How Immigration Detention and Procedural Shortcomings Undermine Children’s Right to Seek Asylum

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This paper examines the reasons why unaccompanied and separated children—those who travel without caregivers—may choose not to apply for asylum or may abandon applications even when they have strong claims. It suggests that four related factors help explain such outcomes. First, children’s asylum claims are not always well-understood by adjudicators. Second, unaccompanied and separated children are generally expected to prepare and present their claims without the assistance of a lawyer or guardian. Third, domestic legal frameworks do not always reflect the international standard that the return of children to their home countries should only be carried out if it is in the best interests of the child. Finally, detention is a tremendous deterrent to children who might otherwise seek asylum. This paper draws largely on research into the treatment of Central American children in Mexico and the United States. Other researchers and advocates have reached similar conclusions in other countries, suggesting that these conclusions may be more generally applicable to child asylum seekers elsewhere in the world—although some of these issues, particularly compliance with the best interests principle and the impact of detention, do not appear to have been examined in depth. Affording children effective access to asylum requires states to recognise the ways that children may be subjected to persecution and to afford them the information and assistance they need to make claims. States should also ensure that children and their families are not detained solely as a means of immigration control, and should establish and make effective use of alternatives to detention.

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Introduction

‘I left Honduras because of problems with the gang’, seventeen-year-old Edgar V told me in June 2015 when we spoke in San Pedro Sula, Honduras, the day he arrived from Mexico. ‘They wanted me to join them, and I didn’t want to, so I had to flee.’\(^1\) Despite this fact, and even though he explained that he feared for his life and safety if he were to return to Honduras, he accepted ‘voluntary return’ to his home country after less than a week in immigration detention.

I have heard accounts like this over and over again while interviewing Central American children who left their homes to seek safety in Mexico or the United States.\(^2\) We know that children have been leaving El Salvador, Guatemala, and Honduras, on their own and with family members, for years. Gang violence has plagued these three countries for more than a decade.\(^3\) The murder rates in El Salvador and Guatemala are in the range of 40 per 100,000, making them the fourth and fifth most violent countries in the world in 2012. Honduras, with a rate of 90 per 100,000, has been the world’s most violent country for several years running.\(^4\)

Children are particularly targeted by gangs in these three countries. In Honduras, for example, over four hundred youths under eighteen were killed in the first half of 2014, most of whom were thought to be the victims of gang violence.\(^5\) It is not uncommon to hear reports of thirteen-year-olds, or even younger children, being

\(^1\) Interview with Edgar V, San Pedro Sula, Honduras, 8 January 2015. The names of all children have been replaced with pseudonyms.

\(^2\) In line with international standards, this paper uses the terms ‘child’ and ‘children’ to refer to a person or persons under the age of eighteen. See Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 1.


\(^4\) United Nations Office on Drugs and Crime (UNODC), Global Study on Homicide 2013: Trends, Context, Data (UNODC 2014) 24, 46, 150.

shot in the head, having their throats slit, or being tortured and left to die.  

It comes as no surprise, then, that a recent study by the UN High Commissioner for Refugees (UNHCR) of children in transit through Mexico found that some 48 per cent had plausible claims to international protection—not meaning that all were necessarily refugees, but rather that their cases would warrant in-depth review. Another UNHCR study—of children who had reached the United States from El Salvador, Guatemala, Honduras, and Mexico—concluded that nearly 60 per cent had suffered or faced the risk of harms that indicated an actual or potential need for international protection.

Instead, the surprising thing about Edgar’s account is that he abandoned his asylum claim so quickly once he arrived in Mexico. I suggest that his decision is not unusual for children in his position and is the consequence of several factors in combination. First, children’s asylum claims—both the child-specific forms such claims may take as well as the fact that children may have independent bases for claiming asylum—are not always well-understood by immigration officials. Second, unaccompanied and separated children, who travel without caregivers, are frequently left to fend for themselves in asylum proceedings: they are generally expected to prepare and

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7 Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), Arrancados de raíz (Oficina del ACNUR en México 2014).

8 United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean, Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection (UNHCR 2014).

