

Care of Migrant Children: The Need for Alternatives to Detention

Training Materials on Alternatives to Detention for Migrant Children



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List of Abbreviations

Introduction

CDDH: Steering Committee on Human Rights, Council of Europe

CERD: Committee on the Elimination of Racial Discrimination

CJEU: Court of Justice of the European Union

CMW: Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

CoE: Council of Europe

CRC: Committee on the Rights of the Child

CRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

EASO: European Asylum Support Office

ECHR: European Convention on Human Rights (formally Convention for the Protection of Human Rights and Fundamental Freedoms)

ECtHR: European Court of Human Rights

EU: European Union

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination

PACE: Parliamentary Assembly of the Council of Europe

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNCRC: United Nations Convention on the Rights of the Child

UNHCR: United Nations High Commissioner for Refugees

This training module is the first one of a series of instructional materials relevant to alternatives to detention for migrant children developed as part of the CADRE (Children's Alternatives to Detention protecting their Rights in Europe) project. The series includes the following training modules:

- I. Care of migrant children: the need for alternatives to detention
- II. Alternatives to detention: practical example of care of migrant children
- III. Appropriate procedures to guarantee access to effective remedies for migrant children in detention and when subject to alternatives to detention
- IV. How to communicate and work with children subject to alternatives to detention

This Module I. provides an overview of international and EU legal framework for alternatives to detention of migrant children.¹

I. Introduction

Detention² of migrants and refugees³, whether upon entry or pending deportation or expulsion, must not be arbitrary and must be carried out lawfully, in good faith pursuant to a proper legal basis. As a general matter, children should not be subject to any form of administrative detention. Therefore, any such detention should be the exception rather than the rule, and should be a measure of **last resort**, to be imposed for very short periods and for a narrow range of reasons only where other **less restrictive alternatives** are not feasible.⁴

Children must never be detained solely because of their or their parents' migration status.⁵

The UN Committee on the Rights of the Child, the UN Special Rapporteur on the human rights of migrants,⁶ the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment⁷ and the Parliamentary Assembly of the Council of Europe⁸ all make it clear that immigration detention of migrant children is **not in their best interest** and that detention of vulnerable individuals, including unaccompanied children is prohibited under international law.

In all actions relating to children, an assessment of the child's **best interests** must be undertaken separately and prior to a decision that will impact that child's life.⁹ Less coercive alternative measures must be sought before resorting to detention of children in migration, and therefore alternatives to detention/care arrangements must always be explored and implemented whenever feasible.

The term "alternatives to detention" refers to a range of formal and informal practices, that is any law, policy or practice applied to avoid detention of migrants while their status is pending or are awaiting expulsion/deportation.¹⁰ Detention should not be the norm, but a last resort.

Although various synonyms are used to refer to it – such as « less coercive measures », « special measures », and « less intrusive measures » – there is international consensus that alternatives to detention are non-custodial measures which respect and protect human rights and provide individual options to detention.¹¹ The core element here is that **alternatives to detention are applied in-**

¹ The sources cited in these materials include various sources of international law binding on EU Member States, for instance:
 - Decisions of the European Court for Human Rights: The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.
 - Decisions of treaty bodies (such as UN CRC): The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties.
 - Reports of Special Rapporteurs: The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.

² The legal term for "detention" is "deprivation of liberty", the term "detention" is used in these training materials as shorthand.

³ Migrants and refugees are separate categories with distinct protection regimes, for purposes of shorthand we will use the term "migrant children" to encapsulate both and that also include stateless children, in these materials.)

⁴ *Rahimi v. Greece*, ECtHR, Application no. 8687/08, Judgment of 5 April 2011, para. 109. Human Rights Committee, *General Comment 35*, para. 18;

⁵ *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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para.5; *United Nations High Commissioner for Refugees (UNHCR)'s position regarding detention of refugee and migrant children in migration context* (January 2017).

⁶ Statement of 16 May 2016.

⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *A/HRC/28/68*, 5 March 2015, para. 80.

⁸ *Resolutions 1707*(2010) and *1810*(2011).

⁹ Article 3 CRC, article 24.2 EU Charter.

¹⁰ UNHCR, *Detention Guidelines*, 2012, para. 8; International Detention Coalition (IDC), *There are Alternatives: A handbook for preventing unnecessary immigration detention* (revised edition), 2015, p. 7

¹¹ Steering Committee for Human Rights (CDDH), *Legal and practical aspects of effective alternatives to detention in the context of migration*, 7 December 2017, para. 17.

stead of detention and not used as an alternative form of detention.¹²

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families¹³ understands as alternatives to detention all community-based care measures or non-custodial accommodation solutions – in law, policy or practice – that are less restrictive than detention. These must be considered in the context of lawful detention decision procedures to ensure that detention is necessary and proportionate in all cases, with the aim of respecting the human rights and avoiding arbitrary detention of migrants, asylum seekers, refugees and stateless persons.

As the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families has stated: “In order to ensure that migrant and asylum-seeking children are not placed in immigration detention or in closed alternative care facilities for children, child protection and welfare actors should take primary responsibility for children in the context of international migration.”¹⁴

It is important for the protection of human rights in migration, including regarding detention or alternative care arrangements, that everyone who claims to be a child is treated as such until proven otherwise. For this reason the next section provides a brief overview of the definitions of the child. That is followed by the overview of the guiding principles on children’s rights.

1.1 Definition of a Child

For the purpose of these training modules, the international law definition of a “child” set out in the United Nations Convention on the Rights of the Child (UNCRC) is used, that is “every human being below the age of eighteen years” (Article 1).¹⁵ It is important to be aware that a different definition may be used in varying national laws, including various laws of the same State, which may use differing definitions of a child or the age in which a person reaches majority applicable in different legal regimes. In addition, varying particular rights protections and standards may vary among different age groups within the overall group of children, including in consideration of their evolving capacities.

Most Council of Europe (CoE) standards relating to children adopt the CRC definition of a child. Examples include article 4(d) of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197, 16 May 2005) and article 3(a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ([Lanzarote Convention](#), CETS No. 201, 25 October 2007). Under these regional and global standards, everyone under the age of 18 must be treated as a child, entitled to special care and procedures, irrespective of national legal provisions.

A migrant child within the meaning of the UNCRC is anyone under the age of eighteen and encompasses the following:

1. **Children of migrant workers**, as such persons are defined by the Committee on the Protection of the Rights of All Migrant Workers and their Families (CMW) ;
2. **Accompanied and unaccompanied children or children separated from their parents** outside of their country of nationality and, in case of statelessness, their country of residence (as defined in the UN Committee on the Rights of the Child (CRC) [General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin](#), CRC/GC/2005/6, 1 September 2005) and
3. **Child refugees** including asylum seekers, as defined by the 1951 [UN Refugee Convention](#)

¹² Steering Committee for Human Rights (CDDH), [Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results](#), 18-21 June 2019, p. 12.

