

# CHILDREN IN IMMIGRATION DETENTION

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What are the  
International Norms?

FELICE D. GAER



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Cover photo: Children in immigration detention, Lesbos, Greece

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### What are the International Norms?

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## Children in Immigration Detention— What are the International Norms?

By Felice D. Gaer

The revelation of “inadequate food, water and sanitation” at a Customs and Border Patrol migrant detention facility housing over 300 children in Clint, Texas has put a spotlight on the minimal standards required for treatment of minors in US custody.<sup>[1]</sup> Vice President Mike Pence told CNN’s Jake Tapper that children should “of course” be provided with soap and other amenities.<sup>[2]</sup>

Yet just days before, the US government argued before the Ninth Circuit Court of Appeals that it was not required by the 1997 “Flores Settlement” (hereafter, Flores) to provide soap and toothbrushes for unaccompanied children in immigration detention. Flores, the government argued, merely referenced the need for conditions to be “safe and sanitary”<sup>[3]</sup> because the parties to Flores could not reach an agreement on what that meant. But US Circuit Judge William Fletcher had a different theory—that the meaning of “safe and sanitary” in Flores was “relatively obvious.”<sup>[4]</sup>

The public charges of filth and mistreatment<sup>[5]</sup> have raised questions about what standards do—or should—apply to the care and treatment of children placed in immigration detention. As Ryan Goodman observed on Twitter, these youngsters were being treated “worse than the most basic standards required by international humanitarian law for enemy prisoners of war.”<sup>[6]</sup> Indeed, the earliest efforts to codify the laws of war included provisions for humane treatment of captured enemies; the 1949 Geneva Conventions specified that civilians as well as enemy prisoners must be treated humanely.<sup>[7]</sup>

Of course, the children in immigration custody on the US border are not engaged in armed conflict. This article addresses the standards that apply to the detention of migrant children under international human rights law. First I explore

the standards of care for children based on binding US treaty obligations; then I take up the question that the minimum standards debate has sidelined—whether it is appropriate to keep migrant children in detention at all.

## Standards of Care Based on Treaty Obligations

The US government has ratified two international human rights treaties that specify rather clearly that all persons who have lost their liberty and are held by the state must be treated humanely. Both the International Covenant on Civil and Political Rights (ICCPR, ratified by the United States in 1992) and the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT, ratified by the United States in 1994) affirm this. The ICCPR provides that detainees should be “treated with humanity and respect for the inherent dignity of the human person” (article 10). The Convention against Torture requires States parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture” and “acts of cruel, inhuman or degrading treatment or punishment ...” (articles 2 and 16). It specifies some of these measures such as educating law enforcement personnel about standards, monitoring custody of detainees, and maintaining complaint mechanisms to uncover and punish those responsible for abuse.

Upon ratifying the ICCPR and the CAT, the United States agreed to be subjected to periodic reviews of their compliance with the human rights treaties by submitting reports on the measures the government has taken to give effect to these undertakings. The United States has sent government representatives to answer questions and conduct a dialogue with the independent experts elected to serve on these monitoring committees. The committees—the Human Rights Committee (which monitors the ICCPR) and the Committee against Torture (which monitors CAT)—have articulated their views of what the treaties require with respect to treatment of persons who have lost their liberty, largely in their concluding observations issued publicly following the review of each State party.

Both the Human Rights Committee and the Committee against Torture have urged states repeatedly to live up to the norms set out in the Standard Minimum Rules for the Treatment of Prisoners (SMR), particularly the 2015 revised SMR, now called the Nelson Mandela Rules, which were adopted in 2015 by the UN General Assembly with US support, and without a vote.<sup>[8]</sup> These set out guidance on minimal conditions for persons who have been detained or imprisoned including the need to provide for their personal hygiene, clothing, food, water, accommodations, and more.

