

11th European Forum on the rights of the child

6-8 November 2017



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7-8 November 2017

Children deprived of their liberty and alternatives to detention

Version 1.3

20 November 2017 – updates highlighted

International standards on deprivation of liberty of children¹

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1. INTRODUCTION

This is a compilation of international standards on the deprivation of liberty of children, to facilitate Forum discussions. If you detect any errors or omissions, please write to EC-CHILD-RIGHTS@EC.EUROPA.EU. EU legislation is set out in the Forum general background paper.

2. LEGAL STANDARDS ON DEPRIVATION OF LIBERTY OF CHILDREN

2.1. International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (2006)

Article 2

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 17

1. No one shall be held in secret detention.

*2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, **each State Party shall, in its legislation:***

*(a) Establish the **conditions** under which orders of deprivation of liberty may be given;*

*(b) Indicate those **authorities** authorized to order the deprivation of liberty;*

*(c) Guarantee that any person deprived of liberty shall be held solely in **officially recognized and supervised places** of deprivation of liberty;*

*(d) Guarantee that any person deprived of liberty shall be authorized to **communicate with and be visited by** his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;*

*(e) **Guarantee access** by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;*

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

*3. Each State Party shall assure the **compilation and maintenance of one or more up-to-date official registers and/or records** of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:*

(a) The identity of the person deprived of liberty;

(b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;

(c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;

(d) The authority responsible for supervising the deprivation of liberty;

(e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;

- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

2.2. [International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#) (ICRMW) (1990)

Article 16

1. Migrant workers and members of their families shall have the **right to liberty and security** of person.
2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
3. Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.
4. **Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.**
5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.
6. Migrant workers and members of their families who are arrested or detained on a criminal charge shall be **brought promptly before a judge or other officer authorized by law to exercise judicial power** and shall be entitled to **trial within a reasonable time or to release**. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.
7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
 - (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
 - (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;
 - (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

8. Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

9. Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

2.3. [Convention on the Rights of Persons with Disabilities](#) (CRPD) (2006)

Article 14 Liberty and security

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that **the existence of a disability shall in no case justify a deprivation of liberty.**

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation. [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (OPCAT) (2002)

Article 1

The objective of the present Protocol is to establish a **system of regular visits** undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

2.4. [UN Convention on the Rights of the Child](#) (CRC) (1989)

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) **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;**

(c) Every child deprived of liberty shall be treated with **humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.** In particular, every child deprived of liberty shall be **separated from adults** unless it is considered in the child's best interest not to do so and shall have the

right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

*(d) Every child deprived of his or her liberty shall have the right to **prompt access to legal and other appropriate assistance**, as well as **the right to challenge the legality of the deprivation of his or her liberty** before a court or other competent, independent and impartial authority, and to a **prompt decision on any such action**.*

2.5. [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(CAT\) \(1984\)](#)

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 10

*1. Each State Party shall ensure that **education and information regarding the prohibition against torture** are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.*

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

2.6. [Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW\) \(1979\)](#)

2.7. [International Covenant on Civil and Political Rights \(ICCPR\) \(1966\) and its Optional Protocol](#)

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

*2. Anyone who is arrested shall be **informed**, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

*3. Anyone arrested or detained on a criminal charge shall be **brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody**, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

4. *Anyone who is deprived of his liberty by arrest or detention shall be **entitled to take proceedings before a court**, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable **right to compensation**.*

Article 10

1. *All persons deprived of their liberty shall be treated with **humanity and with respect for the inherent dignity** of the human person.*
2.
 - (a) *Accused persons shall, save in exceptional circumstances, be **segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons**;*
 - (b) *Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
3. *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their **reformation and social rehabilitation**. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

Article 24

1. *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, **the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State**.*
2. *Every child shall be registered immediately after birth and shall have a name.*
3. *Every child has the right to acquire a nationality.*

2.8. [International Covenant on Economic, Social and Cultural Rights \(ICESCR\) \(1966\)](#)

Article 10

The States Parties to the present Covenant recognize that:

1. *The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*
2. *Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
3. ***Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.** Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.*

Article 12

1. *The States Parties to the present Covenant recognize the right of everyone to the **enjoyment of the highest attainable standard of physical and mental health.***

2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

(a) *The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*

(b) *The improvement of all aspects of environmental and industrial hygiene;*

(c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

(d) *The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

2.9. [Convention on the Reduction of Statelessness \(1961\)](#)

2.10. [The 1951 Convention relating to the Status of Refugees \(1951\)](#)

Article 31 Refugees unlawfully in the country of refuge

1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

2. *The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

2.11. [European Convention on Human Rights \(ECHR\) \(1950\)](#)

Article 5 Right to liberty and security

Everyone has the right to life, liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) *the lawful detention of a person after conviction by a competent court;*

(b) *the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*

(c) *the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

(d) *the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

(e) *the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

(f) *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

2.12. [Universal Declaration of Human Rights \(UDHR\) \(1948\)](#)

Article 3

Everyone has the right to life, liberty and security of person.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

2.13. [New York Declaration for Refugees and Migrants \(19 September 2016\)](#)

33. *Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross-border movements. We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.*

2.14. [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice \(2010\)](#)

19. *Any form of deprivation of liberty of children should be a **measure of last resort** and be **for the shortest appropriate period of time**.*

20. *When deprivation of liberty is imposed, children should, as a rule, be **held separately from adults**. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.*

21. *Given the vulnerability of children deprived of liberty, the importance of **family ties and promoting the reintegration into society**, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children in particular should have the right to:*
*a. **maintain regular and meaningful contact with parents, family and friends through visits and correspondence**, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment;*

b. receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport;

c. access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status.

22. The deprivation of liberty of unaccompanied minors, including those seeking asylum, and separated children should never be motivated or based solely on the absence of residence status.

2.15. [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) (2010)

2.16. [Guidelines for Action on Children in the Criminal Justice System](#) (1997)

2.17. [UN Rules for the Protection of Juveniles Deprived of their Liberty \(JDL\)](#) (Havana Rules) (1990)

11

(a) A juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law;

(b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

13. Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

2.18. [UN Standard Minimum Rules for non-custodial Measures \(The Tokyo Rules\)](#) (1990)

2.19. [UN Guidelines for the Prevention of Juvenile Delinquency \(Riyadh Guidelines\)](#) (PJD) (1990)

2.20. [The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(PPDI\)](#) (1988)

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

2. *Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
3. *Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.*
4. *During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential **aim** of the treatment of a migrant worker or a member of his or her family shall be his or her **reformation and social rehabilitation**. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.*
5. *During detention or imprisonment, migrant workers and members of their families shall enjoy the **same rights as nationals to visits by members of their families**.*
6. *Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.*
7. *Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.*
8. *If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.*

- 2.21. [UN Standard Minimum Rules for the Administration of Juvenile Justice \(Beijing Rules\) \(AJJ\) \(1985\)](#)
- 2.22. [Declaration of the Rights of the Child \(1959\)](#)
- 2.23. [The Standards Minimum Rules for the Treatment of Prisoners \(TP\) \(1955\)](#)[The 1954 Convention relating to the status of stateless persons \(1954\)](#)
- 2.24. [Geneva Declaration of the Rights of the Child \(1924\)](#)

3. UNITED NATIONS

3.1. Introduction

Please note that *each of the treaty bodies publishes its interpretation of the provisions of its respective human rights treaty in the form of “general comments” or “general recommendations”*² General comments provide comprehensive interpretation of substantive provision and set out general guidance on the information that should be submitted in State reports.