¹³ UNCommittee on the Protection of the Rights of All Migrant Workers and Members of their Families, [General comment No. 5](#) (2021) on migrants’ rights to liberty, freedom from arbitrary detention and their connection with other human rights, Advance unedited version, 23 September 2021, para. 48.

¹⁴ *Ibid.*, para. 45.

¹⁵ Article 1 UN Convention on the Rights of the Child, 1989.

¹⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), UNGA Resolution 45/158 of 18 December 1990, Article 2: “For the purposes of the present Convention: 1. The term “migrant worker” refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

¹⁷ Para. 7 reads: “‘Unaccompanied children’ (also called unaccompanied minors) are children, as defined in article 1 of the Convention (CRC), who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”; Para. 8 reads: “‘Separated children’ are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.”

The UN CRC and CMW in their Joint General Comment No. 3 (para. 9) include in **children in the context of international migration**:¹⁸

- Children who have migrated with their parents or primary caregivers,
- Children who are unaccompanied or separated,
- Children who have returned to their country of origin,
- Children who were born to migrant parents in countries of transit or destination, or
- Children who remained in their country of origin while one or both parents migrated to another country, and regardless of their or their parents' migration or residence status (migration status).

1.2 Guiding Principles on Children's Rights

1.2.1 The Best Interests Principle

In all actions concerning children, including migrant children, the best interests of the child must be a primary consideration (Article 3 UNCRC).

The best interests of the child principle is an overarching component of substantive rights and thus, a fundamental interpretative legal principle. It is applicable to all official procedures pertaining to children and must be based on an assessment of all elements of a child's interests in a specific situation.

The CRC General Comment No. 14 provides that the elements to be taken into account in assessing and determining a child's best interests are:

- the child's views and identity;
- the preservation of the family environment and maintaining relations;
- the child's care, protection and safety;
- situation of vulnerability; and
- the child's right to health and right to education.¹⁹

The relevance and application of any of these elements varies on a case-by-case basis in such assessment, and may also conflict with one another.²⁰

According to the European Court of Human Rights (ECtHR), the best interests of a child principle will require that the extreme vulnerability of a child, for instance in the case of detention of a five-year-old in the case of *Mubilanzila Mayeka v. Belgium* (below), should be considered as a first priority. This means that when deciding on the placement of a child who is in an immigration procedure, it should be their individual circumstances, rather than their migration status, which must be decisive.

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, [Application No. 13178/03](#), Judgment of 12 October 2006

A five-year-old child was apprehended by authorities at the Brussels airport while travelling from the Democratic Republic of Congo with her uncle, without travel and immigration documentation, to join her mother in Canada where she held a refugee status. The child was refused entry in Belgium and detained for two months in a transit centre for adults, unaccompanied by her parents, before being ordered removal from Belgium. The Brussels Court of First Instance found that the child's detention was in violation of her best interests and ordered her immediate release. Although no adult in her home country was able or willing to take care of the child, she was deported back to the DRC. The ECtHR unanimously found that the child's detention violated her best interests (Article 3) and her right to the preservation of family relations (Article 8). It considered that:

55. The [child's] position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention.

¹⁸ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 9.

¹⁹ UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1 of the CRC), UN Doc. CRC/C/GC/14, (29 May 2013), paras. 52-79.

²⁰ See paras. 80-81.

As affirmed in the [Joint General Comment](#) by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) and the Committee on the Rights of the Child (No. 4 CMC and No. 23 CRC, children must never be detained because of their or their parents' migration status (para. 5). This is also stressed in the [United Nations High Commissioner for Refugees \(UNHCR\)'s position regarding detention of refugee and migrant children in migration context](#) (January 2017) and it provides that the best interests of the child should always be the primary consideration. The United Nations (UN) [Special Rapporteur on torture considered](#) that detention of children in the context of administrative immigration enforcement is never in the best interest of the child and that it may constitute cruel, inhuman or degrading treatment.²¹ Alternatives to detention/care arrangements should therefore always be explored.

In all actions relating to children, an assessment of the child's **best interests** must be undertaken separately and prior to a decision that will impact that child's life (Article 3 UNCRC, Article 24.2 EU Charter²²).

In their joint general comment, the CRC and CMW stated that:

"States parties [to the CRC and CRMW] should assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status. Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration."²³

The EU asylum law provides that less coercive alternative measures must be sought before resorting to detention of children in migration.²⁴

The Court of Justice of the EU (CJEU) held that the best interest of the child is a fundamental right and not just a general principle of law, meaning that it can be relied upon in legal proceedings as a source of substantive rights, rather than simply being invoked as a frame for interpretation.²⁵ In one later case, the Court emphasised the necessity of assessing the best interests of the child in *any* matter affecting a child, not solely in relation to matters being examined.

CJEU, M.A., B.T. and D.A. v Secretary of State of the Home Department, Case no. C-648/11, 6 June 2013

Upon a request by three minor third-country nationals, the Court examined Article 6 of the Dublin II Regulation²⁶ on the mechanism for determining the Member State responsible for examining an asylum application of unaccompanied minors, in light of the best interests principle:

57. Those fundamental rights include, in particular, that set out in Article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.

59. Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.

²¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, [A/HRC/28/68](#), 5 March 2015, para. 80.

²² It is important to note that the EU Charter is applicable within the scope of EU law and the implementation of such law by Member States in national law. Therefore, when Member States are implementing law on detention of migrants in line with EU instruments, this should reflect and respect the provisions of the EU Charter (see Article 52 of the EU Charter).

²³ [Joint general comment No. 3 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 \(2017\) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration](#), CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 32(e).

²⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereafter EU Reception Conditions Directive), Article 11(2).

²⁵ CJEU, *M.A., B.T. and D.A. v Secretary of State of the Home Department*, Case no. C-648/11, 6 June 2013.

