



"ENDING IMMIGRATION DETENTION OF
CHILDREN AND SEEKING ADEQUATE
RECEPTION AND CARE FOR THEM"

RESPONSE TO "QUESTIONNAIRE OF THE SPECIAL RAPPORTEUR ON
THE HUMAN RIGHTS OF MIGRANTS: ENDING IMMIGRATION
DETENTION OF CHILDREN AND SEEKING ADEQUATE RECEPTION
AND CARE FOR THEM"

GLOBAL DETENTION PROJECT

May 2020

THE GLOBAL DETENTION PROJECT MISSION

The Global Detention Project (GDP) is a non-profit organisation based in Geneva that promotes the human rights of people who have been detained for reasons related to their non-citizen status. Our mission is:

- To promote the human rights of detained migrants, refugees, and asylum seekers;
- To ensure transparency in the treatment of immigration detainees;
- To reinforce advocacy aimed at reforming detention systems;
- To nurture policy-relevant scholarship on the causes and consequences of migration control policies.

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Global Detention Project Response to “Questionnaire of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them”

15 May 2020

The Global Detention Project (GDP) is pleased to provide this submission to the Special Rapporteur on the human rights of migrants concerning his thematic study on ending immigration detention of children.

1. Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country.

The GDP maintains a global database of indicators concerning immigration detention systems, which includes specific information about the legal grounds of immigration detention in over one hundred countries around the world. This information is available on our website, where each country has a dedicated webpage. If you click on the “Domestic Law” button on the webpage of any country on our website, you can access the relevant laws concerning “Grounds for Detention” in each country, as well as specific data concerning “Vulnerable Persons,” which details whether there are grounds for detaining children “In Law” and whether it is done “In Practice.” See: <https://www.globaldetentionproject.org/>

In addition to this data, it is important to underscore a critical aspect about immigration detention of children: The GDP has found that in many countries, while there may be no specific grounds for detaining children for immigration reasons, children are de facto detained in practice along with their parents or guardians, even when they are not officially recorded in statistics as being detained or given a specific detention order. For instance, in Canada children are “housed” as “guests” of their parents in immigration detention. In France, Poland, Spain, and numerous other countries children “accompany” their parents in detention centres. Such policies can make detained children “invisible” to the law, preventing them from accessing basic legal protections that are offered to other detainees—including hardened criminals—while denying them procedural safeguards (including a review of the detention order), adequate education, health care, and nurturing environments.

2. Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.

The GDP encourages the Special Rapporteur to be cautious about employing the terms “alternatives” or “alternatives to detention” when discussing best practices for receiving and caring for child migrants or asylum seekers. As stated above under Question 1, many countries do not in fact have laws in place providing for the detention of children. The GDP

firmly believes that ATDs must be strictly tied to legitimate, lawful detention measures. When there is no lawful ground for detaining a child, it would be inappropriate to place him or her in an “alternatives to detention” measure. Rather, a child must be given proper care and security.

This point of view has been validated repeatedly by many international authorities, including the **Committee on Migrant Workers** and the **Committee on the Rights of the Child** in their 2017 “Joint General Comment on State Obligations Regarding the Human Rights of Children,” which pointedly makes no references to ATDs for children but rather states that **“child protection and welfare actors, rather than immigration agencies should take primary responsibility for migrant children.”**

The UN High Commissioner for Refugees in its 2018 alternatives to detention assessment toolkit, similarly states: **“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.”**¹

More recently, the Global Compact for Migration urges states to implement ATDs “especially in the case of families and children.” This language threatens to sidestep years of advocacy around ending the detention of children, which found expression in the CMW-CRC joint general comment. The Global Compact is a political document that by necessity makes compromises. However, **we hope that this thematic study by the Special Rapporteur does not make the same compromise, especially given its human rights-based mandate.** The GDP is concerned that doing so would represent a step backwards in ending the detention of children and protecting their human rights.

Ultimately, while the ATD framework may have a rationale in the context of adults, its application to children is contradictory and risky. If the immigration detention of children is fundamentally at odds with their best interests, as CMW-CRC joint general comment states, then ATDs likewise should not apply since by definition they form part of detention procedures. In effect, encouraging states to consider ATDs for children may reinforce or give rise to policies 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 arguably be framed as an obligation, not an “alternative.”**

One way some advocates have sought to sidestep this quandary is by framing ATDs as anything that is not detention, even measures that are applied outside lawful detention procedures. However, once you define ATDs in this way, you open a Pandora’s box—liberty itself may be considered an “alternative” rather than an inherent right. In fact, at the Global Detention Project we have on numerous occasions seen this result. In one case, an advocacy group characterised access to asylum procedures as an “alternative to detention,” even though it is in fact a globally recognised right provided in international law and most domestic legal frameworks.²

¹ UNHCR, “Guiding Questions for the Assessment of Alternatives to Detention,” <https://www.unhcr.org/protection/detention/5b17d9c47/guiding-questions-assessment-alternatives-detention.html>

² See: M. Flynn, “The Debate over Alternatives to Immigration Detention of Children,” In: *Migration, State Obligations, and Rights in a Globalized Context (Conference Proceedings from Geneva Human Rights Week*

In one instance, 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.” Subsequent drafts eventually removed this language after the GDP strongly protested characterising “liberty” as anything other than an inherent right.

