's like rotten, so we couldn't eat it, but since we are starving, we have to eat to survive.'

'Two children were born inside the prison. And there were other women who were detained with me, eight people, and one of them is Eritrean and she died in the prison. The prison cell is disgusting, very smelly, urine and dirt. It's very

bad. And that woman, she lost her appetite and she couldn't eat anything. Finally she starved to death.'

Chekolech recalls life in the cell: 'I remember one day my brother, every time he goes to the bathroom, like, he doesn't want to go, like, he doesn't want to go by himself and I'm always with him while he cleans himself and everything. And while we were in the toilet we heard someone crying and he was asking me, what's going on? And I came to my mum and asked her, what's going on? And my mum told me that an Eritrean woman died and she was crying. This is what I remember. We were starving and we didn't have anything when we were in detention. And the food was very bad.'

According to Abrinet, 'There was a toilet in the prison cell. It's very disgusting and it smells bad, and the toilet is there, everybody use the toilet there, in the same prison cell. Every day we were taken to another room to sign or for some kind of interrogation, and then, when we came back the inmates were the ones stealing the clothes, not the police.'

After 15 days, Abrinet and her children were transferred to a jail in Cairo while her husband remained separated. The family was kept in the second prison for a further four months.

### DAIO FROM BURUNDI, DETAINED IN SOUTH AFRICA, AGED 17

'My mother and father died when I was six, my grandfather doesn't have the power to help me to go to school. I came with a friend from Tanzania, I had 400 dollars for the journey. In Swaziland the police caught me. My friend ran away when they arrived.... He may have died. The police took my money, my phone and clothes. Afterwards I spent two or three months in the police station in South Africa.

'Why me? I didn't steal anything, I was crying everyday. The police just told me to shut up. The police told me they don't want foreigners here and I should go back to Burundi. They took my fingerprints.

'I was beaten because I didn't speak English. They then put me in a detention centre for people who don't have a passport. That was Lindela. There are 5000 people there without documents.

While I was in detention I saw two people from Tanzania who died in a fight. You have to be quiet and not talk too much so they don't beat you. People were also fighting for the food. I made a friend from Kenya. He helped me to take the food without getting beaten. In total I spent two months in Lindela. I am safe now, but I am thinking about the people who are still in jail, it gives me pain in my heart. I am thinking too much, I don't have a number for my friend who helped me in prison. Today is the first time I tell my story.'

Some children are detained in closed children's facilities.

### CAROLINA FROM HONDURAS, DETAINED IN THE USA, AGED 16

Eventually, Carolina's mother paid the ransom and two months after she was captured, the kidnappers freed her. She travelled across the Rio Grande into the United States where immigration officials picked her up. She was taken to a 'foster home', a closed facility which she shared with another 16 girls.

Carolina stayed there for three months.

'There were a lot of rooms and they treated us well, they gave us food on time. And they had us there for a short time, just until they found somebody to help us get out of there. We were also locked up. We had liberty in the house, like what to eat, when to play, but we couldn't go outside.

I cried a lot because it reminded me of when I was locked up in the kidnapping.'

Sometimes, as in Carolina's case, these facilities have reasonable amenity and staff or carers who are genuinely concerned about the child's best interest. In other instances, children are detained in squalor; in overcrowded, unhygienic conditions with a lack of access to basic nutrition and health care. This was the situation reported by Abrinet and her family. In some instances, they are deliberately detained in a harsh environment.

#### SERGIO FROM EL SALVADOR, DETAINED IN THE UNITED STATES, AGED 16

When he first was captured by US officials, Sergio was kept in the 'ice box', a room without windows or natural light which means that people do not know what time of the day it is. The air conditioner is turned up so that it is too cold for detainees to sleep. This pushes people who are already often exhausted to their physical limits. It is, apparently, a deliberate strategy on the part of border officials to encourage irregular migrants to leave the United States.

In other cases they are deliberately subject to restrictions that are meant to humiliate.

#### ABDI FROM SOMALIA, DETAINED IN GREECE, AGED 16

In the airport detention centre, Abdi remained in the same clothes without washing for 17 days. 'At that time, I hate my life. We were living in small (room) and they locked it. And you cannot do anything. Sometimes you are sitting. You are not able to sit how you are sitting all the day. Now you are free, you can make movement. If I say - sit like this for one hour or five minutes, you feel something. I have been there 17 days without taking bath, without changing clothes and they allow me to go to the toilet two times, in the morning and in the night. After that, I hated my life. I waited and I begged my god to take me out of here. After that they called me one day and the said - we take this paper for you and say you are free, you can go wherever you like in Greece. They give me one paper. And I arrived in Athens.

In other scenarios, it appears that the state does not have the resources to provide a higher level of care to those within immigration detention.

## CONCLUSION

Children are detained as migrants in a range of circumstances around the world. Some are detained in purpose built centres, others in ad hoc facilities. Some are detained with their families, others are separated from them. Some children are incarcerated with adults, others only with children. Some are kept in absolute squalor, others in conditions they have never before had the good fortune to live. As well as the material conditions of their detention, children are incarcerated through a range of legislative, policy and practical circumstances. Some are detained as a result of a deliberate policy; others are detained as a result of no policy at all.

Regardless of the conditions in which children are detained or the legal basis for their detention, it is the fact they are denied their liberty, a fundamental human right that is most significant. Detention, even in the most amenable conditions, can have a profound impact on children. The impact of detention on children is discussed next .

See Chapter 1 'International Law and Standards' for information on standards and conditions in places of deprivation of liberty.

## RECOMMENDATIONS

### Recommendation 4.1:

That unaccompanied and separated children should never be detained. Alternatives to detention must be utilised in the first instance.

### Recommendation 4.2:

That consistent with the principles of family unity and the bests interests of the child not to be detained, the parents or primary carers of refugee, asylum seeker and irregular migrant children should not be detained, but should be able to live in a community setting with their children.

## CHAPTER 5

# IMPACTS OF DETENTION ON CHILDREN

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### INTRODUCTION

There is compelling evidence that immigration detention has a detrimental impact on the mental and physical health of those detained, be they children or adults. Much research has been conducted into the psychosocial impacts of immigration detention on adults. For example, a United States study of 70 detained asylum seekers, published in *The Lancet*, found that 77 per cent of the group had 'clinically significant symptoms of anxiety,' 86 per cent had depressive symptoms, and 50 per cent displayed symptoms of Post Traumatic Stress Disorder (PTSD).<sup>85</sup> The researchers found that 'all symptoms were significantly correlated with the length of detention.'<sup>86</sup> Further, '[a]t a follow up, participants who had been released had marked reductions in all psychological symptoms, but those still detained were more distressed than at baseline.'<sup>87</sup> The researchers concluded that 'detention of asylum seekers exacerbates psychological symptoms.'<sup>88</sup>

Other studies demonstrate similar findings.<sup>89</sup> For example, a Japanese study found that detained Afghan asylum seekers suffered from pronounced rates of PTSD and depression.<sup>90</sup> A qualitative study from the United Kingdom concluded that detainees are usually able to cope with the first month or two in detention, beyond which a 'number of psychological symptoms emerge, including sleep and appetite disturbance, symptoms of post-traumatic stress, psychosomatic symptoms and so on.'<sup>91</sup> Various Australian studies have

found that not only are asylum seekers in immigration detention more likely to have suffered trauma prior to arriving in Australia,<sup>92</sup> but the detention experience itself may cause and/or exacerbate mental health problems, including depression, anxiety and, in some instances psychotic symptoms.<sup>93</sup>

The impact of detention on children is similar to its effect on adults. However, because of children's particular vulnerabilities, detention may cause additional problems for children's developmental and physical health. Much research into the effects of immigration detention comes from Australia because of Australia's long-standing practice of detaining children who arrive there without prior authorisation.

In 2004, Australia's Human Rights and Equal Opportunities Commission (HREOC) released the results of its inquiry into children in immigration detention, *A Last Resort?* It remains a benchmark work, bringing together the scholarly research, and other evidence, primarily in the form of written submissions and appearances before the Commission, from a range of senior health professionals, bureaucrats, detention officials, and detainees themselves. Because of its thoroughness and breadth, this chapter draws heavily on HREOC's work.

Children who are detained for immigration purposes are at risk of a variety psychosocial and developmental problems linked to their detention experiences.



A range of factors contribute to these psychosocial and developmental issues. This chapter will deal first with the factors that contributes to children's psychosocial and developmental problems in detention before detailing the problems themselves.

### CONTRIBUTING FACTORS TO THE PSYCHOSOCIAL AND DEVELOPMENTAL PROBLEMS OF CHILDREN IN DETENTION

A variety of factors contributes to or exacerbates the psychosocial and developmental problems experienced by children in immigration detention. These factors include previous trauma experienced in their home country or during migration, the length of time detained, disruption of the family unit and parental roles, poor and unsafe conditions of detention and a lack of basic needs including food.

Particularly vulnerable are young people with extended experiences of trauma, unaccompanied minors or those separated from their families, and those who are asylum seekers. For some children, detention maintains or aggravates existing trauma and other psychological conditions. For others, the detention experience is the worst thing that has happened to them.<sup>94</sup> For the majority of children the detention experience includes a loss of control, enforced separation from the outside world, detachment from community, culture, religion, and the inability to

experience life as predictable, meaningful and safe. The experience of detention may mimic the experience of human rights abuses, persecution and terror. Detention is highly traumatising for children who are less able to understand explanations as to the reason they have been detained.

There is a clear link between the length of time that

children are detained and the psychosocial and developmental issues they confront. The longer children are detained, the more likely they are to be exposed to traumatic events. Further, children and young people who are detained for extended periods of time are more likely than others to experience feelings of isolation, detachment and loss of confidence.<sup>95</sup>

Detention can have profound and terrible implications for families.<sup>96</sup> The longer a family spends in detention, the more likely it is to break down. Detention undermines the ability of adults to parent adequately. It creates or exacerbates the parents' mental health problems and can also damage their ability to provide the

emotional and physical support children need for healthy development. Parental mental health issues can also mean that parents are separated from their children when they are accessing appropriate mental health treatment and support. Both of these outcomes mean that parents' mental health problems associated with detention may leave children at risk of exploitation

#### MAJAK FROM SUDAN, DETAINED IN TURKEY, AGED 16

When he was detained in Istanbul, Majak was reminded of being in jail in Sudan. In Sudan, he had been jailed with other small children. He had been 14 or 15 years of age. He said that he 'suffered too much.' He was tortured and was 'suffering in very bad conditions.' Children were not involved in political activities but were treated like political people. The authorities directed political accusations at the children.

In Turkey, Majak said he thought similar things were going to happen to him in detention. He said it was 'frightening and scary.' He said 'maybe I would run from detention and maybe I would be tortured the same as in Sudan.' Majak did not know why he was in detention in Turkey. He registered with UNHCR as seeking protection, but was transferred to the police. He was 'scared and frightened.'

and abuse within the detention context. Further, the institutional affect of detention disempowers parents from their role as carers, providers and protectors.

The family unit is also undermined by detention when children take on adult roles. This frequently arises in circumstances where parents, perhaps because of their own psychological distress or for other reasons, are unable to function in their capacities as caregivers. In such instances, children carry an emotional burden disproportionate to their age, as they deal with authorities (such as officials and detention guards) and take on the role of parenting and attempting to support and comfort their parents.<sup>97</sup> According to HREOC, 'the longer that families are in detention, the further the capacity of parents to care for their children is compromised.'<sup>98</sup>

There is also evidence of a detrimental effect on the mental and physical health of children held in immigration detention for short periods. Children detained and assessed in a 2009 British study displayed symptoms of depression and anxiety, sleep problems including nightmares, eating difficulties and somatic complaints. They further displayed emotional and behavioural problems. Parents in this study showed signs of psychological deterioration as a result of their detention. The study concluded that 'the high levels of mental and physical health difficulties detected support the view that detention, even for short periods of time, is detrimental and not appropriate for children.'<sup>99</sup> According to the study, the children in detention in the United Kingdom, *are also placed at risk of harm due to poor access to specialist care, poor recording and availability of patient information, a failure to deliver routine childhood immunisations, and a failure to provide prophylaxis against malaria for children being returned to areas where malaria is endemic.*<sup>100</sup>

The detention environment itself impacts on children's development and psychosocial health. The prison-like environment, the lack of freedom and the constant surveillance and control is confusing and intimidating.<sup>101</sup> Detention shatters the child's

assumptions that the country to which they were coming is a place in which they would be safe, welcomed and treated fairly. Witnessing others being released from around them whilst they face prolonged detention, is profoundly disillusioning. Further, the detention environment, with its lack of recreational and educational facilities, can also lead to overwhelming boredom and isolation.

Notwithstanding that detention centres are frequently sites of constant control, they can be places where children do not feel safe. Tensions within the detainee population and between detainees and staff can manifest in violence. Not only is this a reminder of past traumatic experiences but it can be traumatising itself. Violence in detention can affect the behaviour of children and young people who may mimic what they observe. Such behaviour makes parenting difficult, especially if it is impossible to protect children from such violence.<sup>102</sup>

A further factor that can impact children's development and psychosocial wellbeing in detention is how they are treated within the detention context. Disrespectful treatment at the hands of detention officials can exacerbate feelings of humiliation and poor self-image. For those children and young people who have fled their countries due to human rights abuses and/or persecution, detention may serve to continue their experience of being treated unfairly or unjustly, as well as their perception that life is unsafe, uncertain, unstable and unpredictable. Thus detention serves to continue the very experiences that lead children and their families to leave their homeland in the first place. Detention therefore may become a continuation of the child's abuse. It is important that staff working with children in detention facilities have appropriate training to identify and address physical and mental health needs of asylum seekers as well as cultural awareness training. Poor quality food and arbitrary control measures can reinforce a sense that detainees are not treated with due respect.<sup>103</sup>

PSYCHOSOCIAL AND DEVELOPMENTAL PROBLEMS LINKED TO CHILDREN'S DETENTION

While a range of factors may impact on a detained child's psychosocial and developmental wellbeing, detention itself causes or reinforces children's mental and emotional health problems. Some children suffer from diagnosable mental illnesses, such as depression or PTSD. Others can experience more general problems affecting their wellbeing. According to one study,

A wide range of psychological disturbances are commonly observed among children in the detention centre, including separation anxiety, disruptive conduct, nocturnal enuresis, sleep disturbances, nightmare and night terrors, sleepwalking, and impaired cognitive development. At the most severe end of the spectrum, a number of children have displayed profound symptoms of psychological distress, including mutism, stereotypic behaviours, and refusal to eat and drink.<sup>104</sup>

KUMAR, MAHELA AND LASITH, FROM SRI LANKA, DETAINED IN MALAYSIA, AGED 11, 10 AND 8

Kumar, Mahela and Lasith fled Sri Lanka with their parents. They were detained in Malaysia. In the detention camp, they were made to strip naked and squat and stand repeatedly while they were checked for unauthorised possessions. If they stopped squatting and standing, they were hit with a stick.