3.2. UN Secretary General

- 3.2.1. [*Report of the UN Secretary-General "In safety and dignity: addressing large movements of refugees and migrants", A/70/59, 21 April 2016*](#)
- 3.2.2. [*Report of the UN Secretary-General on the "Promotion and protection of human rights, including ways and means to promote the human rights of migrants" A/69/277, 7 August 2014*](#)
- 3.2.3. [*Report of the UN Secretary-General on "International migration and development", A/68/190, 25 July 2013*](#)

3.3. UN General Assembly

- 3.3.1. [*Resolution adopted by the General Assembly on 19 September 2016, "New York Declaration for Refugees and Migrants", A/RES/71/1, 3 October 2016*](#)
- 3.3.2. [*Resolution adopted by the General Assembly on 17 December 2015, "Protection of migrants", A/RES/70/147, 25 February 2016*](#)
- 3.3.3. [*Resolution adopted by the General Assembly on 18 December 2014, "Protection of migrants", A/RES/69/167, 12 February 2015*](#)
- 3.3.4. [*Resolution adopted by the General Assembly on 18 December 2014, "Migrant children and adolescents", A/RES/69/187, 11 February 2013*](#)
- 3.3.5. [*Resolution adopted by the General Assembly on Guidelines for the Alternative Care of Children, A/RES/64/142, 17 March 2009*](#)
- 3.3.6. [*Resolution adopted by the General Assembly on 18 December 2008, "Protection of migrants", A/RES/63/184, 17 March 2009*](#)

3.4. UN Human Rights Council

² <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>

3.4.1. *Human rights in the administration of justice, including juvenile justice*
(22 September 2017)

A resolution on human rights in the administration of justice, including juvenile justice, adopted without a vote, reaffirmed the **principles that should apply to the detention of children**: best interests of the child as a primary consideration in all decisions; measure of last resort, for the shortest appropriate period of time, and with a periodic review of its continuing necessity and appropriateness; and the avoidance of pre-trial detention for children whenever possible. Were also recalled the recommendation of the Committee on the Rights of the Child to States to increase their lower minimum age of criminal responsibility as well as the principle that no capital punishment nor life imprisonment should be imposed for offences committed by persons under 18 years of age.

An OHCHR report on human rights in the administration of justice, in particular on violence, death and serious injury in situations of deprivation of liberty, shall be presented to the HRC at its 42nd session.

- 3.4.2. [Resolution adopted by the Human Rights Council, "Unaccompanied migrant children and adolescents and human rights" A/HRC/RES/29/12, 2 July 2015](#)
- 3.4.3. [General Comment No. 10, Article 9 \(Liberty and security of person\), 16 December 2014](#)
- 3.4.4. [Resolution adopted by the Human Rights Council, "Rights of the Child" A/HRC/RES/19/37, 19 April 2012](#)
- 3.4.5. [Resolution adopted by the Human Rights Council, "Human Rights of migrants: migration and the human rights of the child" A/HRC/RES/12/6, 12 October 2009](#)
- 3.4.6. [Resolution adopted by the Human Rights Council, "Human Rights of migrants:" A/HRC/RES/9/5, 16 September 2008](#)
- 3.4.7. [UN Sub Commission on the Promotion and Protection of Human Rights, Resolution 2002/23 on International Protection for Refugees, E/CN.4/Sub.2/RES/2002/23, 14 August 2002](#)

3.5. UN Committee on the Rights of the Child

- 3.5.1. [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 migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017](#)
- 3.5.2. [Joint general comment No. 4 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 \(2017\) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, MW/C/GC/4-CRC/C/GC/23, 16 November 2017](#)
- 3.5.3. [Report of the 2012 Day of General Discussion on "The Rights of All Children in the Context of International Migration" \(including position on child immigration detention\), 28 September 2012](#)

In 2012, the UN Committee on the rights of the child held a day of general discussion on the rights of all children in international migration and issued recommendations to states parties and others, relevant today and relevant to all Forum discussions.³ Some of the most important recommendations are replicated below for ease of reference:

"Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of

³<http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf> - recommendations start on page 15

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."

57. States should ensure that the rights enshrined in the Convention are guaranteed for all children under a State's jurisdiction, regardless of their own or their parents' migration status and address all violations of those rights. Child care and protection agencies/bodies rather than immigration agencies take primary responsibility for all children in situation of international migration.

58. States should adopt comprehensive human rights-based laws and policies to ensure that all children involved in or affected by international migration enjoy the full protection of the Convention in a timely manner, regardless of age, economic status, documentation status of themselves or their parents, in both voluntary and involuntary migration situations, whether accompanied or unaccompanied, or any other.

72. States should conduct **individual assessments and evaluations of the best interests of the child** at all stages of and decisions on any migration process affecting children, and with the involvement of child protection professionals, the judiciary as well as children themselves. In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child's or their parents' detention, return or deportation.

74. To the greatest extent possible, States should conduct **continuous and individual best interests of the child assessments** as well as formal determination procedures at all stages or decisions of any migration process affecting children, with the involvement of child protection professionals and the judiciary. This includes any proceeding resulting in the child or his/her parents' deportation. States should make clear in their legislation, policy, and practice that the principle of the best interests of the child takes priority over migration and other administrative considerations. In doing so, States parties should ensure the availability of information on migrating procedures, risks and rights, health and mental health support, legal representation and guardianship, interviews and other processes in a child-friendly and culturally sensitive manner.

81. In the light of concerns for the situation of child migrants going missing or unaccounted for from reception centres and/or other equivalent facilities, States should ensure **concrete guidelines for reception centre procedures/facilities and conditions** which are in full accordance with the Convention and the United Nations Guidelines for the Alternative Care of Children."

3.5.4. [General Comment No. 10, Children's right in juvenile justice, CRC/GC/10, 25 April 2007](#)

3.5.5. [General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005](#)

3.6. UN Human Rights Committee

3.6.1. [*Bakhtiyari v. Australia Communication No 1069/2002, 29 October 2003, CCPR/C/79/D/1069/2002*](#)

Summary: Mr. Bakhtiyari had arrived in Australia illegally and later obtained a visa to remain in the country on the basis of his Afghan nationality and Hazara ethnicity. Mrs Bakhtiyari and their five children arrived to Australia separately, were detained and their applications to remain were refused at all instances. At a later point, the authorities found evidence which suggested that the family were of Pakistani nationality and not from Afghanistan, at which point Mr Bakhtiyari was put back in detention and later transferred to be with his family. In 2003, after reviewing **evidence of the adverse effects detention has had on the children's mental health**, the Family Court ordered the release of the children pending the resolution of the parents' application. **The children's total period of detention was two years and eight months.** At the time when the case was before the Committee, Mrs Bakhtiyari was awaiting deportation and Mr Bakhtiyari was still in the process of appealing before the domestic courts.

In the Committee's view, **the detention of Mrs. Bakhtiyari and the children was arbitrary and contrary to article 9(1) of the Covenant, as the state could not account for why other less intrusive measures were not implemented.** In addition, **inability to challenge judicially such arbitrary detention was a violation of subparagraph 4 of the same article.** It was also held that the planned return to Pakistan of Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari's appeals would constitute an **arbitrary interference with the family of the complainants** in violation of articles 17 (right to respect for privacy, the family, home and correspondence) and 23 (protection for the family).

Finally, there was also a violation of article 24 (**protection of the child**) in that until the Family Court decision to release the children, other institutions had not been guided by the best interests of the child principle.

In considering the meaning of the "**best interests of the child**", the Committee rejected the suggestion that article 24 of the Covenant should be interpreted in light of the Convention on the Rights of the Child (CRC), on the grounds that the Human Rights Committee is not competent to examine violations of the CRC.

