



Summary of normative standards and recommendations on ending child immigration detention

Introduction

Every day, all around the world, millions of children are affected by immigration detention. Whether detained themselves or impacted by the detention of their parents or guardians, migrant children around the globe are frequently detained illegally, arbitrarily, and unnecessarily, often at great cost to states.

Migrant children are particularly vulnerable to abuse and neglect in places of immigration detention and are exposed to increased risks of grave human rights violations including cruel, inhuman or degrading treatment or punishment. When deprived of liberty, migrant children are exposed to increased risks of physical, psychological and sexual abuse, acts of violence, social discrimination and denial of their civil, political, economic, social and cultural rights, including access to education, medical and mental health care, adequate nutrition, play and leisure facilities, and family life. Even very limited periods of detention in relatively humane contexts can have severe, negative, and lifelong impacts on child mental and physical health and development.

As a result, in recent years the issue of child immigration detention has risen in importance on the global agenda. A broad range of United Nations, intergovernmental and civil society actors have undertaken significant research and reporting which demonstrates that immigration detention is incredibly harmful to children, violates their rights to liberty and family life, and is never in their best interests.

This has been reflected in a growing consensus and acknowledgement from the international community that the immigration detention of any child—whether accompanied or unaccompanied—constitutes a clear child rights violation as it is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.

As a result, States have an obligation to expeditiously and completely cease the immigration detention of migrant children and to adopt human rights-compliant, non-custodial, community-based alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life.

Summary of standards

Article 37 of the United Nations Convention on the Rights of the Child prescribes that “no child shall be deprived of his or her liberty unlawfully or arbitrarily.” Article 3 further states that “in all actions concerning children . . . the best interests of the child shall be a primary consideration.” In 2005, the Committee on the Rights of the Child, in General Comment No. 6, clarified the obligations of States regarding the right to liberty of children:

In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.

Since this time, a number of additional United Nations and regional human rights treaty bodies, special procedures and specialized agencies have reinforced that detention cannot be justified solely on the basis of a child's migratory or residence status, and they have further clarified that protection of the child's best interests necessarily prohibits the detention of any child—whether accompanied or unaccompanied—for reasons related to their or their parents' or guardians' migratory or residence status.

The following is a summary of normative and policy developments that reflect this growing consensus and acknowledgement from the international community regarding the immigration detention of children.

“

In recent years the issue of child immigration detention has risen in importance on the global agenda.

About the Inter-Agency Working Group (IAWG)

The Inter-Agency Working Group (IAWG) to End Child Immigration Detention is an international alliance to support States to end child immigration detention consistent with existing international human rights obligations to protect the best interests of the child. Together, they have committed to engaging and supporting States to “completely and expeditiously” end the practice of child immigration detention, consistent with the UN Convention on the Rights of the Child.

History

In September 2012, at the annual Day of General Discussion of the UN Committee on the Rights of the Child, UN, intergovernmental and civil society experts discussed growing concerns around the detention of migrant children and their families on the basis of irregular immigration status.

In March 2014, at the UN Human Rights Council, a broad stakeholder group of child rights organizations, migrant groups and long-time supporters of the Global Campaign to End the Immigration Detention of Children hosted a side-event where they explored “A Global Strategy to End Child Immigration Detention.” Immediately following this side-event, groups met and agreed to form an Inter-Agency Working Group to End Child Immigration Detention (IAWG). Terms of reference were developed in the following months and the first official meeting of the IAWG was held in June 2014 on the margins of the UN Human Rights Council.

Members

The IAWG is comprised of twenty-one prominent UN groups, intergovernmental organizations, and civil society representatives who collectively represent stakeholders in every country of the world.

Institutional Partners

United Nations and Intergovernmental Bodies

- o UN Committee on Migrant Workers
- o UN High Commissioner for Human Rights (OHCHR)
- o UN High Commissioner for Refugees (UNHCR)
- o United Nations Children's Fund (UNICEF)
- o International Organization for Migration (IOM)
- o UN Special Rapporteur on the Human Rights of Migrants
- o UN Special Rapporteur on Trafficking
- o UN SRSG on Violence Against Children
- o UN Working Group on Arbitrary Detention (WGAD)

Regional Human Rights Bodies

- o Inter-American Commission on Human Rights (IAHCR), Rapporteurship on the Rights of Migrants
- o Council of Europe, Commissioner on Human Rights
- o Council of Europe, General Rapporteur on Ending Immigration Detention of Children

Civil Society Partners

- o Caritas Internationalis
- o Child Rights International Network (CRIN)
- o Defence for Children International (DCI)
- o Global Campaign to End Child Immigration Detention
- o Human Rights Watch (HRW)
- o International Detention Coalition (IDC)
- o Platform for International Cooperation on Undocumented Migrants (PICUM)
- o Save the Children
- o Terre des Hommes International Federation (TDH)

“

Together, they have committed to engaging and supporting States to “completely and expeditiously” end the practice of child immigration detention

Instrument

Key text

UN Secretary General

Report of the UN Secretary-General 'In safety and dignity: addressing large movements of refugees and migrants', A/70/59, 21 April 2016.