They stayed in a tent. There were two tents joined and together more than a hundred people stayed there. When it rained, water would come inside and it was difficult to sleep. The toilet was in another part of the camp and it was dirty and there were not enough spaces for all the detainees.

'Sometimes I was scared because they [the guards] beat the fathers,' Kumar said. 'They beat our father, one day they beat my father. I am so frightened.'



A Sri Lankan family was forced to leave their country after which they were detained and the children and there father were seperared from the mother in detention. © David Corlett

## JP, FROM AFRICA, DETAINED IN THE UK, AGED 10 <sup>105</sup>

JP, then aged four, arrived in the UK with her mother in 2003. JP's mother had been subjected to domestic violence by her partner many times in the presence of JP, stemming from the mother's reluctance to allow her child to be circumcised.

After arrival in the UK, JP flourished. She was a popular child at school who was seen as an able and academically gifted pupil. However, some years after living in the UK she and her mother were subjected to a dawn raid and taken to Yarl's Wood IRC [Immigration Reception Centre]. On route, JP reportedly witnessed her mother being hit over the head by an immigration officer. When she was detained she began to wet her bed, and eat less. In June 2009, JP witnessed the forcible break up of families protesting in Yarl's Wood. In part, these protests were against the impact of detention on their children. JP says she saw blood when the head of one protestor was hit against a wall.

Prior to the break up of this protest, an attempt was made to remove JP and her mother from the UK, but this was cancelled because of the extreme distress the girl was experiencing. At some point after this failed removal attempt, UKBA's [UK Border Agency's] Office of the Children's Champion authorised the use of force against her if she was to resist removal again. A second attempt involved tricking the girl by asking her to run an errand for staff in the IRC, and then locking her in a room with DCOs [Detention Custody Officers] for approximately an hour before her mother arrived. However, this removal was eventually cancelled after being prevented by lawyers. After being transferred to Tinsley House IRC, the family were released.

The mother was again detained after a few months and her daughter lived with a relative for a further few months. In this period, an independent psychotherapist assessed JP and raised concerns that she was suffering from PTSD, and that another period of detention could instigate 'a further deterioration in her functioning, suicidal thoughts and possibly a shift into psychosis'. Nonetheless, in the following month JP was detained and the relative was not allowed to accompany her to Tinsley House. Reportedly, a social worker, who was observing the dawn raid, looked on as the girl was taken away 'screaming and crying inconsolably'. Within a few days of being taken to Tinsley House, JP was found, tying electrical cord around her own neck, stating that she wanted to die.

JP was assessed again a few days later by an expert psychologist who concluded she was suffering from depression, anxiety, and PTSD.

Another expert found the traumatic incidents JP had experienced, created a range of impacts including changes in her self-identity, feelings of helplessness and hopelessness, mood disturbances, overdeveloped avoidance responses, and disassociation as a way to try and push difficult feelings from her mind. This expert observed difficulties in the progress of development, stating that whilst JP 'seems to be on the cusp of childhood and pre-adolescence... she functions psychologically as a much younger child'.

After being subjected to immigration detention,

'She could no longer bear her anxieties and fears. She began to regress in her functioning and in the ways fear and anxiety are expressed. She began not being able to sleep at night, and could not stop thinking about her fear of return. She could no longer hold her fears in her mind, needed to go to the toilet about five times each night, sometimes wet her bed and it was very hard for her to sleep. When she fell asleep she tended to talk in her sleep and have bad dreams and nightmares.'

#### RAHIM FROM AFGHANISTAN, DETAINED IN AUSTRALIA, AGED 17

Rahim arrived on Christmas Island and was detained for a year. He said that immigration detention had ruined him physically and mentally. 'I had dreams, I had wishes, I had desires for my future. [But] I was seeing only the darkness around me,' he said. 'As a refugee I want to say we are not the criminals.'<sup>106</sup>

Children have a range of physical, psychosocial, emotional and cognitive developmental needs. All of these can be compromised by the detention experience. Poor nutrition, sanitation and health care in detention can result in children's physical development being impaired. Similarly, a lack of educational and recreational facilities and dysfunctional family dynamics can hinder and reverse psychosocial and cognitive development, as well as the development of fine and gross motor skills. In the Australian case, HREOC found the 'evidence indicates that the detention environment can have, and has had, a negative impact on children's development.'<sup>107</sup>

The impact of detention can also be affected by the age of the child. Older children are affected by their detention differently from infants. Children aged between seven and 17 may experience a sense of hopelessness and futility and can have trouble sleeping and concentrating. As a response to their hopelessness and anger, some young people harm themselves, as did Alamdar and Montezar whose stories are noted below. Witnessing acts of self harm not only encourages other young people to harm themselves as a behavioural strategy for coping with detention,<sup>108</sup> but also helps to reinforce a sense that the detention environment is unstable and unsafe, leading to symptomology such as suicidal ideation, disassociation, depression, restricted affect and anxiety.<sup>109</sup>

#### CHILD IN DETENTION WITNESSING SELF-HARM

'My world has become like upside down, because I have never seen things like this, I see people who bury themselves alive one day. I wake up in the morning, I see people have buried themselves, I see people go on the tree and just jump down just like that and I see people who cut themselves. I see officers hit women and children with batons, or use tear gas. I just, it's too much for me, I don't know why and sometimes I wonder you know, it is very stressful to me.'<sup>110</sup>

## ALAMDAR AND MONTEZAR FROM AFGHANISTAN, DETAINED IN AUSTRALIA, AGED 13 AND 12

After months in Australia's notorious outback detention centre in Woomera, a psychologist wrote about Alamdar Bakhtiyari that he was "a child of good intelligence and of superior artistic talent" but that he was 'suffering deep depressive symptoms' which were inflamed by 'the depression now infecting his family'. She wrote that Alamdar needs 'freedom and security' which were unavailable within the detention system.

On the very day the psychologist wrote her report, Alamdar's younger brother, Montezar, took a razor blade and cut himself across the arm and leg. At 12 years of age, 'Monty' was tired, lonely and without hope.'

In early 2002 a detention centre youth worker wrote that over her year's involvement with the Bahktiyari family she had witnessed 'a continual decline in the children's well-being, particularly related to their socialisation and psychological state.' Alamdar, the 13-year-old, was suffering from mood swings, suggesting; he withdrew from others and displayed 'obvious signs of distress and trauma'. During a psychological consultation he had sat 'curled almost into a ball and cried'. At other times he was aggressive. Alamdar had slashed his arms on two occasions, cutting the word 'freedom' into his inner forearm the second time. He had also twice sewn his lips together.

Montezar, too, had slashed himself and sewn his lips together.' <sup>111</sup>

As well as impeding a child's development, immigration detention is strongly linked to PTSD and to depression, either 'because detention triggered the illness, exacerbated the seriousness of the illness or inhibited the ability to appropriately treat the illness.' <sup>112</sup>

For refugee and asylum seeking children, detention frequently serves to continue or return the child to the state of existential panic that they experienced when subjected to the human rights violations or persecution which lead them to flee their country of origin. Governments must acknowledge that to detain children is to collude with those who perpetrated the human rights violations or persecution that lead the child alone or the child and his or her family to flee in the first place.

### **In summary, HREOC concluded:**

*While there are a number of factors that contribute to the mental health problems found in children in detention, all of those factors are either a direct result*

*of, or exacerbated by, the long-term detention of children and their families.* <sup>113</sup>

Australia's Immigration Department, the private company managing Australian detention centres, mental health experts and the children held in detention all 'agree that the longer the period of detention the more likely it is that children will have mental health issues.' <sup>114</sup>

### **CONSEQUENCES FOR RESETTLEMENT AND RETURN**

The consequences of detention can be long term, impacting on former detainees' ongoing lives and relationships. While little longitudinal research has been undertaken with refugee, asylum seeker and migrant children who have been detained, there is some evidence from research with adults that may be indicative.

An Australian study of 17 former detainees conducted on average three years and eight months after their release found that 'there is enduring harm rendered to asylum seekers who have been detained for prolonged periods in immigration detention.' The participants had each been in detention for two or more years. The research found that even years after their detention experience, the former detainees 'were struggling to rebuild their lives and for the majority the difficulties experienced were pervasive'.

They 'described changes in their view of themselves and their capacity for agency, their values and their ability to relate to others.' According to the research, the harm done by immigration detention 'compromises the capacity to benefit from the opportunities ultimately afforded by permanent protection.'<sup>15</sup>

The following stories reflect some of what children themselves say about the impact of detention.

#### CARLOS FROM HONDURAS DETAINED IN THE USA, AGED 16

If you did something wrong, then they'd put you over there, for a couple of days...they'd put you in 'the hole', they called it, which is a small room. There's no windows, just a door. I was there for probably three days. The only thing I had there was a bible. I was really confused and stuff. It was really small [and] I was like kind of being the free guy, you know, I did the journey, and being in that space, kind of tripped something in my mind...I felt like an animal. I felt, and I was believing myself, that I was bad, that I had something that other people can see but I couldn't see. And that is why they made me believe that I probably acted, that I had such bad behaviour, that I deserved to be there. I was starting to believe that I deserved to be there. I started thinking that I was a mean guy then, and that I probably deserved it.

#### DAKARAI FROM ZIMBABWE, DETAINED IN SOUTH AFRICA, AGED 15

'Sometimes I feel very angry or cry when I think about the past experiences, like my brother's dead,' Dakarai said. 'The detention centre pained me because of my health condition. It sometimes comes to my mind or I dream about it. Being in jail, being beating by the police.'

Dakarai was arrested for a second time by the police at the age of 17

#### RAHIM FROM AFGHANISTAN, DETAINED IN AUSTRALIA, AGED 17

Rahim arrived on Christmas Island and was detained for a year. He said that immigration detention had ruined him physically and mentally. 'I had dreams, I had wishes, I had desires for my future. [But] I was seeing only the darkness around me,' he said. 'As a refugee I want to say we are not the criminals.'

## GRACE FROM SOUTH SUDAN, DETAINED IN ISRAEL, AGED 15

Two years after her detention, Grace recalled what it was like for her:

'Some of [the other kids in detention] were really going crazy and I remember twice when I was there, there was two kids who tried to kill themselves. Just to get out of the prison. One of them, she'd drink the stuff that we'd clean the floor with it, she'd drink the whole bottle. And then after she fell on the floor so we couldn't do anything, we'd scream and then the police come and took her to the hospital.

For me, in the first few months that I have been there, it was terrible for me. I used to always cry, just go to my room and cry and don't talk to anybody. Just always crying. Because I can't scream and hit the door and do anything like this, I just always go to my room, myself, just close the door and cry, this is always what I do. And I don't have anything to do. I don't have anyone to talk to. The other people are not like from my country. They are from a different country. And most of them they don't speak the language that I speak. Some of them do. So it was really very hard for me because I had left my mother and my brothers and I felt so lonely. And I feel like I have nowhere to go any more. And one of the things I felt I would never get out of that place.

After a few months, I never think about it because I think that this is the end of my ... this is how my life is going to be, just here in this prison, and that's it. So I never think about it at all again. I just get used to it. I feel like I don't have to think about it any more. I just have to believe this is my life, how it will look like to be living here in the prison with these people, and that's it. Even though there are so many kids coming and going and I'm still there. I never get out. So that's why, especially after I see these things, so I've been

thinking that I'll never get out and I don't have to think about it any more. I just have to live it and that's it.

You know, it's been really so hard for me. Sometimes when I see the light in my room and I remember the outside of the prison, I think a lot about it. I never ever think that I can get out of that place. I think about it and I can feel, imagine that I can[t] get out of that place. Because always what I was thinking, I would never ever get out of there. I would just stay there. Because first of all I don't have anybody who came to visit me, like, some of the other kids, they have their cousins or someone from the city who come out to visit them but I never have anybody, except my lawyer, I have two lawyers. These are the only people when they come, I get out for them, they took me out to see them in the office. But I never see anybody else. Like the other people, they always have people visit them, they can bring for them stuff, clothes and whatever they need, money, but I never have somebody come and visit me. I was always alone.

It was really hard. I mean, until now, I can still imagine how did I get out of there. It was really hard.

After being subjected to immigration detention,

'She could no longer bear her anxieties and fears. She began to regress in her functioning and in the ways fear and anxiety are expressed. She began not being able to sleep at night, and could not stop thinking about her fear of return. She could no longer hold her fears in her mind, needed to go to the toilet about five times each night, sometimes wet her bed and it was very hard for her to sleep. When she fell asleep she tended to talk in her sleep and have bad dreams and nightmares.'



Similarly, research undertaken by Physicians for Human Rights into the effects of indefinite detention found not only that detention had harmful physical and psychological effects (including severe and chronic anxiety and dread; pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well as on the central nervous system; depression and suicide; post-traumatic stress disorder; and enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release),<sup>116</sup> but that ‘the literature supports the conclusion that the harms that develop during detention do not resolve once the detainee is freed, and that indefinite detention makes detainees vulnerable to new physical, social, and emotional harms after they are released.’<sup>117</sup> The experience of indefinite detention causes ‘enduring personality change,’ and ‘shatters familial bonds’.<sup>118</sup>

The implications of research such as this is that children who are held in detention for extended periods, at least, are likely to experience the implications of their detention beyond the walls and wire of the detention environment. This has consequences not only for the individual children but also for the communities in which they will live their lives. This is the case regardless of whether they are returned to their countries of origin, deported to a third country or are resettled in the country in which they were detained. It is also possible that the harm associated with long term detention could undermine the safety of a child returned to a socially or politically volatile country. For example, while a child may not have had a strong claim to international protection before being detained, returning a child who may come to the attention of a persecutory government as a result of their behaviour post-detention may place the child at greater risk. In this sense, detention may be understood to precipitate the return of refugees to a situation where they may be persecuted. The long term damage caused by the extended detention of children is not in the interests of the children concerned, their families or the communities of which they will

eventually be members.