In this context, the GDP wishes to emphasise our understanding that the mandate of the Special Rapporteur on the human rights of migrants has been firmly rooted in the bedrock of the relevant international human rights legal framework and that sound legal reasoning is pivotal for the Special Rapporteur to remain an authoritative voice for the protection of migrants, in particular migrant children. Thus, we think that that it is paramount that the Special Rapporteur not employ concepts like “alternatives to detention” in a way that is divorced from lawfulness or officially sanctioned detention procedures, and that it avoid promoting a concept that could in fact undermine fundamental human rights and humanitarian principles.

3. Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education(e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).

One of the more instructive cases we have found at the Global Detention Project in assessing national detention systems and children is that of Belgium. We include a brief history of Belgium’s efforts to avoid detaining children in our [March 2020 profile on the country](#).³ We encourage the Special Rapporteur to consider this case when drafting his thematic reports as it provides important insights into potentially good practices for the reception of families as well as pitfalls in advocating ATDs in the case of children.

Belgium’s policies on the detention of children and families have experienced a series of developments in recent years. This has included the adoption of one of Europe’s more forward-looking ATD programmes for families, which was subsequently abandoned in favour of a return to family detention. However, in early 2019, a Belgian Council of State ruling suspended a Royal Decree allowing for the detention of children.⁴

According to the Belgian Aliens Act, unaccompanied minors (UAMs) cannot be placed in detention. However, NGOs emphasise that according to the Reception Act (Article 41 §2), unaccompanied minors arriving at the border may still exceptionally be detained for up to nine days for the purposes of an age determination procedure if their age is in doubt.⁵

Colloquium, 11-12 October 2017), Global Studies Institute (University of Geneva), 2019, <https://www.globaldetentionproject.org/the-debate-over-alternatives-to-immigration-detention-of-children>

³ Global Detention Project, “Immigration Detention in Belgium,” March 2020, <https://www.globaldetentionproject.org/countries/europe/belgium>

⁴ European Database of Asylum Law, “Belgium: Council of State Rules to Suspend Royal Decree Permitting the Detention of Children,” 2019, <https://bit.ly/2YEH68s>

⁵ Plate-forme Mineurs en Exil, “Détection,” 2019, <https://bit.ly/2SRiLqI>

Since the Reception Act entered into force in 2007, UAMs arriving at the border are first brought to specific centres, Observation and Orientation Centres (OOCs). UAMs are housed in these centres for seven days, under the authority of the Federal Agency for the Reception of Asylum Seekers (Fedasil). Here, they are identified, registered, and assigned a guardian, and the seven-day period here can be renewed once.⁶ The OOCs, based in Neder-over-Hembeek and Steenokkerzeel, are legally regarded as being situated at the border so that unaccompanied minors housed within are not considered to have entered the country (Article 41 of the 2007 Reception Act). The facilities are not closed but are secured and can hold any unaccompanied minor regardless of their administrative status. Following their stay at an OOC, Fedasil moves the UAMs to either a federal reception centre, a Red-Cross centre, or a local reception centre (*initiative locale d'accueil*).

In 2008, Belgium established *maisons de retour* (“return houses”), an ATD system aimed at helping prevent family detention. In 2009, the detention of families in the first instance was ended following repeated condemnation of this practice in the country by the European Court of Human Rights.⁷ However, the law authorising family detention did not change and in fact was later refined. In 2011, the Aliens Act incorporated a provision authorizing detention for as short a period as possible on the condition that the premises are adapted to the needs of the children.⁸

In November 2016, the Secretary of State for Asylum and Migration announced that families would again be detained in closed centres, claiming that nearly all families abscond from the “semi-open” houses prior to removal.⁹ He further added that new “closed housing” would be constructed at the [127bis Repatriation Centre](#), adjacent to Brussels International Airport. The announcement was followed in July 2018 by a Royal Decree permitting the detention of children.¹⁰

In response to the construction of the new detention units in 2018, the Council of Europe’s Commissioner for Human Rights reminded the Belgian government that children should never be detained because of their or their parents’ immigration status. She stressed that detention conflicts with the best interest of the child—the position that both the UN Committee on the Rights of the Child and the Committee on Migrant Workers take—and encouraged the

⁶ Service Public Fédéral (SPF) Justice, “*Prise en charge d’un mineur étranger non accompagné*,” 2019, <https://bit.ly/2JehicB>

⁷ European Court of Human Rights (ECtHR), “*Mubilanzila Mayeka and Kaniki Mitunga vs Belgium*, No 13178/03,” 2006, <https://bit.ly/37qC9QH>; European Court of Human Rights (ECtHR), “*Muskhadzhiyeva and Others vs Belgium*, No 41442/07,” 2010, <https://bit.ly/2SNtp21>; European Court of Human Rights (ECtHR), “*Kanagaratnam and Others vs Belgium*, No 15297/09,” 2011, <https://bit.ly/2Oq0JNq>

