International Detention Coalition

Human rights for detained refugees, asylum seekers and migrants

A REVIEW OF LAWS THAT PROHIBIT CHILD IMMIGRATION DETENTION

Never in a child's best interests

June 2017, No. 2

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KEY POINTS

- The UN Committee on the Rights of the Child has clarified that immigration detention is never in the best interests of the child and will always constitute a child rights violation
- Despite this, millions of children are impacted by immigration detention practices each year for reasons related to their, or their parents', irregular migration status
- This paper briefly explains the child rights framework as it applies to children in the context of migration, and reinforces that no child or family should ever be held in immigration detention
- The paper then provides positive examples of domestic laws from more than 15 countries that prohibit the detention of children and families for reasons relating to their migration status
- The paper demonstrates that robust legal protections for migrant children are an achievable and effective alternative to child immigration detention

EXECUTIVE SUMMARY

This briefing paper reviews the applicable human rights standards regarding child immigration detention, highlighting expert clarifications that the detention of children in the context of migration is never in their best interests and always a child rights violation. The paper then reviews the ways in which this standard is implemented in legal frameworks by describing laws in over 15 countries that establish safeguards against child immigration detention.

Around the world, millions of children are affected by immigration detention each year. Whether detained alone, or alongside a parent, carer or family member, all of these children experience unnecessary harm and suffering, no matter the conditions of their detention. The impacts can last a lifetime.

The UN Committee on the Rights of the Child (CRC Committee) has made it clear that immigration detention is never in the best interests of the child and therefore always a child rights violation. While the Convention on the Rights of the Child allows for very limited use of detention of children in some contexts -such as criminal juvenile justice - whenever the CRC Committee has addressed immigration detention for children, whether accompanied or unaccompanied, their guidance has been clear: detention is never an acceptable practice.

Numerous human rights experts have reinforced this guidance including, among others, the Office of the High Commissioner for Human Rights (OHCHR), the UN Special Rapporteur on the Human Rights of Migrants, the UN Working Group on Arbitrary Detention, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Children's Fund (UNICEF), and the UN High Commissioner for Refugees (UNHCR). Additionally, this guidance is increasingly being taken up at the regional level. For example, both the Inter-American Court of Human Rights (IACtHR) and the Council of Europe, have found immigration detention is not consistent with a child's best interests.

The introduction of these protections into domestic law, policy and practice is an urgent priority. Every possible step should be taken to ensure children are not exposed to the unnecessary harms of detention. Children who cross borders are first and foremost children, and should be afforded the protections that all children deserve. Both governments and civil society have a responsibility to develop and expand alternatives to detention and reception options for children.

I. BACKGROUND

More and more children are on the move. In 2016, there were 31 million children living outside their country of birth, and this number is only set to grow.[1] Children migrate for many reasons, including: as regular visa holders, often as part of a family unit; in order to be reunited with a parent or family member; to escape persecution, endemic violence or extreme poverty; to escape conscription into the armed forces or forced marriage; or as a result of being trafficked against their will into forced labour or commercial sex work.

Like adults, children who cross borders are subject to migration rules and regulations. However, the best interests of the child must always be a primary consideration, and special procedures may be required to ensure that a child is properly cared for and protected while any migration matters are resolved. Unfortunately, many countries have not introduced the appropriate standards to safeguard children during the application of migration rules and regulations, including the proper standards for safeguarding children from the use of immigration-related detention.

As a result, millions of children are affected by immigration detention every year. Many children are detained themselves, while others are impacted by the detention of their parents or guardians. In practice, States detain children for a number of reasons (which do not require detention), including for health and security screening, to verify identity, and to facilitate removal from the territory. Children are also detained when they are incorrectly classified as an adult or, in some cases, when their age is contested. Children can be detained alongside family members, or detained on their own when unaccompanied or separated from family members.

Children are particularly vulnerable to abuse and neglect in immigration detention facilities, either at the hands of other detainees or of detention guards and staff.[2] Children can find it difficult to comprehend the situation at hand, and are less able to advocate for their own rights. Children who are unaccompanied or separated are particularly vulnerable if they do not have an independent guardian to represent their best interests.

Immigration detention has "undeniable immediate and long-term mental health impacts on asylum-seeking children and families."[3] The effects on children include heightened rates of suicide, suicide attempts and self-harm, mental disorder, and developmental problems, including severe attachment disorder. Symptoms include insomnia, nightmares, mutism and bed-wetting. Further, detention impacts on the independence and health of parents, affecting their ability to fulfil their parental duties.[4] Due to the fact that children

1 UNICEF (2016) *Uprooted: The growing crisis for refugee and migrant children*. UNICEF: New York p. 6.

2 Corlett, D., et al. (2012) *Captured childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention.* Melbourne, International Detention Coalition. Available at: www.idcoalition.org/publication/captured-childhood/

3 Dudley, M., et al. (2012) "Children and young people in immigration detention." *Current Opinion in Psychiatry*, 25(4): 285-292.

