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# **An Intersectional Approach to Alternative Care Models: A case study of asylum-seeking children at the Makeni Transit Centre in Zambia**

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## **Abstract**

As the use of immigration detention has increased, so too has the development of alternative care models. Alternative care models are interim measures implemented when an asylum-seeker initially enters a country to avoid their detention until a durable solution is found. This paper seeks to determine the impact of alternative care models on the well-being of unaccompanied asylum-seeking children and asylum-seeking children with their families, specifically those accommodated at the Makeni Transit Centre in Lusaka, Zambia. Due to the diverse identities of children accommodated in alternative care models, an intersectional approach is applied to make visible the realities of children with minority identities. The findings of this research highlight that although there are gaps in the services provided at the Makeni Transit Centre, many of the well-being needs of accommodated children are being fulfilled. However, due to the limitations of the research, the indicators used can only offer an objective understanding of the well-being of children in alternative care models. More broadly the findings of this research highlight the need for an intersectional approach to alternative care models to ensure the needs of women and girls are satisfied. The findings further show that disaggregated data is required to understand the extent to which those with minority identities enjoy their rights, and thus uncover discriminatory practices within alternative care models.

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## 1 Introduction

A study conducted in Australia comparing the well-being of community-based asylum seekers with those in detention found that the children in detention had significantly worse social-emotional well-being than the community-based children.<sup>1</sup> This highlights the critical importance of children's well-being being the primary consideration in the development of alternative care models. This paper therefore seeks to determine how alternative care models can ensure the well-being of asylum-seeking children. To achieve this, the issue of immigration detention will be outlined, including the relevant international legal framework which will be considered through an intersectional lens. Drawing on this discussion, a series of child well-being outcomes will be developed to assess the well-being of children accommodated in alternative care models. These outcomes will then be applied to the situation of children in the Makeni Transit Centre. It is hoped that this research will not only inspire future evaluations of the well-being of children in alternative care models, but also the adoption of intersectionality in such evaluations.

This research has been conducted in collaboration with the International Detention Coalition (IDC), who are a global network working to reduce the use of immigration detention and encourage the use of rights-based alternatives.<sup>2</sup> The research was used by IDC to develop a research brief for the Government of Thailand on promising practices in alternatives to immigration detention (ATD) for children and families, aiming to further the Thai Government's understanding of other states' implementation of these models. It provides recommendations to ensure the needs of women and girls, men and boys living in ATDs are met and to support the Thai Government and

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<sup>1</sup> Karen Zwi and otherd, 'The Impact of Detention on the Social-emotional Well-being of Children Seeking Asylum: A comparison with community-based children' (2018) 27 *European Child and Adolescent Psychiatry* 411.

<sup>2</sup> 'About Us' (International Detention Coalition) <<https://idcoalition.org/about/>> accessed 23 May 2022.

other stakeholders in strengthening and expanding ATD in Thailand. This research supports the project by developing a framework capable of assessing the well-being of asylum-seeking children in alternative care models.

Immigration detention is a law, a policy, and a practice.<sup>3</sup> Therefore, a mixed-method approach has been adopted for this research. A doctrinal methodology was used to examine the normative sources of law regulating child immigration detention and to identify their limitations. Focus was given to the rights set out in the Convention on the Rights of the Child (CRC),<sup>4</sup> drawing on the rights prescribed by the Convention Relating to the Status of Refugees (Refugee Convention).<sup>5</sup> Building on this doctrinal analysis, a series of rights-based, gender-sensitive indicators has been developed to enable the well-being of children in alternative care models to be measured. Sensitivity to intersectionality is essential to ensuring the well-being of asylum-seeking children, especially girls, in alternative care models. To demonstrate this, the intersections of migration status, age and gender have been considered, in addition to an analysis of the Convention on the Elimination of Violence Against Women (CEDAW),<sup>6</sup> to provide an understanding of how best to support and promote the well-being of children accommodated in these models.

Furthermore, this paper will argue for the application of intersectionality beyond the context of alternative care models, highlighting the need for an intersectional lens to be applied to international human rights law and international refugee law to

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<sup>3</sup> Amy Nethery and Stephanie Silverman, 'Understanding Immigration Detention and its Human Impact' in *Immigration Detention: The Migration of a Policy and its Human Impact* (Routledge 2015) 1.

<sup>4</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

<sup>5</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (The Refugee Convention).

<sup>6</sup> Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

adequately protect those falling under more than one international treaty. This paper will first provide support for this hypothesis by presenting the findings of desk-based research reviewing existing literature demonstrating the need for an intersectional approach to international human rights law (IHRL), and discussing the development of indicators to measure the enjoyment of human rights. It will further illustrate how adopting an intersectional lens to an indicator methodology can uncover discrimination in the enjoyment of rights.

The empirical element of the research considers the context within which immigration detention is practised, attempting to gain an authentic insight into the operation of the practice. These indicators are applied and considered alongside an analysis of alternative care models implemented in Zambia. Zambia has been chosen for specific analysis due to the existing myriad of good practices, policies and models relating to asylum seekers implemented within the country. This case study was further chosen in an attempt to challenge Eurocentrism within the discussion surrounding good practices in migration policies.

## **2 The Immigration Detention Context**

### **2.1. Child Immigration Detention**

Immigration detention is an increasing phenomenon. It is estimated that 272 million people migrated in 2019 compared to 192 million at the start of the century,<sup>7</sup> an increase correlating with the accelerating development of immigration detention policies and systems globally.<sup>8</sup> Immigration detention has been defined as ‘the deprivation of liberty

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<sup>7</sup> Marie McAuliffe and Binod Khadria (eds), *World Migration Report 2020* (International Organisation for Migration 2020) 22.

<sup>8</sup> Nethery and Silverman (n 3) 1.

of non-citizens for reasons related to their immigration status'.<sup>9</sup> It is seen as an exercise of state sovereignty, as well as a means to control migrating populations and protect against perceived national security threats.<sup>10</sup> For these reasons states are investing ever growing sums of money into detention facilities, including a recent trend of investing in facilities in transit countries.<sup>11</sup>

Children made up 14 per cent of the total migrating population in 2019,<sup>12</sup> many of whom will have been placed in immigration detention. Child immigration detention is a more complex phenomenon than that of adults. The Committee on the Rights of Migrant Workers has defined it as: 'any setting in which children are deprived of their liberty for any reason relating to their immigration status or that of their parents, regardless of the name or justification provided by the state for depriving children of their liberty or the name of the facility or location where the child is deprived of liberty.'<sup>13</sup> It is well established that child immigration detention is a violation of children's rights and severely detrimental to their well-being.<sup>14</sup> It

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<sup>9</sup> Global Detention Project, 'Children in Immigration Detention: Challenges of Measurement and Definition' (Global Detention Project, 1 June 2015) <[www.globaldetentionproject.org/wp-content/uploads/2016/06/GDP\\_child\\_detention\\_discussion\\_paper\\_2015\\_FINAL.pdf](http://www.globaldetentionproject.org/wp-content/uploads/2016/06/GDP_child_detention_discussion_paper_2015_FINAL.pdf)> accessed 23 May 2022.

<sup>10</sup> Robyn Sampson and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' (2013) 1(3) *Journal of Migration and Human Security* 97.

<sup>11</sup> *ibid.*

<sup>12</sup> McAuliffe and Khadria (n 7) 232.

<sup>13</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee of the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (OHCHR, 16 November 2017) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/343/65/PDF/G1734365.pdf?OpenElement>> accessed 23 May 2022.

<sup>14</sup> Nethery and Silverman (n 3) 8–9.

has been found to consistently exacerbate existing health conditions of detainees,<sup>15</sup> with sleeping and eating problems, suicidal ideations and self-harm being alarmingly prevalent among child detainees.<sup>16</sup> Despite this, the detention of children for immigration purposes is used regrettably frequently.<sup>17</sup> Seventy-seven states are known to detain children, with 330,000 children being detained every year in immigration detention facilities globally.<sup>18</sup> These statistics alone demonstrate the sheer magnitude of the problem.

## 2.2. Alternatives to Detention

The use of child immigration detention has accelerated since the early 20<sup>th</sup> century,<sup>19</sup> simultaneous to pushbacks from civil society against the practice and to States recognising the need to pursue alternatives.<sup>20</sup> Despite the growing push for ATD, many States are reluctant to surrender their right to detain anyone, including children, for immigration purposes.<sup>21</sup> Alternative care arrangements have emerged

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<sup>15</sup> Martha von Werthern and others, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18(1) BMC Psychiatry 382.

<sup>16</sup> *ibid* 13.

<sup>17</sup> International Detention Coalition, 'Strategic Plan: 1st July 2020 to 30th June 2022' (3 July 2020) <<https://idcoalition.org/wp-content/uploads/2020/07/IDC-Strategic-Plan-2020-2022-ENGLISH.pdf>> accessed 23 May 2022.