## CONCLUSION

The detention of children for immigration purposes has profound and far-reaching implications for their development and physical and psychological health. Research indicates that detention can precipitate delays or even regression in the development of children. Detention can both exacerbate existing physical and mental health problems in children and create new problems. The longer that children are detained, the more likely they are to suffer the effects of detention, although there is also evidence that even short-term detention can impact detrimentally on children. Research also indicates the consequences of detention can be long-term, impacting on former detainees personalities and senses of self. This has serious implications for children regardless of whether they are allowed to remain in the state in which they are detained or required to return to their homelands.

Because of the impact of detention on children, detention for migration purposes is never in the best interests of the child. States should do everything possible to avoid the detention of child migrants. The following chapter provides a ‘blue print’ for achieving this goal.

## RECOMMENDATIONS

### Recommendation 5.1:

That children with a history of trauma – whether originating from their countries of origin or their journeys beyond that – ought never to be detained. It is incumbent on States to assess whether children have such histories.

### Recommendation 5.2:

That it is never in the best interests of a child to be detained for immigration purposes. States should ensure that a minimum level of protection and support for children is in place in the community.

## CHAPTER 6

# THE CHILD-SENSITIVE ASSESSMENT AND PLACEMENT MODEL

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### INTRODUCTION

This chapter presents a new model for managing children and families in the community and thereby preventing the detention of children for immigration purposes. The model is not prescriptive. Rather, it presents a way in which states might design responses to the irregular movement of child refugees, asylum seekers and migrants that ensure that they are not detained.

The model articulated below builds upon the IDC's Community Assessment and Placement (CAP) model. CAP combines mechanisms to prevent unnecessary detention with strategies for effective and humane case resolution in the community. CAP ensures governments have a clear understanding of the diversity within the population of asylum seekers and irregular migrants in order to make informed decisions on placement, support and management.

The model developed below provides a greater level of detail for policy-makers and legislators to actualise the CAP model for children. We have called this the Child-sensitive Community Assessment and Placement model (CCAP).

CCAP is represented in figure 6.1 below. This chapter describes the diagram in detail, making reference to state practice around the world to illustrate that the model presented is entirely

achievable. In doing so, the chapter highlights good practice and refers to international opinion on various aspects of the model, including screening, age assessment, guardianship, best interest determination and implementation, addressing special needs, and the sorts of reception resources that are required to ensure that children can live safely and with dignity in a community setting while their immigration status is resolved. CCAP is designed to be applicable from the time that a child or a person who is potentially a child is discovered by authorities – whether at the border or within a states territories – until the very end of any process where a child either is allowed to remain within the state or is expected to leave. CCAP can also help in situations in which states experience capacity constraints in responding adequately to children who are irregular migrants.

CCAP involves five distinct steps that governments should take to ensure refugee, asylum seeker and irregular migrant children are not detained. All but one of the steps involves several components. These are discussed below.

Is a presumption against the detention of children. It occurs



A Sri Lankan family was forced to leave their country after which they were detained and children and the father were separated from their mother. © Jon Frank.jpg

# CHILD-SENSITIVE CAP MODEL

## THE CHILD-SENSITIVE COMMUNITY ASSESSMENT AND PLACEMENT (CCAP) MODEL

A 5-step process to avoid the detention of refugee, asylum seeker and irregular migrant children.



### 3 MANAGEMENT & PROCESSING

CASE MANAGEMENT\*

BEST INTEREST DETERMINATION\*

PROTECTION NEEDS\*

- Step 3 -

Is the substantive part of the model. It involves 'case management', including an exploration of the migration options available to children and families, a best interest determination, and an assessment of the protection needs of children and/or their families.

### 4 REVIEWING & SAFEGUARDING

PERIODIC REVIEW\*

PRE-DEPARTURE RISK ASSESSMENT\*

- Step 4 -

Involves ensuring that the rights of children and their best interests are safeguarded. It includes legal review for various decisions taken regarding children and their families – including decisions about where they are accommodated and about their legal status. It also includes an opportunity on the part of states to review the conditions accompanying the child or family's placement in the community following a final immigration status decision.

### 5 CASE RESOLUTION

LEGAL BASIS TO REMAIN\*

NO LEGAL BASIS TO REMAIN\*

- Step 5 -

Involves the realisation of sustainable migration solutions.

# PREVENTION

## STEP 1 OF CHILD SENSITIVE CAP MODEL

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Fundamental to preventing the detention of children who are refugees, asylum seekers and irregular migrants is a prohibition, in law, against their incarceration. Laws, policies and practices ought to be based on the assumption that detention is not necessary when resolving an individual child's migration status. According to the CAP, 'Such a "presumption against detention" establishes each individual's right to freedom of movement and helps to prevent immigration officials from resorting to confinement when other options may suffice.'<sup>119</sup>

The expectation of liberty has a strong foundation in international law. The presumption against detention is consistent with this body of law, and in particular, the particular abhorrence in international law for the detention of children. International law's predilection against detaining children reflects an understanding

of the dire consequences associated with denying children their liberty. The presumption against detention is strengthened by the principle of treating minors as minors, prior to viewing them as migrants.

Further, the ends to which states detain children – for political, policy and practical reasons – are not achieved by their detention. Detention is expensive and ineffective, meaning that a presumption against detention is not only consistent with international law, in the interests of children themselves, but also more rational from a state's perspective.

A number of states around the world, including Hungary, the Czech Republic, Ireland, Venezuela, Italy and Portugal have legislated to prohibit the detention of refugee, asylum seeker and irregular migrant children.

## PANAMÁ, Migration Law (No.3, 22nd February, 2008), Article 93

'Panama's legislation provides that the detention of migrants only applies to people over 18 years of age. According to Article 93, the National Immigration Service will provide short-stay shelters for housing foreign violators of the national immigration law.'<sup>120</sup>

## ESTONIA – Act on Granting International Protection to Aliens, Article 35

Article 35 of the Act on Granting International Protection to Aliens says that an applicant who is an unaccompanied minor shall be placed in the reception centre or a social welfare institution for the duration of the asylum proceedings, and welfare services appropriate to the age of the applicant shall be guaranteed to him or her. An

applicant who is an unaccompanied minor may be placed with an adult relative or a social care family, if the host is appropriate for taking care of a minor.

In placing an applicant who is an unaccompanied minor in the reception centre or social welfare institution, or with an adult relative or a social care

family, the rights and interests of the minor shall be the main consideration. Unaccompanied minor sisters and brothers shall not be separated, if possible. The applicant who is an unaccompanied minor may be placed in the initial reception centre until the necessary procedures are conducted.<sup>121</sup>

# ASSESSMENT & REFERRAL

## STEP 2 OF CHILD SENSITIVE CAP MODEL

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Avoiding detaining refugee, asylum seeker and irregular migrant children requires, at the moment of interception, several processes to be triggered to stream them into a process specifically designed to ensure the interests and well being of children. Within hours of the interception of a child, states must have undertaken an assessment of the needs of the child and refer them to an age, gender, culturally appropriate community placement.

Referral to an appropriate community placement requires:

1. screening
2. the appointment of a guardian to unaccompanied and separated children
3. the assignment of a case manager
4. an intake assessment and referral
5. community placement
6. an age assessment in cases of serious doubt of actual age

### 2.1 Screening and age assessment

As soon as state authorities intercept a child - or someone who is potentially a child - officials should undertake an initial screening to determine the person's age and if they ought to be placed immediately in a system most likely to protect the interests of children. Any person who claims to be a child should be assumed at this point of initial contact to be a child. Any person who looks or behaves as though he or she may be a child should be treated

as a child. In undertaking this initial screening the benefit of the doubt should always fall in the child's favour. This means that anyone who is potentially an unaccompanied or separated child should be appointed an interim guardian and a case manager and any family in which there is potentially a minor should be assigned a case manager, as detailed in 2.2 and 2.3 below.

Where there remains serious doubt about the age of a person who claims to be a minor or who appears to be a minor but claims to be an adult, that person may be engaged in an age assessment process. This process should occur after the appointment of the guardian and case manager so that the minor is appropriately supported throughout the age assessment process.

Assessing the age of minors is both a key issue for young people and states and a difficult task to perform well. Determining a young person's age can have profound implications for whether or not they are detained, and, if they are, the length and location of their detention. A wrongful age assessment can place minors at risk of being incarcerated in conditions that are unsuitable for minors or unable to sponsor relatives for resettlement after their own visa grant. An incorrect age assessment can lead to children being detained with adults. Minors are due a range of entitlements reflecting their vulnerability and level of development as stipulated in international laws and norms.



Age assessment can be a difficult task in part because many refugee, asylum seeker and irregular migrant children do not have reliable documentation verifying their age.<sup>122</sup> They may have given their documents to smugglers and not have them returned, they may have been instructed by their smugglers to destroy them, or they may never have possessed the relevant documentation because they come from countries that do not systematically record children's births. Children and young people may not know how old they are because they come from cultures where birth dates or the passage of time are not as important, or are marked differently from the way they are measured in more westernised norms. Some may have a general idea of the year of their birth, but not know the day or month of their birth.

Further, it can be difficult to elicit information from young people because they do not always understand or know what is relevant. Some may fear authority or seek to please adults, saying what they think adults want to hear. Some children and young people may have an interest in not disclosing their true ages. For example, children may assess that they are more likely to be able to work if they say that they are older than they actually are. For others, the prospect of being released early from detention may motivate some minors to inflate their age.

Conversely, younger adults may think that it may be beneficial to be minors – thinking that they may be released from detention sooner than adults, or not detained at all.

As an addition to the complex process of determining a young person's age, 'most age-disputed young people will have experienced a difficult and traumatic journey, as well as difficulties in their country of origin, resulting in mental trauma, which is often undiagnosed until much later. Some children may present as obviously vulnerable, whilst others will portray a lot of resilience and will find it hard to engage with professionals.'<sup>123</sup>

Finally, a young person who turns 18 while still in a precarious status or asylum process should continue to be provided supports and allowed to reside in the community while awaiting a decision on their case.

### **Age assessment processes**

States use a number of different age assessment mechanisms if the age of people claiming to be minors is in dispute, including documentary evidence, interviews and professional observation and medical assessments. Each has its challenges. Documentary evidence such as birth certificates or identity papers, if they exist, can be unreliable and difficult to verify. Interviews and other observational techniques – visual, cognitive, behavioural and psychological – can be highly subjective and dependent on the expertise and competence, including cross-cultural awareness, of those conducting the assessments.<sup>124</sup>

Medical assessments – including Magnetic Resonance Tomography, bone and dental radiology, and examinations of sexual maturity – have been found to be inaccurate, with some experts suggesting a margin for error of five years either side of the assessed age.<sup>125</sup> Such procedures may also be felt as an intrusion of physical integrity, and may be traumatic. According to the Separated Children in Europe Program (SCEP), age determination techniques 'often do not take into account ethnic variations, they are based on reference materials that for the most commonly used tests are out of date, and generate a margin of error that makes them too inaccurate to use.'<sup>126</sup>

### **Good practice**

The UN Committee on the Rights of the Child has offered guidance on both the mechanisms that ought to be used in assessing the ages of unaccompanied or separated minors, and the most appropriate processes by which such mechanisms might be employed. The Committee states that age assessments should include reference to the physical appearance of the person concerned as well as their psychological maturity. The assessment should be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding

the risk of violating the child's physical integrity and giving them due respect. If the determination process does not remove doubts as to the person's age, then they should be considered a minor.<sup>127</sup>

The European Agency for Fundamental Rights articulates its position on age determination thus:

*Age assessment should only be used where there are grounds for serious doubts of an individual's age. If medical examinations are considered essential, the child must give his/her informed consent to the procedure after any possible health and legal consequences have been explained in a simple, child-friendly way and in a language that the child understands. Age assessment should be undertaken in a gender appropriate manner by independent experts familiar with the child's cultural background and fully respecting the child's dignity. Recognising that age assessment cannot be precise, in cases of doubt, authorities should treat the person as a child and grant the right to appeal age assessment decisions.<sup>128</sup>*

Age assessment processes can be resource intensive and because of this adequate systems can be prohibitive for many states. This is all the more the case for low-income countries, which are transit or host states for significant numbers of irregular child migrants. Whatever resources a state has at its disposal, the benefit of the doubt should be given to children, or people claiming to be children because the alternative is to risk treating minors as adults. This position is consistent with the principle treating refugee, asylum seeker and irregular migrant children first and foremost as children. Where the child's year of birth is known, but the day and month are not, the date of birth should be determined in such a way as to provide the longest period of protection to the child as a minor. For example, where a child is believed to have been born in 2000, in the absence of any other information, their date of birth should be deemed to be 31.12.2000 rather than 1.1.2000 thereby providing an additional 12 months of protection, and in some cases an additional 12 months in which the child can seek to sponsor family members overseas for resettlement.

A number of tools and resources relating to age assessment, best interest determination and working with children in the community can be found at the IDC's website: [www.idcoalition.org](http://www.idcoalition.org)

## UNITED KINGDOM

### - Age assessment

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Following a 2003 court case known as 'Merton,' age assessments in the UK must be carried out by local 'social services on the basis of their own assessment and not that of the Border agency; it cannot be determined solely on the basis of the youth's physical appearance, but must be based on a complete assessment that include an individual interview and that considers the applicant's experiences and past (family history, schooling, recent activities). The assessment must be carried out by experienced social workers, under conditions that guarantee a fair decision; in the event that the minority is rejected, their decision must be justified.'<sup>129</sup> Some authorities also rely on documents provided by young people, and some use medical examinations. In practice, however, significant problems remain in the way UK authorities conduct age assessment.<sup>130</sup>

## SWEDEN – Age assessment

Where there is doubt about a minor's age, the Swedish Migration Board carries out an age assessment. An official meets with the young person and makes a decision based on his or her story, level of education, age of siblings and parents and, importantly, appearance and demeanour. If necessary, the official

can seek further information from other people involved with the young person, including municipal officials. If doubt remains, the Migration Board's decision maker can request wrist and dental x-rays, although there is no paediatric examination. The Migration Board acknowledges that the margin

of error in bone examinations is three years for 17 to 18 year olds and that the margin be interpreted for the benefit of the young person. This means that the young person will only be declared an adult if both x-rays suggest an age of 21 or older.<sup>131</sup>

In summary, the age assessment process involves several steps. First, a cursory age assessment whereby anyone suspected or claiming to be a child is moved into a minor reception and determination stream. Where doubt remains about whether such a person is in fact a minor, they are subject to a more comprehensive age assessment process. The benefit of the doubt should fall in favour of the minor. Should the claimant be proven to not be a minor, they should have access to an appeal mechanism. If they are found to be an adult, they should be treated as such. Should they be found to be a minor, they should continue in the child-friendly stream. The voice of the child should be heard throughout the age assessment and determination processes.