4 Hamilton, C., K. Anderson, R. Barnes, and K. Dorling (2011)

are still growing and developing, even very short periods of detention can compromise a child's lifelong mental and physical wellbeing and affect them for extended periods after release.[5]

II. THE CHILD RIGHTS FRAMEWORK

The UN Convention on the Rights of the Child (CRC) sets forth a number of fundamental rights which all children are entitled to, irrespective of their migration or residency status.[6] The CRC is the most widely ratified Convention in the world and is considered an authoritative source of child rights guidance.

Children are children first and foremost

The child's right to non-discrimination is a fundamental and overarching principle enshrined in Article 2 of the Convention:

> *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

This principle establishes that children are children first and foremost and, as such, all CRC protections apply without distinction or discrimination. Children who are non-citizens without a recognised migration or residency status are to be treated in an equitable manner to children who are citizens. Importantly, limited resources are not an adequate justification for discrimination against any child.[7]

The best interests of the child

Article 3 of the Convention enshrines the principle of the best interests of the child, which – like the right to non-discrimination – is a foundational and overarching child right that is foundational to the enjoyment of other rights enshrined in the Convention:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The Committee on the Rights of the Child (CRC Committee) – the body of 18 independent experts that monitors implementation of the Convention by its State parties — has consistently and clearly stated that a child's best interests should supersede other considerations of the State, including administrative considerations such as immigration control. In General Comment No. 6, the CRC Committee stated:

> *The principle of the best interests therefore requires States to take a clear and comprehensive assessment of the child's age and identity, including their nationality, upbringing, ethnic, cultural and linguistic background, as well as any particular vulnerabilities or protection need they may have. The child's best interests must supersede state aims, for example, of limiting irregular migration.*[8]

Similarly, in the European Court of Human Rights decision of *Popov v. France*, when applying the principle of the best interests of the child to State decisions around detention and migration control, the Court found that:

> *The child's extreme vulnerability is the decisive factor and [the child's best interest] takes precedence over considerations relating to [migration] status.*[9]

The child's right to liberty

Article 37 of the Convention enshrines the child's right to liberty and freedom from arbitrary detention, in addition to a number of other fundamental norms of international law enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights:

Administrative detention of children: A global report. New York: UNICEF. pp. 95-96.

5 No Child in Detention Coalition (2014) *Dad, have we done something wrong? Children and parents in immigration detention*. No Child in Detention Coalition. See also Cleveland, J. and C. Rousseau (2013) "Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada." *Can J Psychiatry* 58(7): 409-416.

6 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577. Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

7 Child Rights Information Network (2009) *Guide to non-discrimination and the CRC*. London: CRIN.

8 UN Committee on the Rights of the Child, *General Comment No. 6 (2005) on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, para. 86.

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

> *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*[10]

This article is not specific to immigration detention, but rather speaks to the general use of deprivation of liberty for any child, and sets forth a number of minimum human rights protections for children in the context of deprivation of liberty, including the prohibition on torture, the prohibition on capital punishment, and rights to habeas corpus.

When the CRC Committee has specifically addressed the situation of children deprived of their liberty for migration-related reasons, it has consistently made clear that any such detention of children is prohibited as being in conflict with the principle of the best interests of the child articulated in Article 3 of the Convention. In the Committee's General Comment No. 6, they stated:

> *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.*[11]

Later, when the Committee addressed the human rights of all children — whether accompanied or unaccompanied — in the context of migration, they stated:

> *Children should not be criminalised 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 interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.*[12]

The child's right to family

Further, Article 9 of the Convention enshrines the child's right to a supporting and caring family environment, including the right to at all times remain with one's family unless there are well-established reasons for legal separation to ensure the child's protection and best interests, interests, such as in cases involving abuse or neglect of the child by the parents. Further, the definition of family is not limited to biological family members or any single traditional definition of family, with the CRC Committee stating:

> *The term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.*[13]

III. SUMMARY: IMMIGRATION DETENTION IS ALWAYS A CHILD RIGHTS VIOLATION

In applying these child rights principles to the use of detention for migration-related reasons, it becomes clear that such deprivation of liberty is categorically prohibited under the CRC. While deprivation of liberty of children may be a necessary measure of last resort that is consistent with the child's best interests in exceptional circumstances within the contexts of criminal juvenile justice or institutional care of children, such deprivation of liberty is never in the best interests of the child when used solely for the purposes of administrative immigration enforcement.