<sup>18</sup> UN Special Rapporteur on the Human Rights of Migrants, 'Ending Immigration Detention for Children and Providing Adequate Care and Reception for Them' (20 July 2020) para 12 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/188/27/PDF/N2018827.pdf?OpenElement>> accessed 23 May 2022.

<sup>19</sup> Amy Nethery and Stephanie Silverman, 'Understanding Immigration Detention and its Human Impact' in *Immigration Detention: The Migration of a Policy and its Human Impact* (Routledge 2015) 6.

<sup>20</sup> Robyn Sampson and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' (2013) 1(3) *Journal of Migration and Human Security* 97.

<sup>21</sup> Flynn M, 'The Debate over 'Alternatives' to Immigration-related Detention of Children' in *Migrations, State Obligations and Rights in a Globalized Context* (Global Studies Institute 2019)

from this crossroad between the opposition to child immigration detention and States refusing to concede their sovereignty.

IDC defines ATD as “any legislation, policy or practice, formal or informal, that ensures people are not detained for reasons relating to their immigration status.”<sup>22</sup> IDC have carried out extensive research into ATD, finding that they are more affordable, humane, and effective than detention.<sup>23</sup> Their research has found that existing best practices ensure the right to liberty by establishing a presumption against detention; mandating ATD in the first instance; only permitting detention when ATD cannot be implemented; and prohibiting the detention of vulnerable individuals.<sup>24</sup> They have further identified that the most successful ATD incorporate case management into their approach, as implementing case management at all stages often leads to a case resolution which is tailored to the individual’s needs.<sup>25</sup> Case management focuses on understanding and responding to the specific needs of the individual and is usually achieved by employing a caseworker to assist them and their family.<sup>26</sup> The caseworker can make referrals, which often has a positive impact on well-being as a result of facilitating access to support services.<sup>27</sup> As part of their advocacy, IDC have developed a series of tools

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<sup>22</sup> Robyn Sampson, Vivienne Chew, Grant Mitchel and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (revised edition)* (IDC 2015) 2.0.

<sup>23</sup> *ibid.*, III.

<sup>24</sup> *ibid.*, 4.0.

<sup>25</sup> Robyn Sampson, Vivienne Chew, Grant Mitchell and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (revised edition)* (IDC, 2015) VI.

<sup>26</sup> Steering Committee for Human Rights, ‘Human Rights and Migration: Legal and Practical Aspects of Effective Alternatives to Detention in the Context of Migration’ (Council of Europe, 2018) para 205 < <https://edoc.coe.int/en/migration/7961-legal-and-practical-aspects-of-effective-alternatives-to-detention-in-the-context-of-migration.html>> accessed 8 March 2022.

<sup>27</sup> Robyn Sampson, Vivienne Chew, Grant Mitchell and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (revised edition)* (IDC, 2015) 7.1.2.

underpinned by human rights-based standards.<sup>28</sup> Their latest tool, the ‘Revised Community Assessment and Placement Model’ has been designed to help governments and stakeholders analyse and develop ATD.<sup>29</sup> They have gone on to develop the ‘Child Sensitive Community and Assessment Placement Model’, which seeks to ensure asylum-seeking children are not detained.<sup>30</sup>

The Steering Committee for Human Rights at the Council of Europe has identified that ATD come on a spectrum of restrictiveness.<sup>31</sup> Regardless of where the ATD lies along the spectrum, each measure has its strengths and weaknesses.<sup>32</sup> For example, *registration with authorities* is identified as the least restrictive model, fully respecting the individual's liberty. However, this model may limit access to other human rights.<sup>33</sup> Flynn has argued against the use of ATD on the basis that they are fundamentally part of the detention system and as such perpetuate it,<sup>34</sup> and jeopardise the right to freedom of movement and other fundamental rights.<sup>35</sup> He further argues that ATD are inapplicable in cases involving children. ATD may only be used when there are legitimate grounds for detention, the absence of which will render the alternative arbitrary.<sup>36</sup> There are no legal grounds upon which to detain children and therefore immigration detention is always

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<sup>28</sup> *ibid*, 5.0.

<sup>29</sup> *ibid*, 3.0.

<sup>30</sup> *ibid*, 4.4.

<sup>31</sup> Steering Committee for Human Rights, ‘Human Rights and Migration: Legal and Practical Aspects of Effective Alternatives to Detention in the Context of Migration’ (Council of Europe, 2018) para 205 < <https://edoc.coe.int/en/migration/7961-legal-and-practical-aspects-of-effective-alternatives-to-detention-in-the-context-of-migration.html> > accessed 8 March 2022.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid*, 207.

<sup>34</sup> *ibid*.

<sup>35</sup> Michael Flynn, ‘The Debate over ‘Alternatives’ to Immigration-related Detention of Children’ in *Migrations, State Obligations and Rights in a Globalized Context* (Global Studies Institute 2019) 115-117.

<sup>36</sup> *ibid*.



a violation of children's rights.<sup>37</sup> Flynn therefore contends that ATD are not the solution to the problem of child immigration detention.<sup>38</sup>

Flynn's argument highlights an ongoing debate surrounding the terminology used in relation to alternatives. On the one hand, the advocacy being carried out in relation to countries who practice child immigration detention is promoting *alternatives to detention*. On the other hand, in other contexts and considering Flynn's critique, the term *alternative care models* may be more appropriate. Regardless, alternatives are a recent phenomenon and while there is expanding literature on this subject matter, additional research is required to evaluate the impact of practices being adopted to combat the phenomenon of immigration detention on the well-being of children. Furthermore, the existing literature fails to provide a gendered analysis, a gap this research seeks to address.

### **2.3. An Intersectional Approach to International Human Rights Law and International Refugee Law**

The emergence of the concept of intersectionality in the late 1980s, and Crenshaw's coining of the term, exposed the monolithic nature of law.<sup>39</sup> It challenges the rigid and homogenising approach the law takes

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<sup>37</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee of the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 5.

<sup>38</sup> Michael Flynn, 'The Debate over 'Alternatives' to Immigration-related Detention of Children' in *Migrations, State Obligations and Rights in a Globalized Context* (Global Studies Institute 2019) 115-117.

<sup>39</sup> Sumi Cho, Kimberlé Crenshaw and Leslie McCall, 'Towards a Field of Intersectional Studies: Theory, Application and Praxis' (2013) 38(4) University of Chicago Press 785.

to female experiences,<sup>40</sup> by allowing multiple facets of identities to be considered simultaneously.<sup>41</sup> It further serves as a framework to dissect and address the interactions between power structures and their consequential social inequalities and oppressions.<sup>42</sup>

At an international level, the immigration detention of children is governed by IHRL and international refugee law (IRL). Today, IHRL seeks to ensure atrocities are not repeated, whereas IRL continues to seek to remedy displacement when an individual's rights have been violated.<sup>43</sup> The two legal regimes operate in parallel,<sup>44</sup> yet often complement one another. This section will adopt an intersectional lens to demonstrate the ability of both regimes to work together to protect asylum-seeking children. It will further demonstrate the necessity of an intersectional lens to ensure all asylum-seeking children are protected.

IHRL is not immune to law's monolithic and homogenising nature. In this context, the consequences materialise as a protection void for persons protected by more than one IHRL treaty.<sup>45</sup> Davis argues for an intersectional approach to IHRL to address this void, contending that IHRL requires reform to adequately remedy the violations and inequalities of those with intersecting minority identities.<sup>46</sup> The same issues arise in IRL with the labels of 'victims'<sup>47</sup> and 'baggage'

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<sup>40</sup> Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stan L Rev* 1241 at 1244 –45.

<sup>41</sup> Aisha Nicole Davis, 'Intersectionality and International Law: Recognising Complex Identities on the Global Stage' (2015) 28 *Har Hum Rts J* 205 at 208.

<sup>42</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine' (1989) 1989(1) *U Chi Legal F* 139.

<sup>43</sup> Alice Edwards, 'International Refugee Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (OUP 2019) 543.

<sup>44</sup> *ibid* 539. See also Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' [2002] 15 *Har Hum Rts J* 139.

<sup>45</sup> Davis (n 41) 206.

<sup>46</sup> *ibid* 216.

<sup>47</sup> Heaven Crawley, 'Gender, "Refugee Women" and the Politics of Protection' in Claudia Mora and Nicola Piper (eds), *The Palgrave Handbook on Gender and*

traditionally being attached to migrating women,<sup>48</sup> exposing its homogenising nature. Within a migration context, research on women was largely absent in the literature until the 1980s.<sup>49</sup> Since then the female experience of migration has gained further focus within academia, with findings demonstrating how women have different migration experiences to men.<sup>50</sup> It is often more difficult for women to receive international protection and they suffer more violence as well as discrimination throughout their migration journeys.<sup>51</sup> These issues fundamentally arise from The Refugee Convention's omission of the rights violations most typically suffered by women, namely, violations of social, economic and cultural rights.<sup>52</sup> This is addressed in the following section.

