

Children in Immigration Detention: Challenges of Measurement and Definition¹

Global Detention Project Discussion Paper

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Introduction

Several years ago, responding to a Freedom of Information Act request seeking details about the facilities used to detain non-citizens for immigration-related reasons, U.S. Immigration and Customs Enforcement (ICE) sent the Global Detention Project (GDP) a list of nearly 900 facilities used or under contract with the federal government during FY 2007. The list included local jails, federal prisons, dedicated immigration detention centers, hospitals, juvenile detention centers, and ICE short-term holding facilities.

Additionally, and rather unexpectedly, ICE included a few dozen church-based shelters and other privately operated child welfare institutions on its list of detention centers. These are sites used by a separate government agency that has custody of unaccompanied non-citizen minors or children (or UAMs), the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services. When we contacted a handful of these shelters to clarify their relationship with ORR, they were shocked to learn that the government had included them on a list of detention sites. Since then, ICE has ceased including ORR facilities on their published lists of detention sites.

This case raises a number of important questions about how researchers, advocates, and policy-makers account for and measure the immigration detention of children. Having reliable statistics about how many children are being placed in immigration detention annually must be an integral part of any campaign aimed at reducing or ending this practice. How can we measure the impact of such a campaign without having a rigorous data collection methodology that allows observers to measure year-to-year trends in an individual country and undertake comparative assessments of national policies?

¹ An earlier version of this discussion paper was presented at the annual meeting of the Interagency Working Group on Child Immigration Detention, Geneva, Switzerland, 29 June 2015.

Yet, the hurdles confronting researchers in this regard are significant. In the first place, many countries fail to make statistics available, as the GDP recently discovered during a joint project with Access Info Europe aimed at using freedom of information legislation in 33 countries in Europe and North America to analyze levels of transparency in immigration detention regimes. Only 17 countries adequately responded to our questionnaire seeking details about the detention of accompanied and unaccompanied children.² The other 16 countries either ignored our repeated requests, claimed they did not have the requested information, or provided invalid or incomplete information.³

When statistics are available, they are often selective, non-systematic, and non-comparable between countries. For instance, in the responses we received as part of the joint project with Access Info Europe, some countries provided statistics on UAMs only, while others only provided information on accompanied children. Many countries only provided statistics on certain age groups, while others provided statistics for certain months only and not year-on-year data.

How authorities define the detention of children is also an important consideration in determining the reliability and comprehensiveness of the data they provide. Thus, for instance, in the U.S. case discussed above, the GDP faced a number of difficult questions: Should we include in children detention statistics the numbers of UAMs accommodated in facilities operated by the Catholic Social Services and at other shelters included in the ICE list? Had authorities included these numbers in their immigration detention statistics? Should these facilities be included in the GDP's list of detention sites?

At the heart of this problem is the fact that there are inherent differences in how we observe and qualify the detention of adults and the detention of children. The GDP defines immigration detention as the "deprivation of liberty of non-citizens for reasons related to their immigration status." In the case of adults, observing deprivation of liberty is relatively straightforward: If there is any form of physical coercion preventing a person from exiting a facility, then we must consider that person to be detained and the facility to be a detention center.

This rule of thumb, however, does not appear to be adequate to the issue of children in detention. With respect to the detention of children who are accompanied by a parent or guardian, the aforementioned rule should apply—any coercive restraint amounts to detention because it involves an adult. The situation of UAMs, on the other hand, presents particular

² The countries that provided the requested information were Austria, Canada, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, Netherlands, Poland, Slovak Republic, Slovenia, Sweden, Switzerland, and the United Kingdom.

³ Non- or inadequate respondents were Belgium, Bulgaria, Cyprus, France, Germany, Greece, Iceland, Italy, Latvia, Malta, Norway, Portugal, Romania, Russia, Spain, and the United States.

challenges. When a state takes custody of a child—or anyone for that matter—it has ultimate responsibility for that person’s welfare. Thus, it is reasonable to expect, for instance, that a young unaccompanied child would be accommodated in a facility from which he or she could not freely come and go. Further, in cases involving victims of trafficking, not only might it be reasonable to accommodate a young person in a secure facility, but it may also be wise to not make the location of that facility public knowledge.⁴ The UN Guidelines for the Alternative Care of Children provide: “Particular attention needs to be paid to the age, maturity and degree of vulnerability of each child in determining his/her living arrangements. Measures aimed at protecting children in care should be in conformity with the law and should not involve unreasonable constraints on their liberty and conduct in comparison with children of similar age in their community.”