²⁶ Council Regulation (EC) [No 343/2003](#) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

CJEU, M.A. v Belgium, Case no. C-112/20, 11 March 2021

A parent of a Belgian minor irregularly staying in Belgium was subject to a return decision by the Belgian authorities and appealed to the CJEU to interpret the Return Directive in light of the best interests principle. The Court held that the Return Directive must be implemented in accordance with this principle and stated:

36. [...] *It follows that [Article 24(2) of the EU Charter] is itself worded in broad terms and applies to decisions which, like a return decision adopted against a third-country national who is the parent of a minor, are not addressed to that minor but have significant consequences for him or her.*

38. *According to Article 3(1) [of the UNCRC], the best interests of the child are to be taken into account in all decisions concerning children. Therefore, such a provision covers, in general terms, all decisions and actions directly or indirectly affecting children, as was pointed out by the UN Committee on the Rights of the Child (see [CRC General Comment No. 14 (2013),] CRC/C/GC/14, paragraph 19).*

1.2.2 The Right of the Child to Participate and To Be Heard

The right to be heard is both a substantive right in itself and a necessary right for the interpretation and implementation of all other rights and is set out in international standards, including the UNCRC and the EU Charter.²⁷

The CRC General Comment No. 12 (2009) provides that States shall presume that a child has capacity to form their own views.²⁸ This right must be applied in any procedure determining status in a country or rights or otherwise affecting the child, including both civil and criminal proceedings.²⁸ It grants children the right to counseling (access to a lawyer), to information, to interpretation when needed, and other procedural rights.

The fact that the child is very young, cannot express views verbally or is in a vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant.) does not deprive them of the right to express their views, nor reduces the weight given to the child's views in determining their best interests.

The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in the decision-making process. This obligation extends to States when determining which or whether to apply alternatives to detention affecting an individual migrant child.

See also Modules III. and IV. for more details.

1.2.3 Non-discrimination

In accordance with EU and international law, including the Convention on the Rights of the Child, the rights of children must be secured without discrimination on any grounds such as their or their parent(s)' or guardian's sex, race, colour, ethnicity, indigenous status, descent, language, religion, political or other opinion, national or social origin, disability, socio-economic background, immigration status, association with a national minority, property, birth, sexual orientation and gender identity/expression or other status.³¹ In addition, children can face multiple and intersecting forms of discrimination on any combination of these and other grounds.³²

States must not only eliminate plainly discriminatory laws, policies and practices but also ensure that seemingly neutral measures do not have a discriminatory effect in real terms. The Committee on the Elimination of Racial Discrimination (CERD) has clarified that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation are not applied pursuant to a legitimate aim and are not proportionate to the achievement of this aim.³³ Considering that under international law, detention of children cannot be considered to be

²⁷ CRC, Article 12; EU Charter, Article 24(1).

²⁸ CRC General Comment No. 12 (2009) on the Right of the Child to be Heard, [CRC/C/GC/12](#), para. 20.

²⁹ CRC, Article 12(2). See also CRC General Comment No. 12, op. cit., paras. 26-27.

³⁰ See CRC General Comment No. 14, op. cit., para. 54; Views of the CRC in [Y.B. and N.S. v. Belgium](#), CRC/C/79/D/12/2017, 22 March 2017, para. 8.7.

³¹ CRC, Article 2. General Comment 21 on children in street situations, UN DOC CRC/C/GC/21.

³² General Comment 21 on children in street situations, UN DOC CRC/C/GC/21, para 26.

³³ CERD General Recommendation No. 30 (2004) on Discrimination Against Non-Citizens, para. 4.

legitimate or proportional in the context of migration, it could amount to discrimination on the basis of citizenship or immigration status.

1.2.4 The Positive Obligation to Provide Care and Protection

It is the duty of the State to provide care and protection to children in all situations, including where their families are unwilling or unable to do so. The duty implies positive obligations on the State to take the necessary steps to ensure the well-being of children. This obligation is provided for in several articles of the CRC and covers diverse situations such as children deprived of their family environment (art. 20), refugee children (art. 22), and children who are victims of abuses (art. 39).

Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR) also entitles every child "to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". This article entails the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required to ensure the right to liberty under article 9 for everyone. Article 17 of the European Social Charter requires States to provide for economic and social protection for children; Article 31 of the revised European Social Charter requires States to provide access to housing of adequate standard; Article 17 of the revised Charter provides for the need to protect children and young persons against negligence, violence or exploitation, and to provide protection and special aid from the State for children and young persons temporarily or definitively deprived of their family's support. Article 7 of the revised Charter further provides that children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.

Alternatives to detention ensure that these obligations are being respected and that the liberty and security of children as well as their well-being, otherwise violated through detention, are preserved.

1.3 Age Assessment

Age assessment refers to procedures through which authorities seek to establish the age of a migrant to determine whether the individual is or may be a child, in which case special procedures, rules, care and treatment must be applied.

Given the definition of a child and the entitlement of children to special care and protection, it is important to ensure that all individuals who are under the age of 18 are treated as children.

Age assessment for the purpose of determining an individual's procedural and substantive rights should only be carried out when there is reasonable doubt as to whether or not an individual is a child. In case of doubt, when an individual claims to be a child and this fact cannot be easily verified, the individual should be treated as a child unless and until proven otherwise.³⁵

Age assessment is of vital importance to the protection of children's rights as the outcome of such procedure determines whether the individual in question will enjoy or be excluded from protection as a child under the law.³⁶ In other words, determining that a child is, in fact, a child activates the access to fundamental rights and protection under relevant national and international human rights law.

Persons who claim to be children should be treated as such until proven otherwise.³⁷

International Law

In the context of migration, whenever a child is required to prove age and they do not have a birth certificate, the State must provide the child with a birth certificate promptly and free of charge. If there is no proof of age by birth certificate, the responsible authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent

³⁴ UN Human Rights Committee, General Comment No. 32, paras. 42–44; CRC, General Comment No. 12, paras. 32–37.

³⁵ [Joint general comment No. 4 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families \(CMW\) and No. 23 \(2017\) of the Committee on the Rights of the Child \(CRC\) 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, para. 4; CRC General Comment No. 6 (2005), CRC/GC/2005/6, para. 31(A); see also UN Committee on the Rights of the Child, report of 2012 Day of General Discussion of 28 September 2012, "The Rights of All Children in the Context of International Migration", para. 49; PACE resolution 2020(2014), para 9.4.

³⁶ See CRC, [N.B.F. v. Spain](#), CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.3.

³⁷ [Joint General Comment No. 4 \(2017\) CMW and No. 23 CRC, CMW/C/GC/4-CRC/C/GC/23](#), paras.5-13; CRC General [Comment No. 6 \(2005\)](#), CRC/GC/2005/6, Para.61-63; see also [UN Committee on the Rights of the Child, report of 2012 Day of General Discussion of 28 September 2012, "The Rights of All Children in the Context of International Migration"](#), para. 32 PACE resolution 2020(2014), para 9.4

lent documents or school reports. Documents should be considered genuine unless there is proof to the contrary.³⁸ Authorities should allow for interviews with or testimony by the children and parents regarding age, or for affirmations to be filed by teachers or religious or community leaders who know the age of the child. Only if these measures prove unsuccessful may there be an assessment of the child's development to determine age.