56. All refugees and migrants, regardless of status, are entitled to due process of law in the determination of their legal status, entry and right to remain, and in no cases are collective expulsions permissible. I therefore call upon States to consider alternatives to detention for purposes of immigration control and to adopt a commitment never to detain children for this purpose.

101. I call upon Member States to commit:
(b)(ii). To review border management and detention policies to ensure that the human rights of all those who arrive are upheld in line with international standards, consider alternatives to the detention of refugees and migrants and ensure that children, as a matter of principle, are never detained for purposes of immigration control.

Report of the UN Secretary-General on the 'Promotion and protection of human rights, including ways and means to promote the human rights of migrants', A/69/277, 7 August 2014.

79. Conclusions and recommendations:

The Secretary-General welcomes the information received from Member States concerning legislation, regulations and policies to strengthen the protection of the human rights of all migrants and, in that regard:

(c) Reminds States that the principle of the best interests of the child should guide their legislation, policies and practices relating to children, including in the context of migration and regardless of their status. Children should not be detained, and their rights to liberty and family unity should be respected.

(e) Encourages States to implement the recommendations adopted by the Committee on the Rights of the Child at the 2012 day of general discussion on the rights of all children in the context of international migration.

(k) Encourages States to implement alternatives to administrative detention guided by human rights considerations.

Report of the UN Secretary-General on 'International migration and development', A/68/190, 25 July 2013.

66. Children in the context of irregular migration face numerous challenges, including detention, deportation (of themselves or their parents) and lack of access to basic rights and services, such as birth registration, education, health care and housing.

Recommendations:

75. Member States should guarantee access by children to all rights under the Convention on the Rights of the Child. The best interests of the child should always take priority. Detention of migrant children constitutes a violation of child rights.

77. States should seek alternatives to administrative detention of irregular migrants, especially children.

Instrument

Key text

UN General Assembly

Resolution adopted by the General Assembly on 17 December 2015, 'Protection of migrants', A/RES/70/147, 25 February 2016

3(a). Calls upon all States to respect the human rights and inherent dignity of migrants, to put an end to arbitrary arrest and detention and, in order to avoid excessive detention of irregular migrants, to review, where necessary, detention periods and to use alternatives to detention, where appropriate, including measures that have been successfully implemented by some States;

3(b). Encourages States to put in place, if they have not yet done so, appropriate systems and procedures in order to ensure that the best interests of the child are a primary consideration in all actions or decisions concerning migrant children, regardless of their migration status, and to use, when applicable, alternatives to the detention of migrant children;

Resolution adopted by the General Assembly on 18 December 2014, 'Protection of migrants', A/RES/69/167, 12 February 2015.

4(b) Encourages States to put in place, if they have not yet done so, appropriate systems and procedures in order to ensure that the best interests of the child are a primary consideration in all actions or decisions concerning migrant children, regardless of their migration status, and to use, when applicable, alternatives to the detention of migrant children.

101. I call upon Member States to commit:

(b)(ii). To review border management and detention policies to ensure that the human rights of all those who arrive are upheld in line with international standards, consider alternatives to the detention of refugees and migrants and ensure that children, as a matter of principle, are never detained for purposes of immigration control.

Resolution adopted by the General Assembly on 18 December 2014, 'Migrant children and adolescents', A/RES/69/187, 11 February 2015.

3. Underlines that children, including adolescents, should not be subject to arbitrary arrest or detention based solely on their migration status and that the deprivation of liberty of migrant children and adolescents should be a measure of last resort, under conditions that respect the human rights of each child and in a manner that takes into account, as a primary consideration, the best interest of the child.

Resolution adopted by the General Assembly on 18 December 2008, 'Protection of migrants', A/RES/63/184, 17 March 2009.

7. Expresses concern about legislation and measures adopted by some States that may restrict the human rights and fundamental freedoms of migrants, and reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants;

9. Calls upon all States to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention and, where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention;

11. Requests States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, to train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants, inter alia, arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from their country of origin to the country of destination and vice versa, including their transit through national borders;

13. Takes note with appreciation of the successful implementation by some States of alternative measures to detention in cases of undocumented migration as a practice that deserves consideration by all States;

Instrument

Key text

UN Human Rights Council

Resolution adopted by the Human Rights Council, 'Unaccompanied migrant children and adolescents and human rights', A/HRC/RES/29/12, 2 July 2015.

Expressing serious concern about the situation of vulnerability and risk faced by migrants in transit and destination, in particular children, including adolescents, who are unaccompanied or separated from their families, who are forced to flee or decide to leave their homelands owing to multiple causes, and calling upon States of origin, transit and destination to work together to find effective and sustainable solutions within a framework of solidarity and regional and international cooperation.

