

**Stakeholder submission to
the Special Rapporteur on Human Rights of Migrants
on
'Ending immigration detention of children and seeking
adequate reception and care for them'**

Submission by the International Bar Association's Human Rights Institute

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About the IBA

Established in 1947, the International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers and 190 bar associations and law societies, spanning more than 170 countries, and has considerable experience in providing assistance to the global legal community.

About the IBAHRI

The IBA's Human Rights Institute (IBAHRI) was established in 1995 and works across the IBA helping to promote, protect and enforce human rights under a just rule of law and to preserve the independence of the judiciary and legal profession worldwide. The IBAHRI holds that lawyers and judges play a fundamental role in facilitating access to justice, ensuring accountability of the state and upholding the rule of law and human rights.

About the IBA Human Rights Law Committee

The IBA Human Rights Law Committee is currently developing a white paper exploring how to improve a child rights-compliant migration system. We thank the IBA Officers, Wajiha Ahmed and Nantina Tsekeri, for their input to this submission.

Introduction and methodology

The information and recommendations presented below are based on the findings presented in the 2019 IBA Presidential Task Force on the Refugees Crisis Initiative's report on 'A Child Rights Response to Child Migration and Migrant Children at Risk', authored by Professor Siobhán Mullally and Claire Raissian from the Irish Centre for Human Rights.¹

The Taskforce on the Refugee Crisis Initiative was formed at the behest of the IBA President, Mr Horacio Bernardes Neto, who made the difficulties faced by refugee and migrant unaccompanied children a priority of his tenure.

As requested in the [call for submission](#) issued by the Office of the Special Rapporteur on Human Rights of Migrants, the IBAHRI's submission provides information and recommendations on:

- (1) Legislation or policies that prohibit or restrict the use of immigration detention of children and their families;
- (2) Existing non-custodial alternatives to immigration detention of children (e.g. community-based reception solutions) and their effect on the protection of the rights of migrant children and their families;
- (3) Good practices or measures taken to protect the human rights of migrant children and their families while their migration status is being resolved;

¹ Available at: https://www.ibanet.org/Committees/task_force.aspx. The report provides a full discussion of the current legal context and recommendations for reform of the migration system for children. It is complemented by the report on 'A Model Instrument for an Emergency Evacuation Visa' issued concomitantly.

- (4) Challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families; and
- (5) Recommendations to completely cease or eradicate the immigration detention of children.

The information provided covers cases of detention of migrant children whether they are: accompanied by their parents or guardians; travelling as 'separated children' accompanied by an adult who is not their parent or guardian; or as 'unaccompanied' children travelling alone. Globally, the number of accompanied, separated and unaccompanied child migrants has been on the rise for years and accounts for between 40 to 50 per cent of the world refugee population each year.²

(1) Legislation or policies that prohibit or restrict the use of immigration detention of children and their families

1.1. International legal instruments and policies

The IBAHRI commands worldwide commitment towards ending immigration detention of children and, by extension, the family unit, as well as the increasing use of noncustodial alternatives to detention in line with human rights standards in the best interest of the child.³

Article 37(b) of the Convention on the Rights of the Child (CRC) provides that '[n]o 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'. Accordingly, the Committee on the Rights of the Child clearly states that '[t]o 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... and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved'.⁴

² UNHCR, Global Trends: Forced Displacement in 2018 (June 2019) www.unhcr.org/globaltrends2018 accessed 20 April 2020. UNICEF, Data Brief: Children on the Move Key Facts and Figures (February 2018).

³ See, in particular, the Inter-Agency Working Group to End Child Immigration Detention webpage; Committee on the Rights of the Child, 'The Rights of All Children in the Context of International Migration, Report of the 2012 Day of General Discussion' (2013), para 79; the Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context of International Migration (2017) UN Doc CMW/C/GC/3-CRC/C/GC/22, para 32 (f); the UN, Global Study on Children Deprived of Liberty (2019) UN Doc A/74/136. See also the UN Guidelines for the Alternative Care of Children (2010) UN Doc A/RES/64/142, Arts 9 and 10 stipulating that appropriate care and protection must be sought for vulnerable children including unaccompanied and separated children, internally displaced and refugee children, children of migrant workers and children of asylum-seekers. See also the 2016 Global Compact Safe, Orderly and Regular Migration; Sustainable Development Goal (SDG) Target 16.2, which calls for ending abuse, exploitation, trafficking, torture of children and all forms of violence against them; and SDG Target 17.8, aimed at enhancing the use of enabling technology, in particular information and communications technology, and which has been interpreted broadly in the context of migration and specifically in relation to children on the move. Overseas Development Institute (ODI), Migration and the 2030 Agenda for Sustainable Development (2018), Conclusion 5, p 7 www.odi.org/publications/10913-migration-and-2030-agenda-sustainable-development, accessed 20 April 2020.

