

UNHCR’s position regarding the detention of refugee and migrant children in the migration context.

The purpose of this note is to provide clarification about UNHCR’s position regarding the detention of children, unaccompanied, separated or in families for immigration related purposes. The scope of this note includes refugee and asylum-seeking children as well as migrant children.

UNHCR’s position on the detention of children in the immigration context is developed in the 2012 *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Detention Guidelines)¹ it has been reiterated and expanded in other recent policy papers on the issue; in particular, in UNHCR’s *Global Strategy Beyond Detention 2014-2019* (Global Strategy)², and was clearly framed by the High Commissioner on occasion of the celebration of CRC’s 25th Anniversary in 2014: “The practice of putting children in immigration detention is in violation of the CRC in many respects and it should be stopped,” he said.³

As affirmed by Art. 3 of the CRC, the best interest of the child shall be a primary consideration in all the measures affecting the child,⁴ overall an ethic of care, and not an enforcement, needs to govern the actions taken, since the extreme vulnerability of minors.⁵ A best interests’ assessment procedure should be conducted, which may be in the context of the existing child protection system of the States, where applicable. The principles of minimal intervention and the best interest of the child should govern any measures taken by States. Consequently, unaccompanied or separated children should not be detained; instead, appropriate care arrangements remain the best measure, as liberty and freedom of movement of children should be always the preferred solution.⁶

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.⁷ Furthermore, children should never be criminalised or subject to punitive measures because of their parents’ migration status.⁸ Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities.

¹ Available at: <http://www.refworld.org/docid/503489533b8.html>. The Detention Guidelines further restate, in paragraph 51 and successive, the provisions of the Convention on the Rights of the Child (CRC) regarding international obligations in relation to children and the guiding principles for their protection.

² All detention related documents, policies and tools developed by UNHCR (and jointly with partners) under the framework of the Global Strategy can be found in: <http://www.unhcr.org/detention.html>. Further documents on UNHCR’s position in relation to the Detention of persons of concern can be found in: <http://www.refworld.org/detention.html>. For UNHCR staff only, please refer for further guidance to UNHCR’s Protection Manual, sections B9 and B10.

³ UN Refugee Agency calls on States to end the immigration detention of children on the 25th anniversary of the Convention on the Rights of the Child, November 2014, available at <http://www.unhcr.org/news/press/2014/11/546de88d9/un-refugee-agency-calls-states-end-immigration-detention-children-25th.html>

⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 51 available at: <http://www.refworld.org/docid/503489533b8.html>

⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 52 available at: <http://www.refworld.org/docid/503489533b8.html>

⁶ Executive Committee of the High Commissioner’s Programme Standing Committee, para F, EC/66/SC/CRP.12, 3 June 2015

⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 54-57 available at: <http://www.refworld.org/docid/503489533b8.html>

⁸ See, *A home away from home for refugee and migrant children*, Advocacy Brief, UNICEF, August 2016, available at: http://www.unicef.org/ceecis/A_home_away_from_home_29_08_2016.pdf

This is particularly critical as recent studies⁹ have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development. Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting.¹⁰ There is indeed strong evidence that detention has a profound and negative impact on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families. The risk of exposure to others forms of harm, including sexual and gender-based violence, are also significant in many detention contexts. Furthermore, there is no evidence that detention of children serves the aim of deterring refugee or asylum-seeker movements or irregular migration.

In this context, UNHCR's position is that *children should not be detained*¹¹ for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and *detention is never in their best interests. Appropriate care arrangements and community-based programmes* need to be in place to ensure adequate reception of children and their families.

Therefore, UNHCR acknowledges and welcomes the varied State practice in providing care arrangements and alternatives to detention for children and families and has compiled a number of examples in its Options Paper 1: *Options for governments on care arrangements and alternatives to detention for children and families*.¹² In particular, placement options within the community, with proper case management support, can further strengthen compliance with asylum and migration processes and foster integration prospects, where relevant.¹³

UNHCR's position is in accordance with international standards¹⁴ as stated in, for example:

- UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005 (CRC/GC/2005/6) – paragraph 61 “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.”¹⁵
- UN Committee on the Rights of the Child (CRC), *Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration* – paragraph 78 “Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. 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

⁹ Human Rights Watch (HRW) has documented, over more than 10 years in Europe and beyond, serious violations of children's rights arising from immigration detention of children; highlighting that children may be arbitrarily detained, held in cells with unrelated adults, and subjected to brutal treatment by police, guards and other authorities and are often held in poor conditions that fall far short of international standards governing appropriate settings for children deprived of their liberty. See: <https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.

¹⁰ For more information on the negatives effects of detention on children, see: <http://endchilddetention.org/impact/> and also <http://www.fmreview.org/detention/farmer.html>.

¹¹ See Detention Guidelines, paragraph 51. Please note that no other qualifications should be added to the baseline position of non-detention of children for immigration related purposes. References to the application of Art.37(b), “exceptional circumstances / measure of last resort”, are not appropriate for cases of detention of any child for immigration related purposes. It is understood from the commentaries of the CRC (see below), that while Art. 37 (b) may apply in other contexts (such as in cases of children in conflict with the law – see CRC/C/GC/10 from 2007), its application to detention in the immigration context would be in conflict with the principle of best interests of the child.

¹² Available at: <http://www.refworld.org/docid/5523e8d94.html>

¹³ For further reference please see Summary of Deliberations, Second Global Roundtable on Reception and Alternatives to Detention, April 2015, Toronto, Canada, at: <http://www.unhcr.org/55df05769.html>

¹⁴ At regional level, this position has been recently reaffirmed by the Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion (OC-21/14) on the “Rights and guarantees of children in the context of migration and/or in need of international protection”, see paragraph 6, available at: http://www.corteidh.or.cr/docs/opinion/es/seria_21_eng.pdf

¹⁵ Available at: <http://www.refworld.org/docid/42dd174b4.html>

interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”¹⁶

- UN Special Rapporteur on Torture, *Thematic Report on torture and ill-treatment of children deprived of their liberty*, 5 March 2015 (A/HRC/28/68) – paragraph 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 [...] The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, 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.”¹⁷

UNHCR will continue to advocate for the ending of child detention as reflected in the first goal of its Global Strategy and to support governments in developing care arrangements and alternatives to detention for children and families in the asylum and migration context.

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¹⁶ Available at:

<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>

¹⁷ Available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>