Concerned by the fact that migrant children and adolescents who find themselves in a vulnerable situation by attempting to cross international borders without the required travel documents may be exposed to serious human rights violations and abuses that can threaten their physical, emotional and psychological well-being, and may also be exposed to crimes and human rights abuses committed by transnational criminal organizations or gangs, including crimes such as theft, kidnapping, extortion, physical abuse, sale of persons and trafficking in persons, including forced labour, and sexual abuse and exploitation.

2. Encourages States to continue to take into account the principle of the best interests of the child as a primary consideration, and to promote, protect and respect their human rights, bearing in mind their needs in the process of return to their countries of origin;

5. Calls upon all States to ensure that their immigration policies are consistent with their obligations under international human rights law, and to promote the enjoyment of human rights by all migrants without discrimination,

Resolution adopted by the General Assembly on 18 December 2008, 'Protection of migrants', A/RES/63/184, 17 March 2009.

Freedom from violence

27. Calls upon States to take effective and appropriate legislative and other measures or, where they already exist, to strengthen legislation and policy to prohibit and eliminate all forms of violence against children in all settings;

28. Also calls upon States to take, as a matter of urgency, all appropriate measures to prevent, and to protect children from, torture and other cruel, inhuman or degrading treatment or punishment and from all forms of violence, including physical, mental and sexual violence, to tackle all forms of bullying, child abuse and exploitation, domestic violence and neglect, human trafficking and violence perpetrated by the police, other law enforcement authorities and employees and officials in detention centres or welfare institutions, including orphanages, giving priority to the gender dimension, and to address underlying causes through a systematic and comprehensive approach;

Resolution adopted by the General Assembly on 18 December 2008, 'Protection of migrants', A/RES/63/184, 17 March 2009.

Migrant children

20. Also calls upon all States to ensure for migrant children, as well as for children of migrant parents, the enjoyment of all human rights of every child within their jurisdiction without discrimination of any kind, to provide access to health care, social services and education of good quality in accordance with domestic laws consistent with applicable international obligations, and to ensure that migrant children, especially those who are unaccompanied and those who are victims of violence and exploitation receive special protection and assistance, in accordance with their obligations, as reflected in articles 9 and 10 of the Convention on the Rights of the Child;

21. Calls upon States to establish or strengthen policies and programmes aimed at addressing the situation of children in the context of migration that have a human rights- based approach and are based on general principles, such as the best interests of the child, non-discrimination, participation, survival and development;

Resolution adopted by the Human Rights Council, 'Human rights of migrants: migration and the human rights of the child', A/HRC/RES/12/6, 12 October 2009.

1. Calls upon States to promote and protect effectively the human rights and fundamental freedoms of all migrants, especially those of children, regardless of their status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party, and therefore:

(a) Underlines that the international legal framework for the protection of the child applies irrespective of his/her migration status and that of his/her parents or family members, and calls upon States to respect and ensure the protection of the human rights of every child within their jurisdiction, without discrimination of any kind;

4. Reaffirms that the arrest, imprisonment or detention of a child should be in conformity with the law and the international obligations of the State, and recalls in this context article 37 of the Convention on the Rights of the Child, which provides that such measures should be taken only as a last resort and for the shortest appropriate period of time, and urges States to protect effectively the rights of children affected by the detention of their parents, guardians or family members because of their migratory status and, in this regard:

(a) Encourages States to consider positively alternatives to detention for children and the family group, when children or their parents are detained on the sole basis of their migratory status, recalling in this context the conclusions and recommendations of human rights mechanisms that the treatment of irregular migration of children as a criminal offence can have a negative impact on the enjoyment of their human rights, and taking into account the necessary balance between the need to protect family unity and the best interests of the child;

Resolution adopted by the Human Rights Council, 'Human rights of migrants', HRC/RES/9/5, 16 September 2008.

Resolved to ensure respect for the human rights and fundamental freedoms of all migrants,

1. Reaffirms the rights set forth in the Universal Declaration of Human Rights, and in this regard:

(b) Requests States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party;

(c) Expresses concern at legislation and measures adopted by some States that may restrict the human rights and fundamental freedoms of migrants, and reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants;

2. Also reaffirms the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party, and therefore:

(a) Urges all States to adopt effective measures to put an end to the arbitrary arrest and detention of migrants and to take actions to prevent and punish any form of illegal deprivation of liberty of migrants by individuals or groups;

(b) Takes note with appreciation of States that have successfully implemented alternative measures to detention for undocumented migrants and requests the Special Rapporteur, other special procedures of the Council and the High Commissioner for Human Rights to pay special attention to cases of arbitrary detention of migrants, particularly of migrant children and adolescents;

(c) Requests States to adopt concrete measures in order to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, and to train public officials who work in those facilities and in border areas to treat migrants and their families respectfully and in accordance with the law;

UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2002/23 on International Protection for Refugees, E/CN.4/Sub.2/RES/2002/23, 14 August 2002.