### 2.2 Appoint Interim Guardian to Unaccompanied and Separated Children

Having determined, in the first instance, that a refugee, asylum seeker or irregular migrant is a child, and that they may be unaccompanied or separated from their families, states should immediately appoint a guardian. A guardian is an adult who is not the child's parent (biological or legal) who may be both the primary caregiver, responsible for ensuring their basic

needs are met, and the protector of the child's rights.

While hearing the 'voice of the child' is important in any decision regarding children, it is also the case that minors, because of their physical, emotional and cognitive development are often unable to identify and advocate for their own rights and best interests. These limitations – legal, physical and psychosocial – are filled by the minor's parent, or, in the case of separated or unaccompanied children, their guardians.

Guardianship is 'the legally recognized relationship between a competent adult and a disadvantaged person who does not have the legal capacity to exercise some or all of her or his rights. A guardian has a range of powers, rights and duties,' including exercising rights on behalf of the child and protecting the interests of the child.<sup>132</sup>

Unaccompanied and separated irregular child migrants are, by definition, without a parent or guardian to guide, support and advocate for their rights and interests. The United Nations Office of the High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing

with Unaccompanied Children Seeking Asylum stipulates that it is incumbent on states as soon as an unaccompanied or separated minor is identified or claims to be a minor, to appoint a competent and independent guardian. Guardians (and case managers, discussed below) need to be able to understand and communicate well with children from culturally and linguistically diverse backgrounds.<sup>133</sup>

According to the Separated Children in Europe Program (SCEP) the responsibilities of guardians in such cases are to:

- Ensure that all decisions have the child's best interests as a primary consideration;
- Ensure the child's views and opinions are considered in all decisions that affect them;
- Ensure that the child has suitable care, accommodation, education, language support and health care provision and that they are able to practice their religion;
- Ensure the child has suitable legal representation to assist in procedures that will address protection claims and durable solutions;
- Explore, together with the child, the possibility of family tracing and reunification;

- Assist the child to keep in touch with his or her family where appropriate;
- Contribute to a durable solution in the child's best interests;
- Provide a link, and ensure transparency and cooperation between the child and the various organizations who may provide them with services;
- Engage with the child's informal network of friends and peers;
- Consult with and advise the child; and
- Advocate on the child's behalf<sup>134</sup>

It is the guardian's role to advocate to ensure children's rights and best interests, which includes preventing them from being detained. Given this, it is conceivable that the responsibilities of the guardian may be in conflict with the interests of state migration authorities.

In order to avoid a conflict of interests and to ensure that the guardian is concerned primarily with the best interests of the child, guardians need to be independent of state migration authorities.<sup>135</sup>

## **BELGIUM – Guardianship arrangements**

Guardians in Belgium are entirely unrelated to immigration authorities. They are also independent from, but monitored by, the body charged with their administration, Guardianship Services. Where a conflict arises between a guardian and the Guardianship Services, courts determine whether or not another guardian should be appointed. The guardian's role, taking the child's view

into account, is:

- 'To ensure the well-being of the child (which includes education, mental and physical health).
- To build a relationship of trust with the child.
- To help him/her with his/her asylum application and be present at every hearing/interview.
- To appoint a lawyer for the child and also find him/her accommodation.
- To assist the child in family tracing.
- To seek a durable solution for him/her.
- To explain the decisions and ensure the child understands all processes, manage his/her finances and provide reports on the child.'<sup>136</sup>

The importance of the role of guardian in preventing the detention of migrant children is reinforced by the consequences of the lack of that role in practice. Children have been kept in detention for a lack of a competent guardian on the basis that it is in their best interests to remain within a detention environment – they are safer, more secure and more able to be cared for – than being released.

mean that such children and young people may be mature beyond their years and extraordinarily resilient, as well as particularly vulnerable. Some young people may have spent months or years living independently, gaining a worldliness, maturity and sense of responsibility beyond their age. Guardianship arrangements need to accommodate this lived experience, while at the same time being cognisant that physically and psychologically, the young people

### GRACE FROM SOUTH SUDAN, DETAINED IN ISRAEL, AGED 15

Grace's mother was kept in detention in Southern Israel after Grace was taken to a children's detention centre in Tel Aviv. While other children came and were released from the detention centre in which Grace was incarcerated, Grace remained, 'because I don't have anybody outside, first of all. But the other kids they have like maybe their uncles or their cousins.'

In other instances, children have been released from detention but without access to adequate reception resources or effective guardianship to advocate for their rights and interests, have been placed in situations not only of material deprivation, but also of physical and psychological harm.

Guardianship arrangements for unaccompanied or separated minors need to balance strong advocacy for and protection of the welfare of the minor with the flexibility to respond to the diverse needs and interests of children and adolescents. To some extent, this is true for all children: mature adolescents will not require the same level of daily care as younger children, although they do need monitoring and guidance. But there are further complicating factors for unaccompanied and separated refugee, asylum seeker and irregular migrant children and young people.

The experiences of unaccompanied and separated minors who are refugees, asylum seekers and irregular migrants – in their home countries and on their journeys beyond their home countries – can

are still developing.

Conversely, traumatic experiences may mean that older young people need particular assistance and support beyond that which may be normally associated with their age. This means that the amount and type of assistance and support will vary from case to case. It also highlights the need for young people to be active participants – in accordance with their level of maturity – in the decisions that affect their lives.<sup>137</sup> This requires that guardians are able to develop strong and meaningful relationships with the young people for whom they hold the duty of care.

The 'voice of the child'<sup>138</sup> is 'an important part' of discovering a child's best interests.<sup>139</sup>

#### As Crock concludes:

*What is clear is that each case ought to be dealt with individually, ensuring that the best interests of [the] child are kept paramount in every decision relating to the child. For older children the principle that children should be able to participate fully in any process affecting their lives is of equal importance.*<sup>140</sup>

## PHILIPPINES – Guardianship arrangements for undocumented arrivals

Undocumented children located at the border are generally not detained, or if so are released as a matter of course following referral to the Department of Social Welfare and Development, who are delegated as the responsible guardians and provide social work, shelter and healthcare services.<sup>141</sup>

## NETHERLANDS – Guardianship arrangements

Nidos is an organization commissioned by the Dutch authorities to be temporary guardians to unaccompanied minors who are refugees, asylum seekers or other migrants for whom return to their homelands is a

realistic option. The organization employs social workers with specific expertise working with children cross culturally. Nidos is responsible for the minor's reception, although the daily education and care is sourced to third parties under the supervision

of the guardians. The 'guardian is expected to focus on the promotion of the child's best interests, his/her education, care and protection and the prevention of abuse, disappearances and an existence in illegality.'<sup>142</sup>

### 2.3. APPOINT CASE MANAGER

Having identified a child refugee, asylum seeker or irregular migrant, whether accompanied, separated or within a family unit, the child or family should be appointed a case manager in order to assess, oversee, advise, support and manage the case throughout the process of awaiting a final migration outcome. The major part of the case management process occurs in step 3 and is discussed below. At this initial point of contact with the minor, the case manager's role is to conduct an initial intake screening and to refer children and, where applicable, their caregivers to an appropriate community setting. Case managers should have the skills, expertise and supports to work sensitively and effectively with children from different cultural backgrounds. See section 3.1 for details.

### 2.4. INTAKE ASSESSMENT AND REFERRAL\*

Following their appointment, the case-manager should undertake an 'intake assessment' where the immediate needs and risks associated with the child are assessed. This assessment will inform a decision on the most appropriate accommodation and support required to meet basic needs and protect the child. According to the CAP, 'Screening and assessment of the individual case are important tools in reducing unnecessary detention, as authorities can identify and assess levels of risk and vulnerability as well as the strengths and needs of each person.' Four key areas of assessment include:

- legal obligations;
- identity, health and security checks;
- vulnerability;
- individual case factors.

Regarding children, the intake assessment should also consider whether the child has family who can care for the child and protect his or her best interests. The intake process will also assess whether the child is at risk of absconding or in danger of being exploited or abused, and apply conditions to the community-based placement, if required, to mitigate such risks. The intake assessment will determine the facilities into which the child will be placed in the immediate term. Ideally, these will be facilities that can accommodate the child beyond the short term, but it is also possible that as the child's circumstances are better understood, the form of accommodation and types of support the child needs may alter.

An intake assessment should occur whether children are with their families or are unaccompanied or separated. It is a preliminary opportunity for case managers to assess the welfare of children in whatever context they present. Children's voices must be heard at this point in the process. A 'mobility map' where the child represents through drawing significant people and places in their lives can be a useful tool to help to give children a voice and assist with the initial assessment process.<sup>143</sup> Any 'mobility map' drawn at this time should be kept as it will become a useful resource to be used throughout the rest of the status and best interest determination processes.

## 2.5 COMMUNITY PLACEMENT\*

The intake assessment, and the community resources available, will determine the best community-based accommodation in which refugee, asylum seeker or irregular migrant children should be placed. Minimum standards of reception of asylum seekers have been articulated by the international community and represent a useful benchmark for understanding what states should provide to refugee, asylum seeker and irregular migrant children outside of the detention environment. Minimum provisions include access to adequate housing, food and clothing, healthcare, education, legal advice, family reunion.<sup>144</sup> Children's wishes and needs should be taken into account in determining the nature of the community placement.

## Housing

Community-based accommodation is central to preventing the detention of children for migration purposes. Refugee, asylum seeker and irregular migrant children, whether they are accompanied by a parent or parents, unaccompanied or separated, need to be accommodated in a place that is safe and secure. While it is inappropriate and contrary to international law and international norms that children be detained, it is also inappropriate for children to be homeless or at risk of homelessness. To be in such a position is to contravene the child's best interests. Yet refugee, asylum seeker and irregular migrant children are particularly marginalised within society, meaning that their access to accommodation is severely limited. Often such children live in overcrowded and insecure conditions, as highlighted by Adan and Achak's stories. Sometimes refugee, asylum seeker and irregular migrant children have nowhere to live but on the streets.

It is incumbent on states to ensure that refugee, asylum seeker and irregular migrant children have access to appropriate accommodation - whether short or long term. The Convention on the Rights of the Child specifies the rights of children 'to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'<sup>145</sup> and that

*States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*<sup>146</sup>

Commenting specifically on unaccompanied and separated children, the Committee on the Rights of the Child notes that when considering the range of accommodation options available to such children,

*the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process.*<sup>147</sup>

interests of the child; that siblings should be kept together; that children with adult relatives arriving with them, or already within the host country, should be able to stay with those relatives unless it is contrary to their best interests; that children's 'physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities' be assessed regularly; and that children are informed and consulted about the care arrangements being made for them.<sup>148</sup>

#### ADAN, FROM SOMALIA, DETAINED IN GREECE AGED 17

Adan escaped the conflict in Somalia and travelled through Turkey to Greece. He was detained on more than one occasion. Since being released, He was not working or drawing money. He was not attending school. He slept till late in the day, then came out in the afternoon. He then went to bed late. He lived in a room with 8 other people, and paid 70 Euros per month for the space. Friends of Adan's said that they lived with 10 people to a room, others 12. One said he was sharing a room with 23 or 25 people. He said that it was difficult to breathe in there. Adan said that the owners of these rooms were exploiting them.

#### ACHAK, FROM SUDAN, DETAINED TURKEY AGED 16

After been imprisoned and tortured in Sudan, Achak fled to Turkey via Egypt and Syria. He was detained for a short period in Turkey and then released.

Achak now stays with a friend in a small room in the basement of an apartment. The room is a little bigger than a double bed. When it rains, the water comes in. It costs the pair TL120 per month. He said that he is ashamed of where he lives. If he sees friends, he will meet them anywhere but his room. Neither Achak nor his room-mate work. They do not have permission to work. They get TL100 from UNHCR - Achak is a recognized refugee awaiting resettlement as is his room-mate. Each pays half the rent. This leaves TL40 per month. Achak said that the situation in Turkey is 'so difficult.' He only eats breakfast. He visits some friends. If neither he nor they have food, he will just drink tea.

Achak said that if he did not have serious problems in Sudan, he would not remain in the situation in which he now finds himself, he would not have come to Turkey. He would not have come to Turkey to 'live like this'.

The Committee makes several further points, including that moving children to different places of residence should be limited and only when in the best

There are a number of community placement options that states around the world use to accommodate children rather than to detain them.



Community models include open reception centres, accommodation within ethnic communities, shelters, as well as independent and supported accommodation. It is important that accommodation options take account of the experiences of refugee, asylum seeker and irregular migrant young people. Models of working should include an understanding of the resilience of refugee, asylum seeker and irregular migrant young people, but also of their vulnerabilities and the risks they continue to face, even in destination countries.

In other words, housing and support models need to be designed with full cognisance of the possibility or likelihood that the children involved may face adverse decisions on their protection or migration applications and that it is possible that they may have relatives and friends killed, arrested or subject to other grave human rights violations in their home communities. These are extremely difficult and potentially traumatic experiences to live with and require extensive support and understanding from workers. Anecdotal experience is that this is a time of increased stress for the child and young person where their usual ability to live and function independently is impaired due to the context of uncertainty and lack of durable safety. The risk of self harm or suicide under such stressful circumstances must be considered and protective mechanisms put in place to manage against this risk, such as rostered staff present or on call 24 hours a day for unaccompanied minors.

A gradually decreasing level on onsite staff support may be considered post status grant for separated or unaccompanied minors, however the lasting impact of trauma would need to be assessed and considered before any supports were removed.

Housing and accommodation in the community is different in various countries. These includes models run by the public service, such as open housing and reception centres in Belgium, Sweden and the New Zealand. In Australia and Hong Kong, partnerships between government and nominated welfare agencies and service providers arrange for private rental and shelter accommodation for eligible families. In the

United States, foster care arrangements are used for unaccompanied minors.

In other countries civil society has played the key role in providing accommodation, often without government funding, which stretches the capacity of local groups and limits the services to vulnerable children and families. These are often small shelters, religious or community housing.

Whatever the model, it is crucial that the alternative arrangements in the community are adequately resourced so as to not leave the unaccompanied or separated minor vulnerable and insufficiently supported, particularly during the period of time where their refugee claim is being assessed – a state of considerable heightened anxiety and limbo.

Families with children may also be released with work rights, allowing for independent living arrangements, or children may be released to existing family members to provide for their living needs. Noting the specific vulnerabilities of the child, the state should take steps to confirm the identity of and relationship with the purported relative.