⁴ Committee on the Rights of the Child, 'The Rights of All Children in the Context of International Migration, Report of the 2012 Day of General Discussion' (2013), para 79. The Committee highlights the General Comment No. 10 (CRC/C/GC/10, 2007) and reiterates that states have the legal obligation to comply with international standards on detention conditions, including the Rules for the Protection of Juveniles Deprived of

At the same time, the IBAHRI notes with concern: the current gaps in international law for the protection of migrant children;⁵ the limited reference to the Convention on the Rights of the Child (CRC) in documents such as the Global Compact on Migration,⁶ as well as the discretionary power granted to states through the ‘less detrimental approach’ adopted in many legal instruments⁷ in place of a clear prohibition of immigration detention for children. The law should forbid any kind of child immigration detention and such prohibition should be fully implemented in practice.

1.2. Regional legal instruments

The European Union (EU) is a notable example of a region where the wide discretion afforded to states when implementing what is supposed to be a harmonised system of asylum law and policy gives rise to gaps in the protection of unaccompanied migrant minors.⁸

The 2008 EU Returns Directive⁹ establishes a legal obligation for member states to take due account of the best interests of the child principle (Article 5). It also stipulates that immigration detention of children and families should only be used as a measure of last resort and for the shortest appropriate period of time (Article 17), and where other sufficient but less coercive measures cannot be applied effectively (Article 15). The 2013 EU Reception Conditions Directive (RCD) stipulates that in implementing the Directive, Member States should ‘seek to ensure full compliance with the principles of the best interest of the child and of family unity’ in accordance with the provisions of the Charter of Fundamental Rights of the European Union, the CRC and the European Convention on Human Rights, respectively.¹⁰ The RCD qualifies the right of Member States to deviate from certain reception ‘guarantees’ in detention, where it is ‘not possible in practice’ to ensure them, and states that any derogation should be temporary, duly justified and ‘only applied in exceptional circumstances’.¹¹ The language used in the EU directives and other instruments falls short in spelling out an explicit ban on the detention of migrant children.

1.3. Country legislation and policies

In Europe, because of the limitations in the EU Directives, and according to the European Commission’s own evaluation, child detention is widely used across the EU27.¹² Alternatives to

their Liberty (the Havana Rules) which apply to all forms of detention including administrative or non-criminal detention.

⁵ See the IBA analysis of the international legal framework in that respect, IBA Task Force on the Refugees Crisis Initiative, ‘A Child Rights Response to Child Migration and Migrant Children at Risk’ (2019), pp 21-30. The 1951 Convention Relating to the Status of Refugees, for instance, does not specifically address children.

⁶ See the Global Compact for Safe, Orderly and Regular Migration (2018), Objective 7: Address and reduce vulnerabilities in migration, para 15(c) and preamble, para 2, fn 4. The Global Compact ‘reaffirms the sovereign right of states to determine their national migration policy’ and, with the exception of the best interests of the child principle, the only explicit reference to the CRC appears in a footnote.

⁷ See below, Section 1.2.

⁸ IBA Task Force on the Refugees Crisis Initiative, see n 5, p 31.

⁹ Council Directive 2008/115/EC (2008) on common standards and procedures in member states for returning third-country nationals staying illegally.

¹⁰ Directive 2013/33/EU (2013) of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, Recital 9.

¹¹ Directive 2013/33/EU, Recital 19, also Art 11(6).

¹² The EU-funded evaluation of the implementation of the Returns’ Directive found that 17 EU countries reportedly detain unaccompanied children (15 member states, and two Schengen Associated Countries) and 19 countries detain families with children. The evaluation notes that some of these countries detain unaccompanied children only occasionally in practice (Austria, Czech Republic, Lithuania, Luxembourg, Malta,

detention are underused and applied for in only a small number of cases.¹³ This category of ‘vulnerable persons’ under EU asylum law often does not have the recommended expedited ‘special reception needs assessment’, and subsequent placement with adult relatives, a foster family or at least in accommodation suitable for minors. Instead, unaccompanied adolescent children are frequently placed in accommodation centres for adults or are systematically detained, contrary to their best interests.