In review after review, the Human Rights Committee has asked states to address deficient conditions of detention—from overcrowding to inadequate access to food and medical care to the use of solitary confinement, for example—and has specifically asked them to bring detention conditions into line with the SMR/Nelson Mandela Rules.<sup>[9]</sup> Similarly, the Committee against Torture sent formal observations to the Member States when they were revising the SMR in 2015 regarding the “procedural standards and safeguards ...that should be applied to all cases of deprivation of liberty.”<sup>[10]</sup> In its Concluding Observations on country reports from all regions of the world since 2015, the Committee has routinely asked for action to bring detention conditions into conformity with the Nelson Mandela Rules, often specifically citing conditions regarding water, sanitation, toilet facilities, and food as well as overcrowding and policies related to solitary confinement.<sup>[11]</sup>

The Nelson Mandela Rules provide, inter alia, “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment...” The Rules further require “adequate” sanitary installations, showers “as frequently as necessary” but “at least once a week”; water, toilet articles; food of nutritional value; and much more.<sup>[12]</sup> The repeated references in CCPR and CAT concluding observations and recommendations to bringing practices into line with the Nelson Mandela Rules indicate that the treaty committees consider them to represent the basic conditions required under those treaties.

In 2006, the United States reported to the Committee against Torture that all US officials are prohibited from engaging in cruel, inhuman or degrading treatment or punishment, in accordance with US obligations under the Convention. The CAT Committee, in its conclusions, welcomed the US National Detention Standards which consolidated and set minimum standards for detention facilities holding DHS detainees including asylum seekers.<sup>[13]</sup> However, the Committee also expressed concern that education and training of US law enforcement officials did not seem adequate to ensure they would know how to identify signs of torture or cruel, inhuman or degrading treatment or punishment. The CAT Committee asked the United States to regularly ensure independent monitoring of their conduct.<sup>[14]</sup>

When the United States returned 8 years later for its next review, in 2014, the CAT Committee put the United States on notice that it was concerned over the expansion of expedited removal procedures “which do not adequately take into account the special circumstances of asylum seekers...” and the practices whereby would-be refugees “may be detained until they are removed from the US.” In its Concluding Observations, the Committee expressed concern about “mandatory detention” for asylum seekers and other migrants in the US who are held in “prison-like detention facilities” and that children are held in facilities “which closely resemble juvenile correctional facilities.” The Committee stated that it was concerned by reports of “substandard conditions of detention in immigration facilities” and recommended review of mandatory detention, and expansion of alternatives to immigration detention and of foster care for unaccompanied children.<sup>[15]</sup>

## Standards about Detaining Migrant Children

By the time of the 2014 review, the CAT Committee reflected serious concerns about US practices regarding immigration detention of children, a subject that had seized the attention of several other relevant UN bodies dealing with migrants and refugees.<sup>[16]</sup> In 2014, then-UN High Commissioner for Refugees, Antonio Guterres, called for an “ethic of care, not enforcement”

and declared that “the practice of putting children in immigration detention is in violation of the Convention on the Rights of the Child in many respects and it should be stopped.”<sup>[17]</sup> The Office of the High Commissioner has expanded its comments and the reasoning behind its position that detention is never in the “best interests” of the child.<sup>[18]</sup>

The threshold question of whether children should be detained at all in connection with immigration or seeking entry to a country has in fact become the key focus of concern and point of advocacy among international bodies addressing their treatment. Two other human rights treaty bodies have been particularly vocal on this issue: The 1989 Convention on the Rights of the Child provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily, and the Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, adopted in 1990, contains a similar prohibition on arbitrary arrest and detention as well as a stipulation that anyone detained must be treated humanely.<sup>[19]</sup>

The United States is not a party to either of these treaties, although it did sign the CRC and hence, is arguably obligated not to take actions to defeat the object and purpose of the Convention. 196 States have ratified the CRC, reflecting very wide acceptance of the obligations it articulates.<sup>[20]</sup>

In 2005, the Committee on the Rights of the Child (CRC Committee) adopted General Comment 6 explaining its standards concerning treatment of unaccompanied and separated children outside their country of origin<sup>[21]</sup> offering guidance on the treatment of unaccompanied children, and placing special emphasis on the widely-referenced principle of the best interests of the child while taking into account stark reality facing such children, including those seeking asylum. General Comment 6 recommends directly that “children should not, as a general rule, be deprived of liberty,” and reminds States parties that detention of children should be a measure of last resort and for the shortest appropriate period of time (article 37(b) of the Convention).<sup>[22]</sup> Furthermore, citing the 1951 Refugee Convention (article 31(1)), the CRC Committee recalls that children should not be criminalized solely because of illegal entry or presence in a country.<sup>[23]</sup>