Depending on their circumstances, UAMs can also be accommodated temporarily in emergency shelters for homeless or vulnerable people and with host families. Some UAMs live alone in private housing with the rental contract signed by the guardian.

Similarly, unaccompanied and separated children are accommodated in a variety of circumstances. The accommodation options for such children include shelters, foster care, and independent and supported accommodation.

Beyond the immediate concern of providing a safe and secure environment, community placement arrangements must ensure that refugee, asylum seeker and irregular migrant children have their basic physical, social and emotional needs met. This requires that minimal standards of care and services are available for children in community settings. These threshold

reception resources will be different within different countries and regions, depending on the wealth and development of the country, whether it is a transit or destination country, and whether the children are accompanied or not. In general however, irregular child migrants should at least have access to the same level of support as local children in their host communities.

Due to the particular experiences of irregular child migrants, some children may also require specialist resources beyond what local children may need.

#### HEALTH CARE

Children who are refugees, asylum seekers and irregular migrants, like all children, have the right to the 'highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.'<sup>151</sup>

Unlike many other children, however, refugee, asylum seeker and irregular migrant children often have lived in conditions of deprivation, danger and violence either in their countries of origin, or as part of their journeys, or both. These experiences may have been for short periods or may have extended over years. According to the Committee on the Rights of the Child, when ensuring unaccompanied or separated children's access to health care, states should

*take into account the fact that unaccompanied children have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence. Many such children, in particular those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war. This may have created deep-rooted feelings of helplessness*

### **BELGIUM – Housing options for UAMs in Belgium**

A number of housing options exist in Belgium, including:

- collective reception facilities
- individual reception facilities (available to children who have been in the collective facilities for at least four months)
- living autonomously but with the assistance of guardians and other social support networks<sup>149</sup>

### **TURKEY – Asylum seekers living in the community**

In Turkey, asylum seekers may live freely in the community but must remain in an assigned city, where they receive basic welfare assistance and access the refugee status determination process. This program has generally been successful, with the incentive to remain in the program is that they lose access to welfare assistance if they leave the city- which is soon to be in 80 cities in Turkey.<sup>150</sup>

## GREECE- ARSIS reception centre Athens

The ARSIS reception centre in Athens is a rambling building which accommodates 15 male UAMs. It receives no state funding, although it is a member of the European Refugee Foundation.

The residents do not pay for anything at the centre. They receive board, lodging, clothes, public transport tickets, phone cards, and toiletries. The service does not provide cash.

The service provides access to psychologists and lawyers. Each resident gets a bed, a desk and a computer. The boys who come to the centre are:

1. assisted to gain documents to make their stay in Greece legal
2. provided with health screening and care
3. assisted to trace their families overseas
4. provided with education, initially doing English and Greek language with volunteer teachers and when they become proficient, they are enrolled in mainstream Greek schools.

Usually, the boys stay for 3-4 years, but some very young boys stay longer. Because of the enormous pressure on beds, the service usually accommodates 15-16 year olds. Younger children

stay longer, meaning that the service must assist fewer people. Priority is given to torture survivors and to those with serious health conditions.. There is always someone at the house – either him, or one of two security guys.

When the boys become 18, the service works to find them permanent jobs, and then after a year, a house in which they can live independently.

*and undermined a child's trust in others. Moreover, girls are particularly susceptible to marginalization, poverty and suffering during armed conflict, and many may have experienced gender-based violence in the context of armed conflict. The profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation.*<sup>152</sup>

While refugee, asylum seeker and irregular migrant children who are accompanied by their parents have the additional protective factor of parental support, their experiences in their home countries and on their journeys are often as difficult as unaccompanied and separated children. Children who are refugees, asylum seekers or irregular migrants, whether accompanied or not, can all face similar physical and mental health problems.

Different states have different capacities to respond to the health concerns of refugee, asylum seeker and irregular migrant children. Countries that do not have adequate capacity to respond to the health needs of irregular child migrants should engage with the international community to assist.<sup>153</sup>

### MEANS OF MATERIAL SUPPORT

Children who are refugees, asylum seekers and irregular migrants often live in absolute destitution. Often they leave their countries of origin with very little money. The journey can be expensive, and irregular migrants are at risk of exploitation and theft. Irregular child migrants and their families are ineligible for state support and often cannot work in the regular economy. Often they cannot afford the means of material survival, risking malnutrition and other physical and psychological illness.



Sudanese boy who was detained in Malta at the age of 16 © David Corlett

Refugee, asylum seeker and irregular migrant children need the means of material survival. They need the capacity to meet their daily nutritional requirements and to be adequately clothed. This is consistent with Article 27 of the Convention on the Rights of the Child noted above, which stipulates that children have a right 'to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.'<sup>154</sup> The capacity of states to deliver adequate means of material support will differ. Where capacity is limited, the Committee on the Rights of the Child has specified that states should 'accept and facilitate the assistance offered by UNICEF, UNESCO, UNHCR and other United Nations agencies within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations (art. 22 (2)) in order to secure an adequate standard of living for unaccompanied and separated children.'<sup>155</sup>

#### EDUCATION AND TRAINING

Refugee, asylum seeker and irregular migrant children, as children, have a right to education, to reach their full potential and to contribute to their culture and society.<sup>156</sup> It is incumbent on states to ensure that this right is actualized. A state should ensure

that while children who are refugees, asylum seekers and irregular migrants are in its jurisdiction, they have access to appropriate education and training-based on the child's age and experiences and on the amount of time that the child is within the state's jurisdiction. Education is not only important for learning opportunities it generates, but also because it assists in maintaining a sense of normality for young people, and in maintaining good mental health. Vocational training may also provide livelihood opportunities for those whose asylum claims are ultimately unsuccessful necessitating their return home.

Similarly, many children who are refugees, asylum seekers and irregular migrants express a desire to work and earn money. Some have debts to family or smugglers. Others have been charged with the task of earning an income in the destination country in order to send money home to support their families' survival. There is a need on the part of states to ensure that such children are not exploited as noted by the International Labour Organization.<sup>159</sup>

## HUNGARY – Access to education

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As minors, the residents of the UAM shelter are required by Hungarian law to attend school until they are 18 years old. Initially, the young people attend Hungarian classes provided on site. There have been challenges in getting these young people into the local school system. However, in partnership with a small NGO, the shelter has now developed a relationship with one of the local schools to create a class for UAMs with a dedicated teacher. The class focuses on Hungarian

and maths; however, individual learning plans are developed to have these students work through the standardised exams used to graduate students through the first 8 years of school in Hungary. It is only after passing these exams that students can enrol in secondary school in Hungary. At the end of the 2008 school year, the first eight UAM students graduated in this way, allowing them to enter a secondary education scheme for refugees in Budapest.<sup>157</sup>

## SPAIN – Access to education

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Children living in an asylum seeker reception centre have access to the public education system. Social workers within the centre arrange for children to attend the local public school.<sup>158</sup>

### RECREATIONAL, RELIGIOUS AND CULTURAL OPPORTUNITIES

All children, including those who are refugees, asylum seekers and irregular migrants, have the right to 'rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'<sup>160</sup> and 'to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.'<sup>161</sup>

Refugee, asylum seeker and irregular migrant children have had their childhoods disrupted by the requirement to leave their home communities and

make the treacherous journey to another place.

They may be in places that are culturally and religiously dissimilar to their homelands. As part of ensuring their development as full human beings, states must provide opportunities for refugee, asylum seeker and irregular migrant children to participate in recreational, cultural and religious opportunities within both their cultural and religious roots, but also within the host community. States should also ensure as far as practical that children are not moved between geographical locations (within the destination country) so far apart as to disrupt any community, social, religious, cultural or recreational connections they have established.

# MANAGE & PROCESS

## STEP 3 OF CHILD SENSITIVE CAP MODEL

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Step two in the child sensitive assessment and placement model is designed to direct refugee, asylum seeker and irregular migrant children into child-friendly processes in which their best interests will be served. It is expected that step two will take only a few hours. These steps require urgent action from the state to ensure that children are at the greatest chance of being protected. Given the possibility that the child's journey has been dangerous and traumatic it is necessary as quickly as possible to establish a secure environment free from the features that led the child to leave their homeland (human rights violations, poverty, exploitation, fear etc) in which the child's best interests can be determined.

The third step in the child sensitive assessment and placement model involves managing and processing young people within the community. Significantly, this involves a case management process. Case management regarding children should include a best interest determination process and an assessment of refugee, asylum seeker and irregular migrants' legal basis for being in the country.

### 3.1 CASE MANAGEMENT

Research indicates that case management is an essential and effective way to work with individuals awaiting final migration outcomes in the community, encouraging cooperation, compliance and improving wellbeing.<sup>162</sup>

Case managers are generally social workers, psychologists or other human services professionals with experience in working with vulnerable individuals and the refugee and migration process. Case managers form working relationships with individuals and families to empower, enhance their wellbeing and problem-solving capacities, resolve outstanding issues, provide information on how to obtain services and resources in their communities, and work towards the protection of people who are not in a position to do so themselves, such as children and youth in need of care or persons experiencing mental illness. Case managers who work with refugee, asylum seeker and irregular migrant children should have the expertise and skills to work sensitively and effectively with children from different cultural backgrounds. Skilled, child-sensitive workers are best able to ensure that children's voices are heard and taken seriously throughout the case management process.

The purpose of the case management process (and the case manager within this process) is to prevent children from being detained and to support, prepare and manage them throughout the migration process. Case management occurs throughout the entire time that the refugee, asylum seeker or irregular migrant child is being processed to determine whether or not they remain in the country.

## CASE MANAGEMENT IN PRACTICE <sup>163</sup>

Applied in the context of migration, case management is a strategy for supporting and managing refugees, asylum seekers and irregular migrants in the community or in detention, whilst their status is being resolved. The case manager role differs to that of an immigration officer, bureaucrat or guard. Case managers are not making decisions on immigration cases or enforcing issues of compliance. Rather, the case manager forms an essential link between the individual, authorities and the community. The case manager may:

- **Promote informed decision making** by both the government decision maker and individual in question, by ensuring timely access to all relevant information, options, rights and responsibilities. Case managers ensure individuals have an understanding of their immigration status, legal and administrative processes, and the options available to them in their country of origin or another country. The more transparent the process, the more likely a person is to feel that all claims have been heard and considered, and understand what their options are and therefore will be more able to comply with any requirements placed on them.

- **Promote timely and fair case resolution.** Case management can assist in achieving faster and more sustainable immigration decisions, building confidence in the determination process and reducing unmeritorious appeals. This in turn can improve final immigration outcomes, such as integration as early as possible, to try and prevent the need for case review later. In addition, case management assists with clients being prepared and more likely to comply with immigration decisions including exploring departure options if protection is refused.

- **Promote coping and wellbeing** by facilitating access to community services and support networks. Where a person with an identified vulnerability, such as health concerns or having been exposed to torture, is supported during status determination,

better outcomes for the individual, community and government are achieved, regardless of the immigration outcome. For example, if the person is granted refugee status or a visa, he or she may be more likely to be well enough to engage with, and make a meaningful contribution to, society, such as supporting themselves and their family. Alternatively, they may be in a better position to return home and be resettled if their case is refused.

- **Avoid unnecessary and wrongful detention** by ensuring case-by-case assessments of the risks, vulnerabilities and needs of individuals and exploring all options and supporting implementation of appropriate decisions. With reliable information, authorities can make informed decisions related to actual flight risk or vulnerabilities. In addition, where a person is determined not to be a refugee or eligible for any other visa, case managers can support the client to look at all remaining options, including departure.

## 3.2 BEST INTEREST DETERMINATION

A good deal has been written about the provision in Article 3 of the CRC that the 'best interest of the child' be the 'primary consideration' in all decisions relating to children.<sup>164</sup> Because of the previous work on the subject, this paper will not examine the determination of the best interests of children in detail. However, it is worth noting some generally agreed positions regarding best interests determinations and how they might apply to preventing refugee, asylum seeker and irregular migrant children from being detained.

As well as the general principles that apply in the CRC, it is significant that the best interests of the child must include both short and long-term considerations.<sup>165</sup> Given what we know about the impact of detention on minors, it is in neither their long term nor short term interests. The emphasis of the CRC on ensuring the best interests of the child – a positive requirement, and not only a passive one – means that it is incumbent on states to create environments and institutions in which children's wellbeing is enhanced. Not only is detention contrary to this requirement, but it is consequential that children ought to have their liberty in contexts

where their rights and their physical, psychological and developmental interests and needs can be met. This points to a further important aspect of the notion of the best interests of the child: it applies both to the individual children and to children as a group.<sup>166</sup> States are required to ensure the best interests of children as a group or constituency are reflected in legislation, policy and practice. States ought to legislate against the detention of minors – since it is in their best interests not to be detained – and to ensure this is also reflected in policy and practice.

Determining the best interest of the child must also occur at an individual level. The UNHCR has developed Guidelines on Determining the Best Interests of the Child.<sup>167</sup> This is a comprehensive resource and is recommended by the IDC. More succinctly, the Separated Children in Europe Program has articulated a set of areas that need to be considered in determining the best interests of the child. These include:

- the child's family situation;
- the situation in their country of origin;
- their particular vulnerabilities;
- their safety and the risks they are exposed to and their protection needs;
- their level of integration in the host country; and
- their mental and physical health, education and socio-economic conditions.<sup>168</sup>

These must be understood within the context of the individual child's gender, nationality, ethnic, cultural and linguistic background. Furthermore, the determination of a child's best interests must be 'a multi-disciplinary exercise involving relevant actors and undertaken by specialists and experts who work with children.'<sup>169</sup>

## SPECIAL NEEDS

According to the United Nations Convention on the Rights of People with Disabilities, it is incumbent on states 'to ensure that people with disabilities on an equal basis with others:

- (a) Enjoy the right to liberty and security of person;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.<sup>170</sup>

Children with special needs are a particularly vulnerable group of children. According to various British medical colleges, 'Children with long-term conditions such as sickle cell disease, diabetes mellitus and children with disabilities are never fit for detention.'<sup>171</sup> Refugees, asylum seekers and irregular migrant children who have special needs ought never be detained.<sup>172</sup>

States need to provide irregular child migrants who have special needs with appropriate care and protection, whether they be in families, or unaccompanied or separated. This is consistent with the CRC which articulates the rights of 'mentally or physically disabled' children to enjoy 'a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.'<sup>173</sup> Recognising this right, it is incumbent on states to 'encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.'<sup>174</sup>



The best interests determination is an ongoing process whereby the caseworker, along with other key stakeholders including children and their guardians, seek to explore and set in place mechanisms to ensure a child's best interests are realised. It may be the case that once a best interest determination process has begun, decisions made at the assessment and referral stage may need to be reviewed or changed.