In their Joint General Comment, the CMW and the CRC set out principles to be applied to the age assessment process.³⁹ The general principles of the CRC, such as the best interest of the child, free and informed consent and non-discrimination are applicable, as well as any relevant provision of the Convention.⁴⁰ Under this interpretation, States have the duty to conduct age assessment procedures through a holistic and multidisciplinary approach which ensures that all the necessary safeguards and principles explored are in place and the rights of the applicant are protected.

Age assessment should therefore be conducted in a scientific, safe, child and gender-sensitive, culturally-appropriated and fair manner, avoiding any risk of violating the physical integrity of the child, and duly respecting human dignity.⁴¹ The consent of the child to age assessment is always required.

Moreover, any medical examination must be performed only with full respect for the individual's dignity and resorting to the least invasive examination being carried out by qualified medical professionals. The CRC has called on States to "refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes."⁴²

It is fundamental that identification measures such as age assessment do not only examine or consider the physical appearance of the individual, but also their psychological maturity.⁴³ This may vary significantly from one person to another, particularly when considering lived traumas and experiences often present among asylum-seekers. This allows authorities and professionals to make an "informed" estimate of a person's age and ultimately allow access to own's own right and status.⁴⁴

As described below, the CRC also establishes in its General Comment No. 6 that the best interests of the child should be a guiding principle to determine when and how the age assessment process shall be conducted for unaccompanied and separated children. This follows from the vulnerable circumstances that are inherent to the situation of this group of children,⁴⁵ and their protection needs should therefore be prioritised.

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

31. The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:

³⁸ See CRC, N.B.F. v. Spain, CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.4. See CRC General Comment No. 24 on children's rights in the child justice system, CRC/C/GC/24, paras. 44-45. See also CRC, R.K. v. Spain, CRC/C/82/D/27/2017, Adoption of views, para. 10.a); M.T. v. Spain, CRC/C/82/D/17/2017, Adoption of views, para. 14.a).

³⁹ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) 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.

⁴⁰ For more information on the general principles of the CRC cfr. *Section II Guiding Principles on Children's Rights, of this Module*.

⁴¹ See CRC recommendations in N.B.F. v. Spain, CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.4; CRC General Comment No. 6 (2005), CRC/GC/2005/6, para. 31(A).

⁴² Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) 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, para. 4; CRC, N.B.F. v. Spain, CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.4.

⁴³ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) 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, para. 4; CRC recommendations in N.B.F. v. Spain, CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.4; A.L. v. Spain, CRC/C/81/D/16/2017, Adoption of views, 31 May 2019, para. 12.7; J.A.B. v. Spain, CRC/C/81/D/22/2017, Adoption of views, 31 May 2019, para. 13.6; R.K. v. Spain, CRC/C/82/D/27/2017, Adoption of views, 18 September 2019, para. 9.7.

⁴⁴ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) 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, para. 4.

⁴⁵ CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, para. 3.

- (i) Prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities (art. 8). Such identification measures include age assessment [...]

The benefit of the doubt surrounding the age assessment process, owed to any individual claiming to be a child, is another established principle where the best interests principle plays a fundamental role. In its Joint General Comment and its recommendations, the CRC and the CMW emphasise the importance of the presumption of minority which shall be maintained unless and until proven otherwise and considers that any documents presented for documentation shall be considered genuine unless there is proof to show otherwise.⁴⁶ They further affirm that when a person refuses to undergo medical tests to ascertain their age, such person should not be declared or assumed to be an adult, based exclusively on such refusal.⁴⁷ The presumption of minority shall thus be maintained even when an individual refuses such tests.

Owing to this presumption of minority and the relevance and importance of the age assessment process, the CRC provides that essential safeguards, namely the provision of legal representation, need to be taken in order to ensure compliance with the best interests principle, as follows:

CRC Recommendations in *N.B.F. v. Spain*, CRC/C/79/D/11/2017, 27 September 2018

- 12.8. [...] The Committee considers that States parties should appoint a qualified legal representative, with the necessary linguistic skills, for all young persons claiming to be minors, as soon as possible on arrival and free of charge. The Committee is of the view that the provision of a representative for such persons during the age-determination process is equivalent to giving them the benefit of the doubt and is an essential guarantee of respect for their best interests and their right to be heard. Failure to do so implies a violation of articles 3 and 12 of the Convention, as the age-determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.

Finally, the fundamental role of the age assessment procedure in activating the access to enjoyment of all remaining child rights and safeguards, it "is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process."⁴⁸ Effective judicial review and the possibility of appealing from any such decision is crucial given the implications of a decision that may refuse a minority status to a child.

EU Law

At the EU level, the recast EU Asylum Procedures Directive (2013/32/EU of 2013) reflects all the safeguards provided by the UNCRC and enshrines the presumption of minority, and further provides requirements on how age assessment should be carried out.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (EU Asylum Procedures Directive), Doc no. 32013L0032

Article 25

(...)

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for inter-

⁴⁶ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017), op. cit., para. 4; CRC, *N.B.F. v. Spain*, op. cit., para. 12.4; CRC, *J.A.B. v. Spain*, op. cit., para. 13.4.

⁴⁷ *Ibidem*.

⁴⁸ CRC Recommendations in *N.B.F. v. Spain*, op. cit., para. 12.3.

national protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

- (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and
- (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

In line with the requirement of effective judicial review, the European Asylum Support Office (EASO) provides practical guidelines which provide that reasons shall be given by the authorities to an applicant against whom a decision refuting minority has been given as well as information as to how that decision can be challenged.⁴⁹ These Guidelines further provide that an age assessment decision shall be made separately from and before a decision on international protection. Unless there is a separate right to challenge an age assessment decision, another possibility of challenging the outcome of this decision shall be provided through ordinary judicial means with the support of legal representatives.