In late 2017, the monitoring committees for the two treaties adopted two joint general comments which explicitly criticize use of punitive measures and criminalization of illegal entry by children.<sup>[24]</sup> They state that “children should never be detained for reasons related to their or their parents’ migration status” and call for the eradication of immigration detention of children.<sup>[25]</sup> They even conclude that “criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.”<sup>[26]</sup>

This language is fully in line with that used by the United Nations Working Group on Arbitrary Detention, a well-respected special procedure of the Human Rights Council consisting of 5 experts, which has declared that criminalization of irregular entry is an excessive measure that States should not carry out, and affirming, more simply, that “deprivation of liberty of an asylum-seeking, refugee, stateless, or migrant child...is prohibited.”<sup>[27]</sup>

The Working Group on Arbitrary Detention visited the United States in October 2016 and issued a report on its findings, calling for an end to mandatory detention and abolishing the detention of families and children.<sup>[28]</sup> More recently, seven Special Procedures mandate holders of the Human Rights Council have sent a communication to the United States, dated June 19 2018.<sup>[29]</sup> The UN experts express concern over allegations of increased criminalization of migration, increased use of migration detention, and automatic separation of children from their families, among other issues. Detention conditions, per se, were not addressed, as the UN officials called for migrant children to be released from detention. Their urgent appeals have been ignored.

## Conclusions

Of course, it will be up to the US courts to determine what constitutes “safe and sanitary” conditions under the Flores settlement. And while a larger debate about US immigration detention policy looms, we can be heartened to recognize that the volunteer lawyers who work to monitor compliance with the Flores settlement have been so shocked by what they saw that they

have not only gone public, but have now moved for a temporary restraining order demanding two actions: that the US government provide the children with “safe and sanitary” conditions including clean water, food, medical care, and access to sleep; and that the US government begin processing individual cases so children can be released from detention to parents and relatives as required by the Flores settlement.<sup>[30]</sup>

Regardless of the government’s arguments as to what “safe and sanitary” specifically entailed, the United States remains obligated to uphold the standards that emanate from its binding treaty obligations. As policymakers and judges continue to debate minimal standards of care for detained children, they must remember that the US government was already obliged to ensure humane conditions because of these treaty obligations when it entered into the Flores settlement. In this context, to use Judge Fletcher’s term, those obligations are “relatively obvious.”<sup>[31]</sup>

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*Following publication of this analysis by [www.justsecurity.org](http://www.justsecurity.org), the Ninth Circuit Court of Appeals issued a decision in August 2019 in which it determined that the district court’s interpretation of “safe and sanitary” conditions to include soap, toothbrushes, and other similar hygiene items was consistent with both the Immigration and Nationality Act as well as the Flores Settlement. Furthermore, the Court determined that this was not a modification of the Flores Settlement.<sup>[32]</sup>*

*In addition, in late August, the Department of Homeland Security (DHS) issued a rule<sup>[33]</sup> establishing different procedures for treatment of unaccompanied minors and minors accompanied by at least one at the border prior to arrest. Opponents argue that the new rule allows for “indefinite” detention of minors, however DHS argues that the detention would not be indefinite but rather it would last until the end of the adjudication of the asylum claim. The elimination of time limits on detention for minors is limited to accompanied minors, as unaccompanied minors are afforded special additional protections, a distinction which has existed for many years. California and other states have challenged the rule in district court*

*under that premise. The case is pending as of September 2019.*

*In July 2019, UN Independent Expert Manfred Nowak issued the long-awaited Global Study on Children Deprived of Liberty called for by the UN General Assembly. This comprehensive study reinforces the international norms around child detention including migration-related detention cited in this essay. It concludes that “since there are always other options available to States, detention of children for purely migration-related reasons can never be considered a measure of last resort or in the best interests of the child and shall, therefore, always be prohibited.” The report further clarifies that “this applies to unaccompanied and separated children, as well as to children with their families.”<sup>34]</sup>*