While some member states may not allow for child immigration detention under national law, de facto detention of children remains a reality. This is the case in Greece, notwithstanding the European Court of Human Rights’ (ECtHR) decisions condemning Greece for degrading treatment.¹⁴ The ECtHR further clarified that a verification procedure has to be undertaken in order to demonstrate that no other less restrictive measures could be applied in a particular case.

However, since 2010, according to the Inter-Agency Working Group (IAWG) to End Child Immigration Detention ‘there has been a clear shift toward detention reform and decreasing the use of immigration detention in several States’.¹⁵ Several states have thus established legislation prohibiting the immigration detention of children or have pledged to end child immigration detention as a matter of priority.¹⁶ Despite the pledge, the situation has little improved in some countries, like the UK.¹⁷

On the other end of the spectrum, a number of states, like the United States and Australia, have set up mandatory detention for all persons arriving to seek international protection, including

Slovenia and Sweden). 11 countries reported that they do not detain unaccompanied children in practice and eight reported that they do not detain families with children. Matrix & ICMPD, *Evaluation on the application of the Return Directive (2008/115/EC)*, Final Report, European Commission – DG Home Affairs, Luxembourg: Publications Office of the European Union, 22 October 2013, available at: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws_en accessed 20 April 2020.

¹³ See PICUM, *Protecting undocumented children: Promising policies and practices from governments at all levels*, 2015.

¹⁴ ECtHR, *Rahimi v Greece*, No 8687/08, 5 April 2011. For a recent condemnation of Greece’s ‘protective custody’ for children, see: *Sh.D. and others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia*, No 141165/16, 13 June 2019.

¹⁵ Inter-Agency Working Group (IAWG) to End Child Immigration Detention, *End Child Immigration Detention* (2016), p 12.

¹⁶ *Ibid.* The report mentions for their good practices: Argentina, Austria, Costa Rica, Hungary, Italy, Ireland, Japan, Latvia, Mexico, Portugal, Panama, Spain, Taiwan, Venezuela, the United Kingdom, Finland, Poland, France and Malta. The report also mentions that every EU member state, except Malta, had passed national legislation promoting alternatives to detention prior to the end of 2011. Likewise, in Africa, drawing on the African Charter on the Rights and Welfare of the Child (ACRWC), Articles 4 and 23, several African states have incorporated protection for unaccompanied migrant children into their national child-specific legislation. The IBA Task Force report, see n 5, mentions in that respect: Algeria, Botswana, Egypt, Kenya, Tunisia, Lesotho, Mozambique, South Africa and Swaziland.

¹⁷ See <http://detentionforum.org.uk/2019/07/03/has-child-immigration-detention-ended-in-the-uk/>. In 2017, a study found that there was ‘no reduction in the number of people in detention’: <https://www.theguardian.com/commentisfree/2017/aug/24/migrants-europe-detention-centres-time-limit>. In 2018, ‘Bail for Immigration Detainees’ organisation found that more than 200 parents were separated from a child or children while in immigration detention in the UK: <https://www.theguardian.com/uk-news/2018/jul/03/uk-immigration-authorities-separating-children-from-parents>. In its 2019 Report on ‘Immigration detention’, the House of Commons Home Affairs Committee reiterated that ‘unaccompanied children (that is persons under the age of 18) must not be detained other than in very exceptional circumstances’: <https://www.theguardian.com/uk-news/2018/jul/03/uk-immigration-authorities-separating-children-from-parents> accessed 20 April 2020.

unaccompanied minors, where the individual does not hold a valid visa.¹⁸ Since August 2012 in Australia, asylum seekers arriving by boat or those turned back while still at sea have been brought to what are known as ‘offshore’ or regional processing centres in Nauru and Papua New Guinea.¹⁹ In a time of pandemic like that of Covid-19, conditions on these islands are particularly detrimental due to the lack of access to appropriate information and health services.²⁰ Since 2013, in order to lower numbers in detention within the country,²¹ the Australian Government has re-introduced a visa known as a Bridging Visa E. The visa permits people to be released into the community, however it does not allow work, education, medical or social security rights. There is no formal policy on what the visa recipients are meant to do while on the visa. Due to the anonymity of the statistics, it is almost impossible to ascertain how many children on the Bridging Visa E are reunited with family or other persons in the community known to them, or whether the children have been released into foster care.