3.7. UN Committee on Migrant Workers

- 3.7.1. [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 migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017](#)
- 3.7.2. [Joint general comment No. 4 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 \(2017\) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017](#)
- 3.7.3. [CMW-CRC Joint General Comment on the Human rights of Children in the Context of International Migration, 2017](#)
- 3.7.4. [Statement by the Chair of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Ending Immigration Detention of Children", 3 July 2014](#)
- 3.7.5. [General Comment No. 2, The Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 August 2013](#)

3.8. UN Special Rapporteur on the human rights of migrants

- 3.8.1. [Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, "The Global Compact for safe, regular and orderly mobility", A/71/40767, 20 July 2016](#)
- 3.8.2. [Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, "Detention of migrants in an irregular situation", A/HRC/20/24, 2 April 2012](#)
- 3.8.3. [Report of the UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, "The protection of children in the context of migration", A/HRC/11/7, 14 May 2009](#)

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

- 3.9.1. [Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, "Children Deprived of Liberty" A/HRC/22/53, 5 March 2015](#)

3.10. UN Special Rapporteur on trafficking in persons, especially women and children

- 3.10.1. [Report of the UN Special Rapporteur on trafficking in persons, especially women and children, "Trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children", A/HRC/32/41, 3 May 2016](#)
- 3.11. UN Working Group on Arbitrary Detention (WGAD)
- 3.11.1. [Report of the Working Group on Arbitrary Detention, "United Nations Basic Principles and Guidelines on Remedies and procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court", A/HRC/30/37, 6 July 2015](#)
- 3.11.2. [Report of the Working Group on Arbitrary Detention, "Detention of immigrants in an irregular situation", A/HRC/13/30, 18 January 2010](#)
- 3.12. UN Special Representative of the Secretary-General (SRSG) on Violence against Children
- 3.12.1. [Annual Report of the Special Representative of the Secretary-General on Violence against Children to the Human Rights Council, A/HRC/31/20, 5 January 2016](#)
- 3.12.2. [Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, A/HRC/21/25, 27 June 2012](#)
- 3.12.3. [Annual report of the Special Representative of the Secretary-General on Violence against Children to the Human Rights Council, A/HRC/16/54, 28 February 2011](#)
- 3.12.4. [Annual report of the Special Representative of the Secretary-General on Violence against Children to the General Assembly, A/65/262, 9 August 2010](#)
- 3.13. UN High Commissioner for Human Rights (OHCHR)
- 3.13.1. [OHCHR, "Situation of Migrants in Transit", A/HRC/31/35, 11 March 2016](#)
- 3.13.2. [OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders", A/69/277, 7 August 2014](#)
- 3.13.3. [OHCHR, "Study of the Office of the United Nations High Commissioner for Human Rights on challenges and the best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration", A/HRC/15/29, 5 July 2010](#)

3.14. UN Children's Fund (UNICEF)

- 3.14.1. [UNICEF, Call for Action: Protecting the rights of refugee and migrant children arriving in Europe 2016](#)**

3.15. UN High Commissioner for Refugees (UNHCR)

- 3.15.1. [UNHCR, Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019, 2014](#)**
- 3.15.2. [UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012](#)**
- 3.15.3. [UNHCR Guidelines on International protection: child asylum claims under Articles 1\(A\)2 and 1\(F\) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009](#)**
- 3.15.4. [UNHCR Conclusion on Children at Risk No. 107 \(LVIII\), 2007](#)**
- 3.15.5. [UNHCR Revised Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 26 February 1999](#)**
- 3.15.6. [Executive Committee of the High Commissioner's Programme \(ExCom\) ExCom Conclusion No. 85 \(XLIX\), 9 October 1998](#)**

4. REGIONAL HUMAN RIGHTS BODIES

4.1. Parliamentary Assembly of the Council of Europe (PACE)

- 4.1.1. [Recommendation 2056 \(2014\) on "The alternatives to immigration detention of children", 3 October 2014](#)
- 4.1.2. [Resolution 2020 \(2014\) on "The alternatives to immigration detention of children", 3 October 2014](#)
- 4.1.3. [Statement by Ms. Doris Fiala, General Rapporteur on the "Parliamentary Campaign to End Immigration Detention of Children", 23 April 2014](#)
- 4.1.4. [Resolution 1810 \(2011\) on "Unaccompanied children in Europe: issues of arrival, stay and return", 15 April 2011](#)
- 4.1.5. [Resolution 1707 \(2010\) on "Detention of asylum seekers and irregular migrants in Europe", 28 January 2010](#)

4.2. Commissioner for Human Rights of the Council of Europe

- 4.2.1. [High time for states to invest in alternatives to migrant detention, 31 January 2017](#)
- 4.2.2. [Council of Europe's Commissioner for Human Rights, Nils Muižnieks. Report following his visit to Belgium from 14 to 18 September 2015, 28 January 2016](#)
- 4.2.3. [Council of Europe's Commissioner for Human Rights, Nils Muižnieks. Report following his visit to Netherlands from 20 to 22 May 2014, 14 October 2014 2015](#)
- 4.2.4. [Council of Europe's Commissioner for Human Rights, Nils Muižnieks. Report following his visit to Bulgaria from 9 to 11 February 2015, 22 June 2015](#)
- 4.2.5. [Statement by the Council of Europe's Commissioner for Human Rights, Nils Muižnieks. "Protecting Children's Rights Europe should do more", 18 November 2014](#)

4.3. European Court of Human Rights (ECtHR)

ECtHR, [Khlaifia v. Italy](#), Application No 16483/12, 15 December 2016

ECtHR, [A.B. and Others v France, A.M. and Others v France, R.C. and V.C. v France, R.K. v France, R.M. and Others v France](#), Application Nos. [11593/12, 24587/12, 76491/14, 68264/14, 33201/11](#), 12 October 2016

ECtHR, [Stoyanov and Others v. Bulgaria](#), Application No 55388/10, 31 March 2016

ECtHR, [Alexey Petrov v. Bulgaria](#), Application No 30336/10, 31 March 2016

ECtHR, [*Petrov and Ivanova v. Bulgaria*](#), Application No 45773/10, 31 March 2016

ECtHR, [*Ilias and Ahmed v. Hungary, Application No. 47287/15*](#), 14 March 2017 on the lawfulness of detention (breach of Article 3 ECHR)

ECtHR, [*O.M. v. Hungary*](#), Application number 9912/15, 5 July 2016 on arbitrary and unjustified detention (breach of Article 5(1) ECHR)

ECtHR, [*Case of Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*](#), Application No 47848/08, 17 July 2014

ECtHR, [*Çoşelav v. Turkey, No. 1413/017*](#), 9 October 2012 on detention of a minor in an adult prison and the authorities' failure to conduct an effective investigation (breach of Article 2 ECHR)

ECtHR, [*Austin and Others v. the United Kingdom*](#), No. 39692/09 40713/09 and 41009/09, 15 March 2012 on the possibility that the deprivation of liberty be justified by the "common good"

ECtHR, [*Case of Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*](#), Application No 47848/08, 17 July 2014

ECtHR, [*Nencheva and Others v. Bulgaria*](#), Application No 48609/06, 18 June 2013

ECtHR, [*R.M.S. v. Spain*](#), Application No 28775/12, 18 June 2013

ECtHR, [*Kanagaratnam and Others v. Belgium*](#), No. 15297/09, 13 December 2011 on the detention of an asylum-seeking mother and her three children in a closed centre for aliens in an irregular situation (breach of Articles 3 and 5 ECHR)

ECtHR, [*Rahimi v. Greece, No. 8687/08, 2011*](#) on effective remedies to challenge conditions of detention (breach of Article 3, Article 5 paragraphs 1 and 4 and Article 13 ECHR)

ECtHR, [*Popov v. France*](#), Nos. 39472/07 and 39474/07, 19 January 2012 on administrative detention of a family for two weeks at the Rouen-Oissel centre in France pending their removal to Kazakhstan (breach of Article 3, Article 5 and Article 8 ECHR)

ECtHR, [*Muskhadzhiyeva and Others v. Belgium*](#), No. 41442/07, 19 January 2010 paras. 74–75 on the detention of a mother and her four children in a closed transit centre (breach of Article 3 ECHR)

ECtHR, [*Güveç v. Turkey, No. 70337/01*](#), 20 January 2009 on detention of a minor in an adult prison and inadequate medical care (breach of Article 37(c) CRIC and Article 3 ECHR)

ECtHR, [*Saadi v. The United Kingdom, No. 13229/03*](#), 29 January 2008 on the characteristics that make a deprivation of liberty arbitrary (breach of Article 5(2) ECHR)

European Court Of Human Rights, [*Nart v. Turkey, No. 20817/04*](#), 6 May 2008 on the pre-trial detention of a minor (breach of Article 5(3) ECHR)

ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006 on detention of an unaccompanied child to prevent unauthorised entry (breach of Article 3, Article 5 and Article 8 ECHR)

ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1998 on the hearing of applicant's detention (breach of Article 5(4) ECHR)

ECtHR, *Rahimi v. Greece*, Application No 8687/08, 5 July 2011

ECtHR, *Nielsen v. Denmark*, No. 10929/84, 28 November 1988 on the placement of children in institutions