4. Reminds States that the detention of asylum-seekers and refugees is an exceptional measure and should only be applied in the individual case where it has been determined by the appropriate authority to be necessary in line with international refugee and human rights law, and encourages States to explore alternatives to detention and to ensure that children under 18 are not detained.

Instrument

Key text

UN Treaty Bodies - UN Committee on the Rights of the Child

Report of the 2012 Day of General Discussion on 'The Rights of All Children in the Context of International Migration', 28 September 2012.

Recommendations:

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

79. To the greatest extent possible, and always using the least restrictive means necessary, States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians if they are present in the transit and/or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.

General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005.

61. In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.

UN Treaty Bodies - UN Committee on Migrant Workers

Statement by the Chair of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Ending Immigration Detention of Children', 3 July 2014.

In all actions concerning children, the best interests of the child should be a primary consideration. States should not detain children based on their migration status or that of their parents or guardians. [...]

Accordingly, the Chairperson of the CMW calls upon States to cease the immigration detention of children, and to adopt alternatives to detention that fulfill the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved.

General Comment No. 2, The Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 August 2013.

42. States parties should seek alternatives to administrative detention, as administrative detention often has dire consequences, both economically and psychologically, for spouses and children.

44. As a general rule, children and families with children should not be detained and States parties should always give priority to alternatives to detention where children and families are concerned.

Instrument

Key text

UN Special Procedures and Mandate Holders

UN Special Rapporteur on the human rights of migrants

Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, 'The Global Compact for safe, regular and orderly mobility', A/71/40767, 20 July 2016.

36. Fully implementing a global compact relying on a human-rights-based framework for regular migration therefore involves a number of policy orientations:

- developing rights-based alternatives to detention, and expeditiously and completely ending the immigration detention of children and families;

92. Of particular concern is the frequent presence of children in detention. Children are usually afforded additional protections by States and, according to many national policies, should not be detained. However, the Special Rapporteur has witnessed detained children in all the countries he has visited, some of which have absurdly justified the detention by calling it protective custody.

94. The detention of children, even for short periods, can have severe psychological consequences. It has been made clear by the Committee on the Rights of the Child – and reinforced by other human rights mechanisms – that immigration detention can never ever be in the best interest of a child and that immigration detention of children, whether unaccompanied or together with their families, constitutes a child rights violation. Consequently, both unaccompanied children and families with children should always benefit from alternatives to detention.

95. Many rights-based alternatives to detention exist. A number of countries have moved towards open reception facilities, particularly for vulnerable migrants such as unaccompanied minors and families. However, prolonged immigration detention and its associated negative human rights consequences continue in many countries.

Conclusions and recommendations:

123. The global compact should:

(...)

Ensure that the detention of migrants is always a measure of last resort, only permissible when reasonable, necessary, proportionate, decided on a case-by-case basis, and for the shortest period of time; develop rights-based alternatives to detention for most cases; ensure that migrant children and families with children are never ever detained for reasons relating to their administrative immigration status."

Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, 'Detention of migrants in an irregular situation', A/HRC/20/24, 2 April 2012.

Conclusions and recommendations:

72(h). Detention of children is permitted only when it has been determined to be in the best interest of the child. [...] The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit: instead, alternatives to detention should be applied to the entire family.

73. Alternatives to detention should have a human rights-based approach, be established by law, be non-discriminatory and be subject to judicial review and independent monitoring and evaluation. In designing alternatives to detention, Governments should pay attention to the specific situation of particular groups of migrants, such as children, pregnant women and persons with disabilities, and use the least intrusive measure possible.

Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, 'The protection of children in the context of migration', A/HRC/11/7, 14 May 2009.

62. Migration-related detention of children should not be justified on the basis of maintaining the family unit (for example, detention of children with their parents when all are irregular migrants). As UNICEF and other experts have stressed, detention of children will never be in their best interests.

Recommendations:

103. States should recognize the need to comply with and implement the provisions contained in the Convention on the Rights of the Child and all relevant human rights instruments.

106. The Special Rapporteur furthermore recalls that migrants should not be deprived of liberty as a sole consequence of their migratory status and that, according to general comment No. 6 of the Committee on the Rights of the Child, as a general rule, unaccompanied migrant children should not be detained.

110. The Special Rapporteur recommends the development of alternatives to deprivation of liberty, such as sheltered housing and alternative care with national child protection services.

111. The Special Rapporteur recalls that irregular migration should not be criminalized and migrants, especially children, should not be detained in penitentiaries or facilities for criminal detention, and they should have, inter alia, the right to legal advice, an interpreter, legal review, to have contact with the external world as well as access to education and health services.