(2) Existing non-custodial alternatives to immigration detention of children (e.g. community-based reception solutions) and their effect on the protection of the rights of migrant children and their families

There is strong evidence to suggest that alternatives to detention that use case management to support and engage migrants in immigration processes achieve high rates of compliance and case resolution, and better ensure the rights and wellbeing of migrants.²²

However, the lack of state-run appropriate alternatives remains a major issue in most countries, leading to children being detained in custodial settings for prolonged periods. This situation may be concealed by states using the misleading label of ‘protective custody’, such as the ‘safe zones’ on the Greek islands. Far from complying with children’s rights, these ‘safe zones’ have been the place of

¹⁸ As of March 2020, children younger than 18, who arrive at the U.S. border without a parent or guardian, are first held in border cells run by the Department of Homeland Security. Federal law requires that they be transferred within 72 hours to the Office of Refugee Resettlement (ORR), which is under the Department of Health and Human Services (DHHS).

¹⁹ See CRC, List of Issues in Relation to the Combined Fifth and Sixth Reports of Australia (2019) CRC/C/AUS/Q/5-6, para 10, available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/list-of-issues-convention-on-the-rights-of-the-child-australia.PDF>. See Australia’s response: <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/australias-response-to-the-list-of-issue-rights-of-the-child.PDF>.

²⁰ <https://www.theguardian.com/australia-news/live/2020/apr/16/australia-coronavirus-live-updates-nsw-victoria-qld-national-cabinet-schools-latest-news-update?page=with:block-5e97dda58f08ea7431f43b32>.

²¹ As of 29 February 2020, the Department of Home Affairs statistics show there are a total of five children in Australian detention centres. However, there are 284 children on the Bridging Visa E, in the community. See <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-29-february-2020.pdf> accessed 20 April 2020.

²² International Detention Coalition, ‘There Are Alternatives – A handbook for preventing unnecessary immigration detention (revised edition)’ (2015), p 4. UNHCR, ‘Options Paper 2: Options for governments on open reception and alternatives to detention’ (2015), available at: <https://www.unhcr.org/protection/detention/5538e53d9/unhcr-options-paper-2-options-governments-open-reception-alternatives-detention.html>, accessed 20 April 2020. See also, ‘Effective Alternatives to the Detention of Migrants’, International Conference organised jointly by the Council of Europe, the European Commission and the European Migration Network, 4 April 2019, Council of Europe Strasbourg, France. Output document available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/coe-eu-emn_conference_4_april_2019_conference_report.pdf, accessed 20 April 2020.

reported cases of torture and child abuse.²³ In 2020, the threat of the Covid-19 pandemic spreading in the refugee camps eventually caused the move of some vulnerable people, including unaccompanied children, from the Greek islands to other countries²⁴ and the mainland, which, still lacks appropriate accommodation facilities.²⁵ However the number of persons actually moved is reportedly way less than that announced. Furthermore, the pandemic will unavoidably expand the length of detention, as from March 2020, Greece has frozen all asylum applications.

In practice, civil society organisations play a key role in providing support or alternative accommodation to children, too often with little attention and support from governments.²⁶ The development of networks of host families in charge of the unaccompanied minors as soon as they arrive in the territory and in the absence of a legal guardian, is one of the solutions developed to address the risk of disappearance and exploitation of unaccompanied children, until their minority is recognised.²⁷

(3) Good practices or measures taken to protect the human rights of migrant children and their families while their migration status is being resolved

3.1. Regional initiatives

A major hurdle to ending child detention arises at children's very arrival at a state border, where they are not identified as children in the first place and are consequently deprived of their rights.