ECtHR, *Guzzardi v Italy*, No. 7367/76, 6 November 1980 on the criteria for assessing whether applicants have been objectively deprived of their liberty

4.4. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The CPT reports have contributed in a significant way to international human rights jurisprudence concerning the treatment of juveniles in detention. At the same time, it is apparent that the CPT does not set out to create standards but rather they emerge and are distilled from its empirical findings and recommendations in the visit reports. As such, they evolve and develop over time, in line with the CPT's developing experience. The following Reports address the situation of children deprived of their liberty:⁴

4.4.1. [*CPT Factsheet on Immigration detention CPT/Inf\(2017\), March 2017*](#)

4.4.2. [*24th General Report – Extracts on juveniles deprived of their liberty under criminal legislation \(2015\)*](#)

4.4.3. [*19th General Report – CPT comments on Safeguards for Irregular Migrant Children \(2008/2009\)*](#)

4.4.4. [*18th General Report – CPT Comments on the Draft European Rules \(2007/2008\)*](#)

4.4.5. [*9th General Report – Juveniles deprived of their liberty \(1998\)*](#)

4.5. Committee of Ministers

4.5.1. [*Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe \(Nicosia, 19 May 2017\)*](#)

To avoid resorting to the deprivation of liberty of children on the sole ground of their migration status:

- **Proposed immediate action in 2017**

- A conference to be organised within the framework of the Czech Chairmanship of the Committee of Ministers on topics relating to the detention of migrant

⁴ <https://rm.coe.int/168045d229>

children, bringing together government authorities and other relevant stakeholders, including Ombudspersons for Children and NGOs, to identify best practices and draw up recommendations.

- A Guide for monitoring places where children are deprived of their liberty as a result of migration procedures to be issued and training to be organised for Parliamentarians and National Ombudspersons (and other stakeholders, if relevant) in the framework of the Parliamentary Campaign to End Immigration Detention of Children.
- The factsheet on immigration detention published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on 15 March 2017 to be translated into several languages.

• **Proposed further action for 2018-2019**

- Guidance on alternatives to immigration detention and/or a compilation of good practices to be submitted to the Committee of Ministers.
- A training module on alternatives to detention may thereafter be developed and training conducted.

4.5.2. [Recommendation CM/Rec\(2008\)11 of the Committee of Ministers to Member States on the European Rules for juvenile offenders subject to sanction's or measures, 5 November 2009](#)

4.6. **Steering Committee for Human Rights (CDDH) Drafting Group on Migration and Human Rights (CDDH-MIG)**

4.6.1. [Extracts from Council of Europe Standards on Alternatives to Immigration Detention, 8 September 2016](#)

5. **GENERAL PRINCIPLES**

5.1. [Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, "Children Deprived of Liberty" A/HRC/22/53, 5 March 2015](#)

72. The deprivation of liberty of children is intended to be an *ultima ratio* measure, to be used only for the **shortest possible period of time**, only if is in the **best interests of the child**, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the **least restrictive means necessary**, adopt alternatives to detention that fulfil the best interests of the child and the obligation to prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies and practices that allow children to remain with family members or guardians in a non-custodial, community-based context. Alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children. This includes access to counselling, probation and community services, including mediation services and restorative justice. Furthermore, if circumstances change and the reclusion of children is no longer required, States are required to release them, even when they have not completed their sentences.

5.2. Non-discrimination

The international legal framework applies in its entirety to all children, with no distinction. This principle, provided for in article 2 of the Convention, is confirmed in other texts which have as their concern children deprived of liberty (see JDL for example, article 4).

All children deprived of liberty must therefore be treated equally, irrespective of any consideration of race, colour, sex, age, language, religion, the child's or his parent's political or other opinion, national, ethnic or social origin, beliefs or cultural practices, property, disability, birth, domestic situation or any other status.

In recognition of the fact that girls generally do not benefit from the same treatment as boys, article 26(4) AJJ provides further that “[girls] shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.”

In addition, article 45(3) TP stipulates that the transport of prisoners shall be carried out “in equal conditions”.

This illustrates that the principle of non-discrimination must apply in all circumstances.⁵

5.3. Best interests of the child

The best interests of the child must be a primary consideration in all actions concerning him (CRC, article 3(1)). With regard to children deprived of their liberty, the best interests of the child must be taken into consideration at several stages, including the following: at the time of the procedure leading to the deprivation of liberty; when the decision is made as to the type of institution; when decisions are made inside the institution; every time the possibility of release is discussed.⁶

5.4. Right to life, survival and development

Article 6 CRC recognizes the child's inherent right to life, as well as the responsibility of States Parties to ensure the survival and development of the child. This right and this responsibility do not come to an end when children enter closed institutions.⁷

This also has implications for arrest, detention and imprisonment of children. Article 37 (c) CRC requires that each child must be treated in a manner that takes into account the fact that he is a child with specific needs compared to adults. In conjunction with article 2 CRC the child may only be limited in the enjoyment of his rights if his best interests are being given full weight. In light of this, article 37 (c) explicitly provides for two particularities: a child deprived of his liberty must be separated from adults, and is entitled to maintain contact with his family through correspondence and visits, which may only be set aside if required by the child's best interests.⁸

⁵ <https://www.unicef.org/tdad/geertchildrendeprivedliberty.pdf> p. 102

⁶ <https://www.unicef.org/tdad/geertchildrendeprivedliberty.pdf> p. 103

⁷ Ibid p. 103

⁸ Deprivation of Liberty of Children in Light of International Human Rights Law and Standards (T. Liefwaard, 2008), p. 163

5.5. Right to participation

The right to participation (art. 12 CRC), has implications for the entire juvenile justice process. Regarding all decisions, and thus those related to deprivation of liberty, the right of the child to express his views freely must be fully respected and implemented. Regarding deprivation of liberty, this general principle has implications for inter alia the decisions that lead to deprivation of liberty, that follow upon the challenge of legality (art. 37 (d) CRC), or that lead to the child's placement. It also has implications for decisions affecting the child's legal status during deprivation of liberty, such as (further) limitations of the child's human rights and fundamental freedoms, treatment programmes, reintegration schemes, and his right to remedy unlawful or arbitrary treatment, for example through the right to file complaints. According to the CRC Committee 'the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights' (GC No. 10, para. 12).⁹

⁹ Ibid p. 164

6. THEMATIC FOCUS

6.1. Children in conflict with the law

6.1.1. Specific provisions

Article 37 (b) CRC

*(b) 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;*

Article 40 CRC

*1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be **treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.***

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

*(b) Every child alleged as or accused of having infringed the penal law has at least the following **guarantees**:*

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

*3. States Parties shall seek to **promote the establishment of laws, procedures, authorities and institutions specifically applicable to children** alleged as, accused of, or recognized as having infringed the penal law, and, in particular:*

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 14 ICCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

*3. In the determination of any criminal charge against him, everyone shall be entitled to the following **minimum guarantees**, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

Guidelines for Action on Children in the Criminal Justice System (1997)

20. *In order to maintain a link between the detained child and his or her family and community, and to facilitate his or her social reintegration, it is important to **ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty**, unless the best interests of the child would suggest otherwise.*

23. *In relation to children in the criminal justice system, due account should be taken of concerns raised by intergovernmental and non-governmental organizations and other interested parties, in particular systemic issues, including **inappropriate admissions and lengthy delays** that have an impact on children deprived of their liberty.*

24. *All persons having contact with, or being responsible for, children in the criminal justice system should receive education and training in human rights, the principles and provisions of the Convention and other United Nations standards and norms in juvenile justice as an integral part of their training programmes. Such persons include police and other law enforcement officials; judges and magistrates, prosecutors, lawyers and administrators; prison officers and other professionals working in institutions where children are deprived of their liberty; and health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice.*

6.1.2. Interpretative guidance

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

The present report, submitted pursuant to Human Rights Council resolution 18/12, builds upon the 2006 United Nations Study on Violence against Children, which remains a foundational document for the prevention and elimination of all forms of violence against children in all settings, including within the juvenile justice system. This report describes the current situation of violence against children in the juvenile justice system, identifies the risks of violence to which children are exposed and analyses the systemic factors which contribute to violence. It provides a number of recommended strategies to prevent and respond to violence against children in the juvenile justice system.