The question is: When do these custodial situations rise to the level of immigration detention?

This question must be addressed in order to develop coherent and meaningful data on this issue. The objective of this brief paper is to help encourage discussion of this issue by making some preliminary proposals on a way forward, in particular by suggesting the development of a methodology that would allow for careful designation of custodial arrangements focusing narrowly on the facilities used by states to accommodate child migrants and asylum seekers.

While it is vitally important to ensure that the decision-making processes for the care and protection of UAMs adhere to fundamental human rights, including best interest considerations, it is equally important to establish some kind of minimum standards that take into account the peculiarities of the situation of UAMs and can be used by advocates, policy-makers, and researchers to distinguish between detention and non-detention situations based on assessments of the full range of physical infrastructures in which these children are placed (including initial screening or reception centers, as well as longer-term facilities). Arguably, until such a methodology has been established, efforts to analyze trends in this phenomenon will be stymied by lack of clarity on what should and should not be considered sites of deprivation of liberty.⁵

⁴ Among the other important considerations, in certain parts of the globe, UAMs should be accommodated away from border zones to ensure safety from persecution and recruitment as child soldiers.

⁵ Much work has already been done to establish minimum compliance standards for children who are in state custody, including notably the UN Guidelines for the Alternative Care of Children. This paper attempts to build on these efforts by focusing on the specificities of UAMs and placing emphasis on the need to have guidelines that are specifically aimed at distinguishing between differing types of institutionalized settings.

From “alternatives to detention” to “deinstitutionalization”

When pressed on the challenges of measuring the immigration detention of children, some observers argue that it is sufficient if authorities shift custody of these children from immigration agencies (or any enforcement body empowered to keep people in custody for immigration-related reasons) to child welfare institutions not associated with immigration enforcement.

This idea has some positive upsides insofar as it identifies the importance of the nature of the custodial authority responsible for the UAMs. The type of authorities empowered by law to hold foreigners in custody—including both children and adults—is an important indicator for measuring both the treatment of these people as well as the official perception of non-citizens in a given country. Changing the custodial authority may also in some cases change the grounds for which the state has taken custody of an UAM, away from immigration control and to care and welfare.

Nevertheless, simply shifting custodial authorities is not a sufficient response and in some instances could have unfortunate unintended consequences. The GDP argues that what is at the fundamental core of any effort to develop data on children in immigration detention is establishing a set of criteria to be used to accurately characterize the facilities in which children are housed, detained, or accommodated.

One problem with shifting UAMs from immigration custody to child welfare institutions is that it ignores the very real possibility that the custodial settings employed by the alternative agency may be in worse condition than those used by immigration authorities. The severely inadequate conditions of child welfare institutions—particularly orphanages—across the globe have been an important driver in global campaigns aimed at reforming child welfare systems. Merely changing custodial authority could be a way for states to continue confining UAMs but just not in the immigration detention system, thereby giving officials a way to avoid falling afoul of non-detention norms while pursuing similar ends.

Also, advocacy of such a solution could encourage the continued institutionalization of UAMs, which runs contrary to the child care reform campaign’s efforts aimed at “deinstitutionalizing” child custody arrangements.

The global campaign promoting “alternatives to detention” clearly recognizes the problem of institutionalization. For instance, Jesuit Refugee Services-Europe, in its 14-point policy position on alternatives, states: “Unaccompanied children shall be placed in community-based and non-custodial settings that are age-appropriate, and which provide comprehensive and individualised support.”

While this is a laudable position, there are two important things to consider about this proposal. First, we think it potentially detrimental to the apparently strengthening global taboo against detaining children to associate their care and custody with “alternatives to detention” (ATDs). ATDs imply that the person/foreigner—the UAM in this case—can be liable to detention but that a more lenient and less constraining measure is being adopted. When advocating for prohibition or termination of detention policies and practices for UAMs, language should be clear so as to preclude any return to some perceived *status quo ante*. In effect, ATDs could turn into a back-door way of introducing or re-introducing detention measures when situations become acute. Arguably the campaign to end the detention of children would be better served by more closely associating itself with UN-led efforts to reform child welfare systems and deinstitutionalize all child custody arrangements.