## **2.4. International Law and the Immigration Detention of Children**

IHRL seeks to prevent arbitrary detention,<sup>53</sup> stipulating that immigration detention is only permissible when it is necessary, proportionate, and in pursuance of a legitimate aim.<sup>54</sup> Additionally, the Global Compact on Migration requires that immigration detention must be used as a last resort and only after less coercive measures have been considered.<sup>55</sup> In spite of this, states often arbitrarily detain migrants, including children, ignoring these safeguards.<sup>56</sup>

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*Migration* (Palgrave Macmillan 2021) 363.

<sup>48</sup> Monica Boyd, 'Women, Gender, and Migration Trends in a Global World' in Claudia Mora and Nicola Piper (eds), *The Palgrave Handbook on Gender and Migration* (Palgrave Macmillan 2021) 20.

<sup>49</sup> *ibid* 21.

<sup>50</sup> *ibid*.

<sup>51</sup> Crawley (n 47) 360.

<sup>52</sup> *ibid*.

<sup>53</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) (ICCPR) art 9(1).

<sup>54</sup> *ibid*.

<sup>55</sup> UN, Global Compact for Safe, Orderly and Regular Migration (19 December 2018) objective 13 <<https://refugeemigrants.un.org/migration-compact>> accessed 23 May

The CRC falls under the IHRL regime, positioning children as rights holders for the first time.<sup>57</sup> A key principle of the CRC is non-discrimination, meaning that the rights set out in the CRC are afforded to all children, irrespective of nationality or status.<sup>58</sup> It requires states to ensure all children's right to liberty,<sup>59</sup> healthcare,<sup>60</sup> education,<sup>61</sup> and other essentials,<sup>62</sup> as well as their right to family life are being met.<sup>63</sup> Perhaps most importantly, it requires states to ensure the best interests of the child are the primary consideration in all cases involving that child.<sup>64</sup>

The CRC is seemingly gender neutral, utilising both male and female pronouns.<sup>65</sup> It also encompasses both economic, social, and cultural rights as well as civil and political rights,<sup>66</sup> therefore addressing issues most relevant to females, unlike the Refugee Convention. However, the CRC omits girl-specific issues, failing to consider harmful practices specific to young females.<sup>67</sup> For example, it addresses the issue of child military service,<sup>68</sup> but fails to mention practices

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<sup>56</sup> Grant Mitchell, 'Global Advocacy: Civil Society Engagement of Government on Alternatives to Immigration Detention' in Michael Flynn (ed), *Challenging Immigration Detention* (Edward Elgar 2017) 121.

<sup>57</sup> Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality. International Human Rights Law and the Marginalisation of the Girl-Child' (2009) 17(3) *International Journal of Children's Rights* 345, 356.

<sup>58</sup> Convention on the Rights of the Child (CRC) art 2.

<sup>59</sup> *ibid* art 37.

<sup>60</sup> *ibid* art 24.

<sup>61</sup> *ibid* arts 28–29.

<sup>62</sup> *ibid* art 27.

<sup>63</sup> *ibid* art 16.

<sup>64</sup> *ibid* art 3(1).

<sup>65</sup> Cynthia Price Cohen, 'The United Nations Convention on the Rights of the Child: A Feminist Landmark' (1997) 29(3) *William and Mary Journal of Women and the Law* 29, 45.

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*.

<sup>68</sup> CRC art 38.

affecting girls such as child marriage and female genital mutilation.<sup>69</sup> Likewise, girls are omitted from the protection of the adult-centric CEDAW,<sup>70</sup> which was introduced as an attempt to remedy the male-dominance of IHRL.<sup>71</sup> However, in doing so, the rights it provides are predominantly framed as being women's rights, largely ignoring the needs of girls.<sup>72</sup>

IRL stems from the right to seek asylum enshrined in the Universal Declaration of Human Rights (UDHR).<sup>73</sup> The Refugee Convention being the primary source of IRL regulates the refugee status determination process and provides asylum-seekers with the right to enter a country to seek international protection; however, it is otherwise largely silent on asylum-seekers.<sup>74</sup> Despite the so-called gender-neutral approach adopted by the Refugee Convention, the literature has identified that the Refugee Convention is often interpreted through androcentric<sup>75</sup> and adult-centred lenses,<sup>76</sup> calling for an intersectional approach to address the needs of women, children and specifically girls into the dialogue. The Refugee Convention offers international protection to anyone who

‘...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such

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<sup>69</sup> Taefi (n 57) 345, 356.

<sup>70</sup> *ibid* 355.

<sup>71</sup> Davis (n 41) 205, 216.

<sup>72</sup> Taefi (n 57) 345, 355.

<sup>73</sup> Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III)) (UDHR) art 14.

<sup>74</sup> Larry Lock, ‘The Refugee Convention: Who Are Refugees and Asylum Seekers’ (*Free Movement*, 5 June 2020) <[www.freemovement.org.uk/refugee-convention/](http://www.freemovement.org.uk/refugee-convention/)> accessed 23 May 2022.

<sup>75</sup> *ibid*.

<sup>76</sup> Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017) 3 citing Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Federation Press 2006) 244.

fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’<sup>77</sup>

Under this definition, women frequently find it harder to be granted international protection as the male migrant is often considered the norm and female experiences frequently go unrecognised as requiring protection under the Refugee Convention.<sup>78</sup> This was acknowledged by the United Nations Refugee Agency (UNHCR) in their ‘Guidelines on International Protection’.<sup>79</sup> IRL prioritises activity in the public sphere, which is traditionally seen as masculine, over the feminine activities of the private sphere.<sup>80</sup> This is demonstrated by the fact that political persecution is often considered more worthy of international protection than gender-based violence.<sup>81</sup> However, it is widely accepted within the women’s rights movement that this paradigm is a result of the way IRL is interpreted and that IRL need not be reformed.<sup>82</sup>

Furthermore, in theory, the Refugee Convention is ‘age-neutral’,<sup>83</sup> however, in reality children are often omitted from the scope of the Refugee Convention, leaving their claims vulnerable to becoming

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<sup>77</sup> The Refugee Convention (n 5) art 1.

<sup>78</sup> Crawley (n 47) 360.

<sup>79</sup> UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees* (7 May 2002) <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3d36f1c64&skip=0&query=HCR/GIP/02/01>> accessed 24 May 2022 .

<sup>80</sup> Crawley (n 47) 360.

<sup>81</sup> *ibid.*

<sup>82</sup> Deborah Anker (n 44) 139. See also Crawley (n 47) 360. See also, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (Manchester University Press, 2000).

<sup>83</sup> Pobjoy, *The Child in International Refugee Law* (n 76 ) 17.

invisible or decided incorrectly.<sup>84</sup> This is especially true for accompanied asylum-seeking children as their fate often echoes that of their parents or guardian despite being entitled to their own refugee status determination.<sup>85</sup> When administrative procedures fail to consider the needs and vulnerabilities of children, this can amount to a violation of the best interests of the child. Therefore, as Pobjoy argues, the best interests of the child principle imposes an obligation on states not only to protect asylum-seeking children, but to consider their claims individually and provide children with international protection, even if they remain outside the protection afforded by the Refugee Convention.<sup>86</sup> It is commonly said that asylum-seeking children should be treated as children first and foremost. While this statement is accurate, it risks failing to address the needs that arise from the other aspects of the child's identity. For this reason, the CRC and the Refugee Convention must work in tandem to provide protection to asylum-seeking children. The CRC supplements the protection provided by the Refugee Convention,<sup>87</sup> to ensure each child receives the full spectrum of rights they are entitled to as a child *and* as an asylum-seeker. Therefore, the CRC is crucial to ensure the rights of asylum-seeking children are met. It is particularly important during the refugee status determination process, providing children with the right to have their views heard during proceedings.<sup>88</sup>

CEDAW is also crucial for the protection of the asylum-seeking girls who are especially vulnerable to marginalisation. Their rights are suspended somewhere between CEDAW, CRC and the Refugee Convention. As Taefi suggests, an intersectional approach will remedy the exclusion of the girl-child from the rights discourse.<sup>89</sup> This

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<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.* 49.

<sup>86</sup> Jason Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64(2) *International and Comparative Law Quarterly* 327, 332.

<sup>87</sup> Pobjoy, *The Child in International Refugee Law* (n 76) 239.

<sup>88</sup> CRC arts 9(2) and 12(1).