The below summarises the EASO's key recommendations:⁵⁰

1. The best interests of the child (BIC) should be observed not only when a child is identified as such, but also when there are doubts as to whether the applicant may be a child.
2. Age assessment should not be a routine practice. The necessity of the assessment should be duly justified based on substantiated doubts on the stated age.
3. The implementation of the principle of the BIC requires a child-centred age assessment which should place the child at the centre and be adapted to the specific needs of the applicant, including by taking into account, among other considerations, their gender, range of disputed age, and cultural background.
4. Benefit of the doubt must be given as soon as doubts on the claimed age appear, during the age assessment and until conclusive results are provided. The applicant should be considered and treated as a child unless and until they are found to be an adult.
5. The child, or the presumed child, must be appointed a guardian/representative who ensures that the child can participate in the assessment, has been informed about the age assessment process in a child-friendly, gender-sensitive and age-appropriate manner in a language that the child can understand and does, in fact, fully understand the assessment process. This information is essential to allow the child to express views, wishes and opinions and make an informed decision to participate in the process.
6. The age assessment process must be conducted using a holistic and multidisciplinary approach which ensures that all the necessary safeguards and principles explored are in place and the rights of the applicant are protected.
7. Since no single method currently available can determine the exact age of a person, a combination of methods assessing not only the physical development but also the maturity and the psychological development of the applicant can reduce the range of age in question.
8. No method involving nudity or the examination, observation or measurement of genitalia or intimate parts should be used for age assessment purposes.

These Guidelines also highlight that the benefit of the doubt in age determination procedures is a key principle and safeguard since none of the current methods of age assessment are able to determine a specific age with certainty.⁵¹

Under EU law framework, the principle of the benefit of the doubt must be applied when assessing the age of an individual. Until the age assessment has been completed and while doubts remain, the individual should be afforded the benefit of the doubt, and treated as a child.

Consistent with CRC General Comment No. 6 and the EU Asylum Procedures Directive, if uncertainty remains after age assessment, the individual should be given the benefit of the doubt. If there is a possibility that the individual is a child, they should be treated as such.

⁴⁹ [EASO Practical Guides Series, Practical Guide on Age Assessment \(2nd edition\)](#), 2018, p. 37.

⁵⁰ *ibid*, pp. 11-12.

⁵¹ *ibid*, p. 22.

1.4 The Right to Liberty

Everyone has the right to liberty and security of person, by virtue of the European Convention on Human Rights (ECHR) (article 5), the EU Charter of Fundamental Rights (EU Charter) (Article 6) and the International Covenant on Civil and Political Rights (ICCPR) (article 9). **No one shall be deprived of such liberty except on lawful exhaustive grounds and in line with procedures established by law.**

At the Council of Europe level, among the limited number of exceptions to the comprehensive application of article 5, the ECHR provides for the lawful detention of migrants, or “immigration detention”, and only in order to prevent their unauthorised entry into the country or pending their deportation or extradition (article 5.1.f). In line with this, the ECtHR interpreted the restricted scope of immigration detention under article 5(1)(b) with the sole purpose of fulfilling an obligation under the migration legal framework:

O.M. v. Hungary, ECtHR, Application No. 9912/15, Judgment of 5 July 2016

42. The Court recalls that detention is authorised under subparagraph (b) of Article 5 § 1 only to “secure the fulfilment” of the obligation prescribed by law. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned, and the arrest and detention must be for the purpose of securing its fulfilment and must not be punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (see *Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003; *Göthlin v. Sweden*, no. 8307/11, § 57, 16 October 2014). Moreover, this obligation should not be given a wide interpretation. It has to be specific and concrete, and the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment (see *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 72, 22 May 2008).

Under both EU and international law and standards, deprivation of liberty must comply with procedural safeguards and other human rights guarantees to be lawful and not arbitrary. The Working Group on Arbitrary Detention (WGAD) recommends that “the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including (...) detention of migrants and asylum seekers.”⁵²

1.5 Detention

Detention of migrants, whether upon entry or pending deportation, must not be arbitrary and must be carried out in good faith pursuant to a legal basis. International and European law and standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of **last resort**, to be imposed only where other **less restrictive alternatives**, such as reporting requirements or restrictions on residence, are not feasible following a thorough assessment of all relevant facts and circumstances in the individual case.⁵³ Detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.⁵⁴

Under international human rights law, a deprivation of liberty is not defined solely with reference to the classification imposed by national law, but rather takes into account the reality of the restrictions imposed on the individual concerned. For example, persons accommodated at a facility classified as a “reception”, “holding” or “accommodation” center and ostensibly not imposing “detention”, may, depending on the nature and duration of the restrictions on their freedom of movement, their cumulative impact, and their manner of implementation, be considered under international human rights law to be deprived of their liberty.⁵⁵ The [UNHCR Guidelines on Detention](#) applicable to asylum-seekers take the same approach (p. 9, para. 7).

⁵² Human Rights Council, Report of the Working Group on Arbitrary Detention, [A/HRC/22/44](#), 24 December 2012, para. 82(b).

⁵³ CJEU, *Hassen El Dridi* case, Case no. C-61/11, 28 April 2011, para. 39; CJEU, *Bashir Mohamed Ali Madi* case, Case no. C-146/14, 5 June 2014, para. 64; [Rahimi v. Greece](#), ECtHR, Application No. 8687/08, Judgment of 5 April 2011, para. 109.

⁵⁴ Human Rights Committee, [General Comment 35](#), para. 18; [A. v. Australia](#), HRC, Communication No. 560/1993, Views of 3 April 1997, UN Doc. CCPR/C/59/D/560/1993, paras. 9.3–9.4; [Samba Jalloh v. Netherlands](#), HRC, Communication No. 794/1998, Views of 26 March 2002, UN Doc. CCPR/C/74/D/794/1998, para. 8.2; [Nystrom v. Australia](#), HRC, Communication 1557/2007, Views of 18 July 2011, UN Doc. CCPR/C/102/D/1557/2007, paras. 7.2 and 7.3; [Saadi v. United Kingdom](#), ECtHR, Application No. 13229/03, Judgment of 29 January 2008, para. 74; [Baban v. Australia](#), HRC, Communication 1014/2001, Views of 18 September 2003, UN Doc. CCPR/C/78/D/1014/2001, para. 7.2; [Bakhtiyari v. Australia](#), HRC, Communication 1069/2002, Views of 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002, paras. 9.2–9.3; UNHCR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#) (2012), guideline 4.3 and annex A (describing alternatives to detention).

⁵⁵ See *Amuur v. France*, ECtHR, [Application No. 19776/92](#), Judgment of 25 June 1996.

While there are well-known and easily identifiable forms or places of detention, such as prisons and correction facilities, other places intended to restrict the freedom of movement of a person for immigration purposes, such as transit zones, may very easily have an effect of depriving an individual of their liberty in violation of human rights law and often in a concealed manner by authorities. Such conditions were considered by the CJEU in the following cases in the context of the Return Directive and the Reception Directive of the EU:

CJEU, FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, Joined Cases C-924/19 PPU and C-925/19 PPU, 14 May 2020

4. Directive 2008/115 and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national's movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty, characterised by 'detention' within the meaning of those directives.