9 Unaccompanied children are children ‘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.’ Separated children are those who are ‘separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives.’ UN Committee on the Rights of the Child (UNCRC), ‘General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’ (2005) UN Doc CRC/GC/2005/6 [7]-[8]. See also UNHCR, Inter-Agency Guiding Principles on Unaccompanied and Separated Children (ICRC 2004) 13.
present their claims without the assistance of a lawyer or guardian. Third, domestic legal frameworks do not always reflect the international standard that the return of children to their home countries should only be carried out if it is in the best interest of the child. Finally, detention is a tremendous deterrent to children who might otherwise seek and pursue asylum claims.

This paper draws largely on research I have undertaken this year into the treatment of Central American children in Mexico and the United States. As noted in the text, however, researchers and advocates have reached similar conclusions in other countries, suggesting that much of what I conclude may be more generally applicable to child asylum seekers elsewhere in the world—although some of these issues, particularly compliance with the best interests principle and the impact of detention, do not appear to have been examined in depth.

Child-Specific Asylum Claims

As the UNHCR notes, children may have claims for asylum that are based on ‘child-specific forms and manifestations of persecution.’ As one example, recruitment by gangs, an activity that amounts to hazardous labour, as well as other gang-related violence, may be a basis for recognition as a refugee. The UNHCR observes that ‘Young people, in particular, who live in communities with a pervasive and

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10 UNHCR, ‘Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’ (2009) UN Doc HCR/GIP/09/08 [3]. See also UNCRC, ‘General Comment No. 6’ (n 9) [74] (which notes several other child-specific forms and manifestations of persecution such as persecution of family members, underage recruitment into military service, trafficking of children for sexual exploitation, other forms of sexual exploitation, and subjection to female genital mutilation).

powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention.’

Edgar had already stopped attending school well before he left Honduras because he felt threatened by the gang that controlled his neighbourhood. On one occasion when he was still going to school, a classmate was killed for wearing a shirt of a colour associated with a rival gang. ‘There were always problems from the gang. It was dangerous’, he told me.

Even though he tried not to attract attention to himself, the gang pressured him to join their ranks. One day, he said, ‘They came to my house and told me, “Join the gang”. They hit me. They hit me and I fell to the ground. From then on, they didn’t hit me again, but they threatened my mother. They said they would kill me and my mother.’

His mother took him to the police station to make a complaint, and he took refuge for a time in a shelter run by missionaries. ‘I spent two months and twenty-one days there’, Edgar said. ‘I needed to be there for my protection, because they [the gang] were hunting for me. But I would have been there my entire life. I would lose the rest of my adolescence. I wouldn’t be able to study. I would become an adult and wouldn’t know anything. I told myself, “I can’t do this. I have to leave.”’

Those who resist, or are seen to resist gangs include not just those who refuse recruitment but also people who refuse sexual demands by gang members; business owners and other individuals who are unable or unwilling to meet extortion or other demands for money or services; witnesses to crimes committed by gangs; former and current gang members, ethnic minorities, lesbian, gay, bisexual, and transgender persons, and others who are seen as not conforming to gangs’ practices; and the family members of anybody falling into one of these categories.

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13 Interview, San Pedro Sula, Honduras, 8 June 2015.
14 UNHCR, ‘Guidance Note’ (n 12) [12]-[17].
The UNHCR also notes that ‘people fleeing gang-related violence may have a well-founded fear of persecution on account of their political opinion, especially where criminal and political activities overlap.’\(^\text{15}\)

Intra-family violence is another example of child-specific abuse that may give rise to a claim for recognition as a refugee. Children have the right to protection from all forms of physical or mental violence, abuse, neglect, and exploitation.\(^\text{16}\) In some cases, as UNHCR observes, ‘Domestic violence may also come within the scope of torture and other cruel, inhuman or degrading treatment or punishment.’\(^\text{17}\) A state’s failure to afford protection from parental abuse may give rise to an asylum claim.\(^\text{18}\)

Furthermore, deprivation of the right to education\(^\text{19}\) or other economic, social, and cultural rights may also give rise to an asylum claim from children. As the UNHCR has noted, ‘Children’s socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child’s claim as that of civil and political rights.’\(^\text{20}\)

Nevertheless, researchers have found that child-specific asylum claims are too often given short shrift, not only in Mexico, but also in Australia, Canada, the United States, the United Kingdom, and elsewhere in Europe: adjudicators and other authorities may not

\(^{15}\) ibid [65].