<sup>89</sup> Taefi (n 57) 345, 346.

analysis of the male-dominant CRC and adult-dominated CEDAW, and the Refugee Convention, which is guilty of both issues, highlights the protection voids that materialise in the absence of intersectionality in IHRL and IRL. This demonstrates the need for an intersectional approach to ensure the full enjoyment of rights.

### **3 Developing Indicators for Assessing Well-being**

#### **3.1. An Intersectional Approach to Indicators**

Indicators are tools used to gain insight into social phenomena.<sup>90</sup> Human rights indicators specifically have been defined as ‘a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.’<sup>91</sup> They can play an important role in the protection and promotion of human rights,<sup>92</sup> and as Gilleri promotes, they can tackle discrimination and measure substantive gender equality.<sup>93</sup>

Human rights indicators are frequently adopted by the human rights movement to measure progression in the realisation of fundamental rights,<sup>94</sup> however their use is contested by some academics who claim they are insufficient to produce meaningful data or capture the

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<sup>90</sup> Siobhan Alice McInerney-Lankford, *Human Rights Indicators in Development* (World Bank 2010) 14.

<sup>91</sup> Maria Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23(4) *Hum Rts Q* 1062, 1065.

<sup>92</sup> Emilie Filmer-Wilson, ‘An Introduction to the Use of Human Rights Indicators for Development Programming’ (2006) 24(1) *NQHR* 155–156.

<sup>93</sup> Giovanna Gilleri, ‘“How Are You Actually Doing Ladies” Indicators of Gender Equality Through the Lens of the UN Committee on the Elimination of Discrimination against Women’ (2020) 24(8) *IJHR* 1218.

<sup>94</sup> Gauthier de Beco, ‘Human Rights Indicators: From Theoretical Debate to Practical Application’ (2013) 5(2) *Journal of Human Rights Practice* 380.



necessary information.<sup>95</sup> Rosga and Satterthwaite contend that whilst the ability of human rights indicators to simplify complex data is useful, their limitations are frequently overlooked.<sup>96</sup> Due to the natural constraints of indicators, their role is reduced to that of a proxy.<sup>97</sup> Unable to provide a complete understanding of the realisation of a human right in a state, indicators instead measure manageable pieces of data that can be built up to provide a fuller picture.<sup>98</sup> Similarly, Gilleri argues that indicators can often produce oversimplified data which requires the views of those with first-hand experience of the issues to ‘re-contextualise’ and ‘re-humanise’ to ensure their voices are not silenced.<sup>99</sup> With regards to gender-sensitive indicators, she argues that they are insufficient to measure intersectional discrimination due to their simplifying nature, but the data produced by indicators can be supplemented by primary sources to provide a better understanding.<sup>100</sup>

In conjunction with indicators, disaggregated data can be used to provide a better understanding of the enjoyment of rights and to uncover discrimination.<sup>101</sup> However, an issue with adopting this methodology is the potential lack of data in the public domain.<sup>102</sup> In many cases, acquiring disaggregated data will be particularly challenging,<sup>103</sup> especially where it is the government's responsibility to

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<sup>95</sup> Katrien Beeckman, ‘Measuring the Implementation of the Right to Education: Education *Versus* Human Right Indicators’ (2004) 12 *International Journal of Children’s Rights* 71, 72.

<sup>96</sup> Ann Janette and Margaret Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’ (2009) 27(2) *Berkeley J Int’l Law* 253, 255–256.

<sup>97</sup> Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh, ‘Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR’ (2010) 32(2) *Hum Rts Q* 253, 288.

<sup>98</sup> *ibid* 289.

<sup>99</sup> Gilleri (n 93) 1218, 1237.

<sup>100</sup> *ibid* 1232.

<sup>101</sup> Gauthier de Beco, ‘Human Rights Indicators for Assessing State Compliance with International Human Rights’ (2008) 77 *Nord J Int’l L* 23, 30.

<sup>102</sup> Kalantry, Getgen and Koh (n 97) 253, 290.

<sup>103</sup> *ibid*.

produce the data, as it may expose a failure on their behalf to uphold their human rights obligations or discriminatory practices.<sup>104</sup> This presents a challenge when adopting an intersectional approach to indicators, as this requires disaggregating already disaggregated data,<sup>105</sup> allowing for a better understanding of the differing enjoyment of rights within communities. The International Organisation for Migration (IOM) specifically advocates for an intersectional approach to migration data, utilising sex-and-gender-disaggregated data to understand the diverse realities within migrant communities.<sup>106</sup> Both sex-and-gender-disaggregated migration data can support the provision of rights and help develop a gender response to migration governance.<sup>107</sup> An absence of gender-disaggregated data allows inequalities and intersectional discrimination in migration to remain invisible.<sup>108</sup>

The Global Compact for Safe, Orderly and Regular Migration<sup>109</sup> was introduced alongside The Global Compact on Refugees<sup>110</sup> in 2018 to promote international cooperation on the situation of refugees and migrants.<sup>111</sup> The global compacts are significant because they introduce an intersectional approach to migration, adopting ‘gender-responsive’ and ‘child-sensitive’ as guiding principles. The latter is especially significant as it explicitly ‘ensures the human rights of women, men, girls and boys are respected at all stages of

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<sup>104</sup> *ibid.*

<sup>105</sup> de Beco (n 101) 23, 30.

<sup>106</sup> Jenna Hennebry, Hari KC and Kira Williams, ‘Gender and Migration Data: A Guide for Evidence-Based, Gender Responsive Migration Governance’ (International Organization for Migration, 2021) 8.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> UN, Global Compact for Safe, Orderly and Regular Migration (19 December 2018).

<sup>110</sup> UN, Global Compact on Refugees (17 December 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/446/08/PDF/N1844608.pdf?OpenElement>> accessed 23 May 2022.

<sup>111</sup> Vitit Muntarbhorn, ‘The Global Compacts and the Dilemma of Children in Immigration Detention’ (2018) 30(4) *IJRL* 668.

migration.<sup>112</sup> To achieve these goals, disaggregated data is required to understand the diverse experiences at each stage of the migration process.<sup>113</sup> Prior to the global compacts, the Beijing Platform of Action attempted to introduce an intersectional lens to migration,<sup>114</sup> calling for governments to intensify efforts to ensure equal enjoyment of human rights for all women and girls. This was also the first international attempt to recognise the rights of girls; however, it fails to acknowledge the effects of adult domination and gender-bias.

### 3.2. Developing Indicators

A human rights-based approach is required to ensure human rights are encompassed by the indicators.<sup>115</sup> For this reason, indicators traditionally used by the development community cannot be recycled by the human rights community. For example, where the development community may use traditional indicators such as literacy rates to assess the right to education, human rights indicators require information on laws and policies related to education and discriminatory practices.<sup>116</sup> A human rights-based approach commences by understanding the context in which human rights exists.<sup>117</sup> The content of the right to be measured is clarified by examining the relevant treaties and general comments to identify the important attributes of the right.<sup>118</sup> A clearly defined conceptual framework is then required to develop the indicators.<sup>119</sup> Responding to

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<sup>112</sup> UN, Global Compact on Refugees (17 December 2018) objective 15.

<sup>113</sup> Hennebry, KC and Williams (n 106) 3.

<sup>114</sup> Nira Yuval-Davis, 'Intersectionality, Citizenship and Contemporary Politics of Belonging' (2007) 10(4) *Critical Review of International Social and Political Philosophy* 561, 565.

<sup>115</sup> de Beco (n 101) 23, 26.

<sup>116</sup> Filmer-Wilson (n 92) 155, 159.

<sup>117</sup> de Beco (n 101) 23, 26.

<sup>118</sup> Janette and Satterthwaite (n 96) 253, 273, 295.

<sup>119</sup> Beeckman (n 95) 71, 74.

calls from United Nations Treaty Bodies,<sup>120</sup> The Office of the High Commissioner for Human Rights (OHCHR) has created a framework for human rights indicators.<sup>121</sup> Within this framework there are three types of indicators; structural, process, and outcome.<sup>122</sup> Structural indicators assess a state's intention to abide by IHRL, considering the ratification of legal instruments and their subsequent adoption into domestic law.<sup>123</sup> Process indicators link structural and outcome indicators by assessing a state's efforts to implement human rights and outcome indicators aim to capture the results of a state's efforts.<sup>124</sup>

A series of indicators — *the child well-being outcomes* — have been developed using a human rights-based approach and drawing on OHCHR's framework to evaluate the impact alternative care arrangements have on children's well-being. The child well-being outcomes adopt a holistic, rights-based, and actor-orientated approach to well-being, based on the 'doing well-feeling good' framework which encompasses both objective and subjective facets of well-being.<sup>125</sup> 'Doing well' refers to the material dimension of well-being and 'feeling good' refers to one's personal perception of their well-being.<sup>126</sup> This research project has endeavoured to encompass both facets within its child well-being outcomes. An indicator methodology has been adopted to assess the extent to which the well-being of children in alternative care arrangements is being met. This framework allows the enjoyment of their human rights fundamental to

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<sup>120</sup> McInerney-Lankford (n 90) 18.