The UN Special Rapporteur on Torture, Juan E. Mendez, found that immigration detention is not only contrary to the best interests of the child, but may even constitute a particular form of torture or ill-treatment of children:

> *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 and degrading treatment of migrant children.*[14]

Numerous other UN and regional human rights experts have now reinforced this categorical

10 UN General Assembly Convention on the Rights of the Child, Art. 37(b).

11 UN Committee on the Rights of the child, General Comment No. 6 (2005) op cit., para 61.

12 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, para. 78-79, accessed 8 June 2016 at www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2012.aspx.

13 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para 1), CRC/C/GC/14, para. 59.

14 UN General Assembly Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 5 March 2013 para 80.

prohibition on child immigration detention including, *inter alia*, OHCHR, the UN Special Rapporteur on the Human Rights of Migrants, the Human Rights Commissioner for the Council of Europe, UNICEF and UNHCR.[15]

The CRC Committee's opinion has also informed regional norms and standards. For instance, the Parliamentary Assembly of the Council of Europe has adopted a resolution affirming that it "is never in the best interest of a child to be detained on the basis of their or their parent's immigration status" and calling upon States to:

> *Introduce the prohibition of the detention of children for immigration reasons into their legislation, if it has not yet been done, and ensure its full implementation in practice.* [16]

Similarly, the European Parliament has adopted several resolutions condemning the recourse to detention of child migrants and calling upon European Union 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.*[17]

Finally, the Inter-American Court of Human Rights reaffirmed the principle of the non-detention in its important Advisory Opinion on the "Rights and Guarantees of Children in the Context of Migration and/ or in Need of International Protection", stating:

> *[T]he 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. Adding to this, the Court finds that 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. Thus, the Court considers that measures exist that are less severe and that could be appropriate to achieve such objective and, at the same time, satisfy the child's best interest.* [18]

IV. THE CHILD'S BEST INTERESTS NOT TO BE DETAINED EXTENDS TO THE ENTIRE FAMILY

The CRC furthermore protects the child's right to family and makes clear that children should never be separated from their parents or guardians unless it is considered in the child's best interests to do so.[19]

For this reason, when a child's parent or guardian is at risk of immigration detention, the child's right to liberty extends to the entire family. This has been asserted by, *inter alia*, the CRC Committee,[20] the UN Special Rapporteur on the Human Rights of Migrants,[21] and the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[22] As concluded by the Inter-American Court of Human Rights (IACtHR):

> *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.*[23]

As a result, States cannot detain children for the purposes of keeping the family together. The IACtHR has established that family unity is not a sufficient reason to make an exception to allow

15 For a summary of relevant standards and recommendations see: Inter-Agency Working Group to End Child Immigration Detention (2016) *Summary of normative standards and recommendations on ending child immigration detention*. Available at: www.iawgendchilddetention.org/wp-content/uploads/2016/11/IAWG_Child-Detention-Standards_Aug-2016_FINAL.pdf

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

17 *European Parliament Resolution on undocumented women migrants in the European Union,* 2013/2115 (INI), 4 February 2014.

18 Inter-American Court of Human Rights, *Advisory Opinion OC-21/14 of August 19, 2014, 'Rights and Guarantees of Children in the Context of Migration and/ or in Need of International Protection'*, para. 154.

19 UN General Assembly Convention on the Rights of the Child, op cit. see Articles 3 and 9.

20 Committee on the Rights of the Child *2012 Day of General Discussion* op cit.

21 UN General Assembly, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, 2 April 2012, A/HRC/20/24, para. 40, Accessed 8 June 2016 at www.refworld.org/docid/502e0bb62.html

22 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 5 March 2015, para, 80. Accessed 30 May 2017 at antitorture.org/wp-content/uploads/2015/03/Children_Report.pdf

23 Inter-American Court on Human Rights (IACtHR) *Advisory Opinion OC-21/14*, para. 158. Accessed 21 June 2015 at www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf

children to be detained due to the serious negative impacts on a child's emotional development and physical wellbeing.[24] This subsequently requires States to design, adopt and implement alternatives to detention in order to preserve and maintain the family unit and to promote the protection of the family.[25]

V. DOMESTIC LEGAL SAFEGUARDS AS AN ALTERNATIVE TO CHILD IMMIGRATION DETENTION

A number of countries have introduced the prohibition of the immigration detention of children into their domestic legislation.

These protections are established in different ways within domestic legal frameworks. In some cases, these protections are provided for in laws relating to immigration detention. In other cases, these protections are provided for in laws relating to the rights and treatment of children.

Finally, some countries specify which groups of children are to be protected from immigration detention. For instance, there are differences in the age at which a child becomes an adult (or reaches 'majority'), with implications for the application of immigration detention law.