In 2018, the European Parliament proposed a visa scheme and to the European Commission that would allow the holder to enter the issuing Member State to apply for international protection²⁸ and so create safe and legal pathways to Europe.²⁹ Such measures would help to combat human smuggling, human trafficking, and death and suffering experienced by migrants at sea. There is a gender perspective in the proposal, with reference to women travelling with children, and a particular focus on the vulnerability of women and girls to different forms of exploitation. The scheme would be

²³ <https://www.hrw.org/news/2019/12/18/greece-unaccompanied-children-risk>. See also the 2018 report by the Global Detention Project: Failure of Greece to end child detention:

<https://www.globaldetentionproject.org/countries/europe/greece> accessed 20 April 2020.

²⁴ <https://www.bbc.com/news/world-europe-52303623>; <https://www.reuters.com/article/us-health-coronavirus-eu-greece-migratio/eu-asks-greece-to-move-migrants-most-at-risk-from-coronavirus-out-of-crowded-camps-idUSKBN21B2Y1>; <https://www.thenewhumanitarian.org/news/2020/03/27/greece-island-refugee-camps-coronavirus> accessed 20 April 2020.

²⁵ <https://www.thenewhumanitarian.org/news/2020/03/27/greece-island-refugee-camps-coronavirus> accessed 20 April 2020.

²⁶ In Greece, Defence for Children International (DCI)-Greece is one of the rare organisations in the country providing legal assistance to child migrants and serving as intermediary between those children and state authorities in charge of children protection. See also, European ATD Network promoting alternative care for migrant children in Cyprus, Poland, Bulgaria and the UK,

<https://europe.ohchr.org/Documents/Publications/Paper-ChildImmigrationDetentionintheEU-EN.pdf>. In Africa, in countries like Malawi and Uganda, alternatives to detention for migrant children include the use of state or civil society-run shelters, and in Kenya, Tanzania, Uganda, Zambia and Zimbabwe, domestic law provides for 'care in the community' incentives that include foster care and guardianship for unaccompanied non-national children. See, International Detention Coalition, 'There are Alternatives: Africa' (2018) p 5.

²⁷ In France, the collective *Maman les Petits Bateaux* has set up a network of host families in Paris and the Paris region, on a voluntary basis.

²⁸ European Parliament Report, with recommendations to the Commission on Humanitarian Visas; Annex to the Motion for a Resolution; Recommendations as to the Content of the Proposal Requested, (6).

²⁹ Ibid. It is recognised that 90 per cent of those granted international protection in the EU have reached the territory by irregular means due to lack of safe legal pathways (E).

significantly strengthened by specific provision being made for unaccompanied migrant children regardless of gender, in recognition of the precarious situation and extreme vulnerability of this group.³⁰

3.2. Country practices

- Non-discrimination in children's protection within the state jurisdiction

In Asia, Thailand has recently taken comprehensive measures to ensure certain rights of migrant children are set down in domestic law and policy, irrespective of their status. Although implementation has been problematic for a variety of reasons,³¹ at least 160,000 migrant children were enrolled in Thai schools in 2019. Migrant children also have the right to be registered at birth and to acquire a nationality in Thailand, even where their parents are irregular migrants. Furthermore, they are not distinguished from citizen children in the Child Protection Act of 2003, which contains commitments to the best interests of the child and the principle of non-discrimination.³²

In Africa, the right of every child to acquire a nationality, recognised in Article 6(3) of the African Charter on the Rights and Welfare of the Child (ACRWC), can be invoked by unaccompanied migrant children at the borders of countries like Kenya, Swaziland, Tanzania and Zambia. Where children are stateless or cannot prove their nationality, they are treated as nationals of these states.³³

- Children's empowerment measures

New Zealand is party to the CRC and the Refugee Convention, and sets out clear guidelines for asylum seekers in a variety of languages on the New Zealand government's immigration website.³⁴ Guidelines on children use the definitions in the CRC and state that the Immigration Act (2009) shall be implemented in accordance with, inter alia: the best interests of the child principle, the right of the child to be heard and the right of the child to have their claim assessed independently.³⁵ Where a migrant child is lodging a claim for international protection, they may do so on their own behalf and will be appointed a legal representative who will be instructed by the child, and an appointed responsible adult (guardian), where the child is unaccompanied.³⁶

In Mexico, a tool was designed to enhance the identification of unaccompanied children at the border where they are potentially refugees.³⁷ Information on asylum and their rights is presented to children in a child-friendly film, which is available in multiple languages.

- Partnership between state authorities and NGOs

³⁰ See on this issue, IBA Task Force Report, see n 5, p 36, and IBA Task Force Report on the Refugee Crisis Initiative, 'A Model Instrument for an Emergency Evacuation Visa' (2019).