Human rights in the administration of justice, in particular juvenile justice, 23 September 2011

9. *Encourages States that have not yet integrated children's issues in their overall rule of law efforts to do so, and to develop and implement a **comprehensive juvenile justice policy** to prevent and address juvenile delinquency as well as with a view to promoting, inter alia, the use of **alternative measures**, such as diversion and restorative justice, and **ensuring compliance with the principle that deprivation of liberty of children should only be used as***

a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pretrial detention for children;

10. Encourages States to foster close cooperation between the justice sectors, different services in charge of law enforcement, social welfare and education sectors in order to promote the use and improved application of alternative measures in juvenile justice;

11. Stresses the importance of including rehabilitation and reintegration strategies for former child offenders in juvenile justice policies, in particular through education programmes, with a view to their assuming a constructive role in society; 12. Encourages States not to set the minimum age of criminal responsibility at too low an age level, bearing in mind the emotional, mental and intellectual maturity of the child, and, in this respect, refers to the recommendation of the Committee of the Rights of the Child to increase their lower minimum age of criminal responsibility without exception to the age of 12 years

CRC General Comment No. 10, Children's right in juvenile justice, 25 April 2007

13. CRC provides a set of fundamental principles for the treatment to be accorded to children in conflict with the law:

– Treatment that is consistent with the child's sense of dignity and worth. This principle reflects the fundamental human right enshrined in article 1 of UDHR, which stipulates that all human beings are born free and equal in dignity and rights. This inherent right to dignity and worth, to which the preamble of CRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;

– Treatment that reinforces the child's respect for the human rights and freedoms of others. This principle is in line with the consideration in the preamble that a child should be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations. It also means that, within the juvenile justice system, the treatment and education of children shall be directed to the development of respect for human rights and freedoms (art. 29 (1) (b) of CRC and general comment No. 1 on the aims of education). It is obvious that this principle of juvenile justice requires a full respect for and implementation of the guarantees for a fair trial recognized in article 40 (2) (see paragraphs 40-67 below). If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?;

– Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society. This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;

– Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented. Reports received by the

Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective followup to the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in October 2006 (A/61/299).

14. The Committee acknowledges that **the preservation of public safety is a legitimate aim of the justice system**. However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC.

26 States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b)).

27 It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims.

80 An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort.

92. A comprehensive juvenile justice system further requires the **establishment of specialized units within** the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

93. The Committee recommends that the States parties **establish juvenile courts either as separate units or as part of existing regional/district courts**. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.

6.2. Detention of children in the context of migration

6.2.1. Specific provisions

All Member States have ratified the [UN Convention on the rights of the child](#) (UNCRC) and the [1951 Convention Relating to the Status of Refugees](#) (1951 Geneva Convention). UNHCR Executive Committee of the High Commissioner's Programme conclusions¹⁰ and Guidelines on international protection provide guidance for States on the interpretation of refugee law

¹⁰ UN High Commissioner for Refugees (UNHCR), *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, <http://www.refworld.org/docid/471897232.html>

from a child rights angle.¹¹ The UN Committee on the rights of the child issues conclusions and recommendations to states parties on ensuring strengthened protection of the rights of children in migration. In addition, General Comments of the UN Committee on the rights of the child provide guidance to states parties in interpreting and implementing the UNCRC.¹² Twelve EU Member States are also party to the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, as well as Albania Montenegro and Switzerland.¹³

The provisions of other core international human rights treaties, including the ICCPR, ICESCR, CEDAW, CAT, CRPD as well as the 1954 and 1961 Conventions on statelessness also provide protection, without discrimination, to children under the jurisdiction of states parties. These treaties have largely been ratified by Member States.

Article 2 CRC

1. 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.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 22 CRC

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

6.2.2. Interpretative guidance

[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](#)

¹¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>

¹² http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

¹³ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en

Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017

30. In particular, the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status.

31. In order to implement the best interests principle in migration-related procedures or decisions that could affect children, the Committees stress the need to conduct systematically best-interests assessments and determination procedures as part of, or to inform, migration-related and other decisions that affect migrant children. As the Committee on the Rights of the Child explains in its general comment No. 14, the child's best interests should be assessed and determined when a decision is to be made. A "best-interests assessment" involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. A "best-interests determination" is a formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment. In addition, assessing the child's best interests is a unique activity that should be undertaken in each individual case and in the light of the specific circumstances of each child or group of children, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves.

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, MW/C/GC/4-CRC/C/GC/23, 16 November 2017

*5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention.¹⁴ The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child.¹⁵ In this light, both Committees have repeatedly affirmed that **children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.***

*10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, **offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a***

¹⁴ Convention on the Rights of the Child, art. 37; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 16 and 17; Universal Declaration of Human Rights, arts. 3 and 9; International Covenant on Civil and Political Rights, art. 9.

¹⁵ See Committee on the Rights of the Child, report of the 2012 day of general discussion, para. 78. See also the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), in particular principle 21, para. 46, and guideline 21.

crime.¹⁶ Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.

11. Instead, States should adopt solutions 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 their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed,¹⁷ as well as before return. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children¹⁸ When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family.¹⁹

12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement.²⁰ They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children's holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced.

[Report by the UN Special Representative on Migration, Peter Sutherland, 3 February 2017](#)

Managing crisis-related movements and protecting migrants at risk

Recommendation 1

Develop global guiding principles on migrants in vulnerable situations, including migrant children

¹⁶ See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2, para. 24. See also Committee on the Rights of the Child, report of the 2012 day of general discussion, para. 78. Along the same lines, see the report of the Working Group on Arbitrary Detention (A/HRC/13/30), para. 58; and the report of the Special Rapporteur on the human rights of migrants (A/HRC/20/24), paras. 31 and 38.

¹⁷ See Committee on the Rights of the Child, report of the 2012 day of general discussion, para. 79.

¹⁸ See Committee on the Rights of the Child, general comment No. 6, paras. 39-40.

¹⁹ See A/HRC/20/24, para. 40; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14 of 19 August 2014*, Inter-American Court of Human Rights, para. 159; and A/HRC/28/68, para. 80.

²⁰ See the Guidelines for the Alternative Care of Children.

49. As Member States requested in the New York Declaration for Refugees and Migrants (resolution 71/1, para. 52), I pledge my full support for the **development of guiding principles on the treatment of migrants in vulnerable situations, including the protection of migrant children in such situations.**

50. I propose that this effort start now, by the commissioning of an independent expert panel that will: (a) develop a working definition of “migrants in vulnerable situations”; (b) provide an overview of the applicable international legal frameworks and non-binding instruments; and (c) identify where protection gaps currently arise in law and in practice.

51. With those findings in hand, States should embark now, in 2017, on a set of regional consultations, where possible in conjunction with their preparations for the global migration compact. These consultations should identify gaps in regional protection frameworks and propose ways to address those gaps. Ideally, the guiding principles will be adopted as part of the global compact on migration in 2018.

52. I further call on States and other stakeholders to act on their international legal obligations towards migrant children by: (a) Developing standards for the treatment of unaccompanied and separated children, based on the “Safe and Sound” guidelines developed by the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations protection responsibilities. I encourage UNICEF and UNHCR to develop such guidelines for other regions of the world by 2018¹⁸ for inclusion in the guiding principles on migrants in vulnerable situations;

(b) Ending the detention of migrant children and their families for reasons of their migration status, drawing on the work of the Inter-Agency Working Group to End Child Immigration Detention to help States adopt rights-focused care alternatives to detention.