Secondly, while the JRS proposal to place UAMs in community-based and non-custodial settings is commendable, we are still left with the challenging task of developing criteria to identify situations that amount to detention.

Certifying custodial arrangements—preliminary considerations

One potential approach to addressing the challenges of observing and measuring instances of child immigration detention is to develop minimum standards crafted around the specific needs of UAMs, which in turn could be used as part of a certification process whereby all facilities used by whatever agency retains custody of UAMs are assessed according to a specific set of criteria. Facilities that meet the criteria would not be considered sites of detention; any institution accommodating UAMs that does not satisfy the criteria or has yet to be assessed on the basis of these minimum standards would by default be considered a detention center.

There is much to be wary about when proposing any kind of certification procedure, not the least of which are the thorny questions related to certification processes and the selection of certification authorities. Our intention here is not to advance a specific mechanism, but rather to encourage discussion around this issue. If not certification, then what? What kind of methodology can we imagine that would allow us to readily distinguish between types of accommodation settings and be used to critique both the practices of national authorities and better assess their judgment on who they consider to be detained and not detained?

A primary consideration in establishing these standards would be to assess the extent to which government responses take into account the

vulnerability of migrant and asylum-seeking children due to their age.⁶ At the national level, “isolated” children, children removed from their families by social services, homeless and runaway children, children orphaned as a result of emergencies and catastrophes are generally viewed as *children at risk* who are in need of state protection.

In the case of non-citizen children this vulnerability is compounded as they are removed from their usual family settings as well as their cultural and language environments; and are beyond the protection of their country of origin or habitual residence. Obstacles, hardships, and abuses UAMs may have experienced during their migration journey put them through a fast “adultizing” process. State responses in non-detention settings need to cater to this often traumatic experience.

A second challenge relates to different gender and age protection levels for different groups (younger children will often be placed in foster families); the specific needs of girls; and children at risk (trafficking, exploitation, former child soldiers, torture survivors, children under trauma).

Additionally, many states apply differing responses depending on whether the child is seeking asylum. However, a rule of thumb for any minimum standards on this issue should be that all UAMs benefit from the same level of protection.⁷

Adults generally face a two-stage reception system put in place to initially deal with the entrance of non-citizens at border entry points (as well as unauthorized persons identified when already on the national territory). Likewise, a few days will initially be necessary to identify the UAM’s nationality or origin and his/her status (and the more vexed issue of age determination). This initial screening often takes place in reception centers, clearing houses, or “observation and orientation centers,” as for instance in Belgium.⁸ Many of these structures are secure. However once this stage is completed, UAMs should be accommodated in community-based and non-custodial settings or, failing that, in appropriate medium- to long-term facilities.

⁶ According to the European Parliament, “[A]n unaccompanied minor is above all a child who is potentially in danger and [that] child protection, rather than immigration policies, must be the leading principle for Member States and the European Union when dealing with them, thus respecting the core principle of the child’s best interests; recalls that any person below the age of 18 years, without exception, is to be regarded as a child and thus as a minor.” European Parliament, *The situation of unaccompanied minors in the EU*. 12 September 2013. 2012/2263(INI).

⁷ European Migration Network. Policies, practices and data on unaccompanied minors in the EU Member States and Norway Synthesis Report Final 2015 (EN). http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/studies/results/unaccompanied-minors/index_en.htm.

⁸ European Migration Network. Policies, practices and data on unaccompanied minors in the EU Member States and Norway Synthesis Report Final 2015 (EN). http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/studies/results/unaccompanied-minors/index_en.htm.

Definitions and criteria—elements of a non-detention environment for UAMs

In this concluding section of the paper we attempt to provide an overall definition for the practice of child immigration detention and to enumerate some of the characteristics or standards that should be included in assessments aimed at distinguishing between detention and non-detention institutional settings in which UAMs are accommodated. These minimum standards address the specific situation of non-citizen children (as per the CRC definition)⁹ who are generally described in UN and civil society documents as “unaccompanied minors” (UAMs). These measures factor in the specific vulnerabilities that result from their immigration status. They should not be construed as a set of childcare options distinct from or parallel to existing options and policies for children who remain in their countries but have become isolated, separated, or otherwise referred for placement by relevant domestic authorities. As stated by UNHCR, “Family and child appropriate reception arrangements should be integrated into existing national systems. Parallel systems should be avoided.”¹⁰