UN Special Procedures and Mandate Holders

UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 'Children Deprived of Liberty', A/HRC/22/53, 5 March

80. Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children. [...] Therefore, States should expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. [...] States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations. [...] The imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.

84. General recommendations:

[States should] ensure that immigration detention is never used as a penalty or punishment of migrant children, including for irregular entry or presence, and to provide alternative measures to detention that promote the care and well-being of the child. [...] [States should] prohibit the use of immigration detention as a method of control or deterrence for migrant children.

Instrument

Key text

UN Special Procedures and Mandate Holders UN Special Rapporteur on trafficking in persons, especially women and children

Report of the UN Special Rapporteur on trafficking in persons, especially women and children, 'Trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children', A/HRC/32/41, 3 May 2016.

20. For the millions of people who are forced to flee their country because of armed conflict, the journey of escape has become increasingly expensive and hazardous, with a tangible risk of trafficking-related exploitation. Sometimes these dangers relate to the available paths of escape. Throughout their journey and at their destination, migrants, including refugees and asylum seekers, are highly vulnerable to physical violence, sexual assault, extortion and trafficking, as well as detention by national authorities.

24. Moreover, increasingly restrictive and exclusionary immigration policies, including criminalization and detention of irregular migrants, insufficient channels for regular migration and family reunification and lack of regular access to the labour market for asylum seekers, refugees and migrants further contribute to an increase in the exploitation of migrants, including through trafficking.

Recommendations:

64. All States, particularly those hosting potential victims of trafficking among persons fleeing conflict, should:

(h) Not detain, prosecute or punish victims of trafficking for violations of immigration laws or for unlawful activities they were involved in as a direct consequence of their situation as trafficked persons, including violations and offences linked with prostitution, petty crime and irregular entry/stay in the host country.

66. States hosting, among persons fleeing conflict, children who may have been or are at risk of being victims of trafficking in persons should:

(d) Ban administrative detention of children, in particular but not only for violations of immigration laws and regulations;

(e) Ensure that trafficked children and other trafficked persons are not detained, prosecuted or punished for violations of immigration laws or for unlawful activities they are involved in as a direct consequence of their situation as trafficked persons.

Instrument

Key text

UN Special Procedures and Mandate Holders UN Working Group on Arbitrary Detention (WGAD)

Report of the Working Group on Arbitrary Detention, 'United Nations Basic Principles and Guidelines on Remedies and procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court', A/HRC/30/37, 6 July 2015.

34. The right of the child to have his or her best interests taken as a primary consideration shall be paramount in any decision-making and action taken in relation to children deprived of their liberty.

46. The deprivation of liberty of an unaccompanied or separated migrant or of an asylum-seeking, refugee or stateless child is prohibited. Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.

113. National legislative frameworks and migration policies shall reflect that the detention of children because of their or their parent's migration status always constitutes a violation of the rights of the child, and contravenes the right of the child to have his or her best interests taken as a primary consideration.

114. Children who are non-nationals should not be placed in detention centres or shelters for migrants, but in non-custodial community-based alternatives to detention, where they may receive all services necessary for their protection, such as adequate nutrition, access to quality education and leisure, care, physical and psychological medical care and security.

Report of the Working Group on Arbitrary Detention, 'Detention of immigrants in an irregular situation', A/HRC/13/30, 18 January 2010.

58. The Working Group is fully aware of the sovereign right of States to regulate migration. However, it considers that immigration detention should gradually be abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.

59. If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation. The Working Group is concerned about recent developments in some States, which have undertaken criminalization efforts.

60. The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort.

Instrument

Key text

UN Special Procedures and Mandate Holders UN Special Representative of the Secretary-General (SRSG) on Violence Against Children

Annual Report of the Special Representative of the Secretary-General on Violence against Children to the Human Rights Council, A/HRC/31/20, 5 January 2016.

23. The aims with regard to such children [deprived of liberty] must be to pursue the best interests of the child, prevent deprivation of liberty and promote alternatives to detention

Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, A/HRC/21/25, 27 June 2012.

67. There is an urgent need to strengthen national child protection systems that can effectively ensure that children's rights are safeguarded instead of perpetuating the criminalization of children. States should act to prevent the criminalization and penalization of children and reduce the number of children deprived of liberty, including through:

(a) decriminalizing "status offences", such as begging or loitering; preventing the detention of unaccompanied migrant children and asylum seekers;

Annual report of the Special Representative of the Secretary-General on Violence against Children to the Human Rights Council, A/HRC/16/54, 28 February 2011.

97. Marginalized children, including those living in poverty, migrants and asylum-seekers face risks of physical, psychological and sexual violence, are denied access to legal assistance, or placed in detention instead of benefiting from adequate care arrangements. Frequently considered the first option rather than a measure of last resort, the deprivation of liberty remains a reality for thousands of children.