Several other international bodies and courts have since made similar recommendations. See for more information the [summary of normative standards and recommendations on ending child immigration detention](#) (Inter-Agency Working Group on Ending Immigration Detention of Children, August 2016), as well as the study on [the use of detention and alternatives to detention in the context of immigration policies](#) (European Migration Network (EMN), 2014)

[Options for governments on care arrangements and alternatives to detention for children and families](#) (UNHCR)

Identification of victims and potential victims of human trafficking

States shall take all measures against all forms of physical or mental violence, neglect, maltreatment or exploitation, including sexual abuse (Art. 19 CRC), and other forms of exploitation or exposure to illicit drugs (Arts 33, 34, 35, 36, CRC). This applies in both detention and in non-detention settings. All appropriate measures are to be taken for physical and psychological recovery and social integration (Art. 29 CRC).²¹

Documentation

²¹ <http://www.unhcr.org/553f58509.pdf>

Every child has the right to identify documentation (Arts. 7, 8 CRC, Art. 27, 1951 Refugee Convention): any child born in detention shall be registered at birth (Art 7 CRC; ExCom Conclusion No. 11 (LXIV), 2013)

States are to provide asylum seeking and refugee children with individual documentation evidencing their special status as asylum-seekers and refugees (Art. 27, 1951 Refugee Convention).²²

Legal representation and advice

Children who are the principal applicant or UASC are to be informed of their right to and given access to legal advice and representation, not only for asylum or immigration procedures, but also to challenge their detention or challenge the reception arrangement (Art. 16, 1951 Refugee Convention; Art. 37(d), CRC).²³

Best interests assessment

Child's best interests shall be a primary consideration in decision-making (Art. 3, CRC).

Children are to be able to express their views freely and their views should be given "due weight" in accordance with their age and level of maturity (Art. 12, CRC).²⁴

Family tracing and reunification

Children have the right to family unity (inter alia, Art. 5, 8 and 16, CRC), to know and be cared for by their parents (Arts 7(2), 18, CRC), and the right not to be separated from their parents against their will (Art. 9, CRC).

A child temporarily or permanently deprived of his/her family environment, or in whose own best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance (Art. 20, CRC).

Requests for family reunification, including for parents to enter and stay to join the child, shall be dealt with in a positive, humane and expeditious manner (Arts. 10, 22, CRC).²⁵

Options for unaccompanied or separated children (UASC)

Siblings with existing bonds should in principle not be separated by placements in alternative options unless there is a clear risk of abuse or other justification in the best interests of the child.

Where possible, unaccompanied or separated children should be released into the care of family members, including asylum-seeking or refugee family members or others, who have residency in the asylum country.

As unaccompanied or separated children are at heightened risk of abuse and exploitation, monitoring and specific support to carers should be foreseen to ensure their protection.

²² <http://www.unhcr.org/553f58509.pdf>

²³ <http://www.unhcr.org/553f58509.pdf>

²⁴ <http://www.unhcr.org/553f58509.pdf>

²⁵ <http://www.unhcr.org/553f58509.pdf>

Alternative care arrangements should be made by the competent child care authorities, ensuring that the child receives appropriate supervision (UNHCR Detention Guidelines, para. 54).

A child who has been placed by the competent authorities for the purposes of care [...] has a right to periodic review [of the treatment provided to him/her] and all other circumstances relevant to his or her placement (Art. 25, CRC, UNHCR Detention Guidelines, para. 47).²⁶

Options for families with children

Children have the right to know and be cared for by their parents (Art. 7(1), CRC).

Children have the right to family unity, family relations and protection against unlawful interference with their privacy and family (Art. 5, 8 and 16 CRC; ExCom Conclusion No. 93, 2002).

A child can be separated from his/her parents against their will only when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary in the best interests of the child (Art. 9 (1), CRC). In any proceedings related to such separation, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. (Art. 9 (1) and (2), CRC).

Detention of families cannot be justified based solely on the parents' or guardians' immigration or other status. All appropriate measures have to be taken to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [...] of the child's parents, legal guardians, or family members (Art. 2(2), CRC).

Where the separation of a child from their parents is unavoidable in the context of detention, the child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Art. 9(3), CRC). In that context, both parents and child are entitled to essential information from the State on the whereabouts of the other, unless such information would be detrimental to the child (Art. 9(4), CRC).

New York Declaration for Refugees and Migrants (19 September 2016)

Reaffirmed international commitments to protect children in migration, including:

"32. We will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant authorities. We will comply with our obligations under the Convention on the Rights of the Child. We will work to provide for basic health, education and psychosocial development and for the registration of all births on our territories. We are determined to ensure that all children are receiving education within a few months of arrival, and we will prioritize budgetary provision to facilitate this, including

²⁶ <http://www.unhcr.org/553f58509.pdf>

support for host countries as required. We will strive to provide refugee and migrant children with a nurturing environment for the full realization of their rights and capabilities.

3. Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross-border movements. **We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.**

52. We will consider developing **non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance.** The guiding principles and guidelines will be developed using a State-led process with the involvement of all relevant stakeholders and with input from the Special Representative of the Secretary-General on International Migration and Development, the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees and other relevant United Nations system entities. They would complement national efforts to protect and assist migrants.

56. We affirm that **children should not be criminalized or subject to punitive measures because of their migration status or that of their parents.**

59. We reaffirm our commitment to **protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychosocial services,** ensuring that the best interests of the child is a primary consideration in all relevant policies.

70. We will ensure that **refugee admission policies or arrangements are in line with our obligations under international law.** We wish to see administrative barriers eased, with a view to accelerating refugee admission procedures to the extent possible. We will, where appropriate, assist States to conduct early and effective registration and documentation of refugees. We will also promote access for children to child-appropriate procedures. At the same time, we recognize that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, protection elsewhere.

81. We are determined to provide **quality primary and secondary education in safe learning environments for all refugee children,** and to do so within a few months of the initial displacement. We commit to providing host countries with support in this regard. Access to quality education, including for host communities, gives fundamental protection to children and youth in displacement contexts, particularly in situations of conflict and crisis.

82. We will **support early childhood education for refugee children.** We will also **promote tertiary education,** skills training and vocational education. In conflict and crisis situations, higher education serves as a powerful driver for change, shelters and protects a critical

group of young men and women by maintaining their hopes for the future, fosters inclusion and non-discrimination and acts as a catalyst for the recovery and rebuilding of post-conflict countries."

ECHR condemns France for the administrative detention of children (ECRE, 15 July 2016)

On 12 July 2016, the [European Court of Human Rights](#) ruled against France in the cases of [A.B. and Others v France](#), [R.M. and M.M. v France](#), [A.M. and Others v France](#), [R.K. v France](#). The cases concerned the issue of administrative detention of children who are accompanying their parents in the context of a deportation procedure. The Court considered that, given the children's age and the duration and conditions of their administrative detention, the French authorities had subjected these children to inhuman and degrading treatment, violating article 3 of the [European Convention on Human Rights](#) (ECHR).

In four of the cases, the Court found that the families' placement in administrative detention was not a measure of last resort and that the domestic authorities failed to explore all other viable alternatives. As a result, the Court found a violation of the right to liberty and security (Article 5, paragraph 1 of the ECHR) and of the right to a speedy review of the lawfulness of detention (Article 5, paragraph 4).

In two of the cases, the Court also found that there had been a disproportionate interference with the right to respect for family life (Article 8 of the ECHR).

UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 16 May 2016

*As determined by the Committee on the Rights of the Child, **detention can never ever be in the best interest of a child.** Even under the guise of "protective custody", it is utterly unacceptable for children to be administratively detained. Alternatives to detention in the form of open shelters for families and unaccompanied minors, with appropriate counselling and services, must be established as a matter of urgent priority.*

Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, "Children Deprived of Liberty" A/HRC/22/53, 5 March 2015

*80. Within the context of administrative immigration enforcement, it is now clear that **the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.** (...),The Special Rapporteur recalls the different procedural purposes between immigration and criminal proceedings, and that, in the words of the Court, "the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime." (...) The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. (...) **Immigration detention practices across the globe, whether de jure or de facto, put children at risk of cruel, inhuman or degrading treatment or punishment.** Furthermore, the detention of children who migrate to escape exploitation and abuse contravenes the duty of the State to*

promote the physical and psychological recovery of child victims in an appropriate environment. Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations."