<sup>121</sup> OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (HRI/MC/2006/7, Human Rights International, 11 May 2006); OHCHR, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (HRI/MC/2008/3, Human Rights International, 6 June 2008).

<sup>122</sup> McInerney-Lankford (n 90) 14.

<sup>123</sup> de Beco (n 94) 380, 381.

<sup>124</sup> *ibid* 382.

<sup>125</sup> Sarah White, 'Analysing Wellbeing: A Framework for Development Practice' (2010) 20(2) *Development and Practice* 158, 160.

<sup>126</sup> *ibid*.

their well-being to be measured. The child well-being outcomes have been developed based on selected rights enshrined in the CRC that if fulfilled are conducive to the positive well-being of children. These selected rights are indivisible, interdependent, and interrelated on one another,<sup>127</sup> and therefore are all required to ensure a child's well-being. The attributes of these rights were identified to allow the indicators to capture the essence of the rights and, crucially, measure the extent to which these rights are enjoyed by children in alternative care arrangements. They are based upon five rights set out in the CRC, with the best interests of the child being adopted as the overarching principle.<sup>128</sup> However, as an intersectional approach is required to ensure the rights of children with intersecting identities are fulfilled, they also draw upon the rights enshrined in the Refugee Convention and CEDAW.

### 3.3. The Best Interests of the Child

The best interests principle requires the best interests of the child to be the primary consideration in all cases or decisions involving that child.<sup>129</sup> In the absence of a precise legal definition, the Committee on the Rights of the Child has indicated the principle was designed to ensure each child's full enjoyment of their CRC rights and their holistic development.<sup>130</sup> UNHCR has further guided, each child's best interests will vary and be dependent upon their individual circumstances and experiences.<sup>131</sup>

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<sup>127</sup> Vienna Declaration and Programme of Action (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 5.

<sup>128</sup> CRC art 3(1).

<sup>129</sup> *ibid.*

<sup>130</sup> Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (OHCHR, 29 May 2013) art 3 paras 1 and 4 <[https://www2.ohchr.org/english/bodies/crc/docs/gc/crc\\_c\\_gc\\_14\\_eng.pdf](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf)> accessed 23 May 2022.

<sup>131</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) para 2.1.2 <[www.refworld.org/docid/5c18d7254.html](http://www.refworld.org/docid/5c18d7254.html)> accessed 23 May 2022.

With regards to the immigration detention of children, the Committee on the Rights of the Child has said that the ‘detention of children on the sole basis based on their migration status or that of their parents is a violation of children’s rights, is never in their best interests and is not justifiable.’<sup>132</sup> This was reaffirmed in a joint comment made by the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers in 2017 which prohibited the detention of children for immigration purposes.<sup>133</sup> This joint comment represents a shift away from the previous position that children may be detained for immigration purposes as an option of *ultima ratio*.<sup>134</sup>

The best interests principle regulates the reception of asylum-seeking children by host states as well as prohibiting their immigration detention.<sup>135</sup> Consequently, the best interests of the child must be the primary consideration in all decisions made relating to a child from the moment of entry to the state. As it is well established that immigration detention is never in a child’s best interests, alternative care arrangements must be made available by states to ensure the best interests of asylum-seeking children are met. Additionally, Pobjoy

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<sup>132</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussions on the Rights of the Child in the Context of International Migration* (28 September 2012) para 32 <[www.refworld.org/docid/51efb6fa4.html](http://www.refworld.org/docid/51efb6fa4.html)> accessed 23 May 2022.

<sup>133</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No 4 (2017)* (n 13) para 5. See also, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention* (2 July 2018) annex para 40 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/196/69/PDF/G1819669.pdf?OpenElement>> accessed 24 May 2022; United Nations Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (23 November 2018) para 22 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement>> accessed 24 May 2022.

<sup>134</sup> Ciara M Smyth, ‘Towards a Complete Prohibition on the Immigration Detention of Children’ (2019) 19(1) HRL Rev 1–36.

<sup>135</sup> CRC art 2(1).

argues the best interests principle creates a state obligation to protect asylum-seeking children, acting as an independent source of international legal protection.<sup>136</sup> This compensates for the ‘adult-focused lens’<sup>137</sup> traditionally adopted by IRL, as discussed earlier.<sup>138</sup>

UNHCR has developed a case management framework, the Best Interests Procedure, to help decipher what is in the best interests of any given asylum-seeking or refugee child.<sup>139</sup> The Procedure seeks to ensure all actions and decisions made addressing protection risks and needs of a child are made in accordance with the best interest of the child principle. As alternative care models are developed to address the protection needs and care of asylum-seeking children, the Procedure should feature in these models to ensure their best interests are being met. There are two key steps to a Best Interests Procedure: a best interests assessment and a best interests determination. The Assessment is an informal process systematically carried out, assessing the child’s needs throughout the Best Interests Procedure,<sup>140</sup> only ceasing when the child is no longer at risk, or a durable solution has been established.<sup>141</sup> The Determination is a more formal process, with strict procedural safeguards designed to facilitate the implementation of protective measures and assistance for the child and/or their parents or caregivers.<sup>142</sup> It is used when making life-altering decisions for the child, with the aim of ultimately leading to a formal, durable solution for the child that is in their best interests.<sup>143</sup>

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<sup>136</sup> Pobjoy, *The Child in International Refugee Law* (n 76) 1.

<sup>137</sup> *ibid* citing, Mary Crock (n 76) 244.

<sup>138</sup> Pobjoy, *The Child in International Refugee Law* (n 76) 186.

<sup>139</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) para 2.1.2 <[www.refworld.org/docid/5c18d7254.html](http://www.refworld.org/docid/5c18d7254.html)> accessed 24 May 2022.

<sup>140</sup> *ibid* para 2.4.2.

<sup>141</sup> *ibid* para 3.2.3.

<sup>142</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) para 2.1.2 <[www.refworld.org/docid/5c18d7254.html](http://www.refworld.org/docid/5c18d7254.html)> accessed 24 May 2022.

<sup>143</sup> *ibid*.

## 4 The Child Well-Being Outcomes

### 4.1. Liberty

The right to liberty is enshrined in IHRL<sup>144</sup> and afforded to all, irrespective of migration status.<sup>145</sup> It is specifically afforded to children by Article 37(b) CRC. The right to liberty, in conjunction with the right to seek asylum,<sup>146</sup> the right to non-penalisation for irregular entry or stay,<sup>147</sup> and the right to freedom of movement,<sup>148</sup> establishes a presumption against immigration detention in international law. Thus, liberty should automatically be enjoyed by asylum-seekers when they enter states seeking international protection.<sup>149</sup> Unfortunately, this is often not the case.

The right to liberty imposes restrictions on a state's ability to detain persons, including prohibiting arbitrary detention.<sup>150</sup> A way around this is for host states to make alternative care models that respond to the vulnerability of the child available. States should consider the age and personal situation of the child when providing alternative care and protection for an asylum-seeking child as what is required will depend on their specific needs.<sup>151</sup> For example, supported independent living (SIL) may be an appropriate model for older children, but younger children may require enhanced protection.

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<sup>144</sup> UDHR art 3; ICCPR art 9; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW) art 3.

<sup>145</sup> Sampson and others (n 22) para 4.0.

<sup>146</sup> UDHR art 14.

<sup>147</sup> The Refugee Convention (n 5) art 31.

<sup>148</sup> UDHR art 13.

<sup>149</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) para 14 <<https://www.refworld.org/docid/503489533b8.html>> accessed 24 May 2022.

<sup>150</sup> Sampson and others (n 22) para 4.0.

<sup>151</sup> *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) [55].



### 4.1.1. Liberty Indicators

- The immigration detention of children is prohibited in national law.
- Alternative care models are provided for in national law.
- Alternative care models are considered prior to detaining a child for immigration related purposes.
- An appropriate age assessment is carried out only when required to determine the child's age upon their entry to the country.
- The child can freely exercise their right to liberty to an extent that is reasonable for a child of that age.

## 4.2. Physical and Mental Well-Being

The right to health is realised by several international treaties,<sup>152</sup> encompassing both physical and mental well-being. The connection between these two facets of health means that the concept of parity of esteem is fundamental to the realisation of the right to health.<sup>153</sup> This requires physical and mental health to be treated equally. Beyond this, the CRC entitles children to the highest attainable standard of health,<sup>154</sup> and specifically requires those responsible for the care and

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<sup>152</sup>International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 5(d)(iv); CEDAW art 12; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12; ICRMW art 43(e); The Refugee Convention (n 5) art 23; CRC art 24.