### 3.3 PROTECTION NEEDS\*

States must determine whether or not they have protection or other humanitarian obligations to refugee, asylum seeker and irregular migrant children within their territories. This process should be undertaken with the involvement of case managers, independent legal advisers, and, in the cases of unaccompanied and separated children, with the support of the guardian. Children's voices should also be prominent in this process.

As established in chapter 2, irregular migration includes people who leave their homes for a whole host of reasons, including seeking protection. Refugee, asylum seeker and irregular migrant children leave their home communities and make precarious journeys for a reason. In some instances, they will engage a receiving state's protection obligations. In others, they will not.

According to the UNHCR, 'Children should be entitled to access to asylum procedures, regardless of their age.'<sup>175</sup> The Convention on the Rights of the Child stipulates that children who are asylum seekers or refugees should 'receive appropriate protection and humanitarian assistance' to enjoy their rights to international protection.<sup>176</sup> Further, children are to be protected from sexual exploitation and abuse,<sup>177</sup> trafficking<sup>178</sup> and other forms of exploitation,<sup>179</sup> as well as from torture or other cruel, inhuman or degrading treatment or punishment and from capital punishment and life imprisonment.<sup>180</sup> UNHCR has issued specific advice regarding determining the protection needs of child refugees and asylum seekers.<sup>181</sup> The Committee on the Rights of the Child notes that in determining refugee status of children, assessment procedures need to be 'child-sensitive' and take account of the

'child-specific' nature of persecution.<sup>182</sup> The Committee has written:

*In particular, the refugee definition in that Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.*<sup>183</sup>

States should be mindful of the difficulties children have in adequately representing their case for permanent status or protection. At the very time when a child's psychological defences encourage repression of painful and traumatic experiences, the refugee determination process and interviews often requires the child to articulate their fears of persecution and the painful memories of their experiences that underpin the fear of return. The child is thus faced with an unenviable choice between repression and maintaining emotional equilibrium or bearing witness, reliving and exposing their vulnerability in testifying to the persecution they hope may assist in proving their case for asylum.

Further, according to the Committee, children who do not meet the definition of a refugee according to the 1951 Refugees Convention, but who nonetheless have protection concerns, should be granted complementary protection.<sup>184</sup>

Where states are unable to establish and resource procedures to determine such concerns, they should engage with the international community for assistance.

## LEGAL ADVICE AND ASSISTANCE AND INTERPRETERS

As well as having access to protection determination processes, refugee, asylum seeker and irregular migrant children should have access to independent legal advice and assistance and appropriate interpreters at all stages of their application process including judicial review. This is consistent with the Committee on the Rights of the Child which has written: 'The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative...' <sup>185</sup> and '[w]herever the child is unable to communicate directly with the qualified official in a common language, the assistance of a qualified interpreter should be sought.' <sup>186</sup> Further, the Committee calls for unaccompanied and separated children in detention to be 'provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.'<sup>187</sup> The absence of a parent or relative accompanying the child seeker should not be permitted to negatively impact the unaccompanied or separated child refugee or asylum seeker's ability to pursue their claim through all levels. For example, the absence of an individual prepared to perform the function of a litigation guardian (against whom costs could be awarded in the event of an unsuccessful court action) at the judicial review level should not impede the child's right to take their claim before the courts.



A Burmese boy detained for a month after fleeing his home © Jon Frank

# REVIEW & SAFEGUARD

## STEP 4 OF CHILD SENSITIVE CAP MODEL

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Decisions regarding refugee, asylum seeker and irregular migrant children should be subject to administrative and judicial oversight. Whether they are about guardians, case workers and the casework process, community placement or the legal status of refugee, asylum seeker and irregular migrant children, decisions should be reviewable on the basis of merit and lawfulness. Such decisions can have far-reaching implications for the young people concerned and care should be taken to ensure the quality of decision making. Step 4 of the child sensitive assessment and placement model involves safeguarding and reviewing.

### 4.1 PERIODIC REVIEW

The community placement options in which refugee, asylum seeker and irregular migrant children are placed, whether alone or with family members, should be subject to review. While there should be flexibility regarding the timing of such review mechanisms – because the circumstances of young people can change due to a host of factors including relationship breakdown, the threat of domestic violence, opportunities to work or study – there are two important occasions after which a review of community placement conditions is necessary. The first is after a comprehensive Best Interest Determination (BID). According to the child sensitive assessment and placement model, the initial community placement occurs within hours of the child coming to the attention of state officials as a means of preventing the child's detention.

Following a comprehensive BID, it may be determined that the child's best interests will be served in an alternative placement setting. For example, it may be that the child needs more support than initially anticipated, and for this reason should be accommodated in a supported housing setting. Or it may be assessed that the child is older than first thought, and can live in a more independent context.

The second important time after which community placement conditions should be reassessed is following the determination of the child's legal and protection status. Children found to be owed the state's protection may exit the temporary accommodation and reception arrangements they were in during their legal status assessment and enter into a process that ensures their interests and well being in the longer term (see Step 5 below). Alternatively, it may be in their best interests to remain in the stability of the community setting they were in during the status determination process.

If a state finds, as a result of its protection or humanitarian determination process, that it does not owe a refugee, asylum seeker or irregular migrant child a migration solution within its territory, then the state may make preparations for the child to leave its territory. The decision not to allow a child to remain within a state changes the circumstances of the community placement. At this time, the community placement conditions established at Step 2 should be

reviewed. There may be a need for more stringent conditions to be put on the placement to ensure that the child complies with the decision of the state. According to the CAP,

*If authorities remain concerned about the placement of an individual in the community, there are [sic] a range of additional mechanisms that can be introduced to promote engagement with authorities that do not place undue restrictions on freedom of movement.*

These conditions include individual undertakings, monitoring, supervision, intensive case resolution, and negative consequences for non-compliance. These apply to minors as well as adults.

However, because the child has been engaged in effect counselling and support around the possible migration outcomes as part of the case management process (Step 3) the result from the protection or humanitarian determination process will not be surprising. Further preparations can be made with the child to facilitate their leaving the state.

#### 4.2 PRE-REMOVAL RISK ASSESSMENT\*

Given the serious potential implications arising from children leaving a state to which they have fled, whether to return to their country of origin or to a third country, and the vulnerability of children, there is a need for an assessment of any risks associated with children leaving the state. This may include concerns not discovered during the protection or humanitarian determination process. It may involve new information which opens up legal possibilities that have been closed until this point. Children's voices must be heard during this stage.

Those children who cannot be removed safely and in their best interests ought to be allowed to remain in the state.

Regarding UAMs in particular, the Centre for Public Policy Priorities has written:

*The decision to return an unaccompanied child to his country of origin—in a manner that secures his safety and rights and serves to curb the threat of repeated migration—is a matter of determining what is in the best interest of the child. No child should be returned to his country of origin without confirmation of a secure and sustainable plan for his safe placement in a family environment and a mechanism for ensuring that plan's implementation.*<sup>188</sup>

Those who do not face any risk as a result of leaving the state ought to be expected to leave.

## CANADA'S

### - Pre Removal Risk Assessment

Although not specifically designed to address the needs of children, asylum seekers whose cases have been rejected and who are expected to depart Canada can apply for protection under the Pre-Removal Risk Assessment process. This process takes into consideration a change in circumstances in asylum seekers' countries of origin, new information demonstrating that asylum seekers will be at risk of persecution, torture or to cruel, inhuman or unusual treatment or punishment, or the possibility that asylum seekers' lives may be otherwise endangered should they be compelled to leave Canada. The PRRA is not an appeal against earlier decisions and consideration is given only to new information or evidence. The PRRA decision is usually made on the papers. Only a very small percentage of applicants are granted the right to remain in Canada under the PRRA.<sup>189</sup>

# CASE RESOLUTION

## STEP 5 OF CHILD SENSITIVE CAP MODEL

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The final step in the child sensitive assessment and placement model is the realisation of the decision of the state either to allow the refugee, asylum seeker or irregular migrant child to remain, or to expect that they will leave the state. If the child is allowed to remain – either as a consequence of the protection or humanitarian determination process, or because of the pre-removal risk assessment, then the state should ensure the child’s welfare, including accommodation, health etc. and facilitating family reunification if appropriate. As the UNHCR has noted,

*Family reunion is the first priority and it is essential that unaccompanied children are assisted in locating and communicating with their family members... All attempts should be made to reunite the child with his/her family or other person to whom the child is close, when the best interests of the child would be met by such a reunion. When family reunion takes place the family may have been separated for a long period of time. They must therefore be given time and support to re-establish family relationships.*<sup>190</sup>

Children should be supported to integrate into the local community. According to the Committee on the Rights of the Child, states should cooperate with the international community to protect refugee and asylum seeking children, including assisting tracing children’s families.<sup>191</sup>

In the longer term, recognising the importance of a permanent solution for the child, the state should implement processes for the child to regularise his or her legal status to remain and build a future in the country.

Where the state determines that it has no obligations to a particular child, there are a number of options open to it and to the child. The state could facilitate a dignified, prepared and supported voluntary departure to the child’s country of origin or to a third country. The child’s best interests need to remain paramount throughout this process. The child’s best interests are most likely to be met if the child participates in a reintegration program in the destination country – whether that is their country of origin or third country. Such programs should offer a range of supports to assist the child to begin to rebuild their lives, including accommodation, welfare, education and training, health care, family reunion, etc.

## BELGIUM – Avoiding detaining children in families pending return

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Families with children who are required to leave Belgium are accommodated in individual open housing units, called return-houses.

There are two categories of family in the return-houses: the families who were arrested on the territory and the families who asked for asylum at the border. Family unity is maintained even when children have turned 18 years old. Family members are allowed to exit the house, providing that one adult member of the family remains present in the unit. Children are allowed to attend school, even though it is sometimes difficult to

ensure in practice (due to lack of available places in schools, short period prior to the return, etc). Families have access to health care in addition to an obligation to a medical check when entering the return-houses and to a fit-to fly examination before return.

Within the return houses, families receive counselling from a return-coach, who works for the Foreigners Office. Each coach works with 3 to 4 families at a time and is in almost daily contact on behalf of the families with the authorities. The coach's role is to prepare families for return whilst exploring the possibilities

of them receiving a residence permit and supporting them in their current situation. They provide families with information and coordinate the involvement of other actors working with the family, for example, lawyers, and help children enrol in school. They also prepare families for regularisation of their stay. From October 2008 up to February 2011, 145 families with 268 children stayed in the return houses. Amongst them, 60 families returned to their country of origin or to a third country. In very few cases were coercive measures necessary for the return.<sup>192</sup>

## GUATEMALA – Guatemalan Child Return and Reintegration Project (GCRRP)<sup>193</sup>

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KIND has partnered with The Global Fund for Children (GFC) to develop a pilot project to ensure that UAMs who do not have valid protection claims in the US can return safely to their homelands and to 'address the conditions that caused them to make the dangerous journey to the United States alone.' The Guatemalan Child Return and Reintegration Project (GCRRP) 'works to ensure a safe return for unaccompanied children and provide support upon their arrival to Guatemala to access vital services.'<sup>193</sup>

## EL SALVADOR – International Organization for Migration repatriation assistance program

In El Salvador, the IOM runs a repatriation project supporting young people returned to El Salvador from the United States. The program seeks to encourage repatriated young people to remain in El Salvador by encouraging educational opportunities. It provides extra-educational support to its young

people, meaning that they go to school in Salvadoran schools, while also being entitled to extra classes according to their interests, such as English language computer classes. The program has had mixed success in encouraging young people to participate. About half of referrals have chosen not to take part

in the program because they continue to aspire to travel to the US, because their guardians do not approve of their involvement or because local insecurity (the result of gangs and remoteness) prevents them from getting to classes.

A further option available to states that determine that they do not have obligations to a particular refugee, asylum seeker or irregular migrant child is for the child (and their family, where applicable) to leave the state and return to it with a valid visa and other necessary documentation.

### CASE STUDY: CASE MANAGEMENT WITH FAMILIES PENDING REMOVAL

Cecilia is a mother with two sons aged seven and 16. Five years ago, she came to Belgium from Brazil without documents to join her sister. In 2006, Cecilia was detained and sent back to Brazil; however, a month later she made her way back to Belgium intending to stay and work. Cecilia was refused legal residential status and she and her children were placed in the open family units pending their removal. Cecilia was assigned a case manager, and was initially assessed as a risk to abscond, as she was adamant on staying in Belgium.

The case manager sought legal advice for Cecilia to ensure all her options to remain in the country legally had been fully explored. They found that Cecilia would need to return to Brazil and apply for a visa in order to come back to Belgium and work legally. The case manager made sure Cecilia knew what steps to take to apply for a visa from Brazil. The case manager then engaged the International Organization for Migration to work with Cecilia to explore possibilities to support the family's return to Brazil.

By working with the case manager Cecilia had the time to contemplate the future and make the best decision for her and her children. Cecilia finally agreed to return to Brazil.<sup>195</sup>

It may also be possible for the child (and their family) to return to their country of origin but to relocate to another place within that country. In some circumstances this may be consistent with the best interests of the child.



### PREPARING, SUPPORTING AND EMPOWERING INDIVIDUALS FOR A FINAL MIGRATION OUTCOME

International research shows that with case management support, asylum seekers and irregular migrants are prepared, supported and empowered throughout the migration process and are more likely to comply with decisions and are better able to cope with return or integration.

The core principle of building trust, respecting and valuing each person as an individual with dignity and with specific skills and needs are fundamental. Providing a supportive role that is both realistic and sustainable, and also compassionate and consistent, for the period of time that the individual is awaiting a final outcome, is critical.

Strategies used by case managers in working with individuals facing removal include exploring all legal options to remain, third country options, relocation to another area in the country of origin and repatriation assistance, along with flexibility to respond to barriers facing return, such as stabilising health conditions.<sup>196</sup>

Should a child without a right to remain fail to return voluntarily, it is reasonable that a state seek to ensure that the child departs. However, physical force should not be used against children. Children should not be physically or chemically restrained. Rather, it is acceptable that a state enforce a mandatory return, but it must be based on the best interests of the child. According to the European Committee for Refugees and Exiles, mandatory return *refers to persons who no longer have a legal basis for remaining in the territory of the host state and who are therefore required by law to leave the country. It also applies to individuals who have consented to leave, or have been induced to leave by means of incentives or threats of sanctions.*

A study on “best practices in the field of the return of minors” was carried out by ECRE, in strategic partnership with Save the Children, on behalf of the European Commission in 2011. The study looked at legislation and practices regarding the return of children, either unaccompanied or within families, who return voluntarily or are forced to return because of their status as illegally staying third country nationals.