³¹ IOM Thailand, Thailand Migration Report 2019 (2019) 112 <https://thailand.iom.int/thailand-migrationreport-2019-0> accessed 20 April 2020.

³² Ibid 106.

³³ International Detention Coalition, *There are Alternatives: Africa* (2018) 5.

³⁴ Ministry for Business, Innovation and Employment New Zealand, New Zealand Immigration. www.immigration.govt.nz/audiences/supporting-refugees-and-asylum-seekers/asylum-seekers accessed 20 April 2020..

³⁵ New Zealand Immigration, *Guidelines on Children or Minors at the Refugee Status Branch* (2017) 2.

³⁶ Ibid 3–5.

³⁷ This is a joint initiative between the Mexican Refugee Commission (COMAR), the National Migration Institute (INM) and UNHCR.

In Canada, though still a reality,³⁸ the detention of unaccompanied migrant children in all regions of Canada has been considerably lowered every year since 2016 following the implementation of a number of measures.³⁹ Among them, a Memorandum of Understanding between the Canadian Red Cross and Canadian Border Patrol Services allows the Canadian Red Cross to inspect and report on immigration detention. This has resulted in an ongoing decrease in the immigration detention of migrant children across all provinces in Canada.⁴⁰ In 2018, the Canadian Border Service agency adopted a Best Interests of the Child (BIOC) assessment template and standard operation procedures (SOPs), drafted by the UNHCR Canada.

(4) Challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families

For children who migrate internationally, life can be particularly hazardous due to a lack of legal documentation and heavy reliance on smugglers as a result.⁴¹ In the worst-case scenario, there are no reception conditions for children and children face the risk of being exploited upon arrival or trafficked for the purpose of labour or sexual exploitation. All migrant children are especially vulnerable to exploitation by human traffickers. In that respect, child-specific identification measures are essential to ensure the timely detection, identification and protection of child victims and potential victims of trafficking.

4.1. Lack of political will

The practice of using immigration detention as a strategy for combatting irregular migration has been in use at least since the 1980s, but the practice has become increasingly widespread and institutionalised since 2001.⁴² The International Detention Coalition (IDC) has found that, over the past 15 years, states worldwide have increasingly used immigration detention in the first instance, as a result of heightened concerns over combatting irregular migration and false narratives that have often linked international migration with crime, instability, or national security.⁴³ As a result, immigration detention has become a key part of many states' migration management strategies, and is now commonly used in multiple stages of the migration process. This includes: when migrants attempt to leave their own country; when migrants are in transit or at sea; when migrants arrive at international borders; during processing of asylum and other immigration claims; and in preparation for voluntary return, deportation or removal.⁴⁴

In practice, states often detain child refugees, asylum seekers, and migrants for a number of reasons that are completely avoidable, such as: to conduct routine health and identity screening; to maintain

³⁸ <https://ipolitics.ca/2019/08/23/children-stayed-longer-in-immigration-detention-facilities-this-year-new-data-shows/>; <https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.5356376/children-still-being-placed-in-immigration-detention-on-a-regular-basis-report-1.5356591> accessed 20 April 2020.

³⁹ The alignment of the Child, Youth and Family Services Act 260 to the CRC, raising the age of majority to 18 years old and thereby closing a protection gap for older migrant children who had previously been unable to benefit from the provisions of the CRC, due to their attainment of the age of majority at 16 years old.

⁴⁰ Canada Border Services Agency www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2018-eng.html accessed 26 July 2019.

⁴¹ ACERWC, Mapping Children on the Move within Africa (November 2018).

⁴² Michael Flynn, How and Why Immigration Detention Crossed the Globe, Global Detention Project Working Paper No. 8, Global Detention Project, April 2014.

⁴³ International Detention Coalition (2009), Position Paper: Children in Immigration Detention.

⁴⁴ *Ibid.*

family unity; or to facilitate engagement with on-going asylum or migration procedures. Sometimes, children are detained without the knowledge of state authorities, for example because there is a failure to properly conduct age assessments, or due to a lack of appropriate child screening and identification. At other times, children are knowingly detained, for example, when they are detained together with their parents or guardians on the basis of maintaining family unity.

