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The debate over 'alternatives' to immigration-related detention of children

Although there are important provisions in international law that provide protections for children in immigration procedures and arguably limit states' resort to detention, there is no provision that forbids the immigration detention of children. A key provision is Article 3 of the Convention on the Rights of the Child, which states that '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'. Importantly, there is a growing body of legal opinion that holds that immigration detention can never be in a child's best interest.

The strongest statement to date is from the Committee on the Rights of the Child (CRC), which said in 2012 that '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'.[2] The CRC followed up on this in a 2017 Joint General Comment, issued with the Committee on Migrant Workers, concerning children in the context of immigration, stating that detention of children for immigration reasons is in all cases a violation of the best interests principle.[3]

The Special Rapporteur on Torture has voiced similar concerns and the European Court of Human Rights, in a series of rulings since 2016, has called into question whether it is possible for an immigration detention facility to meets the needs of children.

International legal opinion on this issue appears to be quickly congealing. Nevertheless, states remain extremely reluctant to relinquish their sovereign

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2 Report of the 2012 day of general discussion on the rights of all children in the context of international migration, Committee of the Rights of the Child, p. 10, § 32.

3 Committee on the Rights of the Child and Committee on Migrant Workers, Joint General Comment on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return (Paragraph 11), 2017.

right to place anyone, including children, in immigration detention. Thus, much of the focus of advocacy groups and human rights bodies has been on promoting so-called 'alternatives to detention' (ATDs) for children. In European Union law, these are non-custodial measures that states must consider as part of detention procedures. If a person merits being detained, that state must assess whether there is an 'alternative' non-custodial measure that can adequately achieve the goals of the detention order. In this way, 'alternatives' are inherently linked to detention itself in law and policy.

The ATDs framework may have a rationale in the context of adults, but its application to children seems increasingly contradictory and risky. If the immigration detention of children is fundamentally at odds with their best interests, then 'alternatives' likewise arguably should not apply since by definition they form part of detention procedures. In effect, encouraging states to consider 'alternatives' for children reinforces the original policy of detaining them. This is a quandary that we must not ignore. What is more, if immigration-related detention is never in children's best interest, then not detaining them should be framed as an obligation, not as an alternative.

This point was underscored by the UN High Commissioner for Refugees in its alternatives to detention assessment toolkit: 'It is improper to refer to [child] reception measures as alternatives to detention for children, because children should not be detained for immigration related purposes'.[4]

Another challenge with 'alternatives' is that they are often framed as *anything* that is not detention, even measures that are applied outside detention procedures. This loose, non-definitional framing of 'alternatives' appears to avoid the quandary spelled out above by seemingly divorcing the concept from legal detention procedures and instead painting them as a flexible set of tools that are palatable to states and championed by advocates for a wide range of situations.

However, by failing to carefully define 'alternatives', we appear to open a pandora's box—liberty itself may be considered an 'alternative' rather than a fundamental right. In fact, at the Global Detention Project we have on numerous occasions seen this result. We have, for instance, seen access to asylum procedures described as an 'alternative to detention'. In another case, a UN human rights body circulated for comment a draft guidance on the human rights protection of migrants that stated that 'legislation should include the obligation of administrative or judicial bodies to start from liberty as the first alternative'.

[4] UNHCR, Guiding Questions for the Assessment of Alternatives to Detention, https://www.unhcr.org/protection/detention/5b17d9c47/guiding-questions-assessment-alternatives-detention.html

Subsequent drafts eventually removed this language after we repeatedly protested characterizing ‘liberty’ as anything other than an inherent right. However, the message was clear: ATDs can be a slippery slope that present formidable challenges no matter how one chooses to frame them.

This line of analysis eventually leads us to the crux of the dilemma of administrative immigration detention itself: as long as states insist that their sovereign rights take precedence over the individual rights of non-citizens, any seeming ‘solution’ to detention – like ‘alternatives to detention’ – that does not explicitly and unambiguously define a path to diminishing the practice may ultimately lead to its persistence and growth.

Ultimately, if we are to harness the clear momentum of global opinion and recent jurisprudence in opposition to the immigration detention of children, we must carefully consider the messages we send to our elected officials. Promoting 'alternatives' may fail to adequately challenge states to finally end this practice, even if the success of the global campaign championing ATDs for children has led many states to begin seriously considering them. This in turn has led to increased investment in and momentum for the campaign itself and enabled advocacy groups around the world to be given a seat at the table to discuss with governments problems with detention. These are important achievements. But at what cost? If states continue to refuse to abolish the detention of children or to decrease their use of detention, we may have to start carefully rethinking our strategies to end child detention.