The checklist below from ECRE and Save the Children provides helpful guidance to states in developing an effective system for how to consider the return of children.

### A CHECKLIST TO ACHIEVE GOOD PRACTICES WHEN CONSIDERING THE RETURN OF CHILDREN TO THIRD COUNTRIES: A TOOL FOR QUALITY PLANNING FOR MEMBER STATES.

#### 1. DESIGNING THE RETURN PROCEDURE: GENERAL CHILD RIGHTS AND CHILD PROTECTION

- 1.1. National child protection provisions apply to the situation of children who are subject to a return procedure and appropriate child protection procedures are followed where necessary
- 1.2. Mechanisms exist to identify children who may be victims of trafficking or who are at risk of abuse, exploitation, neglect or violence
- 1.3. When designing the return procedure, specific safeguards must be introduced through out the return process to ensure that the best interests of the child is a primary consideration and that appropriate respect is given to best interests throughout the process
- 1.4. When designing the return procedure, specific safeguards must be introduced to ensure that children are provided with opportunities to have their views and opinions heard
- 1.5. Prior to any return decision and procedure, voluntary return is explored with families with children, with appropriate consideration of the best interests of the children and appropriate consultation with children

#### 2. ASSISTANCE TO UNACCOMPANIED AND SEPARATED CHILDREN PRIOR TO A RETURN DECISION 2.1. MECHANISMS ARE ESTABLISHED TO IDENTIFY CHILDREN WHO ARE SEPARATED FROM THEIR PRIMARY CAREGIVERS

- 2.2. Prior to any return decision and procedure, unaccompanied and separated children are provided with special protection and assistance, with a view to ensuring that all decisions have their best interests as a primary consideration
- 2.3. Processes are in place to restore family links for unaccompanied or separated children where this is requested by the child or their guardian, is in the best interests of the child and where it is safe to do so for family members
- 2.4. A formal procedure for determining the best interests of an unaccompanied or separated child has been undertaken, with a view to identifying a durable solution for the child

### 3. DECISION MAKING PROCEDURES

- 3.1. Decision making procedures regarding return take specific account of the situation of children, including children within families
- 3.2. Information has been gathered to indicate that a child will not be at risk of harm, at risk of refoulement, or at risk of (re) trafficking or exploitation following their return
- 3.3. Lawyers with special expertise are appointed to families with children and to unaccompanied children to represent the children throughout the decision-making process and all relevant appeals
- 3.4. A prompt and effective remedy exists for children to appeal against the decision to return and such appeals have a suspensive effect on any return decision

### 4. POST DECISION AND PRE RETURN PHASE

- 4.1. A voluntary departure period is afforded to returns of families with children to ensure minimal disruption to the child's situation
- 4.2. Children have access to education, health and accommodation services pending return
- 4.3. Family unity is maintained throughout all stages of the return procedure

### 5. DETENTION

- 5.1. Alternatives to detention are in place and are fully considered in each case before a decision to detain is taken
- 5.2. Detention is used only as a measure of last resort and for the shortest possible period, is regularly reviewed, and children have access to legal advisers and other actors as well as the possibility to challenge the detention decision
- 5.3. Detention conditions are suitable for families with children
- 5.4. Unaccompanied children are not detained in adult accommodation

### 6 THE RETURN PROCESS

- 6.1. If, after appropriate consideration of all durable solutions, the return option is pursued, relevant information regarding the return procedure is given to the child concerned
- 6.2. A plan is in place to assist the child with reintegration following their return
- 6.3. Practices for the removal of children are appropriate and proportionate
- 6.4. Mechanisms allow for unaccompanied and separated children to be escorted on their journey of return

### 7, ARRIVAL IN COUNTRY OF RETURN AND

- 7.1. Procedures exist for the formal transfer of care and custodial responsibilities for the child
- 7.2. Appropriate reintegration support exists for returning children
- 7.3. Formal procedures for monitoring the outcomes of the impact of return for children exist in countries of return

*ECRE and Save the Children, Comparative study on best practices in the field of return of minors, December 2011*

## AUSTRALIA – Community Assistance Scheme

The CAS is a comprehensive early intervention model using different organizations, such as the Australian Red Cross, the Immigration Advice and Application Assistance Scheme (IAAS) and the International Organization for Migration (IOM) to provide welfare and legal advice.

Specific services depend on the identified needs of clients, but may include:

- Community assistance, including assistance with food, clothing, basic living expenses, health care, and accommodation, which is provided by the Australian Red Cross.
- Immigration advice and application assistance to vulnerable people, delivered by providers under

the Immigration Advice and Application Assistance Scheme (IAAAS).

- Information and counselling services, provided by the International Organization for Migration (IOM). The IOM provides information on immigration processes and assistance to people and prepares them for their immigration outcome.

Case managers are responsible for overseeing the case, meeting regularly with their clients and coordinating case conferences with client and service providers at critical incidents, such as a refusal or change of circumstance.

Of the 918 people initially assisted, 560 (61%) had a final immigration outcome. Of this group 370 people (66%) received a temporary or

permanent visa to remain, 114 people (20%) voluntarily departed, 37 people (7%) absconded, 33 people (6%) were removed and 6 people (1%) died. These figures show that 93% of people complied with their reporting and other obligations and that 60% of those not granted a visa to remain in the country voluntarily departed.<sup>197</sup>

### CONCLUSION

The 5-step Child-sensitive Assessment and Placement model is designed to prevent refugee, asylum seeker and irregular migrant children from being placed in detention. It takes states' interests to manage migration seriously, while at the same time recognising that it is never in the best interests of children to be detained.

The CCAP model has a solid evidence base. Research indicates high levels of compliance among refugees, asylum seekers and irregular migrants who are in supported alternative to detention processes. Similarly, more failed asylum seekers and other migrants who are within such processes chose to leave a state voluntarily compared with those who are not involved in alternative to detention schemes. The evidence suggests that detention does not deter potential irregular migration and nor does it guarantee the removal or return of irregular migrants.

CCAP is a comprehensive model that offers ways of avoiding detaining refugee, asylum seeker and irregular migrant children from the moment they come to the attention of the state, throughout the assessment of the status, and through to the resolution of their cases. The examples presented here of policies and practices already used by states across the world to prevent detaining children demonstrates that the model is both realistic and achievable, as well as being humane.

### Tools

A number of tools such as the Child-friendly Community Assessment and Placement (CCAP) model are available at [www.idcoalition.org/ccap](http://www.idcoalition.org/ccap)

## RECOMMENDATIONS

### Recommendation 6.1:

That States articulate in law and policy a presumption that children will not be detained for immigration purposes.

### Recommendation 6.2:

That upon first encountering a refugee, asylum seeker or irregular migrant child, or such a person claiming to be a child, or someone who appears despite their claims to the contrary to be a child, states treat the person as though they are a child.

### Recommendation 6.3:

That when in doubt about the age of a refugee, asylum seeker or irregular migrant claiming to be a child, that States undertake a process of age assessment that is comprehensive, multidisciplinary and child- and gender-sensitive and that applies the benefit of the doubt and any margin of error in favour of the individual concerned.

### Recommendation 6.4:

That prior to a comprehensive age assessment process being undertaken, unaccompanied persons claiming to be children must be allocated an independent guardian to advocate for their best interests.

### Recommendation 6.5:

That a guardian be appointed to an unaccompanied or separated child as soon as a State is aware that the person is or may be a child without an adult guardian.

### Recommendation 6.6:

That guardians have specialist knowledge and expertise in dealing with children of refugee or migrant background.

### Recommendation 6.7:

That States establish guardians who are independent of state migration authorities, do not have any potential conflict of interest and are mandated to act in the child's best interests. Given the power of guardians over the lives of young people, the institution of guardianship should also be independently monitored.

### Recommendation 6.8:

That guardianship arrangements for unaccompanied and separated children are flexible enough to respond to the diverse rights, needs and interests of children and adolescents, mindful that the migration process can have a significant impact on children's lives.

### Recommendation 6.9:

That the 'voice of the child' is an important aspect of guardianship arrangements and in the determination of the child's best interests and that opportunities for children to input into decisions affecting them are built into the decision-making process.

### Recommendation 6.10:

That consistent with the authoritative guidance of the Committee on the Rights of the Child, refugee, asylum seeker and irregular migrant children be provided with access to safe and secure accommodation appropriate to their age, gender, cultural background, and family situation, pending a resolution of their migration status.

Recommendation 6.11:

That refugee, asylum seeker and irregular migrant children have access to the same level of social resources in the community as native born children in that community.

Recommendation 6.12:

That States provide the highest level of physical and psychological health care to refugee, asylum seeker and irregular migrant children, acknowledging the particular needs of such children arising from their experiences.

Recommendation 6.13:

That States without the capacity to provide adequate physical and mental health care to refugee, asylum seeker and irregular migrant children draw on the international community, including UN agencies and non-governmental organizations, to assist in ensuring that such children have adequate health care.

Recommendation 6.14:

That States provide refugee, asylum seeker and irregular migrant children with resources and support to meet their basic material needs.

Recommendation 6.15:

That States without the capacity to provide for refugee, asylum seeker and irregular migrant children's basic material needs engage with the international community, including UN agencies and non-governmental organizations, to assist in ensuring that such needs be met.

Recommendation 6.16:

That States provide refugee, asylum seeker and irregular migrant children with educational and training opportunities appropriate to their age and experiences as well as responding to their wishes and capacities.

Recommendation 6.17:

That States without the capacity to provide for refugee, asylum seeker and irregular migrant children's education and training engage with the international community, including UN agencies and non-governmental organizations, to assist in ensuring that such needs be met.

Recommendation 6.18:

That States provide opportunities for refugee, asylum seeker and irregular migrant children to participate in recreational, cultural and religious opportunities consistent with their cultural and religious identity, and within the host community.

Recommendation 6.19:

That States develop policies and practices for children to live with dignity within the community consistent with their best interests.

Recommendation 6.21:

That the formal Best Interests Determination involve the child's guardian and other relevant experts and agencies, as well as due consideration of the child's voice.

Recommendation 6.22:

Refugee, asylum seeker and irregular migrant children with special needs ought never be detained.

Recommendation 6.23:

That States ensure that children who are refugees, asylum seekers or irregular migrants with special needs have access to medical, social and other facilities in order to live in safety and with dignity in the community.

Recommendation 6.24:

That refugee, asylum seeker and irregular migrant children have access to protection determination processes that are child and gender-sensitive, and should they be found to have protection needs, be granted appropriate protection, including the relevant rights attached to such protection.

Recommendation 6.25:

That States provide refugee, asylum seeker and irregular migrant children with free, independent legal assistance and advice, and, where appropriate interpreters who can speak a language they can understand, to enable the children to engage most effectively in protection determination processes.

# CONCLUSION

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Children should not be detained for migration purposes. There are alternatives. Reflecting on the lived experiences of refugee, asylum seeker and irregular migrant children who have been detained, as well as the insights of professionals working in the field, and the scholarly and other literature, this policy document has presented a model for preventing the immigration detention of children. The model is based on three fundamental principles:

- That a child is first and foremost a child;
- That it is never in the best interests of a child to be detained;
- That liberty is a fundamental human right.

These principles shift the focus from the state's right to detain children to the right of refugee, asylum seeker and irregular migrant children to be free from the risk of being incarcerated as a consequence of states' desires to control migration.

The CCAP model outlined in this policy document involves five steps. The first is to prohibit the detention of children by enshrining in law that children are not to be detained. The second step, occurring within hours of a child being discovered at the border or within a state's territory, involves screening, assessing and then referring children and/or their families to the appropriate community settings. This second step includes a number of components: initial screening;

the allocation of a guardian to unaccompanied and separated children; the assignment of a caseworker to all children – whether in families or alone; an intake assessment to determine children's needs, vulnerabilities and strengths; and the placement of the child or family within a community setting. An age assessment is only undertaken in cases of serious age dispute.

The third step deals with what happens to refugee, asylum seeker and irregular migrant children during the time in which states are assessing their migration status. This third step involves 'case management,' including an exploration of the migration options available to children and families, a best interest determination, and an assessment of the protection needs of children and/or their families.

The fourth step is designed to ensure that the rights of children and their best interests are safeguarded. Children and their families should have access to legal review to ensure that decision made about and for them are timely, consistent with their best interests and lawful. This includes decisions about where they are accommodated and about their legal status. Step four also includes an opportunity on the part of states to review the conditions accompanying the child or family's placement in the community following a final immigration status decision.



The final step in the model involves the realisation of sustainable migration solutions.

The model described here presents states with the opportunity to maintain careful management of migration into their territories while also ensuring that the best interests of refugee, asylum seeker and migrant children not to be detained are respected. States legitimately need to know the identity of refugees, asylum seeker and irregular migrant children within their territories, and whether such children pose health or security threats to their citizens. Likewise, states have a reasonable expectation that should such children be deemed not to have a right to remain, and where it is in the child's best interests to do so, they should leave the state's territory. The model presented here is designed to allow states to achieve these aims, but without the negative consequences of detention. The evidence presented here points to the effectiveness of supported alternatives to detention in achieving both high compliance rates and, where appropriate, high rates of voluntary return.

The stories of the children who spoke to the IDC as part of the research for this policy document, as well as the scholarly literature, highlight the devastating impact of detention on children. These are children who, often, have already experienced trauma in their countries of origin or on their journeys. Immigration

detention both reinforces past trauma and is of itself traumatic. For this reason alone, refugee, asylum seeker and irregular migrant children should not be detained. That detention is an unnecessary, ineffective and expensive means of achieving the goal of managing migration makes the detention of children doubly problematic. There must be a better way. The model presented here offers a way forward.

## CHAPTER 7

# SUMMARY OF RECOMMENDATIONS

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### KEY RECOMMENDATIONS OF THE PAPER INCLUDE:

As it is never in the best interests of a child to be detained for immigration purposes, States should ensure that a minimum level of protection and support for children is in place in the community.

#### **States should articulate in their legislation and policies that:**

- i. Irregular child migrants, refugees and asylum seekers are, first and foremost, children.
- i. The best interests of the child must be the primary consideration in any action taken in relation to the child.
- iii. The liberty of the child is a fundamental human right.