[PACE Resolution 2020 \(2014\) on "The alternatives to immigration detention of children", 3 October 2014](#)

The Assembly considers that it is urgent to put an end to the detention of migrant children and that this requires concerted efforts from the relevant national authorities. The Assembly therefore calls on the member States to:

- 9.1. acknowledge that it is **never in the best interests of a child** to be detained on the basis of their or their parents' immigration status;*
- 9.2. **introduce legislation prohibiting the detention of children for immigration reasons**, if it has not yet been done, and ensure its full implementation in practice;*
- 9.3. **refrain from placing unaccompanied or separated children in administrative detention**;*
- 9.4. ensure that children are **treated as children first and foremost**, and that persons who claim to be children are treated as such until proven otherwise;*
- 9.5. develop **child-friendly age-assessment procedures** for migrant children;*
- 9.6. continue efforts to make their legislation on foreign nationals conform with the best international standards, while taking into account the best interests of the child as enshrined in Article 3 of the United Nations Convention on the Rights of the Child and promoting various forms of internationally recognised alternatives to detention;*
- 9.7. adopt **alternatives to detention** that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved;*
- 9.8. provide necessary resources in order to develop alternatives to the detention of migrant children;*
- 9.9. seek to develop and implement **non-custodial, community-based alternatives to detention programmes for children and their families**, using the "Child-sensitive Community Assessment and Placement (CCAP) Model";*
- 9.10. **raise the awareness** of all public officials, including the police, prosecutors and judges dealing with migration matters, of international human rights standards, by emphasising the rights of children and the alternatives to detention;*
- 9.11. **share best practices on the alternatives to the detention** of migrant children in all member States;*
- 9.12. **encourage collaboration between governments of member States, the Council of Europe, United Nations agencies, intergovernmental organisations and civil society organisations** to end child immigration detention and implement non-custodial, community-based alternatives to detention for children and their families.*

[Human Rights Committee General Comment No. 35, Article 9 \(Liberty and security of person\), 16 December 2014](#)

18. Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to

*document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. **Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.***

46 Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.

47 Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.

[Report of the 2012 Day of General Discussion on "The Rights of All Children in the Context of International Migration", 28 September 2012](#)

In 2012, the UN Committee on the rights of the child held a day of general discussion on the rights of all children in international migration and issued recommendations to states parties and others, relevant today and relevant to all Forum discussions.²⁷ Some of the most important recommendations are replicated below for ease of reference:

*"Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. **The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.**"*

57. States should ensure that the rights enshrined in the Convention are guaranteed for all children under a State's jurisdiction, regardless of their own or their parents' migration status and address all violations of those rights. Child care and protection agencies/bodies rather than immigration agencies take primary responsibility for all children in situation of international migration.

58. States should adopt comprehensive human rights-based laws and policies to ensure that all children involved in or affected by international migration enjoy the full protection of the Convention in a timely manner, regardless of age, economic status, documentation status of themselves or their parents, in both voluntary and involuntary migration situations, whether accompanied or unaccompanied, or any other.

²⁷<http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf> - recommendations start on page 15

72. States should conduct **individual assessments and evaluations of the best interests of the child** at all stages of and decisions on any migration process affecting children, and with the involvement of child protection professionals, the judiciary as well as children themselves. In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child's or their parents' detention, return or deportation.

74. To the greatest extent possible, States should conduct **continuous and individual best interests of the child assessments** as well as formal determination procedures at all stages or decisions of any migration process affecting children, with the involvement of child protection professionals and the judiciary. This includes any proceeding resulting in the child or his/her parents' deportation. States should make clear in their legislation, policy, and practice that the principle of the best interests of the child takes priority over migration and other administrative considerations. In doing so, States parties should ensure the availability of information on migrating procedures, risks and rights, health and mental health support, legal representation and guardianship, interviews and other processes in a child-friendly and culturally sensitive manner.

81. In the light of concerns for the situation of child migrants going missing or unaccounted for from reception centres and/or other equivalent facilities, States should ensure **concrete guidelines for reception centre procedures/facilities and conditions** which are in full accordance with the Convention and the United Nations Guidelines for the Alternative Care of Children."

Resolution 1707 (2010) on "Detention of asylum seekers and irregular migrants in Europe", 28 January 2010

9. In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

9.1. follow **10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible**. These principles aim to ensure that:

9.1.1. detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative;

9.1.2. detention shall distinguish between asylum seekers and irregular migrants; asylum seekers must be protected from penalties on account of their unauthorised entry or presence;

9.1.3. detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review;

9.1.4. detention shall be ordered only for the specific purpose of preventing unauthorised entry into a state's territory or with a view to deportation or extradition;

9.1.5. detention shall not be arbitrary;

9.1.6. detention shall only be used when necessary;

9.1.7. detention shall be proportionate to the objective to be achieved;

9.1.8. the place, conditions and regime of detention shall be appropriate;

9.1.9. vulnerable people should not, as a rule, be placed in detention and specifically unaccompanied minors should never be detained;

9.1.10. detention must be for the shortest time possible;

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

In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37 (b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time.

UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017

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

6.3. Children in institutions

6.3.1. Specific provisions

Article 23 CRC

- 1. States Parties recognize that a **mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.***
- 2. States Parties recognize the **right of the disabled child to special care** and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.*
- 3. **Recognizing the special needs of a disabled child**, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development*
- 4. States Parties shall promote, in the spirit of international cooperation, **the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children**, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.*

Article 20 CRC

*1. A **child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.***

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 24 (1) CRC

*1. States Parties recognize the **right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.** States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

Article 39

*States Parties shall take all appropriate measures to promote **physical and psychological recovery and social reintegration** of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*

Article 14 CRPD Liberty and security

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

*(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that **the existence of a disability shall in no case justify a deprivation of liberty.***

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 19 CRPD Living independently and being included in the community

*States Parties to this Convention recognize the **equal right of all persons with disabilities to live in the community**, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:*

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

6.3.2. Interpretative guidance

Committee on the Rights of Persons with Disabilities (CRPD Committee) adopts General Comment N°5 on article 19: living independently and being included in the community, 29 August 2017

16(c). Institutional settings may offer persons with disabilities a certain degree of choice and control, however, these choices are limited to specific areas of life and do not change the segregating character of institutions. **Policies of de-institutionalization therefore require implementation of structural reforms, which go beyond the closure of institutional settings.** Large or small group homes are especially dangerous for children, for whom there is no substitute for the need to grow up with a family. “Family-like” institutions are still institutions and are no substitute for care by a family.

27. Legal personality and legal agency are the basis of the realization of independent living within the community for persons with disabilities. Article 19 is, therefore, linked to the recognition and exercise of legal personality and legal capacity as enshrined in article 12 of the Convention, and further explained in the Committee’s general comment No. 1 (2014) on equal recognition before the law. Further, it is linked to the **absolute prohibition of detention on the basis of disability** as enshrined in Article 14 and elaborated in the respective guidelines.

37. The right to equal support services corresponds with the duty to ensure participation and involvement of persons with disabilities in processes related to facilities and services in the community, ensuring that they are responsive to specific requirements, gender and age sensitive, and that they are available to allow for spontaneous participation of persons with disabilities within the community. **For children, the core of the right to live independently and be included in the community entails a right to grow up in a family.**

49. To respect the rights of persons with disabilities under article 19 means that States parties need to phase out institutionalization. **No new institutions may be built by States parties, nor may old institutions be renovated** beyond the most urgent measures necessary to safeguard residents' physical safety. Institutions should not be extended, new residents should not enter in place of those that leave, and “satellite” living arrangements that branch out from institutions, have the appearance of individual living (apartments or single homes) but revolve around institutions, should not be established.

51. States parties should ensure that public or private funds are not spent on maintaining, renovating, establishing, building existing and new institutions in any form

of institutionalization. Furthermore, States parties must ensure that private institutions are not established in the guise of “community living”.