Annual report of the Special Representative of the Secretary-General on Violence against Children to the General-Assembly, A/65/262,9 August 2010.

82. Marginalized children, including migrant and asylum-seeking children, are often subject to physical, psychological and sexual violence, denied access to legal assistance and placed in detention as a substitute for care arrangements. Thousands of children are subjected to deprivation of liberty, frequently used as a first option rather than a measure of last resort; they risk torture, abuse and humiliating treatment

UN Agencies

UN High Commissioner for Human Rights (OHCHR)

OHCHR, 'Situation of Migrants in Transit', A/HRC/31/35, 11 March 2016.

43. Children are often detained along with unrelated adults or arbitrarily separated from their family members. While there is a lack of data on how many children are detained globally, since many countries do not keep or release relevant data, the Global Campaign to End Immigration Detention of Children estimates that hundreds of thousands of children are currently detained for immigration purposes.

44. According to the Committee on the Rights of the Child, detention of a child owing to his or her or the parent's migration status always contravenes the best interest of the child. The Committee has called upon States to expeditiously and completely cease the detention of children on the basis of their immigration status.

67. Recommendations:

The High Commissioner recommends that States and other stakeholders as relevant, should:

(f) Guarantee the human rights of all migrant children in transit and ensure that they are treated as children first and foremost and, in that regard, provide guidance on the operationalization of the principle of the best interests of the child for migrant children in transit;

(h) Make targeted efforts to end immigration detention of migrants in transit, by, for example, establishing a presumption against such detention in law; expeditiously ending immigration detention of all children, regardless of status; and implementing non-custodial, community-based alternatives to detention as a matter of priority;

OHCHR, 'Recommended Principles and Guidelines on Human Rights at International Borders', A/69/277, 7 August 2014.

Guideline 8: Avoiding Detention

States and, where applicable, international and civil society organizations, should consider:

6. Ensuring in legislation, policy and practice that children are never detained on the basis of their or their parents' migration status, irregular entry or stay including through release or, where appropriate, adopting human rights based, non-custodial, community-based alternatives to detention in accordance with the best interests of the child.

OHCHR, 'Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration, A/HRC/15/29, 5 July 2010.

3. The outcome document of the special session of the General Assembly on children, A world fit for children, pledged to build "a world in which all girls and boys can enjoy childhood ... where their safety and well-being are paramount and where they can develop in health, peace and dignity". Yet, to many migrant children, these laudable goals will sound hollow. Often the object of suspicion, neglect and abuse, children are locked up in immigration detention centres, denied access to essential services because of their or their parents' status and subjected to the same regimes of criminalization as adult migrants.

50. The absence of a child and adolescent perspective within migration-related detention policies means that children are often treated, and detained, as adults, including in punitive detention meant to deter future irregular arrivals. In some situations, children are placed in immigration detention as a substitute for care arrangements.

51. Children in immigration detention are often exposed to severely inadequate conditions, including deplorable living conditions, lack of adequate medical care (including psychological care), physical and sexual abuse and violence, overcrowding and inadequate nutrition. They can be detained along with unrelated adults, or arbitrarily separated from their parents or other family members. While all migrants can be detained in inappropriate facilities, such as prisons which house convicted criminals, children who are detained in immigration detention in addition rarely have access to adequate education, play and leisure facilities, and staff who are trained to respond to the specific needs of migrant children. Children in immigration detention will often be traumatized and have difficulty understanding why they are being "punished" despite having committed no crime.

52. International law provides that the detention of children, including children in the context of migration, should generally be avoided. The Special Rapporteur on the human rights of migrants has affirmed that it is never in the best interests of children to be detained. Children should not be detained based on their migratory status or irregular entry to the country.

54. State authorities seeking to uphold the principle of family unity in situations of irregular migration should seek to address the situation of parents and families in ways that do not contemplate the detention of migrant children. The principle to be applied in such circumstances should be "care" rather than a punitive or disciplinary approach, and adequate alternatives to detention, such as community-based and casework-oriented models, should be contemplated in the first instance.

Instrument

Key text

UN Agencies UN Children's Fund (UNICEF)

UNICEF, Call for Action: Protecting of the rights of refugee and migrant children arriving in Europe, 2016.

Priority 2: No detention of children due to their migration status Children should not be arrested and detained because of their migration status. Any kind of center established along the route, in the context of hotspot approach, as first reception center, or as accommodation center for migrant and refugee children pending return, should be an open center. In case the child is with his/her parents, the entire family should benefit from these alternatives.

UN High Commissioner for Refugees (UNHCR)

UNHCR, Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019, 2014.

Goal 1: End the detention of children

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.

Guideline 9: The special circumstances and needs of particular asylum-seekers must be taken into account.

51. [Children] should in principle not be detained at all.

52. Overall an **ethic of care** — and not enforcement — needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the [child's migration status].