For the purposes of this paper, the laws have been categorised into the following:

- all children
- children under a certain age
- children who are unaccompanied or separated
- children who have lodged an application for asylum

Each section presents a variety of examples of the laws and regulations by which children are protected from being confined in an immigration detention facility.

VI. BLANKET PROHIBITIONS ON CHILD IMMIGRATION DETENTION

A number of countries have established a prohibition on immigration detention of all children, without restriction. Within this group, we have included countries that prohibit immigration detention of children; countries that only provide for the detention of children in relation to criminal matters; and countries that restrict the use of immigration detention to adults.

Costa Rica
Costa Rica's immigration law recognises that all children have a right to certain protections in line with the Convention of the Rights on the Child and the UN 1951 Refugee Convention. Specifically, Decree No. 36831-G on the Regulation of Refugees prohibits the detention of all children regardless of whether they are accompanied or unaccompanied.[26]

Article 47 of the decree states that:

> *Under no circumstances shall minors be detained, be they accompanied, unaccompanied or separated.*[27]

Croatia
In Croatia, the only law that enables a minor to be detained relates to the incarceration of minors who have been convicted of a criminal offence. There are therefore no legal provisions allowing for the detention of minors for reasons relating to their migration status.

Ecuador
In January 2017, the Ecuadorian government approved a new *Human Mobility Law* that directly prohibits immigration detention of children.[28] The law also mandates that the right to personal liberty be protected for parents or caregivers, implementing alternatives for the family, if it is in the best interests of the child to maintain family unity.

Article 2 of the law states:

> *At no time may children be detained for immigration infractions. When the best interests of the child requires that family unity be maintained, the obligation to protect personal*

24 IACtHR *Advisory Opinion OC-21/14*, op cit para. 158.

25 IACtHR *Advisory Opinion OC-21/14*, op cit para. 158.

26 Centre for Gender & Refugee Studies (2014) *Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys*. San Francisco: University of California. Accessed 5 May 2017 at www.refworld.org/pdfid/54fd6f204.pdf

27 Unofficial translation. *Reglamento de Personas Refugiadas, 209 La Gaceta Nº 36831-G (Sept. 28, 2011)* (Costa Rica) at Article 47. Available at: www.refworld.org/docid/4fffe64d2.html

28 *Ley Orgánica de Movilidad Humana Ecuador, Suplemento – Registro Oficial Nº 938*. Accessed at: www.refworld.org/pdfid/58a41f864.pdf

> *freedom should be extended to the child's parents or caregivers.*[29]

Ireland

Ireland's *Immigration Act*, 1999 outlines the grounds for detention and removal of non-nationals. Section 5 (4)(a) of that Act specifies that a child cannot be detained under these provisions, stating:

> *[detention pending deportation] shall not apply to a person who is under the age of 18 years.*[30]

Further, Ireland's *International Protection Act 2015* establishes a set of grounds upon which an asylum applicant may be detained. However, children are exempt from these provisions. Specifically, Part 3, Section 20 Subsection (6) of that Act states that:

> *[detention of an asylum applicant] shall not apply to a person who has not attained the age of 18 years.*[31]

Mexico

In December 2015, the Mexican Government issued regulations for its newly enacted Child Rights Law prohibiting the immigration detention of children and adolescents.[32] The regulations require the government to adopt and implement mechanisms to prevent all children from being detained for immigration purposes, including those traveling with their parents or guardians. The regulations provide greater protection than the 2011 Immigration Law, which only prohibited the detention of unaccompanied children.[33]

Specifically, Article 111 of the Regulations for the National Child Rights Law states that:

> *At no time will migrant children or adolescents, regardless of whether or not they are traveling with adults, be deprived of their freedom in Immigration Stations or in any other immigration detention centre.*[34]

The laws relating to immigration detention may now need to be modified to ensure they are consistent with the Child Rights legislation in Mexico.

Panama

Panama's *Decree Law No.3 (of February 22, 2008)* prohibits authorities from holding children under the age of eighteen years in immigration detention centres. Article 93 of the Decree states that the National Immigration Service may operate facilities to detain foreigners who have violated immigration laws. With regards to who may be detained at these facilities, Article 93 stipulates that:

> *Only those over eighteen years of age may be held [in immigration detention centres].*[35]

Minors will instead be placed under the protection of the Ministry for Social Development, and the relevant diplomatic representative or consulate will be contacted.