## Notes

- [1] Cedar Attanasio, Garance Burke & Martha Mendoza, “Attorneys: Texas border facility is neglecting migrant kids,” Associated Press, June 21, 2019, available at <https://apnews.com/46da2dbe04f54adbb875cfbc06bbc615>; Caitlin Dickerson, “Hundreds of Migrant Children Are Moved Out of an Overcrowded Border Station,” New York Times, June 24, 2019, available at <https://www.nytimes.com/2019/06/24/us/border-migrant-children-detention-soap.html>.
- [2] Anya Van Wagendonk, “As immigrant children go without soap and toothbrushes, Trump and Pence say Congress is to blame,” Vox, June 23, 2019, available at <https://www.vox.com/policy-and-politics/2019/6/23/18714699/immigrant-children-soap-toothbrushes-detention-trump-pence-congress>.
- [3] Congressional Research Service, “The Flores Settlement and Alien Families Apprehended at the US Border: Frequently Asked Questions, CRD Report R45297, updated September 17, 2018; “An Overview of US Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border,” CRS LSB10150, Updated June 10, 2019.
- [4] Helen Christophi, “Feds Tell 9th Circuit: Detained Kids ‘Safe and Sanitary’ Without Soap,” Courthouse News Service, June 18, 2019, available at <https://www.courthousenews.com/feds-tell-9th-circuit-detained-kids-safe-and-sanitary-without-soap/>; Gutman, Matt & Owen, Quinn, “Inside the Clint, Texas border facility that’s been accused of child neglect and ‘public health emergency,’” ABC News, June 27, 2019, available at <https://abcnews.go.com/Politics/inside-clint-texas-border-facility-accused-child-neglect/story?id=63992072>.
- [5] Statements by volunteer observers, university clinical professors to the media, for example: <https://www.wbur.org/onpoint/2019/06/25/texas-border-control-facilities-migrant-children>.
- [6] Ryan Goodman, <https://twitter.com/rgoodlaw/status/1142566649465397250>.
- [7] The 1949 Geneva Conventions, in common article 3, specify that persons taking no part in the conflict, whether civilians or soldiers who lay down their arms, shall be treated “humanely,” and the Third Geneva Convention, on prisoners of war, article 29, specifies “sanitary measures necessary to ensure the cleanliness and healthfulness of camps” including that prisoners of war shall have “conveniences which conform to the rules of hygiene,” specifying “baths and showers” and that “prisoners of war shall be provided with sufficient water and soap.”
- [8] United Nations Standard Minimum Rules for the Treatment of Prisoners, (the Nelson Mandela Rules), UN General Assembly Resolution A/170/75, December 17, 2015, adopted without a vote; available at [https://www.unodc.org/documents/justice-and-prison-reform/GA-](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf)

[RESOLUTION/E\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf).

- [9] For example, in recent years alone, see CCPR concluding comments on Honduras, Jamaica, Argentina, Azerbaijan, Moldova, Turkmenistan, Bangladesh, Thailand, Mongolia, Ghana, South Africa, Democratic Rep of Congo, Madagascar, and Denmark, New Zealand and Slovenia available at <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>.
- [10] CAT/C/51/4, paras. 2 and 7.
- [11] For example, see recent CAT concluding comments on South Africa (paras 17 b & c on sanitary conditions, hygiene, food, etc.); Lebanon (para 21 on food and water); Pakistan (para 29 on sanitation), Turkmenistan (para 24 on bathing, toilet, etc); as well as other aspects of the Mandela Rules in conclusions for Moldova, Bulgaria, Bahrain, Republic of Korea, Mauritius, Italy available at <https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx>. Earlier, CAT expressed its concerns more generally, without referring to a specific instrument—e.g., on poor hygiene (Brazil 2001) and on “deplorable material and sanitary conditions” (Greece 2012). On occasion it has pointed to a combination of factors, such as the “length of detention” together with “deplorable conditions of detention” which amount to inhuman or degrading treatment for asylum seekers and migrants (Greece 2012, para 20).
- [12] Some of the most relevant Mandela rules include the following: Rule 15: The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. Rule 16: Adequate bathing and shower installations shall be provided so that every prisoner can, and may be required to, have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate. Rule 18: Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness...; Rule 22 1. Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. 2. Drinking water shall be available to every prisoner whenever he or she needs it; Rule 29 1. A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned; and there is much more.
- [13] See CAT/C/48/Add.3/Rev.1, January 13, 2006, paras. 126-128; see also CAT/C/USA/CO/2, 25 July 2006, par. 10.
- [14] CAT/C/USA/CO/2, July 25, 2006, para. 12.
- [15] CAT/C/USA/CO/3-5, 19 December 2014, paras. 18-19.
- [16] Pointing out that about half of all refugees were children, the UN High Commissioner for Refugees had published *Refugee Children: Guidelines on Protection and Care* in 1994 and was one of the six organizations which, in 2004, issued the Inter-Agency Guiding Principles on Unaccompanied and Separated Children. These specified among other things that any institutionalization (detention) of unaccompanied children outside their own countries must provide them with basic water, health, sanitation and nutrition (p 46) available at [https://www.unicef.org/protection/IAG\\_UAS.Cs.pdf](https://www.unicef.org/protection/IAG_UAS.Cs.pdf).
- [17] “UN Refugee Agency calls on States to end the immigration detention of children on the 25th anniversary of the Convention on the Rights of the Child,” United Nations Office of the High Commissioner for Refugees, November 20, 2014, available at <https://www.unhcr.org/en-us/news/press/2014/11/546de88d9/un-refugee-agency-calls-states-end-immigration-detention-children-25th.html>.
- [18] “UNHCR’s position regarding the detention of refugee and migrant children in the migration context,” United Nations Office of the High Commissioner for Refugees, January 2017, available at <https://www.refworld.org/pdfid/5885c2434.pdf>.
- [19] The International Convention on the Protection of the Rights of Migrant Workers (CMW), adopted by the UN General Assembly in 1990, came into force in 2003. Echoing the ICCPR,

