Is Ending the Detention of Children an “Alternative”? 

By Michael Flynn
1) **The detention of children:** The “low-hanging fruit” of advocacy on the human rights of migrants
2) **What are “alternatives” to the detention of children and are they effective for ensuring the rights of children?**
3) **Looking forward: From “alternatives” to prohibition?**
Summary: If immigration detention is never in the best interests of children, then not detaining them should be framed as an obligation, not as an “alternative.” This raises the question of whether it is possible to develop "alternatives to detention" in a way that does not bolster the logic of detention itself. How have states exploited this paradox by developing alternatives that fail to move policy and practice away from prioritizing detention? Are there long-term unintended consequences of advocating alternatives? And what would be ideal characteristics of an "alternative" policy that is effective at ending the detention of children?
Global Detention Project
OBJECTIVES

Documenting the use of detention as a response to migration and refugee movements and promoting the rights of detainees

- Foster transparency in detention policies and practices
- Promote respect for fundamental rights of detainees
- Reinforce advocacy of detention reforms
- Encourage policy-relevant scholarship
Border crisis in Latvia?

Despite having only a very small number of unauthorized entries, Latvia calls the situation at its borders with Russia and Belarus "alarming" and has begun constructing a multi-million Euro border fence.

See detention profile.
**NETHERLANDS IMMIGRATION DETENTION**

In contrast to many of its European neighbours, the Netherlands has sharply reduced its immigration detention capacity as a result of increasing numbers of immigration detainees. Observers argue that these decreases are in part due to the fact that the government ‘tries the defendant’ in the Kingdom of the Netherlands Caribbean Islands, Curacao and Aruba, as growing numbers of people from nearby Venezuela flee their failing economy.

### TOTAL CENTRES

**14**

### LAST UPDATE

**Mar 2017**

### QUICKFacts

<table>
<thead>
<tr>
<th>Category</th>
<th>Value</th>
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<tbody>
<tr>
<td>Immigration detainees (2016)</td>
<td>2,776</td>
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<tr>
<td>Detained evaders (2016)</td>
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<td>Detained evacuees (2016)</td>
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<td>Persons expelled (2015)</td>
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<td>International immigrants (2015)</td>
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<td>New asylum applications (2016)</td>
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### PROFILE

- **Introduction**
- **Legal, Policies, Regulations**
- **Detention Infrastructure**
- **Visa Presence of 2016 Evets**

**GLOBAL DETENTION PROJECT: NETHERLANDS**

*Global Detention Project. Updated Nov 2016.*

[globaldetentionproject.org](http://globaldetentionproject.org)
Global Phenomenon: GDP Map of Detention Sites
DETENTION OF CHILDREN: Definitions and Framework

**Immigration-related detention**

Deprivation of liberty of non-citizens for reasons related to their non-citizen status.

**Basic framework**

Immigration detention is to be used as a measure of last resort on the basis of an individual assessment of the necessity, proportionality and reasonableness of such a measure and only after determining whether a less coercive measure can be applied to achieve the same end.

**Central consideration for children**

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
Committee on the Rights of the Child (2012)
“The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”

Special Rapporteur on Torture (2015)
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. Deprivation of liberty in this context can never be construed as a measure that complies with the child’s best interests.

European Court of Human Rights (2016)
Even when the material conditions in some detention centres are appropriate, the conditions inherent in such establishments are a source of anxiety for young children.
Are there “alternatives” for children?

Key concerns

1. Lack of clarity = lack of ability to assess impact
2. Slippery slope: Is liberty an alternative?
3. Alternatives as expansion of the surveillance state
4. Challenges in transit states
5. Bolstering the logic of detention
1. Lack of Clarity: Words, Names, Laws

Detention?
- Rétention (France, Argentina, Lebanon), Albergar (Guatemala), Accommodation (Bulgaria, Ukraine)

Detention centers?
- Governmental Shelters (Saudi Arabia), Welcome Centers (Italy), Residential Centers (US), Estaciones Migratorias (Mexico)

Alternatives to detention?
  a. Any measure that ensures a person is not detained – how do you measure?
  b. Lose the narrative: Ankle bracelets

How do we define detention of children?
COMMON PROBLEMS

1. Governments often fail to respond to information requests

2. There is often no public source of statistics, governments fail to develop stats or they refuse to release them

3. Lack of access to detention centers by independent oversight bodies, media, NGOs
Lack of Transparency: GDP-Access Info Joint Study (2014-2015): Repeated FOIA requests to 33 countries over two years

» Over half of the countries monitored (19/33) did not disclose the locations of where migrants are detained

» 12 countries did not provide statistics on the total number of migrants detained

» 17 countries did not disclose information on the number of detained asylum seekers

» 19 countries failed to provide a breakdown of the numbers of unaccompanied and accompanied minors in detention

» Only six countries – Hungary, Lithuania, Luxembourg, Poland, Slovakia, and Sweden – provided full answers to all questions
2. Slippery slope: Is liberty an “alternative”

**Example:** Draft “principles and guidelines” regarding human rights of migrants

**Section on detention:** "Legislation should include the obligation of administrative or judicial bodies to start from liberty as the first alternative ..."