<sup>153</sup> OHCHR, *Mental Health and Human Rights* (31 January 2017) para 21 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/021/32/PDF/G1702132.pdf?OpenElement>> accessed 24 May 2022, citing Royal College of Psychiatrists, 'Whole-Person Care: From Rhetoric to Reality'.

<sup>154</sup> CRC art 24(1).

protection of children to ensure health authority standards are met with respect to children.<sup>155</sup>

It is undeniable that immigration detention is detrimental to the physical and mental well-being of detainees and that children are especially vulnerable to its effects.<sup>156</sup> This can materialise as emotional problems, hyperactivity, and conduct disorders.<sup>157</sup> The children in detention's well-being was similar to that of children referred to mental health services, whilst the community-based children were in line with the Australian norm.<sup>158</sup> In another study, higher levels of anxiety, depression, and PTSD were found in detained refugees compared to non-detained refugees.<sup>159</sup> This highlights the need to keep children out of immigration detention and the benefit of alternatives, especially those which are community-based.

Another feature of alternative care models that can benefit a child's well-being is participation. Participation is not only a human right but has also been shown to be a determinant of psychological well-being.<sup>160</sup> Enjoyment of the right to mental health requires everyone to be involved with decisions relating to their own well-being.<sup>161</sup> Host states should therefore facilitate the participation of asylum-seekers in decisions made regarding their care and support.<sup>162</sup> Drawing on CEDAW, the healthcare needs of women and men must be treated

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<sup>155</sup> CRC art 3(3).

<sup>156</sup> Nethery and Silverman (n 3) 8–9; von Werthern and others (n 156) 382.

<sup>157</sup> *ibid* 417.

<sup>158</sup> *ibid* 419.

<sup>159</sup> von Werthern and others (n 156) 2.

<sup>160</sup> Margarita Alegría and others, 'Social Determinants of Mental Health: Where We Are and Where We Need to Go' (2018) 20(11) *Current Psychiatry Reports* 1, 2.

<sup>161</sup> United Nations Special Rapporteur on the right to physical and mental health, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (27 July 2018) para 43  
<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/464/55/PDF/N1846455.pdf?OpenElement>>.

<sup>162</sup> *ibid* 44.

equally.<sup>163</sup> It requires state parties to take measures to eradicate sex discrimination in the provision of healthcare. This includes the provision of gender-specific healthcare such as pregnancy services, reproductive rights, and family planning education. Therefore, alternative care arrangements must provide nuanced healthcare. As well as providing healthcare to children they must protect and promote both their physical and mental health. Ensuring gender equality at every stage as well as providing gender specific services. Further, they must facilitate children's participation in cases relating to them.

#### **4.2.1. Physical and mental well-being Indicators**

- The state's constitution protects children's right to health.
- The child is screened upon arrival by a suitably qualified health professional with the permission of a parent, carer or guardian.
- The initial health screening is attuned and sensitive to the possibility that the child or members of their family may have been victims of torture or trauma.
- Children receive free healthcare when required.
- Children have their healthcare needs assessed regularly.
- Children who are victims of torture or who have experienced trauma receive psychosocial support.
- Children can participate in decisions made regarding their care and support.
- Women and girls have equal access to health care that is tailored to their needs.
- Pregnancy and postnatal services provided.

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<sup>163</sup> CEDAW art 12.

- Education on reproductive rights and family planning is provided.

### 4.3. Educational Well-Being

The CRC recognises the right of every child to education.<sup>164</sup> This requires states to provide free primary education to all children,<sup>165</sup> and make further education available and accessible to everyone.<sup>166</sup> CEDAW echoes this, enshrining women's right to non-discrimination in education,<sup>167</sup> including access to the same schools and curriculum,<sup>168</sup> and equal opportunities for further education and men.<sup>169</sup> The Refugee Convention requires states to afford that same education to refugees as nationals;<sup>170</sup> however, it is silent on asylum-seekers and other children on the move. There is also a requirement that education develops the child's respect for their own cultural identity.<sup>171</sup>

The right to education is especially important for migrant children who are especially vulnerable to recruitment by armed groups, sexual exploitation, and other violations of their rights. If fulfilled, the right to education can act as a protection mechanism against these risks. Katarina Tomasevski, the former UNSR on the right to education has previously set out a conceptual framework for the right to primary education upon which indicators can be based.<sup>172</sup> This is known as the

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<sup>164</sup> CRC arts 28–29.

<sup>165</sup> *ibid* art 28(1)(a).

<sup>166</sup> *ibid* 28(1)(b)–(c)

<sup>167</sup> CEDAW art 10.

<sup>168</sup> *ibid* art 10(b).

<sup>169</sup> *ibid* art 10(e).

<sup>170</sup> The Refugee Convention (n 5) art 22.

<sup>171</sup> CRC art 29(1)(c).

<sup>172</sup> Katarine Tomaševski, 'Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable' (2001) <[www.right-to-education.org/sites/right-to-education.org/files/resource-](http://www.right-to-education.org/sites/right-to-education.org/files/resource-)

‘4 A’s framework: availability, accessibility, acceptability and adaptability’<sup>173</sup> which was later adopted by the Committee on Economic, Social and Cultural Rights.<sup>174</sup> Drawing on Tomasevski’s framework, educational well-being indicators should reflect a state’s fulfilment of their obligations to make education available, accessible, acceptable, and adaptable.

### 4.3.1. Educational well-being indicators

- National legislation provides for the education of migrant children.
- Children do not have to pay school fees.
- Schooling materials provided free of charge.
- There are enough schools accessible from where children in the alternative care model are residing.
- There is an adequate number of teachers.
- Teachers are appropriately qualified and screened for suitability.
- Children have their educational needs assessed regularly.
- School-age children have access to education appropriate to their age, needs and abilities, including primary and, where possible, secondary education and, if necessary, special education.
- There are incentives for girls to attend school.

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attachments/Tomasevski\_Primer%203.pdf> accessed 24 May 2022.

<sup>173</sup> *ibid.*

<sup>174</sup> Committee on Economic, Social and Cultural Rights, *CESCR General Comment No.13: The Right to Education (Art.13)* (8 December 1999) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement>> accessed 24 May 2022.

- Adequate water, sanitation and hygiene (WASH) facilities are present at schools.
- The enrolment rate for non-national children is the same as national children.
- The child is provided with a transcript and certificate when they complete the course.
- Asylum seeking boys and girls have equal access to secondary education.
- Cultural orientation is facilitated by the education provided.
- Children are taught the language of their country of origin and the local language in the country of asylum and destination.
- Reporting restrictions are not excessive or unduly onerous so as to interfere with educational commitments.

#### **4.4. Material Well-Being**

All human rights are indivisible, interdependent, and interrelated.<sup>175</sup> This means the realisation of one right is often dependent on that of another.<sup>176</sup> For example, the enjoyment of the right to education is dependent on the realisation of other human rights, such as the right to food and health.<sup>177</sup> Likewise, many of the non-material rights conducive to a child's well-being are dependent on their material well-being. For this reason, it is essential that alternative care models fulfil children's right to an adequate standard of living by providing essential items as this is fundamental to multiple aspects of their well-being. Looking to Article 27 CRC which entitles children to an

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<sup>175</sup> Vienna Declaration and Programme of Action (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 5.

<sup>176</sup> Theo van Boven, 'Categories of Rights' in *International Human Rights Law* (2019 OUP) 140.

<sup>177</sup> Beekman (n 95) 71, 76.

adequate standard of living, states are required to facilitate the provision of nutrition, clothing, and housing whether via support programmes or material assistance, the absence of which will impede the child's right to health and right to education.

#### **4.4.1. Material well-being indicators**

- The child has adequate access to food.
- The child has adequate access to clothing.
- The child is provided with shelter.
- Other essential items are provided, such as hygiene kits.
- The child, or their parent or guardian, receives financial assistance.

#### **4.5. Family Life**

The right to family life is provided for in several international treaties.<sup>178</sup> The preamble of the CRC calls for the protection of families by virtue of their status as a fundamental group within society and recognises that growing up in a family environment is conducive to a child's development and well-being. The Refugee Convention also recognises family unity as the essence of society. The Committee on the Rights of the Child reaffirms this by guiding that 'family' must be interpreted in a broad sense to include extended and adopted family.<sup>179</sup> Familial relationships are highly influential over our mental health.<sup>180</sup> Thus, the CRC provides children with the right to

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<sup>178</sup> UDHR arts 12 and 16(3); ICCPR arts 17 and 23(1); ICESCR art 10(1); CRC arts 9 and 16; ICRMW arts 14 and 44(1).

<sup>179</sup> Committee on the Rights of the Child, *General Comment No 14 (2013)* (n 130) para 60 <[https://www2.ohchr.org/english/bodies/crc/docs/gc/crc\\_c\\_gc\\_14\\_eng.pdf](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf)> accessed 24 May 2022.