Article 17 of CMW states that “Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.”

- [20] Convention on the Rights of the Child list of parties and signatories, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&rmtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&rmtdsg_no=IV-11&chapter=4&lang=en).
- [21] See *CRC/GC/2005/6*, September 1, 2005.
- [22] Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3.
- [23] Convention relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137.
- [24] Committee on Migrant Workers and Committee on Rights of the Child, Joint General Comments # 3 on the general principles regarding the human rights of children in the context of international migration and #4, on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return *CMW/C/GC/4-CRC/C/GC/23*, November 16, 2017.
- [25] *CMW/C/GC/4-CRC/C/GC/23*, November 16, 2017, para. 5.
- [26] *CMW/C/GC/4-CRC/C/GC/23*, November 16, 2017, para. 6.
- [27] See Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants, paras 10-11. WGAD had prepared an earlier statement (called a “deliberation”) on the issue of detention of migrants in 1999 based on its country visits. Concern with the “rising prevalence” of depriving asylum seekers of their liberty led WGAD to consult with numerous international agencies and mechanisms and replace it in February 2018. An Advanced Edited Version can be found on the WGAD webpage.
- [28] See *A/HRC/36/37/Add.2*, para 92.
- [29] *UA/USA 12/2018*, dated June 19, 2018, concerning a memorandum of the Attorney General regarding 8 U.S.C. 1325. The communication was signed by independent experts holding special procedure mandates of the UN Human Rights Council, including the Working Group on Arbitrary Detention and special rapporteurs on torture, racism, disabilities, indigenous persons, migrants, and sale and exploitation of children. According to the UN website, while there was a response on March 7, 2018 to an earlier communication dated October 19, 2017 stating nothing could be submitted in response because of a lawsuit on the matter, there has not yet been a response to this more recent communication to the US.
- [30] “Flores Plaintiffs Seek Temporary Restraining Order and Contempt Order against CBP for Migrant Children’s Deaths and Severe Maltreatment as Crisis at Border Patrol Facilities Grows,” Law Professor Blogs Network, June 27, 2019, available at <https://lawprofessors.typepad.com/immigration/2019/06/flores-plaintiffs-seek-temporary-restraining-order-and-contempt-order-against-cbp-for-migrant-childrens-deaths-and-severe-ma.html>.
- [31] Helen Christophi, “Feds Tell 9th Circuit: Detained Kids ‘Safe and Sanitary’ Without Soap,” Courthouse News Service, June 18, 2019, available at <https://www.courthousenews.com/feds-tell-9th-circuit-detained-kids-safe-and-sanitary-without-soap/>.
- [32] *Flores v. Barr*, Ninth Circuit Court of Appeals, August 15, 2019, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/15/17-56297.pdf>.
- [33] “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” Department of Homeland Security 8 CFR Parts 212 and 236, Department of Health and Human Services 45 CFR Part 410, Federal Register Vol. 84, No. 164, August 23, 2019, available at <https://www.govinfo.gov/content/pkg/FR-2019-08-23/pdf/2019-17927.pdf>.
- [34] “Global Study on Children Deprived of Liberty,” *A/74/136*, available at <https://undocs.org/A/74/136>.

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