\(^{16}\) Convention on the Rights of the Child (n 2) art 19.

\(^{17}\) UNHCR, ‘Guidelines on International Protection’ (n 10) [33].

\(^{18}\) ibid [18], [32]-[33].


\(^{20}\) UNHCR, ‘Guidelines on International Protection’ (n 10) [14]. See also Committee on Economic, Social and Cultural Rights, ‘General Comment No. 11: Plans of Action for Primary Education’ (1999) UN Doc E/1992/23 [4]: ‘The lack of educational opportunities for children often reinforces their subjection to various other human rights violations.’
understand such potential claims well enough to identify them, and they may not apply the correct standards in evaluating such claims.\(^\text{21}\)

**Children’s Right to a Fair Process in the Determination of Asylum Claims**

Children have the right to have access to asylum procedures regardless of their age and regardless of whether they are unaccompanied or with other family members.\(^\text{22}\) Realisation of this right requires that children be referred to asylum procedures when facts become known that establish an objective basis for concluding that a child is in need of international protection, even if the child is unable to explicitly articulate a concrete fear.\(^\text{23}\)

In particular, unaccompanied and separated children should have guardians appointed ‘as expeditiously as possible’, a step the Committee on the Rights of the Child regards as ‘a key procedural

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\(^{22}\) UNCRC, ‘General Comment No. 6’ (n 9) [66], [64].

\(^{23}\) ibid [66].
safeguard to ensure respect for the best interests of an unaccompanied or separated child.\textsuperscript{24} When a separated or unaccompanied child is placed in asylum proceedings or any other administrative or judicial proceedings, or whenever a child is the principal applicant in an asylum procedure, the child should also have a legal representative appointed.\textsuperscript{25} The guardian should be ‘an adult who is familiar with the child’s background and who is competent and able to represent his or her best interests.’\textsuperscript{26} In cases where a legal representative is also required, the legal representative should be provided free of charge.\textsuperscript{27} Too often, however, when children are able to apply for asylum, they must complete applications and go through the process without any legal or other assistance. As an example, another child I spoke with recently, fifteen-year-old Daniel L, told me that he travelled from El Salvador to Mexico with the aid of a smuggler. ‘The man who brought me left me when we crossed the border’, he told me. ‘I went to the authorities for help, to the municipal police station.’ On his own, without the assistance of anybody other than the government representative who interviewed him, he applied for recognition as a refugee and was awaiting a decision on his claim when I interviewed him in Chiapas, Mexico, in May 2015.\textsuperscript{28}

Without legal assistance, children face formidable difficulties in navigating complicated procedures. They are unlikely to know what kind of information is relevant to their claim and may not be able to present it in a manner that is easy to follow. Research in countries such as Australia, Canada, the United Kingdom and the United States shows that represented children are far more likely to be granted asylum than those who do not have representation.\textsuperscript{29}

\textsuperscript{24} ibid [21].
\textsuperscript{25} ibid [21], [33]-[34], [36]; UNHCR, \textit{Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention} (2012), [56]; UNHCR, ‘Guidelines on International Protection’ (n 10) [69]. Similarly, the Inter-Agency Guiding Principles on Unaccompanied and Separated Children call for ‘the appointment of a legal representative as well as a guardian to promote a decision that will be in the child’s best interests.’ UNHCR, \textit{Inter-Agency Guiding Principles} (n 9) 61.
\textsuperscript{26} UNCRC, ‘General Comment No. 6’ (n 9) 69.
\textsuperscript{27} ibid.
\textsuperscript{28} Interview with Daniel L, Tapachula, Chiapas, Mexico, 8 May 2015.
\textsuperscript{29} See, for example, Jacqueline Bhabha and Mary Crock, \textit{Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Comparative
From the perspective of child protection, the reluctance to provide children with legal representation is remarkable. As the legal scholar Jacqueline Bhabha has observed, ‘No other group of children with comparable needs, except perhaps convicted juvenile offenders, is expected to fend for themselves in the face of such overwhelming legal and personal complexities.’