<sup>180</sup> Alegría and others (n 160) 1, 2.

unhampered familial relations,<sup>181</sup> to not be separated from their parents against their will unless it is in their best interests,<sup>182</sup> and to family reunification.<sup>183</sup> The right to family reunification requires states to assist unaccompanied children to trace their parents.<sup>184</sup> In cases where this is unsuccessful, the child is entitled to the same protection as any other child deprived of their family environment in that country.<sup>185</sup> This means alternative care must be provided in line with national laws.<sup>186</sup>

#### **4.5.1. Family life indicators**

- The decision to detain a child's parents considers the best interests of the child and their right to family life.
- The child's extended or adopted/foster family is included in family rights.
- Less coercive and intrusive alternatives to detaining children and their families are always explored with child detention as a last resort.
- When placing the child in foster care or guardianship, criminal checks, parental tests, training, and home visits are carried out to ensure the child's best interests will be met.
- The state assists with family reunification.
- Steps are taken to prevent situations which may violate a child's right to family life, such as recruitment by armed gangs, or child marriage.

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<sup>181</sup> CRC art 8.

<sup>182</sup> *ibid* art 9.

<sup>183</sup> *ibid* art 22.

<sup>184</sup> *ibid*.

<sup>185</sup> *ibid*.

<sup>186</sup> *ibid* art 20.



## 5 A Zambian Case Study of Alternative Care Models

### 5.1. The Zambian Context

In a world with ever-growing hostility towards asylum-seekers, Zambia is fast becoming increasingly known for its hospitality as both a transit and destination country.<sup>187</sup> As of 31 January 2022, there were 105,190 persons of concern in Zambia, 4,447 of whom were asylum-seekers; most were from the Democratic Republic of Congo (DRC).<sup>188</sup>

Immigration detention is practised in Zambia. This is partially a result of the Government's reservation to Article 26 of the Refugee Convention which leads to asylum-seekers being detained at points of entry where there are no reception centres.<sup>189</sup> However, some positive steps have been taken to move away from this practice. The Immigration and Detention Act 2010 imposed a 30-day limit on immigration detention, or 90-days prior to deportation.<sup>190</sup> The 2010 Act also provides for ATD in the form of asylum-seekers' permits and report orders,<sup>191</sup> and the Refugee Act 2017 provides a framework for authorities to implement ATD.<sup>192</sup> Beyond this, Zambia is continuously

<sup>187</sup> Nicholas Maple, 'What's Behind Zambia's Growing Welcome to Refugees' (*Refugees Deeply*, 12 June 2018) <<https://deeply.thenewhumanitarian.org/refugees/community/2018/06/12/whats-behind-zambias-growing-welcome-to-refugees>> accessed 24 May 2022.

<sup>188</sup> UNHCR, *Zambia Country Overview* (31 January 2022) <<https://data2.unhcr.org/en/country/zmb>> accessed 24 May 2022.

<sup>189</sup> UNHCR, *Progress Report 2018 Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014–2019* (February 2019) 75 <[www.refworld.org/docid/5c9354074.html](http://www.refworld.org/docid/5c9354074.html)> accessed 24 May 2022.

<sup>190</sup> Immigration and Detention Act 2010 No 18 of 2010 s 18.

<sup>191</sup> UNHCR, *Beyond Detention 2014–2019: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees — Final Progress Report* (August 2020) 18 <[www.refworld.org/docid/5f452dce4.html](http://www.refworld.org/docid/5f452dce4.html)> accessed 24 May 2022.

<sup>192</sup> UNHCR, *Global Strategy Beyond Detention 2014–2019: A Global Strategy to*

working to amend its laws to better protect and end the detention of asylum-seeking children.<sup>193</sup> An example of this is their policy to consider all unaccompanied children found at the border with an unidentifiable nationality as Zambian nationals.<sup>194</sup> According to UNHCR, they have also stopped detaining children and single mothers with children for immigration purposes, made possible with help from UN agencies and other partner organisations supporting the establishment of shelters for migrants, refugees, and asylum seekers.<sup>195</sup> It has also been helped by the promotion of ATD within the country. Five types of ATD have been found to be used in Zambia; reporting conditions, residence at reception centres, release of bail, asylum seekers' permits, and report orders.<sup>196</sup> There was an increase in the use of report orders as an ATD during the COVID-19 pandemic, when Zambia released all foreign nationals detained for immigration purposes.<sup>197</sup>

There has been a decrease in the number of children detained for immigration purposes since 2013, when 49 children were detained for immigration purposes; in 2015, there were 18 children detained in immigration detention.<sup>198</sup> In 2017,<sup>199</sup> 2018 and 2019, there were no

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*Support Governments to End the Detention of Asylum-Seekers and Refugees- National Action Plan Zambia* (November 2015) <[www.unhcr.org/566aa6429.pdf](http://www.unhcr.org/566aa6429.pdf)> accessed 24 May 2022.

<sup>193</sup> UN Migration Network Working Group on Alternatives to Immigration Detention, *Covid-19 & Immigration Detention: What Can Governments and Other Stakeholders Do* (February 2021) Annex, 5 <[https://migrationnetwork.un.org/sites/default/files/docs/annex\\_to\\_policy\\_brief\\_on\\_atd\\_and\\_covid-19.pdf](https://migrationnetwork.un.org/sites/default/files/docs/annex_to_policy_brief_on_atd_and_covid-19.pdf)> accessed 24 May 2022.

<sup>194</sup> Zambia's Constitution of 1991 with Amendments through 2016 art 35(2).

<sup>195</sup> UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 10.

<sup>196</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 75.

<sup>197</sup> UN Migration Network Working Group on Alternatives to Immigration Detention, *Covid-19 & Immigration Detention* (n 193).

<sup>198</sup> UNHCR, *Progress Report mid-2016. Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014–2019* (August 2016) 84 <[www.refworld.org/docid/57b850dba.html](http://www.refworld.org/docid/57b850dba.html)> accessed 24 May 2022.

<sup>199</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 74.

reports of unaccompanied children being detained for immigration purposes.<sup>200</sup> Between 2014 and 2017 the number of places available for UASC in alternative care arrangements increased from 2<sup>201</sup> to 13.<sup>202</sup> The number of ATD places available for families with children increased from 2<sup>203</sup> to 13 during the same period<sup>204</sup> and then decreased again to 12 by 2019.<sup>205</sup>

## 5.2. Seeking Asylum in Zambia

Upon entering Zambia, asylum seekers have seven days to submit an application for international protection.<sup>206</sup> Following submission they will be granted an asylum seekers' permit which is valid for 30-days whilst their refugee status determination is being processed.<sup>207</sup> Asylum-seekers who are issued with a report order or asylum-seekers' permit are able to live in the community; however, this comes with the obstacle that they cannot access basic rights through UNHCR unless they are a vulnerable person.<sup>208</sup> Alternatively they may be accommodated by a transit or reception centre.<sup>209</sup> The Northern province has five semi-permanent reception centres for asylum-seekers.<sup>210</sup> A sixth, in Chikumbi, Lusaka province, was opened in response to recommendations from the Migration Dialogue for Southern Africa to promote ATD.<sup>211</sup> The reception centres currently

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<sup>200</sup> UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 105.

<sup>201</sup> UNHCR, *Progress Report mid-2016* (n 198) 84.

<sup>202</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 74.

<sup>203</sup> UNHCR, *Progress Report mid-2016* (n 198) 84.

<sup>204</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 74.

<sup>205</sup> UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 105.

<sup>206</sup> Refugee Act 2017 No 1 of 2017 13 April 2017 s 11(1).

<sup>207</sup> Zambia Department of Immigration, 'Immigration Permit Types: Asylum Seeker's Permit' <[www.zambiaimmigration.gov.zm/permit-types/#1558184670991-7a5f6a67-8bf7](http://www.zambiaimmigration.gov.zm/permit-types/#1558184670991-7a5f6a67-8bf7)> accessed 24 May 2022.

<sup>208</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 75.

<sup>209</sup> UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 103.

<sup>210</sup> *ibid* 104.

<sup>211</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 73.

serve as an ATD for asylum seekers arriving from DRC. They are first hosted here, before moving onward to a transit centre and then a refugee settlement.<sup>212</sup>

Zambia has three transit centres; one at Maheba refugee settlement, one at Mayukwayukwa refugee settlement, and Makeni in Lusaka.<sup>213</sup> There are a further six shelters for UASC, asylum-seekers, refugees, and victims of trafficking. These provide food, accommodation, and counselling,<sup>214</sup> as well as case management services.<sup>215</sup> In Zambia, it is common for asylum-seekers to be transferred to refugee settlements whilst their refugee status determination is pending.<sup>216</sup> Here they will receive healthcare, education, and food. There are three refugee settlements in Zambia; Meheba, Mayukwayukwa, and Mantapala, with 326, 14, and 130 asylum-seekers respectively.<sup>217</sup>

The Ministry of Health, working with partners, is responsible for healthcare provisions in the refugee settlements.<sup>218</sup> The primary healthcare in Mantapala has been improving steadily since its inception with a health centre opening in June 2019 and serious cases being referred to a local hospital.<sup>219</sup> The Ministry of Health, the Commissioner for Refugee, and UNHCR closely monitor the health situation in the settlements.<sup>220</sup> When poor mental health became more

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<sup>212</sup> *ibid* 72.