29 Unofficial translation. L*ey Orgánica de Movilidad Humana Ecuador* op cit.

30 *Immigration Act, 1999* (Ireland). Available at: www.irishstatutebook.ie/eli/1999/act/22/enacted/en/html

31 *International Protection Act 2015* (Ireland). Available at: www.irishstatutebook.ie/eli/2015/act/66/enacted/en/html

32 International Detention Coalition (2015) *Mexico includes non-detention of migrant children in regulations for new child rights law*. 5 December 2015. Available at: idcoalition.org/news/mexico-regulations-for-new-child-rights-law/

33 IDC 2015 *Mexico includes non-detention of migrant children* op cit.

34 Unofficial translation *Reglamento de la Ley General de los Derechos de niñas, niños y adolescents* (Mexico) 02/12/2015. Available at: www.dof.gob.mx/nota_detalle.php?codigo=5418303&fecha=02/12/2015

35 Unofficial translation. *República de Panamá Órgano Ejecutivo Decreto Ley No. 3 (de 22 de febrero de 2008)*. Available at www.acnur.org/t3/fileadmin/Documentos/BDL/2008/6077.pdf?view=1

VII. PROHIBITIONS FOR YOUNGER CHILDREN

The CRC defines a child as any human below the age of 18 years. The examples provided thus far reflect this age in the relevant law prohibiting child immigration detention. This section provides examples of laws that prohibit the detention of a younger group of children.

China
In 2012, the People's Republic of China adopted the new *Exit and Entry Administration Law*.[36] The law came into effect in July 2013. Detention of foreigners is allowed under this law except for certain provisions stated in Article 61 as follows:

> *[D]etention for investigation is not applicable to foreigners … [who] are under 16 years of age or have reached the age of 70.*

This same article also outlines a set of conditions that may be applied to these persons for a period of up to 60 days. It is unclear at this stage how these laws are being implemented.

Switzerland
The Swiss *Federal Act on Foreign Nationals of 16 December 2005* states that children under the age of 15 years cannot be detained in immigration detention.

As stated in Article 80(4) of that Act:

> *In no event may any detention order in preparation for departure, detention pending deportation or coercive detention be issued in respect of children or young people who have not yet attained the age of 15.*[37]

Austria
In 2005, Austria passed legislation that prohibits the detention of minors under the age of 14 years. Section 8, Article 76(1a) of the *Alien's Police Act* states:

> *Minors shall not be held in detention pending deportation.*[38]

The definition of the age of a minor is not referenced in the Aliens' Police Act. This is defined in Section 1 of the *Juvenile Court Act*, which states that minors [unmündiger] are children who have not yet reached the age of fourteen.[39]

Latvia
Latvia amended its *Immigration Law* in May 2014, and the amendments came into force in September of that year. The *Immigration Law* provides for detention for reasons relating to entry and exit;[40] however, minors under the age of 14 cannot be detained under these provisions.

Specifically, Section 51(1) stipulates that:

> *An official of the State Border Guard has the right to detain a foreigner, except a minor foreigner who has not reached the age of 14 years.*[41]

Taiwan
The Immigration Act of Taiwan[42] was significantly amended in 2015 after a judicial ruling in 2013 found that Article 38 of the *Immigration Act* was unconstitutional.[43] Consequently, Article 38(1) was amended to temporarily suspend the detention sanction of an alien who fails under one of several circumstances. The list of circumstances include "chilldren under 12 years old."[44]

36 *Exit and Entry Administration Law of the People's Republic of China*, accessed 12/4/16 www.mps.gov.cn/n16/n84147/n84196/3837042.html

37 *142.20 Federal Act on Foreign Nationals of 16 December 2005.* Accessed at: www.admin.ch/opc/en/classified-compilation/20020232/index.html

38 Unofficial translation *Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (2005 Aliens' Police Act* – Fremdenpolizeigesetz 2005) www.refworld.org/pdfid/46adc4932.pdf; Section 8 amendment at: Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Fremdenpolizeigesetz 2005, www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004441

39 Unofficial translation *Juvenile Court Act* 1988 (*Jugendgerichtsgesetz*) (Austria). Available at: www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00148/fname_455537.pdf

40 We note Austria's 2015 Asylum Law also provides for the detention of asylum seekers on a number of grounds (such as establishment of identity), and the law does not exempt children from this form of detention. Available at: likumi.lv/ta/id/278986-patveruma-likums

41 Unofficial translation Section 51. (1) *Immigration Law* (Latvia), (Imigrācijas likums) likumi.lv/doc.php?id=68522

42 Formally known as the Taiwan Province of China

43 International Detention Coalition (2015) *Children & Pregnant Women No Longer Detained in Taiwan*. 9 February 2015. Available at www.idcoalition.org/news/new-limits-detention-taiwan/

44 Section 38(1) *Immigration Act* January 23, 2015 Republic of China (Taiwan). Available at: www.moi.gov.tw/english/english_law/law_detail.aspx?sn=332

VIII. PROHIBITIONS FOR UNACCOMPANIED OR SEPARATED CHILDREN

A number of countries only prohibit immigration detention for those children who are unaccompanied or separated from their families.