Ensuring that children have meaningful access to asylum procedures requires more than legal representation, although even that step would be an enormous advance. States should also take steps to address other aspects of their asylum procedures.

In both Mexico and the United States, I have heard frequent complaints from children and their pro bono representatives that asylum procedures can be confusing and are often not suited to children. For instance, children going through refugee recognition proceedings in Mexico have told me that they were profoundly unsettled by the length of the process and the lack of information they were given about it. ‘They should give more explanation’, seventeen-year-old Johanna H, from Guatemala, commented to me. ‘Not knowing what would happen made me so anxious I thought of killing myself.’

The procedures used should allow children to participate meaningfully. As the Separated Children in Europe Programme notes, ‘Separated children must not be fitted into procedures designed for adults and decision making bodies should design procedures that are appropriate to the needs of children and their levels of understanding.’ In particular, adjudicators must take into account and compensate for the fact that children may not be able to express fear
and other elements of their claim with the precision that might be expected of an adult.33

The Separated Children in Europe Programme, a network of non-governmental organisations from 27 European countries which has developed policy guidance on addressing the needs of unaccompanied and separated children, makes the following additional recommendations for adapting proceedings to the age, maturity, and specific circumstances of each child:

- ‘Where interviews are required they must be carried out in a child-friendly manner with breaks and in a non-threatening atmosphere, by officers trained in interviewing children.’34
- ‘Separated children should be able to provide testimony through a number of different means. These include oral testimony, drawings and writings, audio and video recorded interviews with independent experts, and testimony via video-link.’35
- ‘It is desirable, particularly with younger children, children with a disability or those suffering from psychological trauma, that an independent expert carries out an assessment of the child’s ability to articulate their need for protection or a well-founded fear of persecution and also to identify any difficulties a child may have in recounting painful incidents or disclosing sensitive information.’36

Finally, children should be informed of decisions in person, in the presence of their guardian or representative, in a language and manner they understand, and in a supportive and non-threatening environment.37

34 Separated Children in Europe Programme (n 32) pt D11.2.
35 ibid pt D11.2.
36 ibid pt D11.3.
37 UNHCR, ‘Guidelines on International Protection’ (n 10) [77].
The Best Interests Principle as a Constraint on the Return of Children

The principle of non-refoulement prohibits states from transferring anyone, directly or indirectly, to a place where she or he would have a well-founded fear of persecution or would face a risk of torture or other cruel, inhuman or degrading treatment or punishment. The prohibition on refoulement is set forth in the Refugee Convention, the Convention against Torture, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the American Convention, among other treaties, and is widely regarded as a norm of customary international law.

The Committee on the Rights of the Child has determined that the non-refoulement obligation under the Convention on the Rights of the Child is a broad one:

States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of

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38 Convention relating to the Status of Refugees (adopted 28 July 1954, entered into force 22 April 1954) 189 UNTS 150 art 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 3; International Covenant on Civil and Political Rights (ICCPR) (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 7; Convention on the Rights of the Child (n 2) arts 3(1) (best interests of the child), 6 (right to life and survival) and 37 (rights to liberty and freedom from torture); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OASTS No 36, 1144 UNTS 123 art 22(8). See also Human Rights Committee, General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) UN Doc HRI/GEN/1/Rev.7 (1992) [9]; UNCRC, ‘General Comment No. 6’ (n 9) [27].

the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.\textsuperscript{40}

This means that ‘Return to the country of origin is not an option if it would lead to a “reasonable risk” that such return would result in the violation of fundamental human rights of the child’, the committee explains.\textsuperscript{41} The obligation to refrain from \textit{refoulement} includes situations where the risk of harm ‘originate[s] from non-State actors.’\textsuperscript{42}

Read together with the best interests principle and other children’s rights protections, the principle of \textit{non-refoulement} requires, in the words of the Inter-American Court of Human Rights, that ‘any decision about [children]’s return to their country of origin or to a safe third country may only be based on their best interests, bearing in mind that the risk of their rights being violated may be manifested in specific and particular ways given their age.’\textsuperscript{43}

In similar terms, the Committee on the Rights of the Child has stated, ‘Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child.’\textsuperscript{44} The committee further observes, ‘Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child.’\textsuperscript{45}