54. As a general rule, **unaccompanied or separated children** should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child's proper development (both physical and mental) while longer term solutions are being considered. A primary objective must be the best interests of the child.

57. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.

UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999.

Guideline 2: General Principle.

As a general principle asylum-seekers should not be detained.

Guideline 6: Detention of Persons under the Age of 18 years.

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, minors who are asylum-seekers should not be detained.

...

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents.

Executive Committee of the High Commissioner's Programme (ExCom) ExCom Conclusion No. 85 (XLIX), 9 October 1998.

(dd). Deplores that many countries continue routinely to detain asylum seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

Regional Human Rights Bodies Inter-American Court of Human Rights (IACtHR)

Advisory Opinion OC-21/14, 'Rights And Guarantees of Children in The Context of Migration and/or in Need of International Protection', 19 August 19 2014.

154. The Court finds that the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order. [...] The deprivation of liberty of a child in this context can never be understood as a measure that responds to the child's best interest.

155. In view of the special condition of vulnerability of child migrants in an irregular situation, States are obliged [...] to choose measures that promote the care and well-being of the child to ensure its comprehensive protection, rather than the deprivation of her or his liberty.

158. In the case of children who are with their parents, keeping the family together owing to the child's best interest does not represent a sufficient reason to legitimate or justify the exceptional admissibility of the deprivation of liberty of children together with their parents. [...] To the contrary, when the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.

Vélez Lóor V. Panama,
Inter-American Court of
Human Rights,
Judgement of
November 23, 2010

Paras. 182-188

188. Based on the foregoing reasons, the Court considers that the application of a heavier sanction than the one stipulated in Article 67 of Decree Law 16 of 1960 violates the principle of legality and consequently Article 9 of the Convention, in conjunction with Articles 1(1) therein, to the detriment of Mr. Vélez Lóor.

169. ...In this case, the Court considers that the purpose of imposing a punitive measure on an immigrant who reenters a country in an irregular manner subsequent to receiving a deportation order cannot be considered legitimate purpose according to the Convention.

171. According to this principle, it is clear that detaining people for non-compliance with migration laws should never involve punitive purposes. Hence, a custodial measure should only be applied when it is necessary and proportionate in the specific case, to the purposes mentioned supra and only for the shortest period of time. Therefore, it is essential that States devise a range of alternative measures¹⁸⁵ that may be effective to accomplish these purposes. Consequently, migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary.

Inter-American Commission on Human Rights (IACHR)

Human Rights Situation
of Refugee and Migrant
Families and
Unaccompanied
Children in the United
States of America
(2015)

224. With regards to the regime of arbitrary and automatic detention (as there is no substantive criteria being applied nor an individualized analysis of the need to detain) the Commission considers that this practice amounts to a violation of the right to personal liberty, Article I of the American Declaration, and of the principle of the non-deprivation of the liberty of children

230: The IACHR recommends to the United States that it:

1. *End the practice of arbitrary immigration detention of families, which is being applied automatically to families in an irregular migratory situation crossing the border for whom there is space at a family immigration detention center.* The State must conduct individualized assessments of the need to detain, provide a written decision at the conclusion of the assessment with the justifications for detention clearly spelled out, and provide for review of the legality of the detention as soon as practicable with periodic reviews of its continued need. In such individualized assessment, the application of alternatives to detention must be seriously considered and attempted before resort to immigration detention

2. *Desist from creating new family immigration detention centers and implement alternatives to detention. The Commission salutes the United States' closure of the immigration detention centre in Artesia, New Mexico and would welcome the expanded use and implementation of alternatives to detention.*

Report on Immigration
in the United States:
Detention and Due
Process (2010)

51. Under international standards, unaccompanied minors ought not to be detained either. In its Advisory Opinion on the Juridical Condition and Human Rights of the Child, the Inter-American Court adopted the principle of the "best interests of the child," established in the United Nations Convention on the Rights of the Child as the primary consideration when a member State is contemplating a measure that might affect minors under its jurisdiction. The principle of exceptionality governing deprivation of liberty in general and deprivation of liberty for immigration violations, carries even more weight when children are involved. Only in the most extreme cases could such a measure be justified.

Instrument

Key text

Regional Human Rights Bodies Parliamentary Assembly of the Council of Europe (PACE)

Recommendation 2056 (2014) on 'The alternatives to immigration detention of children', 3 October 2014.

1. The Parliamentary Assembly refers to its Resolution 2020 (2014) on the alternatives to the immigration detention of children.
2. The Assembly stresses that States which practice the immigration detention of children contravene the principle of the best interests of the child and violate children's rights. They deprive children of their fundamental right to liberty and put them at risk of severe and lifelong physical, mental and developmental harm. They may also violate other fundamental child rights, such as the rights to family, health, education and play. The Assembly considers that in order to stop this inhuman practice, the Council of Europe has an important role to play in promoting alternatives to the immigration detention of children.