⁸ Myria, “*Retour, détention et éloignement des étrangers en Belgique: Droit de vivre en famille sous pression*,” 2018, <https://bit.ly/2FPAo6t>

⁹ La Ligue des Droits de l’Homme, “*La politique d’asile de Theo Francken, du cynisme à l’inhumanité*,” 2016, <http://www.liguedh.be/la-politique-dasile-de-francken-du-cynisme-a-linhumanite/>; RTBF, “*Theo Francke: C’est nécessaire de pouvoir enfermer les familles quelques jours avant leur rapatriement*,” 30 November 2016, <https://bit.ly/2SM7haW>

¹⁰ European Database of Asylum Law, “*Belgium: Council of State Rules to Suspend Royal Decree Permitting the Detention of Children*,” 2019, <https://bit.ly/2YEH68s>

government to continue investing in human rights compliant alternatives for which Belgium had become a positive reference.¹¹

Following the Royal Decree's entry into force, which regulates conditions of detention for families, "family units" (*unités familiales*) for six to eight families were opened at the 127bis closed centre in August 2018. Families can be held there for up to one month (14 days, renewed once), outdoor playgrounds are available for children who should also be able to have access to education while removal is pending.¹²

Observers have warned that the one-month limit—in cramped and prison-like environments with high noise levels—is in fact only a theoretical limit since detention measures can be renewed if removal efforts fail. Concerns have also been expressed regarding the fact that minors over the age of 16 can be placed in disciplinary isolation premises for up to 24 hours.¹³ These concerns have been further exacerbated by the fact that Belgium only ratified the Optional Protocol to the UN Convention against Torture in July 2018, and to date no system has been introduced for the independent monitoring of places where persons are deprived of liberty.¹⁴

In early 2019, with support from UNICEF Belgium, numerous Belgian civil society organisations, including many health professionals, called on the federal government to stop detaining refugees, asylum seekers, and migrant children.¹⁵ They cited rulings against Belgium by the European Court of Human Rights, which "found that the family units in the 127Bis Centre exposed children of a detained family to significant noise pollution due to the location of the centre close to the runway of Brussels airport ... [and that] the exposure of the child to this noise pollution exceeded the severity threshold required for a violation of Article 3 of the [European Convention on Human Rights]."¹⁶

In April 2019, following the NGO action, the Belgian Council of State ordered the suspension of the decree permitting child detention.¹⁷ Nevertheless, observers underscore the fact that despite the suspension of this policy, the law permitting the detention children remained in place (as of early 2020) and there was little to prevent a future government from publishing a new royal decree or building a facility further away from the airport.¹⁸

An important take away from the Belgian case is that at its heart, the failure of the country to adopt a law prohibiting family detention eventually undermined the policy of

¹¹ Council of Europe Commissioner for Human Rights, "Letter to Mr Theo Francken, Secretary of State for Migration and Asylum," 2018, <https://bit.ly/2DFYZXX>

¹² CIRÉ, "Les centres fermés – édition 2019," 2019, <https://www.cire.be/les-centres-fermes/>

¹³ Myria, "Ouverture imminente des unités familiales dans le centre fermé 127bis," <https://bit.ly/2yqehOd>

¹⁴ Association for the Prevention of Torture (APT), "Belgium – OPCAT Situation," 2019, https://apt.ch/en/opcat_pages/opcat-situation-6/

¹⁵ UN Children's Fund (UNICEF) and Plate-forme Mineurs en Exil, "On n'infirmes pas un enfant. Point," 2019, <http://www.onnenfermepasunenfant.be/>

¹⁶ European Database of Asylum Law, "Belgium: Council of State Rules to Suspend Royal Decree Permitting the Detention of Children," 2019, <https://bit.ly/2YEH68s>

¹⁷ European Database of Asylum Law, "Belgium: Council of State Rules to Suspend Royal Decree Permitting the Detention of Children," 2019, <https://bit.ly/2YEH68s>

¹⁸ Magma, interview with Rob Kaalen of Plate-forme Mineurs en exil (in French), 9 January 2020, <http://www.magma.org/nord-sud/detenir-des-enfants-en-centre-ferme-violation-des-droits-de-l'enfant/>

not detaining them in the first instance. In this way, the Belgian case reveals the importance of lawfulness in child detention cases. Not only is it important to not divorce ATD measures from lawful detention procedures (as noted earlier in this submission), it is equally important to advocate that countries in fact adopt laws that specifically prohibit detention of specific groups. Otherwise, inevitably there will be more cases like Belgium.

While it is critically important to develop and adopt humane child reception measures, ATDs themselves will not end the detention of children and they could in fact undermine fundamental child rights principles. Only laws that prohibit such a practice can ultimately succeed.