Hungary

Hungary's *Act LXXX of 2007 on Asylum* prohibits the detention of unaccompanied minors.

Section 31/B (2) states that:

> *Asylum detention may not be ordered in the case of an unaccompanied minor seeking recognition.*[45]

Further, Section 31/A 8(c) of the law stipulates that:

> *[Asylum detention] shall be terminated without delay if … it has been established that the detainee is an unaccompanied minor seeking recognition.*[46]

In addition, Section 56 (2) of *Third Country Nationals Act* states that:

> *[T]he detention of a third-country national who is a minor may not be ordered.*[47]

This is subject to a separate clause regarding families with minors. *The Third Country Nationals Act* also provides authorities the ability to place unaccompanied minors in a compulsory place of residence instead of detention.[48]

These protections are likely to be watered down under new laws before the Hungarian Parliament that would see the detention of unaccompanied minors seeking asylum who are over 14 years of age.[49]

Israel

Amendment 3 of Israel's *Prevention of Infiltration Law*[50] establishes a number of grounds for release from on-arrival detention including that:

1. *Due to the infiltrator's age or to his physical condition, his being held in detention is likely to harm his health and there is no other way to prevent this stated harm;*

2. *There are other, special humanitarian grounds from those stated in paragraph (1) justifying the release of the infiltrator with a guarantee, including if as a result of his detainment in detention, a minor will be left unaccompanied;*

3. *The infiltrator is a minor who is unaccompanied by his family members or a guardian*[51]*.*

An Administrative Court decision in April 2013 concluded that the 'special humanitarian grounds' extended to accompanied children. As a result, all children have since been released from on-arrival detention.[52]

In addition, Amendment 5 of the *Prevention of Infiltration Law*, which entered in to force in December 2014, protects all children, including unaccompanied and separated children, from mandatory residence at the Holot facility.[53]

Children accompanied by their mother and/or family remain at risk of detention pending deportation under the law.

Italy

The Italian *Legislative Decree no.25/2008* explicitly prohibits the detention of unaccompanied minors in accordance with international and European Union law. While Articles 20 and 21 of that law outline the

45 Unofficial translation *Act LXXX of 2007 on Asylum* (Hungary). Available at: www.refworld.org/docid/4979cc072.html

46 Unofficial translation *Act LXXX of 2007 on Asylum* op cit.

47 Unofficial translation *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals* (Hungary). Available at: www.refworld.org/pdfid/4979cae12.pdf

48 Unofficial translation Section 62(1)b, *Act II of 2007* op cit.

49 International Detention Coalition (2017) *Hungary to detain asylum seekers – including children*. 14 March 2017. Available at: idcoalition.org/es/news/hungary-to-detain-asylum-seekers-including-children/

50 The Israel law refers to undocumented migrants, including asylum seekers and refugees, as 'infiltrators'.

51 Unofficial translation. *Amendment 3 Prevention of Infiltration (Offences and Jurisdiction) Law Israel*, 5714-1954

52 UNHCR (2016) Progress report. *Progress Report Mid-2016: Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019.* Geneva: UNHCR. pp. 51-52. Available at: www.unhcr.org/protection/detention/57b579e47/unhcr-global-strategy-beyond-detention-progress-report.html

53 Holot is a semi-open facility in the Negev desert used for persons who cannot be returned to their country of origin. The IDC argues this is a form of *de facto* detention due to the remote location of the facility and the effective confinement resulting from regular head counts.

conditions under which an asylum seeker would be detained, Article 26(6) states that:

> *Unaccompanied minors may in no case be held at the facilities of articles 20 and 21.*[54]

The protections for unaccompanied minors were strengthened in March 2017 through the (Zampa) law *Provision of Protection Measures*.[55] This law systematises the Italian approach to responding to unaccompanied minors through measures such as a structured national reception system.

Poland

The *Polish Act of 12 December 2013 on Foreigners* states that unaccompanied minors may not be detained in immigration detention.

Article 88a(1) outlines that detention will apply to a foreigner when they are unwilling to abide by the rules to stay in a guarded centre. However, Section 3 states that:

> *The provision of paragraph 1 shall not apply to: an unaccompanied minor.*[56]

In addition, Article 397 outlines that minors under the age of 15 may not be placed in a guarded facility.

Spain

Unaccompanied minors cannot be detained under Spanish immigration law. Spain's *Organic Law 4/2000, of 11 January, Regarding the Rights and Freedoms of Foreign Nationals Living in Spain and their Social Integration* – amended in 2011 – offers protections to unaccompanied minors and transfers their care to child protection authorities.