Applying this principle in practice requires states to look beyond the rigid constraints of their immigration laws. As the UNHCR observes, ‘Overall an ethic of care—and not enforcement—

\begin{itemize}
  \item \textsuperscript{40} UNCRC, ‘General Comment No. 6’ (n 9) [27]. See generally Alice Farmer, ‘A Commentary on the Committee of the Rights of the Child’s Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights’ (2011) 80 Fordham Law Review 39.
  \item \textsuperscript{41} UNCRC, ‘General Comment No. 6’ (n 9) [84].
  \item \textsuperscript{42} ibid [27].
  \item \textsuperscript{43} Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection (n 39) [242].
  \item \textsuperscript{44} UNCRC, ‘General Comment No. 6’ (n 9) [84].
  \item \textsuperscript{45} ibid [82].
\end{itemize}
needs to govern interactions with asylum-seeking children.' More specifically, the Committee on the Rights of the Child explains:

A separated child must never be returned or resettled simply because they do not have a legal right to remain in the host country or because they fit into an administrative return, transfer, re-entry or resettlement procedure. In any event a separated child should only return to their country of origin, or be transferred to, or resettled in a third country when that is considered to be in their best interests.\(^{47}\)

The committee offers the following guidance for when return to the country of origin may be appropriate:

Return to the country of origin should be considered when family reunification can be arranged; or when, having consulted the responsible authorities in the country of origin, an adult care-giver, or an appropriate governmental or non-governmental organization has agreed and is able to provide immediate protection and care upon arrival.\(^{48}\)

Local integration is ‘the primary option if return to the country of origin is impossible on either legal or factual grounds.'\(^{49}\) Resettlement to a third country should also be considered in such cases.\(^{50}\)

Finally, the committee cautions that ‘Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.'\(^{51}\) These standards require states to take particular care when reaching determinations about whether to return unaccompanied and separated children to their countries of origin.

Return should never be an option when the child has been granted asylum, where the child’s life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, or where there are substantial grounds to believe the child would be in danger of being

\(^{46}\) UNHCR, Guidelines (n 25) Guideline 9.2 [52].

\(^{47}\) Separated Children in Europe Programme (n 32) pt D15.

\(^{48}\) UNHCR, Inter-Agency Guiding Principles (n 9) 61.

\(^{49}\) UNCRC, ‘General Comment No. 6’ (n 9) [89].

\(^{50}\) ibid [92].

\(^{51}\) ibid [86].
subjected to torture. In addition to these familiar bases for protection, states should also consider whether a child’s return would expose him or her to other human rights violations, including those that are consequences of generalised violence. Finally, whenever return is not in a child’s best interests, whether because it carries the risk of human rights violations or because there is no suitable caregiver in the country of origin, states should afford children protection, including care and accommodation. States may also consider whether resettlement in a third country is suitable, for example when a parent or relative in a third country is able and willing to care for the child.

The Impact of Detention

Edgar, the seventeen-year-old Honduran whose story this paper opens with, had the opportunity to apply for asylum when he was apprehended in Oaxaca. ‘I told the immigration official that I couldn’t return here’, Edgar said. He showed the official a copy of the complaint he and his mother had filed in an effort to seek protection from the gang that controlled his neighbourhood. ‘Then [the immigration official] said, “You know, you can ask for asylum.” I said yes. But I was locked up, and they said it would be a long time before I heard. I couldn’t handle that. At least two months, up to six months, just for the response. When they told me it would be six months before I heard back, I said no, I don’t want that.’ Instead, he accepted return to Honduras.52

His story is by no means unique. As another example, Carolina Q, aged fourteen, fled Honduras with her family after they started receiving threats from gang members. When I spoke to her, she told me that her family explained what had happened to them when they were apprehended by Mexican immigration officials. ‘They asked a lot of questions—where were we from, where were we going—a lot of questions. Why we left our country’, she said. ‘We presented our papers, and we spent the whole night answering questions. Then we had to decide if we wanted to remain in Mexico, but they told us we would have to wait two months for an answer

52 Interview with Edgar V, San Pedro Sula, Honduras, 8 June 2015.
on our application. My aunt was pregnant, so we decided no. ... Two months locked up, we couldn’t do that.”