Resolution 2020 (2014) on 'The alternatives to immigration detention of children', 3 October 2014.

4. Detention, even for very short periods of time and in relatively humane conditions, has severe negative short- and long-term effects on children's physical and mental health. Children in immigration detention are particularly vulnerable to the negative effects of detention and can be severely traumatised. Also, there is a high risk of detained children being subjected to different forms of violence.

9(1). It is never in the best interests of a child to be detained on the basis of their or their parent's immigration status.

9(2). [States must] introduce the prohibition of the detention of children for immigration reasons into this legislation, if it has not yet been done, and ensure its full implementation in practice

9(3). [States must] refrain from placing unaccompanied or separated children in administrative detention.

9(7). [States must] adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved.

Statement by Ms. Doris Fiala, General Rapporteur on the 'Parliamentary Campaign to End Immigration Detention of Children', 23 April 2014.

There is the need to raise awareness in the Council of Europe Member States on the problem of immigration detention of children. We have the obligation to expeditiously and completely cease this serious violation of children rights in compliance with the provisions of the UN Convention on the Rights of the Child.

Instrument

Key text

Regional Human Rights Bodies

Commissioner for Human Rights of the Council of Europe

Council of Europe's Commissioner for Human Rights, Nils Muižnieks, Report following his visit to Belgium from 14 to 18 September 2015.

48. The Commissioner calls on the Belgian authorities to refrain from resuming the practice of detaining families with children. Like the Belgian national human rights institutions, he firmly believes that a prohibition of administrative detention of all children on grounds of their or their parents' migratory status should be enshrined in law. He draws attention to the view of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, that deprivation of liberty of children based exclusively on migration-related considerations "can never be construed as a measure that complies with the child's best interest", as protected under Article 3 of the UN Convention on the Rights of the Child. Hence, he invites the authorities to maintain and further develop existing alternative arrangements to detention of families with children in closed facilities.

Council of Europe's Commissioner for Human Rights, Nils Muižnieks, Report following his visit to Bulgaria, 9 – 11 February 2015.

141. The Commissioner reiterates that migrant children, including those accompanied by their parents, should not be detained under any circumstances as detention is not in their best interests.

Statement by the Council of Europe's Commissioner for Human Rights, Nils Muižnieks, 'Protecting Children's Rights: Europe should do more', 18 November 2014

I strongly believe that migrant children, whether travelling alone or with their families, should never be detained.[...] Children should also not be detained with their family in order to keep the family together.[...] States should expeditiously and completely end immigration detention of children, as advocated by the UN Committee on the Rights of the Child.[...] Alternatives to detention should be put in place, on the model of existing good practices.

Council of Europe's Commissioner for Human Rights, Nils Muižnieks, Report following his visit to the Netherlands 20 – 22 May 2014.

101. As a first step in this direction, the Dutch authorities should stop the detention of all asylum seeker children. The Commissioner reiterates that any decision taken in the field of immigration detention concerning a child with or without his/her family should be taken in full compliance with the UN CRC and in particular Article 3 under which the best interests of the child shall be a primary consideration in all actions. Moreover, asylum seekers and immigrants belonging to vulnerable groups should not be kept in administrative detention according to the Commissioner.

Instrument

Key text

Regional Human Rights Bodies European Court of Human Rights (ECtHR)

Popov c. France,
Requêtes nos 39472/07
et 39474/07, Council of
Europe: European
Court of Human Rights,
19 January 2012.

91. The child's extreme vulnerability is the decisive factor and [the child's best interest] takes precedence over considerations relating to [migration] status.

European Parliament

European Parliament
resolution on the situa-
tion of fundamental
rights in the European
Union (2013-2014)
(2014/2254(INI)), 8
September 2015.

122. [The Parliament] condemns the indiscriminate recourse of unlawful detention of irregular migrants, including asylum seekers, unaccompanied minors and stateless persons.

155. [The Parliament] calls the Commission to assess the impact of detention policies and criminal justice systems on children.

European Parliament
resolution on undocu-
mented women mi-
grants in the European
Union (2013/2115(INI)),
4 February 2014.

29. Calls on the Commission to ensure that the standards established by the UN Convention on the Rights of the Child remain at the heart of any action on child rights, and therefore calls on the Member States to cease, completely and expeditiously, the detention of children on the basis of their immigration status, to protect children from violations as part of migration policies and procedures and to adopt alternatives to detention that allow children to remain with family members and/or guardians;

European Parliament
resolution on the situa-
tion of unaccompanied
minors in the EU
(2012/2263(INI), 12
September 2013.

13. [The Parliament] calls on the Member States to comply strictly and without fail with the fundamental obligation never to place a minor in detention; [...] urges the Member States also to place minors in homes specifically for children, taking into consideration their age and gender.

To contact the IAWG, including media inquiries, please contact the Chair,
Ben Lewis, at blewis@idcoalition.org.