Children, by reason of their age, are inherently in a vulnerable situation when it comes to deprivation liberty. In the migration context, they are disproportionately affected and find themselves in situations with multiple vulnerabilities. Research shows the heavy impact of detention on children's psycho-social development and well-being, the serious disruption to their education and their risk of being trafficked, exploited or abused.⁵⁶

The International Detention Coalition (IDC) emphasises research which shows alarmingly high rates of depression, anxiety, PTSD and suicidal thoughts among children in detention.⁵⁷

The UN Committee on the Rights of the Child, the UN Special Rapporteur on the human rights of migrants⁵⁸ and the Parliamentary Assembly of the Council of Europe⁵⁹ all make it clear that immigration detention of migrant children is per se **not in their best interest** and that detention of vulnerable individuals, including unaccompanied children is prohibited in international law.

States have a positive obligation to protect and take care of unaccompanied migrant children under Article 3 ECHR and Article 20 CRC.⁶⁰ The duty to act in the best interests of the child requires, in the situation of unaccompanied minors, a comprehensive assessment of the identity of the child in a child friendly manner, and in consideration of such factors as their age, nationality and cultural and other background.

States are required to appoint a competent guardian and a legal representative, if necessary, for asylum, administrative or judicial procedures. The child should also be duly registered with appropriate school authorities as soon as possible and an appropriate care arrangement should be provided.⁶¹

The CRC and CMW Committees have stressed that: "States parties [to the CRC and CMW] should assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status. Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration."⁶²

⁵⁶ Alice Farmer, "The impact of immigration detention on children", in Forced Migration Review, Volume 44, September 2013, pp. 14-16; Save the Children Action Network, [5 Harmful Long-term Effects of Family Detention on Children](#), 3 July 2018.

⁵⁷ International Detention Coalition (IDC), [Captured Childhood](#), Melbourne, 2012.

⁵⁸ Statement of 16 May 2016.

⁵⁹ [Resolutions 1707\(2010\)](#) and 1810(2011).

⁶⁰ [Sh.D. and others v. Greece, Austria, Croatia, Hungary](#), North Macedonia, Serbia and Slovenia, ECtHR, Application No. 14165/16, Judgment of 13 September 2019, paras. 52-62; [Khan v. France](#), ECtHR, Application No. 12267/16, Judgment of 28 February 2019; [Rahimi v. Greece](#), ECtHR, Application No. 8687/08, Judgment of 5 July 2011.

⁶¹ CRC, [General Comment No.6 \(2005\) Treatment of unaccompanied and separated children outside their country of origin](#), CRC/GC/2005/6, 1 September 2005, paras. 19-22; CMW & CRC, [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, paras. 11 and 17; IOM, [Unaccompanied Children on the Move – The work of the International Organization for Migration \(IOM\)](#), 2011, pp.16-20.

⁶² [Joint general comment No. 3 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 \(2017\) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration](#), para. 32(e).

1.6 Procedural Rights of Migrant Children

The main procedural rights of children include:

- > Right to a fair hearing and access to court
- > Appointment of a guardian
- > Right to a public hearing
- > Legal assistance and representation
- > Access to information
- > Right to privacy
- > Right to interpretation
- > Right to an effective remedy

The procedural rights of migrant children will be considered in more detail in Module III of this series. The aim of this section is to provide a brief overview of the existing procedural rights of migrant children pertaining to the context and discussions of this Module.

1.7 The Right to Family life

Family life is a cornerstone of human rights protection. International and EU instruments stress the importance of the right to family life and family unity, and the need to protect it and all individuals, including migrants, are holders of this right under the law. The UDHR provides that the family is the natural and fundamental unit of society and is entitled to protection by society and the State. The ICCPR and the ECHR provide similar safeguards and ensure the protection against arbitrary or unlawful interference with family life.⁶³ The lack of independence and inherent vulnerability of children particularly in migration context renders the effective enjoyment of family life not only important, but essential.⁶⁴ The damaging impact of immigration detention on children evidenced in research leaves no doubt on the fact that detention interferes with the right to family life.

As discussed above, if a child is involved in migration, non-custodial measures should be applied to the child and the family. The CRC and the CMW have affirmed that “[w]hen 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.”⁶⁵ The ECtHR has indeed found that detaining the child, even if together with his parent or family, “thereby subjecting them to custodial living conditions typical of that kind of institution, can be regarded as an interference with the effective exercise of their family life”.⁶⁶

CoE, Legal and Practical aspects of effective alternatives to detention in the context of migration, 7 December 2017

69. In the case of families with children the issue of alternatives has also been addressed in relation to Article 8 of the Convention. Given that detention can also be regarded as an interference with the right to respect for family life, any measure interfering with this right has to be compatible with the conditions set out in Article 8 § 2. Consequently, the authorities have a duty to take into account the children’s best interests when assessing whether a measure is proportionate in achieving the aim pursued. In light of the endorsement by the Court of the best interests of the child in the context of detention of migrant children, it has since been concluded that the protection of the best interests of the child calls both for families to be kept together as far as possible, and alternatives to be considered so that detention of children is truly a measure of last resort. Thus, the Court has found detention to be a disproportionate measure to the aim pursued in light of the absence of any real risk of absconding.

⁶³ Article 16.3 UDHR, Article 17 ICCPR, Article 8 ECHR.

⁶⁴ Helsinki Foundation for Human Rights, Best interest behind bars, March 2019, p. 2.

⁶⁵ Joint general comment No. 4 (2017) of the Committee on the Protection 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 and return, op. cit., para. 11.

⁶⁶ *Popov v. France*, ECtHR, [Applications Nos. 39472/07 and 39474/07](#), Judgment of 19 January 2012, para. 134.

II. Alternatives to Detention

International and regional human rights law, including at EU and Council of Europe levels, require States to provide for alternatives to detention. In the context of child protection, the European Court of Human Rights (ECtHR) has been very firm in suggesting **that respecting the best interests of the child requires States to adopt alternatives to detention**. Where the authorities fail to examine all alternatives to detention, the detention of a child will be considered arbitrary, therefore amounting to a violation of their rights to liberty and security (*Rahimi v. Greece*, ECtHR, Application No. 8687/08, Judgment of 5 April 2011, para. 109). In some cases, there may also be a violation of the absolute prohibition of inhuman or degrading treatment.