Resolution adopted by the General Assembly on Guidelines for the Alternative Care of Children, A/RES/64/142, 24 February 2010

3. *The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members. The State should ensure that families have access to forms of support in the caregiving role.*

5. *Where the child’s own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, **the State is responsible for protecting the rights of the child and ensuring appropriate alternative care**, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.*

23. *While recognizing that residential care facilities and family-based care complement each other in meeting the needs of children, where large residential care facilities (institutions) remain, **alternatives should be developed in the context of an overall deinstitutionalization strategy**, with precise goals and objectives, which will allow for their progressive elimination. To this end, States should establish care standards to ensure the quality and conditions that are conducive to the child’s development, such as individualized and small-group care, and should evaluate existing facilities against these standards. Decisions regarding the establishment of, or permission to establish, new residential care facilities, whether public or private, should take full account of this deinstitutionalization objective and strategy.*

48. *When the child’s sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. **States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent.** The removal of such children should be treated in the same way as other instances where separation is considered. Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.*

6.4. Children of parents in prison

6.4.1. Specific provisions

All Member States have ratified the UN Convention on the rights of the child (UNCRC), with relevant articles for children and imprisoned parents including the four guiding principles (articles 2, 3, 6 and 12 on the right to protection from discrimination, right to consideration of their best interests, the right to development and the right to express their opinion in matters

concerning them) as well as articles 9 and 31 (right to contact with their parents and right to engage in play and recreational activities). Crucially, the UNCRC stipulates that a child shall not be discriminated against on the basis of the status or activity of their parents, legal guardians or family members.

Article 2 CRC

1. 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.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3 CRC

*1. 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.***

*2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, **taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her,** and, to this end, shall take all appropriate legislative and administrative measures.*

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 6 CRC

*1. States Parties recognize that every child has the **inherent right to life.***

*2. States Parties shall ensure to the maximum extent possible the **survival and development of the child.***

Article 9 CRC

*1. States Parties shall ensure that **a child shall not be separated from his or her parents against their will,** except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

*3. States Parties shall respect **the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis,** except if it is contrary to the child's best interests.*

*4. Where such **separation results from** any action initiated by a State Party, such as the **detention, imprisonment, exile, deportation or death** (including death arising from any cause*

while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 31 CRC

1. States Parties recognize the **right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.**

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

The provisions of other core international human rights treaties, notably the [UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders](#) (Resolution 2010/16, Bangkok Rules) , the [UN Standard Minimum Rules for the Treatment of Prisoners](#) (Resolution 70/175, adopted on 17 December 2015, Nelson Mandela Rules) and [General Comment no. 1 on Article 30 of the African Charter on the Rights and Welfare of the Child](#) (African Committee of Experts on the Rights and Welfare of the Child, ACERWC) on Children of Incarcerated and Imprisoned Parents and Primary Caregivers , provide protection to children with parents in prison.

UN Member States have committed to basic minimum standards for women prisoners and offenders under the [Bangkok Rules](#) (2010). These include specific references to children of imprisoned mothers as follows. Crucially, Rule 49 states **“Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.”**

2.2: *Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.*

4: *Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities [...].*

9: *If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.*

21: *Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners.*

22: *Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.*

23: Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.

26: Women prisoners' contact with their families, including their children, and their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes.

28: Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.

33.3: Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.

41: The gender-sensitive risk assessment and classification of prisoners shall:

(b) Enable essential information about women's backgrounds, such as violence they may have experienced, history of mental disability and substance abuse, as well as parental and other caretaking responsibilities, to be taken into account in the allocation and sentence planning process.

42.2: The regime of the prison shall be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children. Childcare facilities or arrangements shall be provided in prisons in order to enable women prisoners to participate in prison activities.

42.3: Particular efforts shall be made to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.

45: Prison authorities shall utilize options such as home leave, open prisons, halfway houses and community-based programmes and services to the maximum possible extent for women prisoners, to ease their transition from prison to liberty, to reduce stigma and to re-establish their contact with their families at the earliest possible stage.

48.1: Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.

49: Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.

50: Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.

51.1: *Children living with their mothers in prison shall be provided with **ongoing health-care services** and their development shall be monitored by specialists, in collaboration with community health services.*

51.2: ***The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.***

52.1: *Decisions as to when a child is to be separated from its mother shall be based on **individual assessments and the best interests of the child** within the scope of relevant national laws.*

52.2: *The **removal of the child from prison** shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.*

60: ***Appropriate resources shall be made available to devise suitable alternatives for women offenders** in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. [...] Such programmes shall take account of the need to provide care for children [...].*

61: *When sentencing women offenders, courts shall have the power to consider **mitigating factors** [...] in the light of women's caretaking responsibilities [...].*

63: *Decisions regarding **early conditional release (parole)** shall favourably take into account women prisoners' caretaking responsibilities [...].*

64: ***Non-custodial sentences for pregnant women and women with dependent children shall be preferred** where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.*

69: *Efforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to **reduce the stigmatization and negative impact** of those women's confrontation with the criminal justice system on them.*

The Standards Minimum Rules for the Treatment of Prisoners (revised in 2015)

UN Member States have committed to basic minimum standards under the UN Standard Minimum Rules for the Treatment of Prisoners (revised in 2015). This includes specific reference to children as follows:

Rule 7(f): collection and recording data of family members including names, ages, location, and custody or guardianship status of children;

Rule 43.3: disciplinary or administrative sanctions shall not include prohibition of family contact;

Rule 58: regular communication with family shall include telecommunications, electronic, digital, and other means where available, and by receiving visits;

Rule 59: Prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation;

Rule 75: standard of education and training for prison staff shall be tailored to their general and specific duties;

Rule 88.2: There should be in connection with every prison social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his or her family and with valuable social agencies;

Rule 106: special attention shall be paid to the maintenance and improvement of relationships between a prisoner and his/her family where this is in the best interests of both;

Rule 107: from the beginning of sentence, encouragement and provision of assistance to maintain or establish relations with persons or agencies outside as may promote rehabilitation and the best interests of the family.

United Nations Third Optional Protocol to the Convention on the Rights of the Child (2014)

The Third Optional Protocol (OP3) to the Convention on the Rights of the Child on a communications procedure, a new instrument which entered into force in April 2014 and has been ratified by 13 EU Member State²⁸, allows children to take cases of rights violations directly to the UN Committee on the Rights of the Child through an individual complaints procedure. Complaints can be brought by one child, a group of children or by someone acting on behalf of one or more children. Applying this to the situation of children of prisoners, potential cases could be foreseen, including lack of mother and baby units in prisons; lack of consideration of the rights of the child in sentencing decisions involving parents; frightening or degrading search procedures for children; restrictions on visiting; problems with access to education, healthcare or recreational activities for children living with parents in prison²⁹.

In February and May 2017, the Child Rights Connect Working Group on Children of Incarcerated Parents (WGCIP) and the UN Committee on the Rights of the Child discussed exploring a possible CRC General Comment on children with imprisoned parents. These discussions are ongoing.

6.4.2. Interpretative guidance

UN Committee on the Rights of the Child Day of General Discussion on Children with incarcerated Parents, 2011

Recommendations:

Alternatives to detention

30. The Committee emphasises that in sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available

²⁸Current status as at 8 September 2017:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en

²⁹ Townhead, L. & Brett, R. (2015). Putting access to the United Nations Committee on the Rights of the Child into the hands of children of prisoners. *European Journal of Parental Imprisonment*, 1, 16-18.

and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).

Children's right to development and non-discrimination

33. The Committee [...] recommends that measures be taken to ensure that children in such situations are protected from stigmatisation. [...] Every child has the right to be with their parent as well as the right to family life and a social environment conducive to their development. In this context, the Committee recommends that decisions on whether the best interests of the child are better respected by having the child live with the incarcerated parent or outside the detention facility should always be made on an individual basis.

For children living with incarcerated parent(s)

34. The Committee recommends that State parties ensure the provision of sufficient social services at an adequate quality, including, health and educational facilities, to children living with incarcerated parent(s).

For children left outside when their parent is incarcerated

35. The Committee reiterates State parties obligation under the Convention to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

39. The Committee [...] recommends that State parties ensure the right of children to regularly visit their incarcerated parent(s). It further recommends that, wherever possible, State parties provide for such visits to occur in a child friendly environment, including by allowing visits at times that do not negatively interfere with other elements of the child's life, such as schooling, and for durations conducive to building or maintaining strong relationships. [...]

40. The Committee recommends State parties to take into account the right of the child to visit their parent(s) whenever a parent is sentenced and incarcerated. In doing so, the State party should seek, wherever possible, to situate the incarcerated parent at a facility close to his/her child to facilitate the child's right to visit and contact the parent. [...]