Definition: Just as the GDP’s rule of thumb on assessing whether an adult has been detained is inadequate for the issue of UAMs in detention, so is its definition of immigration detention: “The deprivation of liberty of non-citizens for reasons related to their immigration status.” The rationale for state custody of a UAM will doubtless often involve both immigration grounds and issues related to safety, security, and other considerations. Adequately defining “immigration detention of children” thus remains an important lacuna. For the purposes of this discussion paper, the GDP proposes the following *working* definition, which can apply to both UAMs and accompanied children: **“The placement of immigrant or asylum seeker children in penal-like institutions for reasons that are at least in part related to their or their parents’ immigration status.”** Penal- or prison-like are common phrases used in assessing immigration detention regimes. Part of the goal in establishing the criteria below are to begin developing some clarity on what these tags mean in the context of UAMs in state custody.

Policy and protection issues: Court decision for placement of UAMs in relevant non-detention care solutions; clear official guidelines/MOU/legal frameworks; national level norms and regulations to ensure a uniform treatment of UAMs across the territory especially as UAMs care arrangements often are decentralized; UAMs placed under national child care institutions and agencies and youth or social ministries and not

⁹ CRC article 1.

¹⁰ UNHCR. ‘OPTIONS PAPER 1: Options for governments on care arrangements and alternatives to detention for children and families.’ 2015.

interior or immigration ministries; decisions of placement on a case-by-case assessment including early family tracing.

Safeguards and monitoring: Independent monitoring including by National Human Rights Institutions, child ombudsman and civil society; mechanisms for review of care arrangements; and clear exit strategies upon reaching majority.

Appropriate institutional setting: To help distinguish between penal and non-penal environments, monitoring should take into account details of appropriate institutional environments for children that are provided in key UN documents, including the General Comments to the UN Convention of the Rights of the Child (CRC) and the UN Guidelines for the Alternative Care of Children. Among the issues listed in the General Comments (CRC GC 6 § 18): “access to appropriate accommodation: the accommodation should always include adequate sanitary conditions, accommodation in a ‘centre’ should never be in a closed centre and, during the initial days, should be in a specialised centre for the reception of unaccompanied minors; this first phase should be followed by more stable accommodation; unaccompanied minors should always be separated from adults; the centre should meet minors’ needs and have suitable facilities; accommodation with host families and in ‘living units’ and the sharing of accommodation with related or close minors should be encouraged when it is appropriate and accords with the minor’s wishes.” And according to the UN Guidelines: “All disciplinary measures and behavior management constituting torture, cruel, inhuman or degrading treatment, including closed or solitary confinement or any other forms of physical or psychological violence that are likely to compromise the physical or mental health of the child, must be strictly prohibited in conformity with international human rights law.”

Rights based considerations: Best Interest determination; child participation; right to information about reception/care arrangements; respect for right to privacy; confidentiality of information about UAMs; unhindered access to social rights including education and vocational training, physical and mental health; rest and recreation; freedom of movement with due consideration to the age group and the UAM’s autonomy (as appropriate, need for an authorization to leave the premises).

Geographical, logistical, and material pre-requisites: Accommodation structures separate from secure or non-secure adult asylum reception centers (to ensure a child-centered and not a migration/”border management” approach); small size structures to reduce level of absconding, including “mini-residences” and “family houses,” in line with broader “deinstitutionalization” processes to reform child care; and younger children placed in community or foster families

*Children not deprived of liberty:*¹¹ Clear responsibility for referrals and deciding UAMs placement in child care centres; reception on a voluntary basis (children should sign a document indicating their willingness to reside at the location); and clear and accountable registration procedure (to identify and keep track of each UAM).

Guardianship: Regardless of the particular institutional setting of the UAM's accommodations, he or she must always have a legal guardian appointed, although it is important to ensure that in appointing a guardian conflicts of interest are avoided (for instance, it arguably should not be the person overseeing a detention or reception center), it is done on a case by case basis, and the child has the opportunity to meet the proposed guardian. According to the UN Guidelines: "No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at any time. ... States should ensure, including through the appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian."

¹¹ Committee on the Rights of the Child. General Comment No. 6 (2005). "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin." CRC/GC/2005/6. 1 September 2005. <http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6>.