Article 62(3) states that:

> *Minors whose cases meet the provisions established for internment shall be placed at the disposition of the competent minor protection agencies.*[57]

IX. PROHIBITIONS FOR CHILDREN SEEKING INTERNATIONAL PROTECTION

Some countries have prohibited the detention of children who are seeking international protection, such as child asylum seekers. An asylum seeker is a third country national or stateless person who has made an application for international protection and is awaiting a final decision in connection with this application.

Cyprus

Article 9ΣΤ(1) of the *Refugee Law* (6(I)/2000) of the Republic of Cyprus prohibits the detention of minors who are seeking asylum.[58]

Although Cyprus law also allow for the detention of children under separate detention provisions (relating to those being removed from the country), since 2014 the government has had a policy not to detain children at all for migration-related reasons, and this has been observed.[59]

Nicaragua

Nicaragua's *Refugee Protection Law* 2008 excludes asylum seekers with special needs from detention, including unaccompanied and separated children.[60] Instead, such children are referred to assistance and support services.[61]

Article 10 of the law states:

> *Asylum seekers with special needs, such as … unaccompanied or separated children … may not be detained and must be immediately referred to an institution that can provide necessary support.*[62]

Such protection from detention is reinforced in Article 219 of the country's *Migration and Foreigners Law* 2008 which states:

54 Unofficial translation *Legislative Decree no. 25 / 2008* ((Italy). Available at: www.camera.it/parlam/leggi/deleghe/08025dl.htm

55 International Detention Coalition (2017) *New Italian law protects unaccompanied migrant and refugee children.* Available at: idcoalition.org/news/italy-child-detention-law-change/

56 Act of 12 December 2013 on Foreigners (Republic of Poland). Available at: ec.europa.eu/anti-trafficking/sites/antitrafficking/files/act_on_foreigners_en_0.pdf

57 Organic Law 8/2000 of 22 December (Spain). Available at: www.refworld.org/pdfid/402237554.pdf

58 Unofficial translation Article 9ΣΤ(1) of the *Refugee Law* (6(I)/2000) of the Republic of Cyprus. Available (Greek language only) www.cylaw.org/nomoi/enop/non-ind/2000_1_6/full.html

59 Personal communication, 24 March 2017. On file with Robyn Sampson.

60 *Nicaragua: Ley No. 655 de 2008, Ley de Protección a Refugiados [Nicaragua]*, 3 June 2008. Available at: www.refworld.org/docid/4884470a2.html

61 UNHCR (2015) *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families.* Available at www.refworld.org/docid/5523e8d94.html

62 Unofficial translation. Article 10. Nicaragua: *Law No. 655. 2008, Ley de Protección a Refugiados*. 3 June 2008. Available at: www.refworld.org/docid/4884470a2.html

> *Refugees and applicants for recognition of the status of Refugee [asylum seekers] are exempt from the application of the provisions on expulsion or deportation, arrest by entry or irregular presence and extradition, according to what is established in Law No. 655, "Refugee Protection Act."*[63]

Turkey

In 2014, Turkey adopted legislation prohibiting the detention of unaccompanied minors seeking international protection. Article 66 specifies that:

> *b) The Ministry for Family and Social Policies shall place unaccompanied children in suitable accommodation facilities, in the care of their adult relatives or, a foster family, taking the opinion of the unaccompanied child into account.*
>
> *c) Children over 16 years of age may be placed in reception and accommodation centres, provided that suitable conditions are available.*
>
> *ç) Siblings shall be accommodated together to the extent possible, taking into account the interest of the children, their age and level of maturity. They shall not be transferred to a different accommodation facility unless compelling [reasons exist].*[64]

X. CONCLUSION

Domestic legal frameworks play an important role in providing children protection from arbitrary detention. Robust domestic legal frameworks can ensure that children are not detained for reasons relating to their or their parents' migration status, and help to promote the development and expansion of alternative models for the appropriate care, protection and support of children.

The examples provided in this paper show that States have a variety of options available to enshrine the liberty into domestic law. These include laws that:

- specify that authorities can only detain persons over the age of 18
- create an exception to the laws of detention for children
- mandate authorities to place children in a child-sensitive location or institution, which protects freedom of movement
- only allow for the confinement of minors who have come into conflict with the law

It is important to note that these laws are only as strong as their implementation. Legal frameworks, such as those outlined above, do not guarantee immigration authorities are able or willing to implement these protections in every case.

It is also important to note that there are countries that do not detain children in practice, even though this has not been mandated in law. Therefore, a number of countries not listed here are in a position to provide important leadership on this issue.[65]

The introduction of these protections into domestic law, policy and practice is an urgent priority. Every possible step should be taken to ensure children are not exposed to the unnecessary harms of detention. Children who cross borders are first and foremost children, and should be afforded the protections that all children deserve. Both governments and civil society have a responsibility to develop and expand alternatives to detention and reception options for children.