4.2. Lack of data

Lack of data regarding children's arrival at borders is recognised everywhere as a key issue to appraise and respond adequately to the situation of migrant children. For instance, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the body charged with overseeing the implementation of the ACRWC, expressed concern in a recent report that the well-documented lack of data collection and reporting by states in the region has led to a 'lack of a comprehensive response mechanism for protecting children' leading to 'human rights violations that have reached unacceptable levels'.⁴⁵

4.3. Need for a harmonised and conducive domestic legal environment that protects children as subject of rights in a non-discriminatory manner

States party to the CRC have been urged to create a 'conducive legal environment'⁴⁶ to close gaps in the protection of unaccompanied and separated children on the move.

However, in practice there is frequently a tension between national legal frameworks governing immigration control, and those governing child protection. As a result, children in an irregular migration situation are adversely affected by restrictive migration control law and policies, and are not sufficiently considered and protected as children primarily under national systems for child protection.⁴⁷

In the context of large movements of people, states' immigration control concerns often lead to the flagrant denial of migrant child's rights. In response to the Covid-19 pandemic, the United States has recently enacted the 'Migrant Protections Protocols' to justify the forcible return of over 60,000 Latin American asylum seekers to Mexico.⁴⁸

4.4. Need for trained immigration officers able to conduct the earliest possible identification of (1) accompanied, separated or unaccompanied children and (2) children victims of human trafficking, followed by tracing activities and family reunification, where this is in the best interests of the child

Legal obstacles appear immediately for unaccompanied children at borders who cannot prove their age to the authorities of a receiving state. This could be due to a lack of documentation or what has been described as a 'growing trend' of administrations' contesting their minority by claiming that civil status documents are not authentic⁴⁹ and then incorrectly identifying a child or adolescent as an adult.

⁴⁵ ACERWC, Mapping Children on the Move within Africa (November 2018), p 2.

⁴⁶ UNCRC General Comment No 6, para 15.

⁴⁷ See IBA Task Force report, see n 5, p 40.

⁴⁸ <https://www.cbsnews.com/news/u-s-postpones-court-hearings-for-asylum-seekers-in-mexico-over-coronavirus/>; <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>. For a detailed analysis of the recent development in migration policies in the United States, see the IBA Task Force Report, see n5, pp 36-40.

⁴⁹ European Association for the Defence of Human Rights (AEDH), In Europe, Unaccompanied Minors are Not

This practice is widespread across European states at present, with many unaccompanied children lacking the necessary documentation to prove their age for a variety of reasons, such as not having been registered at birth, fleeing without documentation, losing it or having it confiscated along the way.⁵⁰

In Greece, despite the passing of new domestic legislation⁵¹ to establish a Reception and Integration Service aimed at providing enhanced protection to particularly vulnerable individuals, including unaccompanied minors seeking asylum, there is a ‘prevailing culture of disbelief as minors’ age and right to protection are continuously doubted and denied by the responsible authorities’.⁵²

The registration of children as adults, sometimes without their knowledge, may result in refusal of entry to the territory of a state, denial by the authorities of the particular care that is to be extended to all children within the jurisdiction of that state, including guardianship or legal representation, or detention or deportation orders being issued. This practice equals invisibility for unaccompanied minors and leads to a denial of rights and human rights violations that may then go unnoticed.⁵³

In this environment, child victims of trafficking cannot be identified. Due to cuts to funding in many countries, there are fewer trained medical and other professionals now working in reception centres.

(5) Recommendations

In order to end immigration detention for children, the IBAHRI draws the attention of the Special Rapporteur on Human Rights of Migrants to the following recommendations for states to:

1- explicitly and immediately **prohibit the detention of migrant children** and set up alternatives to detention to allow children to remain with family members or guardians in non-custodial, community-based contexts, consistent with their best interests and their rights to liberty and a family environment, in accordance with the Joint General Comment No 4 (2017) of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No 23 (2017) of the UN Committee of the Rights of the Child (UNCRC) on the human rights of children in the context of international migration;

2- explicitly **prohibit discrimination** on the basis of the child’s, or their parent or legal guardian’s nationality, race or ethnicity, or immigration status in all child protection and guardianship systems, in accordance with Article 2 of the CRC;

3- immediately establish early identification measures to **register accompanied, separated or unaccompanied children arrivals, as well as arrivals of children who are victims of sale, trafficking and abuse**, at borders without delay so that their **needs may be assessed in a child-friendly manner**, and **information on their rights, upcoming proceedings, referral mechanisms and specialised support services are provided in a child-friendly manner**. This should include the placement of children in safe and appropriate reception centres and appropriate accommodation and family-based

Protected (2017) 2 www.aedh.eu/en/in-europe-unaccompanied-minors-are-not-protected accessed 26 July 2019. See IBA Task Force report, see n 5, p 22.