States develop legislation, policy and practices to ensure that refugee, asylum seeker and irregular migrant children are free to reside in the community during the resolution of their immigration status.

### 1. INTERNATIONAL LAW AND PRACTICE

#### **Recommendation 1.1:**

States should articulate in their legislation and policies that:

- i. Refugee, asylum seeker and irregular migrant children are, first and foremost, children.
- ii. The best interests of the child will be a primary consideration in any action concerning the child.
- iii. The liberty of the child is a fundamental human right.

#### **Recommendation 1.2:**

That the international community works toward the establishment of a binding international instrument articulating the right to liberty of refugee, asylum seeker and irregular migrant children.

#### **Recommendation 1.3:**

Consistent with the spirit of existing international law, States should articulate in law a prohibition against the detention of children for immigration purposes and legislate and develop policies and practices designed to avoid the detention of children for immigration purposes.

#### **Recommendation 1.4**

States should sign, ratify and implement international human rights treaties (CRSR, CRC, ICCPR, ICESCR, CAT, CEDAW, CERD, etc.) in order better to protect and fulfil the rights of the refugee, asylum seeker and migrant children.

#### **Recommendation 1.5**

States that have not signed the United Nations 1951 Convention relating to the Status of Refugees or its 1967 Protocol should do so as well as undertake to provide domestic legal remedies to those in need of international protection.

#### **Recommendation 1.6**

States should share best practices on the alternatives to detention of refugee, asylum seeker and migrant children and families.

### **2. WHY CHILDREN MIGRATE**

#### **Recommendation 2.1:**

That Governments and the international community work to establish conditions where children can be safe and secure in their home communities to reduce pressures on children to migrate. This includes ensuring that children are free from the threat of violence of any form (consistent with the Report of the independent expert for the United Nations study on violence against children<sup>198</sup>), and from the threat of extreme poverty through the realisation of the United Nations' Millennium Development Goals.<sup>199</sup>

#### **Recommendation 2.2:**

That States from which children migrate for socio-economic reasons seek to implement social and economic policies and practices that allow children to develop fully without the need to leave their home communities.

#### **Recommendation 2.3:**

That Governments establish effective migration channels to facilitate legal migration to ensure that the socio-economic needs of child migrants can be met without them having to risk travelling without State-sanctioned protection.

#### **Recommendation 2.4:**

That States employ policies and practices to ensure that their border control methods remain sensitive to the needs of refugee, asylum seeker and irregular migrant children. Such measures include screening of new arrivals to assess whether they have particular vulnerabilities, including due to their age, streamlining protection procedures for children, and adopting a child welfare-based approach to the reception of child migrants.

#### **Recommendation 2.5**

That States develop policies and practices that acknowledge the particular vulnerabilities of separated and unaccompanied children, and children who are seeking asylum.

### **3. WHY STATES DETAIN CHILDREN**

#### **Recommendation 3.1**

That States collect and release data about the numbers of refugee, asylum seeker and irregular migrant children they detain, the length of time they are detained, and the reasons for their detention in a timely manner.

#### **Recommendation 3.2:**

That States do not detain children during health, security or identity screening.

#### **Recommendation 3.3:**

That States refrain from detaining children to prevent absconding or for removal purposes. Community-based alternatives to detention must be utilized in the first instance.

#### **Recommendation 3.4:**

That the detention of children ought never to be used as an alleged deterrent.

#### **Recommendation 3.5:**

That political and civil society leaders ensure that public debate about irregular migration is based on evidence and international good practice and is consistent with the best interests of refugee, asylum seeker and other irregular migrant children.

**Recommendation 3.6:**

That stakeholders develop a strong evidence base from which to advocate for managing the irregular movement of child refugees, asylum seekers and other migrants without the use of detention, and build strategic alliances with opinion makers in the media and politics in order to help to shape accurate portrayals of migration and its implications for children and to be able to participate actively in policy development.

**Recommendation 3.7:**

That robust measures, including accountability processes, be established to ensure that children are not detained by local or regional authorities outside of the law.

4. THE CONDITIONS IN WHICH CHILDREN ARE DETAINED

**Recommendation 4.1**

That unaccompanied and separated children should never be detained. Alternatives to detention must be utilised in the first instance.

**Recommendation 4.2**

That consistent with the principles of family unity and the best interests of the child not to be detained, the parents or primary carers of refugee, asylum seeker and irregular migrant children should not be detained, but should be able to live in a community setting with their children.

5. IMPACTS OF DETENTION ON CHILDREN

**Recommendation 5.1**

That children with a history of trauma – whether originating from their countries of origin or their journeys beyond that – ought never to be detained. It is incumbent on States to assess whether children have such histories.

**Recommendation 5.2**

That it is never in the best interests of a child to be detained for immigration purposes. States should ensure that a minimum level of protection and support for children is in place in the community.

6. MANAGING CHILDREN AND FAMILIES IN THE COMMUNITY

**Recommendation 6.1:**

That States articulate in law and policy a presumption that children will not be detained for immigration purposes.

**Recommendation 6.2:**

That upon first encountering a refugee, asylum seeker or irregular migrant child, or such a person claiming to be a child, or someone who appears despite their claims to the contrary to be a child, states treat the person as though they are a child.

**Recommendation 6.3:**

That when in doubt about the age of a refugee, asylum seeker or irregular migrant claiming to be a child, that States undertake a process of age assessment that is comprehensive, multidisciplinary and child- and gender-sensitive and that Applies the benefit of the doubt and any margin of error in favour of the individual concerned.

**Recommendation 6.4:**

That prior to a comprehensive age assessment process being undertaken, unaccompanied persons claiming to be children be allocated an independent guardian to advocate for their best interests.

**Recommendation 6.5:**

That a guardian be appointed to an unaccompanied or separated child as soon as a State is aware that the person is or may be a child without an adult guardian.

**Recommendation 6.6:**

That guardians have specialist knowledge and expertise in dealing with children with refugee or migrant backgrounds.

**Recommendation 6.7:**

That States establish guardians that are independent of state migration authorities, don't have any potential conflict of interest and are mandated to act in the child's best interests. Given the power of guardians over the lives of young people, the institution of

guardian should also be independently monitored.

**Recommendation 6.8:**

That guardianship arrangements for unaccompanied and separated children are flexible enough to respond to the diverse rights, needs and interests of children and adolescents, mindful that the migration process can have a significant impact on children's lives.

**Recommendation 6.9:**

That the 'voice of the child' is an important aspect of guardianship arrangements and in the determination of the child's best interests and that opportunities for children to input into decisions affecting them are built into the decision-making process.

**Recommendation 6.10:**

That consistent with the authoritative guidance of the Committee on the Rights of the Child, refugee, asylum seeker and irregular migrant children be provided with access to safe and secure accommodation appropriate to their age, gender, cultural background, and family situation, pending a resolution of their migration status.

**Recommendation 6.11:**

That refugee, asylum seeker and irregular migrant children have access to the same level of social resources in the community as native born children in that community.

**Recommendation 6.12:**

That States provide the highest level of physical and psychological health care to refugee, asylum seeker and irregular migrant children, acknowledging the particular needs of such children arising from their experiences.

**Recommendation 6.13:**

That States without the capacity to provide adequate physical and mental health care to refugee, asylum seeker and irregular migrant children draw on the international community, including UN agencies and non-governmental organizations, to assist in ensuring that such children have adequate health care.

**Recommendation 6.14:**

That States provide refugee, asylum seeker and irregular migrant children with resources and support to meet their basic material needs.

**Recommendation 6.15**

That States without the capacity to provide for refugee, asylum seeker and irregular migrant children's basic material needs engage with the international community, including UN agencies and non-governmental organizations, to assist in ensuring that such needs be met.

**Recommendation 6.16:**

That States provide refugee, asylum seeker and irregular migrant children with educational and training opportunities appropriate to their age and experiences as well as responding to their wishes and capacities.

**Recommendation 6.17:**

That States without the capacity to provide for refugee, asylum seeker and irregular migrant children's education and training engage with the international community, including UN agencies and non-governmental organizations, to assist in ensuring that such needs be met.

**Recommendation 6.18:**

That States provide opportunities for refugee, asylum seeker and irregular migrant children to participate in recreational, cultural and religious opportunities consistent with their cultural and religious identity, and within the host community.

**Recommendation 6.19:**

That States develop policies and practices for children to live with dignity within the community consistent with their best interests.

**Recommendation 6.21:**

That the formal Best Interests Determination involve the child's guardian and other relevant experts and agencies, as well as due consideration of the child's voice.

**Recommendation 6.22:**

Refugee, asylum seeker and irregular migrant children with special needs ought never be detained.

**Recommendation 6.23:**

That States ensure that children who are refugees, asylum seekers or irregular migrants with special needs have access to medical, social and other facilities in order to live in safety and with dignity in the community.

**Recommendation 6.24:**

That refugee, asylum seeker and irregular migrant children have access to protection determination processes that are child and gender-sensitive, and should they be found to have protection needs, be granted appropriate protection, including the relevant rights attached to such protection.

**Recommendation 6.25:**

That States provide refugee, asylum seeker and irregular migrant children with free, independent legal assistance and advice, and, where appropriate interpreters who can speak a language they can understand, to enable the children to engage most effectively in protection determination processes.

*[1] IDC, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants, Melbourne, IDC, available online at [http://idcoalition.org/wp-content/uploads/2011/07/IDC-Legal-Detention-Framework-Guide\\_Final.pdf](http://idcoalition.org/wp-content/uploads/2011/07/IDC-Legal-Detention-Framework-Guide_Final.pdf), accessed 24 November 2011. Further advice from the international community regarding the detention of juveniles is available at United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990, available online at [http://www2.ohchr.org/english/law/pdf/res45\\_113.pdf](http://www2.ohchr.org/english/law/pdf/res45_113.pdf), accessed 24 November 2011.*

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- 3 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('Convention on the Rights of the Child') art 1.
- 4 UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, United Nations High Commissioner for Refugees (26 February 1999) ('UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers').
- 5 M Crock (2006) Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children, Themis Press, Sydney, 104, available online at <http://idcoalition.org/wp-content/uploads/2009/06/ssa-australia.pdf>.
- 6 Ibid.
- 7 Inter-agency Guiding Principles on Unaccompanied and Separated Children (2004) International Committee of the Red Cross, Geneva, 13, available online at [http://www.unicef.org/protection/IAG\\_UASCs.pdf](http://www.unicef.org/protection/IAG_UASCs.pdf).
- 8 International Detention Coalition, above note 1.
- 9 Two children were interviewed in South Africa by Glynis Clacherty. Two children were interviewed by Jeroen Van Hove in Malaysia. All other interviews were conducted by Dr. David Corlett.
- 10 See also Committee on the Rights of the Child, General Comment No.12 (2009) The right of the child to be heard, available online at <http://www.coe.int/t/dg3/children/participation/CRC-C-GC-12.pdf>.
- 11 Pedro Agramunt, Rapporteur, Undocumented Migrant Children in an Irregular Situation: a Real Cause for Concern, Council of Europe (Parliamentary Assembly) Doc 12718 (16 September 2011) available online at <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc11/EDOC12718.htm>.
- 12 Ibid. Similarly, McAdam, writing specifically about refugee children concluded, 'if a line has to be drawn, a child is foremost a child before he or she is a refugee' (J McAdam 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection' (2006) 14 The International Journal of Children's Rights 251, 269).
- 13 Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 34th sess, UN Doc CRC/GC/2005/6 (1 September 2005). The Committee on the Rights of the Child has commented that the CRC ought to be read as a complete, interrelated whole, but that several articles express general principles that are key to the rights of children. These include the best interests of the child as a primary consideration in the search for short and long-term solutions (Article 3), non-discrimination (Article 2), the right to life, survival and development (Article 6) and the right of the child to express their views (Article 12).
- 14 Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('Universal Declaration of Human Rights') art 3
- 15 Universal Declaration of Human Rights art 9.
- 16 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('ICESCR') art 9 (1).
- 17 Convention on the Rights of the Child, art 37 (b).
- 18 Convention on the Rights of the Child art 2.
- 19 Convention on the Rights of the Child art 37(b).
- 20 Convention on the Rights of the Child art 37(d).
- 21 Convention on the Rights of the Child art 37(c).
- 22 Convention on the Rights of the Child art 9(1).
- 23 Convention on the Rights of the Child art 37(c).
- 24 Convention on the Rights of the Child art 37(c).
- 25 Convention on the Rights of the Child art 37(d).
- 26 Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, UN CHR, 55th sess, UN Doc E/CN.4/1999/63/Add.3 (18 December 1998) para 37.
- 27 UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers Guideline 6. Emphasis in original.
- 28 Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, UN Doc A/61/106 (entered into force 3 May 2008) ('Convention on the Rights of Persons with Disabilities') art 7(1) and (2).
- 29 Convention on the Rights of Persons with Disabilities art 14(1).
- 30 Joint UN Commentary EU Trafficking Directive Dec 2011, article 13.
- 31 International Organisation for Migration, 'World Migration Report 2010 The Future of Migration: Building Capacities for Change' (Report, IOM, 2010) 115, available online at [http://publications.iom.int/bookstore/free/WMR\\_2010\\_ENGLISH.pdf](http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf).
- 32 Ibid 115.

- 33 Ibid 120.
- 34 R Cholewinski, 'Irregular Migration and Mixed Flows', (Background paper WMR 2010, International Organisation for Migration, 2010), available online at [http://publications.iom.int/bookstore/free/WMR2010\\_irregular\\_migration\\_and\\_mixed\\_flows.pdf](http://publications.iom.int/bookstore/free/WMR2010_irregular_migration_and_mixed_flows.pdf) 6.
- 35 N Cyrus and D Vogel, 'Irregular Migration in Europe – Doubts about the Effectiveness of Control Strategies' (Policy Brief No. 9, Focus Migration, March 2008) 2 <<http://focus-migration.hwwi.de/Irregular-Migration.2874.0.html?&L=1.>>
- 36 Alexander Betts 'Towards a 'soft law' framework for the protection of vulnerable migrants,' (Research Paper No. 162, UNHCR, August 2008) 1.
- 37 Irregular migration and mixed flows: IOM's approach, 19 October 2009. Available at: [http://www.iom.int/jahia/webdav/shared/shared/mainsite/about\\_iom/en/council/98/MC\\_INF\\_297.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/98/MC_INF_297.pdf)
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- 39 Leaving Home: Voices of Children on the Move, above note 37, 6.
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- 52 Ibid, 11.



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# NOTES

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International  
**Detention** Coalition

Human rights for detained refugees,  
asylum seekers and migrants