International law

Under international law, States are called upon **to provide a clear framework for the implementation of alternatives to detention** measures and ensure an application compliant with human rights safeguards, including the principles of necessity, proportionality and non-discrimination. The decision to detain “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.”⁶⁷

PACE, Detention of asylum seekers and irregular migrants in Europe, Resolution 1707 (2010)

9. (...) the Assembly calls on member states of the Council of Europe (...) to comply fully with their obligations under international human rights and refugee law, and encourages them to:
 - 9.3. consider alternatives to detention and:
 - 9.3.1. provide for a presumption in favour of liberty under national law;
 - 9.3.2. clarify the framework for the implementation of alternatives to detention and incorporate into national law and practice a proper legal institutional framework to ensure that alternatives are considered first, if release or temporary admission is not granted;
- (...).

PACE, The alternatives to the immigration detention of children, Recommendation 2056 (2014), final version

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

This standard is also reinforced by the Council of Europe Assembly (PACE) in its [2017 Report](#), providing that “as children should not be separated from their caregivers, alternative measures should be sought for parents as well. States should implement ATDs that ensure protection of the rights, dignity and well-being of children”.⁶⁸

The [UN Special Rapporteur on the Human Rights of Migrants](#) in 2020 called on States to eliminate child migration detention by shifting the focus from enforcement and coercion towards a human rights-based approach, which **promotes children’s rights and well-being and provides alternative care and reception** for all migrant children and their families.

⁶⁷ Human Rights Committee, [General Comment 35](#), para. 18; [Baban v. Australia](#), HRC, op. cit., para. 7.2; [Bakhtiyari v. Australia](#), HRC, op. cit., paras. 9.2–9.3; see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), guideline 4.3 and annex A (describing alternatives to detention).

⁶⁸ PACE, *A study of immigration detention practices and the use of alternatives to immigration detention of children*, October 2017.

HRC, Report of the Special Rapporteur on the Human Rights of Migrants: Ending immigration detention of children and providing adequate care and reception for them, A/75/183, 20 July 2020

82. Detention of any child for reasons related to their, their parents' or their legal guardians' migration status is always a child rights violation and may constitute cruel, inhuman or degrading treatment of migrant children. Immigration detention of children and their families has a pervasive impact on children's physical, social, emotional and cognitive skills development, depriving them of their fundamental rights, and their future.

86. (...) More specifically, States are urged to:

- (a) Establish in domestic law an explicit prohibition of immigration detention of all migrant children under the age of 18, including unaccompanied children and children with their families. Policy framework and quality assurance processes should be established to ensure that the prohibition is effectively implemented and that migrant children are provided with the strongest protection;
- (c) Strengthen existing national child protection and welfare systems and integrate unaccompanied migrant children into these systems without any discrimination, irrespective of the child's migration status. Child protection and welfare authorities, rather than immigration authorities, should take primary responsibility for the care and safety of migrant children. Child protection authorities should be informed and involved from the outset upon the identification of an unaccompanied or separated migrant child;
- (e) Promote family unity throughout asylum and other migration-related procedures, refrain from adopting any policy that would lead to systematic family separation and take appropriate measures to prevent and respond to family separation in the context of international migration;
- (f) Provide alternative care arrangements, preferably family-based alternatives, for migrant children without parental care, while facilitating family tracing and reunification according to the best interests of the child;
- (h) Take affirmative action to overcome obstacles in order to ensure migrant children's access to health care, education, adequate housing and other rights and essential services. Such measures may include reviewing laws and regulations, overcoming administrative barriers, developing firewalls between public service providers and immigration enforcement authorities, providing interim documentation to facilitate access to services, making concrete efforts to overcome language and other access barriers, ensuring the affordability of services and increasing awareness of the human rights and entitlements of migrant children and their families;

(...).

The [UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment](#) also affirmed that **detention of children is never in the best interests** of the child and that it may constitute cruel, inhuman or degrading treatment.⁶⁹

HRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/28/68, 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 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. [...]

States should make clear in their legislation, policies and practices that the principle of the

⁶⁹ HRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, [A/HRC/28/68](#), 5 March 2015, para. 80.

best interests of the child takes priority over migration policy and other administrative considerations. [...]

States are required to favour measures that promote the care and well-being of the child rather than the deprivation of liberty. Facilities that grant accommodation for migrant children should have all the material conditions necessary and provide an adequate regime to ensure comprehensive protection from ill-treatment and torture, and allow for their holistic development. Migrant children should be separated from children who have been accused or convicted of criminal offences and from adults. The Special Rapporteur notes, however, that separating child migrants from unrelated adults can sometimes itself result in harm by depriving children of important interactions; ample opportunities for broader human interaction and physical activity must therefore be given to unaccompanied migrant children. When children are accompanied, the need to keep the family together is a not sufficient reason to legitimize or justify the deprivation of liberty of a child, given the prejudicial effects that such measures have on the emotional development and physical well-being of children.

[W]hen the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.

The CMW and CRC also call upon States to ensure implementation of alternatives to detention to families with children, as it is not legitimate to justify the detention of children by not wanting to separate them from their family when accompanied (Joint General Comment No. 4 and 23, 2017).

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, 16 November 2017

11. (...) 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, 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 Children. 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.**
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. 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.

To meet the strict conditions of **necessity and proportionality of detention** in accordance with the right to liberty under Article 9 ICCPR, it must be shown that other less intrusive measures have been considered and found to be insufficient.⁷⁰

In its [General Comment No. 35](#), the HRC has also expanded at length on the meaning of "arbitrary"

⁷⁰ In [C. v. Australia](#) (CCPR/C/76/D/900/1999, 13 November 2002), the UN Human Rights Committee (HRC) found a violation of article 9.1 ICCPR on the basis that the State did not consider less intrusive means "which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was (...) arbitrary and constituted a violation of article 9, paragraph 1" (para. 8.2).

in immigration detention, pursuant to article 9 of the ICCPR, and provided that "(c)hildren 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" (para. 18).

The ECtHR has held that in the application of Article 5.1(f) ECHR, particular consideration must be given to alternatives to detention for persons or groups in vulnerable situations, for the detention to be in good faith and free from arbitrariness. In case of unaccompanied migrant children, the Court in *Rahimi v. Greece* held that **alternatives to detention must be considered**.⁷¹

In *Bilalova and others v. Poland*, the ECtHR found a violation of the right to liberty under article 5(1) (f), considering that Poland did not correctly examine alternatives to detention of the children⁷²:

Bilalova and others v. Poland, ECtHR, Application No. 23685/14, Judgment of 26 March 2020:

78. The Court observes that at the time when the authorities decided to extend their detention for three consecutive months, the child applicants had already been detained in the same center for almost two months. If the material conditions of reception of the interested parties seem to have been correct (...), this structure was undoubtedly a place of confinement similar, in many respects, to penitentiary establishments (...). The Court recalls in this context that, in cases similar to the present one which it has had to know, it found contrary to the Convention cases of detention - in structures similar to that in which the child applicants were detained - of young minors accompanied by their parents for periods of much shorter duration than that in the present case (...).
79. The Court notes that it emerges from its now well-established case-law in the field that, as a matter of principle, the confinement of young children in such structures should be avoided and that only placement for a short period of time in suitable conditions could be compatible with the Convention, provided, however, that the authorities establish that they have resorted to this ultimate measure only after having concretely verified that no other measure less infringing on liberty could be put in place (...).
80. In the present case, while having regard to the reasons relied on by the national authorities in support of the contested measure, the Court considers that it does not have sufficient information to be satisfied that they have in fact examined whether, in the current circumstances, the detention of the child applicants was a solution of last resort to which no alternative measure could be used (...).