⁵⁰ House of Lords EU Committee, 2nd Report of Session, Children in Crisis: Unaccompanied Migrant Children in the EU (2016–17) HL Paper 34, para 40.

<https://publications.parliament.uk/pa/ld201617/ldselect/lducom/34/34.pdf> accessed 26 July 2019.

⁵¹ Greece: Law 4375/2016.

⁵² Andriani Fili and Virginia Xythali, ‘The Continuum of Neglect: Unaccompanied Minors in Greece’ (2017) *Social Work and Society International Online Journal* 15(2), 4.

⁵³ Ibid 5. IBA Task Force report, see n 5, p 33.

care (if they are not travelling with a foster family). As well as counselling and assistance in accessing health services, including sexual and reproductive health, education and other services (socialisation/recreation, vocational training, mental health services, family reunification, access to legal services and case management) at a minimum, in addition to adequate referral mechanisms. To strengthen compliance with requirements for data collection, the UNCRC or UNICEF could consider publishing an annual list of governments that fail to properly register children arrivals at their border;

4- **carry out mandatory adequate training** for social workers, host families, border police, lawyers, medical professionals, teachers, airline and other transport staff, individuals undertaking data collection and all other staff who come into contact with children. As required by UNCRC General Comment No 6, the timely appointment with a trained and qualified guardian should be guaranteed to all unaccompanied or separated migrant children;

5- **partner with, and support, civil society organisations'** role in visiting detention centres, providing legal assistance, ensuring guardianship and providing safe alternative care to children;

6- **treat children who do not possess documentation as children** where they claim to be such, until their age can be verified in a child rights-compliant manner;

7- unequivocally **recognise migrant children as autonomous rights-bearers** in international and domestic law, protected first and foremost as children, regardless of whether they are accompanied or unaccompanied and **ensure that the most protective migration status** (ie, asylum or residence on humanitarian grounds) **is applied**, in accordance with the best interests of the child;

8- **never separate children from their families** when in violation of the principle of the best interests of the child;

9- ensure that national action plans on child rights incorporate specific actions, targets, timelines and resources to safeguard the rights of migrant children, with explicit reference to the CRC, and **adopt a 'bright lines' approach to guaranteeing CRC rights to all migrant children**. Children should be supported prior to their 18th birthday by their legal guardian and the social services of a state, with measures put in place for a gradual phasing out of childhood support and into independent living. This is a critical measure for unaccompanied or separated migrant children, for whom turning 18 means that they 'age out' of their rights and protection available to them;

10- **ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner**, including facilitating the reunification of children with their parents and siblings where this is in the best interest of the child;

11- **increase refugee resettlement quotas** and make provisions in relevant policies in order to recognise children and adolescents at risk as a group with special needs where this is not already the case;

12- **in response to a crisis or emergency** that could foreseeably lead to an increase in child migration, in light of what we know from current global trends, **expand safe and legal pathways to migration, increase the refugee resettlement quota**; and ensure that migrants have **access to safe living conditions**, with specific measures for vulnerable groups, like children;

13- do not take the pretext of a situation of emergency, such as a pandemic, to apply **forced return or refoulement in violation of international law, reduce resettlement quotas, or freeze asylum applications**; and

14- commit to the establishment of a **special humanitarian visa programme designed for children**, where their claim for international protection can be processed in their country of origin or in a country of transit. Qualification criteria for this visa scheme should be broad and each case should be assessed on an individual basis, with an independent body to oversee and monitor decisions, to prevent high refusal rates. Where the child's claim for international protection is not recognised, the migrant child should be granted a temporary visa ensuring entry to, and the protection of, the state that they are attempting to enter, particularly if a parent or member of the child's immediate family is residing there. Children who have not been recognised as refugees under the 1951 Convention but who are temporarily protected by a receiving state or region should be offered a pathway to regular migratory status and permanent residence or citizenship.