63 Unofficial translation. *Ley general de Migración y Extranjería* [Nicaragua], Ley Nº 671 de 2011, Available at: www.refworld.org/docid/4e268f912.html

64 *Law on Foreigners and International Protection Law No. 6458* (Turkey). Available at: www.refworld.org/docid/5167fbb20.html

65 A separate briefing paper is currently being drafted that will detail these good practice examples.

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LINKS TO ADDITIONAL RESOURCES

Global Campaign to End Child Immigration Detention
endchilddetention.org

Inter-Agency Working Group to End Child Immigration Detention
www.iawgendchilddetention.org

UNHCR Global Strategy – Beyond Detention
www.unhcr.org/detention.html/

CRC / CMW Joint General Comment on the Human Rights of Children in the Context of International Migration
www.ohchr.org/EN/HRBodies/CRC/Pages/CMWCRCContextofInternationalMigration.aspx

FURTHER READING

Corlett, David, Grant Mitchell, Jeroene Van Hove, Lucy Bowring, and Katherine Wright. 2012. *Captured childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention*. Melbourne: International Detention Coalition. idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report.pdf

End Child Immigration Detention, UNHCR, IDC and Lide Labs, *Animation: Alternatives to detention for children*. idcoalition.org/animation-alternatives-to-detention-for-children/

Inter-Agency Working Group to End Child Immigration Detention. 2016. *Ending Child Immigration Detention*. www.iawgendchilddetention.org/wp-content/uploads/2016/11/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf

Inter-Agency Working Group to End Child Immigration Detention. 2016. *Summary of normative standards and recommendations on ending child immigration detention*. www.iawgendchilddetention.org/wp-content/uploads/2016/11/IAWG_Child-Detention-Standards_Aug-2016_FINAL.pdf

Sampson, Robyn, Vivienne Chew, Grant Mitchell, and Lucy Bowring. 2015. *There are alternatives: A handbook for preventing unnecessary immigration detention (Revised)*. Melbourne: International Detention Coalition. idcoalition.org/publication/there-are-alternatives-revised-edition/

UNHCR. 2014. *Child protection issue brief: Alternative care*. Geneva: UNHCR. www.refworld.org/docid/52f0e4f34.html

UNHCR. 2015. *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*. Geneva: UNHCR. www.refworld.org/docid/5523e8d94.html

UNHCR. 2017. *Issue Brief 1: UNHCR's position regarding the detention of refugee and migrant children in the migration context*. Geneva: UNHCR. www.refworld.org/docid/5885c2434.html

UNICEF. 2016. *Uprooted: The growing crisis for refugee and migrant children*. New York: UNICEF. www.unicef.org/videoaudio/PDFs/Uprooted.pdf

ISBN Paperback: 978-0-9924831-8-0 ISBN PDF version: 978-0-9924831-9-7

Published by International Detention Coalition Melbourne, Australia

Recommended citation: International Detention Coalition (2017) *Never in a child's best interests: A review of laws that prohibit child immigration detention*. Briefing Paper No. 2. Melbourne: International Detention Coalition.

This Briefing Paper is available online at www.idcoalition.org

ABOUT THE IDC

The International Detention Coalition (IDC) is a unique global network of over 300 non-governmental organisations, faith-based groups, academics and practitioners in more than 70 countries that advocate for and provide direct services to refugees, asylum-seekers and migrants in immigration detention. We are the only international organisation focused explicitly on immigration detention and alternatives to detention. With an international Secretariat based in Melbourne, Australia, the IDC works globally through Regional Coordinators in Africa, the Americas, Asia-Pacific, Europe, and the Middle East & North Africa (MENA). To learn more about the IDC, including our Mission, key areas of work, and Strategic Priorities, please visit www.idcoalition.org.

ABOUT IDC BRIEFING PAPERS

The International Detention Coalition (IDC) works closely with state policymakers, multilateral agencies, and civil society to seek practical, rights-based migration management solutions. This Briefing Paper series seeks to challenge common misconceptions about the use and effectiveness of immigration detention in migration management; to highlight global positive alternatives to immigration detention; and to provide pragmatic guidance to state policymakers on how to effectively govern migration while upholding human rights.

Collaborative. This Briefing Paper series will draw upon the unique breadth and expertise of the IDC network. Briefing Papers will be researched and written in collaboration with IDC members and partners, including prominent academics and individual practitioners in fields as diverse as law, migration, psychology, human rights, and social work.

Evidence based. The IDC is committed to speaking from an evidence-based position that includes, where possible, the perspectives of those affected by immigration detention. Briefing Papers will draw upon the most recent and reputable evidence in their fields.

Solutions focused. Briefing Papers will focus on providing a number of pragmatic and positive practice examples from around the world that policymakers can directly apply to their own migration context.

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