**GDP response:** We are concerned about framing "liberty" as an "alternative." ... Liberty is not an alternative, it is a core human right that can only exceptionally be deprived.
3. Alternatives as expansion of the surveillance state

Key problem: Adoption of “alternatives”, but not less detention

Case of the United States: Ankle bracelets is officially viewed as an “alternative” / Trump administration decision to replace Obama-era “case management for families.

Detention Watch Network: “As a basic litmus test for whether or not they are being used correctly, alternatives must always decrease the number of people in detention. Instead, as ICE’s budget for alternatives to detention has increased, so has its budget for detention.”

Case of Malta: 2015 “Strategy for the Reception of Asylum Seekers” provides that immigration officers can order “alternative” measures when they do not think detention is warranted. UNHCR commented that these regulations lack sufficient clarity to be consider alternatives to detention, particularly due to the fact that the measures are to be applied when no detention decision has been taken in the individual case. In short, the conditions outlined in the new policy document appear to be alternatives to liberty rather than alternatives to detention
4. Challenges in Transit States

**Key problem:** How do you apply “alternatives” when the population intends to move on?

**Case of Greece:** Xavier Créach: Even when you find a space in an alternative program for a child, they have already moved on.

**Case of Mexico:** 2015 launch of pilot ATDs coincided with largest increase in detention of children perhaps ever in any country – and yet Mexico has used ATDs to bolster their image in human rights venues.
5. Bolstering the logic of detention

**Key problem:** Framing the non-detention of children as an “alternative” legitimates the use of detention

*Adriano Silvestri:* Interior Ministries say that they need detention as a stick to make sure alternatives are effective.
6. Ways forward

1. **How can “alternatives” lead to less detention? Alternative + Prohibition**
   a. States must adopt a law or regulation that explicitly provides at least a limited form of prohibition, i.e., non-detention of children/families in the first instance
   b. If for some exceptional reason detention is deemed necessary, then non-custodial measures must then be considered

   **Lesson of Belgium**: Arguably the best case to date in pairing alternatives with non-detention regulation. However, the law providing alternative for families failed to prohibit the detention, instead saying that “in principle” they should not be detained in the first instance. Thus, (1) even when alternatives were being applied, the families were considered legally to be “detained”; (2) some Belgian jurisdictions rejected the necessity to consider alternatives; (3) when migratory pressures mounted, the country easily capitulated and reverted back to detention.

2. **From alternatives to prohibition?**
Developing tools to track detention globally

Global Immigration Detention Observatory

- Detention Centers
- Statistics
- Domestic Law
- International Law
- Institutions
- Socio-Economic Data
Global Phenomenon: Detention Centers around the World

globaldetentionproject.org
KEY TRENDS

Growing involvement of private companies and non-state actors
Security companies, contractors, international organizations, non-profits

Detention numbers
Until most recent period, numbers appeared to be levelling off in many destination countries, while increasing in transit and periphery

Institutionalization
Emerging dedicated bureaucracies, facilities

Externalisation of detention
Encouraging, financing, insisting on detention in neighbouring countries
TRENDS: Detention numbers in the Council of Europe

- GDP has been able to identify or receive data on only 23 countries of the 47 CoE Member States for the most recent period (between 2010-2015)
- Overall, numbers appear to have decreased during this period. However, available numbers for 2016 show sharp increases (Austria: 14,600 first half of 2016)

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<tr>
<th>Country</th>
<th>2010</th>
<th>2013, 2014, or 2015</th>
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<tbody>
<tr>
<td>Austria</td>
<td>6,153</td>
<td>4,171</td>
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<td>Belgium</td>
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<td>Bulgaria</td>
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<td>Total</td>
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Source: Global Detention Project
Transparency: Access to Info, Statistics and Trends

Number of Immigration Detainees

- 2010
- 2013-2015
- 2016 (Jan-June)

globaldetentionproject.org
TRENDS: Detention on migration routes