Article 31 of the 1948 [Convention](#) Relating to the Status of Refugees, and its 1967 protocol (Refugee Convention) and associated standards and guidance establishes a presumption against detention, and the principle that detention must be justified as necessary in a particular case. It provides that **detention of asylum seekers and refugees**:

- > must never be automatic,
- > should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case,
- > should never be used as a punishment.

The **UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention** ("[UNHCR Guidelines on Detention](#)") provides that "alternatives to detention need to be considered" (Guideline 4.3).⁷³

According to the [UNHCR's position regarding detention of refugee and migrant children in migration context](#), **the best interest of the child should always be the primary consideration and a child can never be detained because of their or their parents' migration status**. Alternatives to detention/care arrangements should always be explored.⁷⁴

⁷¹ *Rahimi v. Greece*, ECtHR, Application No. 8687/08, Judgment of 5 April 2011.

⁷² *Bilalova and others v. Poland*, ECtHR, Application No. 23685/14, Judgment of 26 March 2020.

⁷³ UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012, Terminology, para. 7. In addition, the UNHCR has released two 'option papers' advising governments on alternatives to detention for children ([option paper 1](#)) and adults ([option paper 2](#)). See <https://www.refworld.org/docid/5523e8d94.html> and <https://www.refworld.org/docid/5523e9024.html>.

⁷⁴ UN High Commissioner for Refugees (UNHCR), [UNHCR's position regarding the detention of refugee and migrant children in the migration context](#), January 2017.

UNHCR, Option Paper 1 - Options for governments on care arrangements and alternatives to detention for children and families, 2014, p. 2

- Asylum-seeking, refugee and migrant children should not in principle be detained, any detention should be a measure of last resort and for the shortest possible period of time (Art. 37(b), CRC). Best guaranteed in national legislation.
- The best interests of the child must be a primary consideration (Art. 3, CRC).
- Family-based care arrangements should be prioritised, with institutional care being used only in very limited circumstances.
- Every child has the right to the highest levels of physical and mental health (Art. 24, CRC).
- Every child has a fundamental right to survival and development to the maximum extent possible (Art. 6, CRC). Every child has the right to education (Art. 28, CRC; Art. 22, 1951 Refugee Convention).
- Every child has the right to rest, leisure and play (Art. 31, CRC) and to cultural life (Art. 30, CRC).

UNHCR, Refugee Children: Guidelines on Protection and Care, 1994, p. 37

Alternate accommodation

If refugee children are detained in airports, immigration holding centres or prisons, they must not be held under prison-like conditions. Special arrangements must be made for living quarters which are suitable for children and their families. Strong efforts must be made to have them released from detention and placed in other accommodation. Families must be kept together at all times, which includes their stay in detention as well as being released together.

PACE, A study of immigration detention practices and the use of alternatives to immigration detention of children, October 2017

It needs to be emphasised that the confinement of refugee children in closed camps also constitutes detention. UNHCR suggests a series of alternative measures for asylum seekers, including accommodation in open centres, deposit or surrender of documents, periodic reporting requirements, provision of a guarantor/surety, structured community supervision and/or case-management programmes (UNHCR 2012: 41). The proposed alternatives are not exhaustive. **They identify options which provide state authorities with a degree of control over the whereabouts of asylum seekers while allowing asylum seekers basic freedom of movement. ATDs need to be legally regulated in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement (UNHCR 2012: 22). It needs to be underlined that, even when alternatives apply, access to legal aid should be given to migrants, especially to children.**

EU law

EU Member States have a positive obligation to first explore and implement less coercive measures. The absence of alternatives to detention in national legislation or policy cannot be used as an excuse for resorting to detention in an individual case. Indeed, under EU law detention must be a last resort and all alternatives must first be exhausted, unless such alternatives cannot be applied effectively in the individual case: article 8.2 of the recast Reception Conditions Directive (2013/33/EU), article 18.2 of the Dublin Regulation, article 15.1 of the Return Directive.

The recast Reception Conditions Directive specifically obliges States to lay down rules for alternatives to detention in **national law** (article 8.4).

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on standards for the reception of applicants for international protection (recast) (EU Reception Conditions Directive), Doc. no. 32013L0033

Article 8
 Detention

- (...) 2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
- (...) 4. Member States shall ensure that the rules concerning alternatives to detention, such as

regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

Article 11

Detention of vulnerable persons and of applicants with special reception needs

1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities. Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.
2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.
3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation.

As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

The EU Return Directive establishes a legal obligation for Member States to take due account of the best interests of the child principles (Article 5), and to use immigration detention of children and families only as a measure of last resort and for the shortest appropriate period of time (Articles 15 and 17).

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (EU Return Directive), Doc. no. 32008L0115

Article 5

Non-refoulement, best interests of the child, family life and state of health

When implementing this Directive, Member States shall take due account of:

- (a) the best interests of the child;
- (b) family life;
- (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.

Article 15

Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:
 - (a) there is a risk of absconding or
 - (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Article 17

Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guarantee-

ing adequate privacy.

3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

It is important to understand that even in the case where detention may be justified with the obligation to comply with the EU acquis, EU Member States cannot use EU law to violate human rights duties they are obliged by under other international instruments, particularly the CRC and ECHR.

Steering Committee on Human Rights (CDDH), Council of Europe, Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results, June 2019

The necessity of examining alternatives is of particular importance as regards persons in a vulnerable situation. Due consideration must be given to the special needs of persons concerned, ensuring that they have access to appropriate protection and care. The following groups have been specifically addressed by one or more international bodies in non-exhaustive, indicative listings:

- Children
- Asylum seekers
- People with health conditions
- LGBTI persons
- Stateless persons
- Victims of trafficking
- Pregnant women
- Victims of torture, ill-treatment and/or domestic violence

Migrant children will often face multiple discrimination.

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