And in a similar account, seventeen-year-old Enrique J reported that he left Honduras in early 2015 after he and other members of his family were repeatedly attacked by gang members. ‘I don’t want to return’, he told me. ‘But because of the time locked up here, I told myself it’s better to return, to go.’ If he pursued a claim, he explained, ‘I’d have to spend another 90 to 120 days locked up. I don’t want that.’ He chose to accept deportation even though he did not think he would be safe in his community. ‘I won’t leave the house unless I have to. There are criminals on every corner. They walk around armed as if they were the police appointed by law.”

These accounts are consistent with the findings of the UNHCR’s office in Mexico, which concluded that, frequently, ‘children and adolescents do not access the asylum system in order to avoid being detained during proceedings for recognition as a refugee, instead preferring to be returned to their countries of origin even when their lives or physical integrity is at risk.”

It is not remarkable that detention would weigh heavily in children’s decisions. Detention has adverse effects on mental, and sometimes physical, health. As research among adult detainees in Australia, Britain and the United States has found, detained asylum seekers experience extremely high rates of anxiety, depression, and symptoms of post-traumatic stress disorder, and prolonged detention has adverse effects on mental health that persist for an extended period of time after detention ends.” Detained children demon-

53 Interview with Carolina Q, San Pedro Sula, Honduras, 10 July 2015.
54 Interview with Enrique J, Reynosa, Tamaulipas, 24 June 2015.
55 ACNUR (n 7) 14.
Stratified developmental and behavioural problems as well as mental health difficulties that included major depression, suicide ideation, and incidents of self-harm as well as sleep difficulties, anxiety regarding delays in educational progress, and a sense of shame.\textsuperscript{57}

Moreover, studies of adolescent decision-making show that under stress or in other circumstances of heightened emotion, teenagers are likely to focus on short-term gains, with a limited appreciation of longer-term consequences.\textsuperscript{58} Children who lack the guidance of parents or other caregivers and who are not provided with a guardian or legal representation are even more likely to take decisions that may, with hindsight and the benefit of adult experience, seem rash and imprudent. The nature of adolescence explains why unrepresented and unsupported teenagers might withdraw potentially meritorious asylum claims, choosing to return to risky situations in order to avoid further detention.

Under international standards, the detention of any asylum seeker, whether a child or an adult, should normally be avoided and should only be a measure of last resort.\textsuperscript{59} Mandatory or indefinite detention of children violates the principle that the detention of children should be used only as a matter of last resort and for the shortest appropriate period of time.\textsuperscript{60}

The UN General Assembly has called on states not to detain migrant children solely because they or their parents have breached


\textsuperscript{58} See, for example, Laurence Steinberg et al, ‘Age Differences in Future Orientation and Delay Discounting’ (2009) 80 Child Development 28.

\textsuperscript{59} UNHCR, \textit{Guidelines on the Applicable Criteria} (n 25) [2].

\textsuperscript{60} Convention on the Rights of the Child (n 2) art 37(c).
immigration laws. The UN Committee on the Rights of the Child, which oversees states’ compliance with the Convention on the Rights of the Child, has concluded that ‘Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof’ and it urges states to ‘expeditiously and completely cease the detention of children on the basis of their immigration status.’ The Working Group on Arbitrary Detention has observed, ‘Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the Convention on the Rights of the Child, according to which detention can only be used as a last resort.’ The UNHCR notes that children ‘should in principle not be detained at all.’ And, as the UN Secretary-General confirmed in 2013, ‘Detention of migrant children constitutes a violation of child rights.’ The detention of children solely because of their own or their parents’ immigration status amounts to arbitrary detention, prohibited under international law.

In the Americas, the Inter-American Court of Human Rights has found that the detention of children solely on the basis of their migration status exceeds the requirement of necessity, is contrary to children’s best interests, and is therefore incompatible with regional

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62 UNCRC, ‘General Comment No. 6’ (n 9) [61].
63 UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration (2012) [78]. The Committee’s General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin also notes: ‘Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.’ UNCRC, ‘General Comment No. 6’ (n 9) [61]. Similarly, the Inter-Agency Guiding Principles on Unaccompanied and Separated Children observe, ‘Refugee or asylum-seeking children should not be detained.’ UNHCR, Inter-Agency Guiding Principles (n 9) 60.
65 UNHCR, Guidelines on the Applicable Criteria (n 25) [51].
66 UN General Assembly, International Migration and Development: Report of the Secretary General, UN Doc A/68/190 (25 July 2014) [75].
67 ICCPR (n 38) art 9(1); Convention on the Rights of the Child (n 2) art 37(c).
human rights treaties. Similarly, within Europe, the Council of Europe’s Parliamentary Assembly concluded in 2011 that ‘no detention of unaccompanied children on migration grounds should be allowed.’

Where detention is used, ‘All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.’ Concerns about abduction by traffickers or smugglers are not enough to warrant detention. As the Separated Children in Europe Programme notes:

Separated trafficked children must not be held in detention facilities in order to protect them from those who have trafficked or who wish to exploit them. Alternative secure measures such as safe houses should be developed in conjunction with child welfare authorities. In order to establish safeguards, care workers in reception centres and residential homes need to be made aware of the problem of trafficking of children for the purposes of sexual or other forms of exploitation.

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68 Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection (n 39) [154]-[60].

69 Parliamentary Assembly Council of Europe, ‘Unaccompanied Children in Europe: Issues of Arrival, Stay and Return’ Resolution 1810 (2011) [5.9]. In addition, the Separated Children in Europe Programme’s Statement of Good Practice states that separated children ‘must never be detained for reasons of immigration policy and practice.’ Separated Children in Europe Programme (n 32) pt D1. See also ibid pt D6.1 (‘Separated children must never be detained for reasons related to their immigration status or illegal entry. This includes, whether temporary or otherwise, detention at the border or in international zones, in detention centres, in police cells, in prisons or in any other special detention centres for young people. Judicial oversight must be exercised where it is deemed in a child’s best interests to be placed in a closed centre’).

70 UNHCR, Guidelines on the Applicable Criteria (n 25) [57]. See also UNCRC, ‘General Comment No. 6’ (n 9) [61]: ‘all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.’

71 Separated Children in Europe Programme (n 32) pt D8.1.3.
The Need for Alternatives to Detention

‘[M]ost countries do not rely primarily on detention to manage asylum seekers, refugees and irregular migrants while resolving a migration matter’, a review of migration policies and practices by the International Detention Coalition has found. Instead, the experience of many countries is that community-based alternatives—housing in settings that allow asylum seekers, refugees, and other migrants to attend regular schools, work in the community, and otherwise interact regularly with others—are preferable in virtually every respect to immigration detention. Community-based alternatives do not have the adverse health consequences of detention. They may be more cost-effective. And even in transit countries, individuals who are housed in community-based settings have a high rate of appearance at asylum or immigration hearings.

For children who are separated from caregivers, community-based alternatives must offer adequate supervision and other appropriate care and protection. Such concerns may lead states to rely on detention instead of developing acceptable alternatives. As the International Detention Coalition observes, ‘Sufficient protection must be available to children who are released from or who avoid detention. Practically, sufficient guardianship and reception resources must be accessible to children to ensure that detention does not represent the better of a bad set of options’.

But many states have well-developed systems for providing protection and support to their own children who cannot live with their families, offering, for example, foster care or placement in small group homes for children who have been abused or neglected. Such

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74 International Detention Coalition, Captured Childhood (International Detention Coalition 2012) 35.
programmes could potentially also accommodate unaccompanied and separated children who are seeking asylum. As noted above, states can also do more to facilitate the placement of children with relatives in the destination country or in third countries.

Conclusion

Effective protection for child asylum-seekers requires that states recognise and adequately consider child-specific bases for asylum. States should ensure that unaccompanied and separated children have the benefit of legal representation, without which they cannot effectively enjoy their right to seek asylum and their right to be heard. States should also ensure that returns are in children’s best interests; where they are not—for example, where return would expose a child to human rights violations or where the child has no appropriate caregiver in the home country—states should offer children protection, care, and the opportunity for local integration. Finally, states should not detain children solely on the basis of their migration status.