<sup>213</sup> UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 104.

<sup>214</sup> *ibid*.

<sup>215</sup> UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 75.

<sup>216</sup> IDC, ‘Successful ATD in Zambia’ (IDC, 20 April 2018) <<https://idcoalition.org/news/successful-alternative-in-zambia/>> accessed 24 May 2022.

<sup>217</sup> UNHCR, *Settlement Profile – Meheba* (28 February 2021) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Settlements%20Profiles%20Zambia-CO%20-%20Feb2021.pdf>> accessed 24 May 2022.

<sup>218</sup> UNHCR, *Public Health Briefing Note: Mantapala Settlement* (June 2019) <<https://reliefweb.int/sites/reliefweb.int/files/resources/70149.pdf>> accessed 24 May 2022.

<sup>219</sup> *ibid*

<sup>220</sup> *ibid*.

prominent in the camp, a comprehensive mental health and psychosocial support assessment was established.<sup>221</sup> Childline Zambia provides free counselling to children in need of psychosocial support in Mantapala. Their services include going door-to-door and having a help desk based in the camp, as well as providing case management referrals, implementing youth outreach initiatives, distributing hygiene kits, and creating child-friendly spaces where children can come to play games and engage in activities.<sup>222</sup>

The Ministry of General Education actively ensures the education provided by the primary and secondary school in Mantapala satisfies the national policy.<sup>223</sup> Both schools welcome children from the local community, facilitating local integration.<sup>224</sup> Forty-six per cent of those enrolled at the schools are girls,<sup>225</sup> and six per cent are from the local community.<sup>226</sup> Increased enrolment rates at the primary school have led to overcrowding in both schools, which has resulted in some children not attending school.<sup>227</sup> Plan International responded to this by building two new school blocks in Mantapala, upon completion this will bring the pupil: classroom ratio to 52:1.<sup>228</sup> There is a 72 per cent enrolment rate for children of primary school age, but this drops to 20 per cent at secondary school level. The UNHCR and the World

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<sup>221</sup> *ibid.*

<sup>222</sup> Childline Zambia, 'Our Programmes' <<https://clzambia.org/our-programmes/>> accessed 24 May 2022.

<sup>223</sup> UNHCR, *Educational Briefing Note: Mantapala Settlement* (June 2019) <<https://reliefweb.int/sites/reliefweb.int/files/resources/70148.pdf>> accessed 24 May 2022; UNHCR and WFP, *Zambia: Joint WFP/UNHCR Needs Assessment Mantapala Settlement* (May 2021) 20 <[https://wfp-unhcr-hub.org/wp-content/uploads/2021/05/Zambia-Mantpala-JNA-2021\\_final.pdf](https://wfp-unhcr-hub.org/wp-content/uploads/2021/05/Zambia-Mantpala-JNA-2021_final.pdf)> accessed 24 May 2022.

<sup>224</sup> *ibid.*

<sup>225</sup> UNHCR, *Educational Briefing Note* (n 223).

<sup>226</sup> UNHCR and WFP (n 223) 20.

<sup>227</sup> UNHCR, *Educational Briefing Note* (n 223).

<sup>228</sup> UNHCR, *Fact Sheet: Zambia* (31 March 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/76566.pdf>> accessed 24 May 2022.

Food Programme (WFP) have contributed this to a lack of WASH facilities and teacher accommodation.<sup>229</sup>

Since 2020, WFP has provided monthly cash grants to 90 per cent of residents in Mantapala allowing them to buy food of their choice.<sup>230</sup> Prior to this, families received monthly food baskets.<sup>231</sup> The new system promotes self-reliance and gives families autonomy over their nutrition. UNHCR, working with CARE International, has been attempting to raise support for women's issues within the local community. They have hosted meetings with local and influential men to facilitate community awareness of sexual and gender-based violence (SGBV) and support services.<sup>232</sup> CARE International has held further training sessions to help address the root causes of SGBV, which have targeted women, girls and boys.<sup>233</sup>

### 5.3. Existing Good Practices

In their report *There Are Alternatives: Africa*,<sup>234</sup> IDC identified several good practices implemented in Zambia. These include child-specific screening systems including child-friendly interview spaces in border areas and accompanying training of government officials; case management systems run by civil society organisations and case resolution for unaccompanied children through assisted voluntary return and reintegration to their country of nationality and a variety of alternative care arrangements ranging from shelters and open reception centres to foster care and guardianship arrangements.<sup>235</sup>

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<sup>229</sup> UNHCR and WFP (n 223) 20.

<sup>230</sup> Sophie Smeulders, 'Zambia: Cash grants power hopes for refugees from DR Congo' (*UN World Food Programme*, 18 June 2021) <[www.wfp.org/stories/refugee-day-zambia-dr-congo-hunger-development-un-world-food-programme](http://www.wfp.org/stories/refugee-day-zambia-dr-congo-hunger-development-un-world-food-programme)> accessed 24 May 2022.

<sup>231</sup> *ibid.*

<sup>232</sup> UNHCR, *Fact Sheet: Zambia* (n 228).

<sup>233</sup> *ibid.*

<sup>234</sup> Tiffany Shakespeare and Junita Calder, *There Are Alternatives; Africa* (IDC 2018).

<sup>235</sup> *ibid.*

When placing children with local families, the Government tries to find families with ties to their country of nationality.<sup>236</sup> Beyond this, Zambia has been a pioneer in promoting the best interests of the child principle with the introduction of their ‘Guidelines for Best Interest Determination of Vulnerable Migrant Children in Zambia’ (Best Interest Guidelines).<sup>237</sup> The launch of these Guidelines aimed to incorporate a Best Interests Assessment and Best Interests Determination into their reception system for asylum-seeking children.<sup>238</sup> These built on the ‘Guidelines: Protection Assistance for Vulnerable Migrants in Zambia’, which provide guidance to first-line officers on screening and identifying vulnerable migrants with the use of a ‘migrant profiling form’ during the initial interview.<sup>239</sup> This works in tandem with the National Screening and Referral Mechanism, which is acknowledged as successfully preventing many vulnerable migrants from immigration detention.<sup>240</sup>

The National Referral Mechanism successfully addresses many of the well-being needs of asylum-seeking children. It was developed to identify vulnerable migrants and ensure they are referred to the appropriate authorities and services. Asylum seekers and UASC are considered vulnerable migrants under the mechanism.<sup>241</sup> The process begins with Stage 1, an interview to assess the migrant’s protection needs.<sup>242</sup> At Stage 2 they will be referred to the relevant authority or

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<sup>236</sup> *ibid.*

<sup>237</sup> Government of Zambia, *Guidelines for Best Interests Determination for Vulnerable Child Migrants in Zambia* (IOM, July 2018) <[https://publications.iom.int/system/files/pdf/bid\\_guidelines\\_zambia.pdf?language=es](https://publications.iom.int/system/files/pdf/bid_guidelines_zambia.pdf?language=es)> accessed 24 May 2022.

<sup>238</sup> *ibid.* 1.2.

<sup>239</sup> UNHCR, *Options Paper 2: Options for Governments on Open Reception and Alternatives to Detention* (first published 2015, revised version 2020) (2020) 2 <[www.refworld.org/docid/5523e9024.html](http://www.refworld.org/docid/5523e9024.html)> accessed 24 May 2022.

<sup>240</sup> UN Migration Network Working Group on Alternatives to Immigration Detention, *Covid-19 & Immigration Detention* (n 193).

<sup>241</sup> Government of Zambia (n 237) para 2.5.

<sup>242</sup> *ibid.*

services for further assessment and refugee status determination.<sup>243</sup> The National Referral Mechanism will also identify and meet the immediate needs of the vulnerable migrants, including the provision of alternative care.<sup>244</sup> A social worker will carry out regular assessments of the alternative care arrangement to ensure the child's rights and protection.<sup>245</sup> The immediate needs of the child will continue to be met until a durable solution is found.<sup>246</sup>

#### **5.4. The Alternative Care Model: Makeni Transit Centre**

Makeni Transit Centre (Makeni) is situated in the Zambian capital, Lusaka. The Commissioner for Refugees has been responsible for the management of Makeni since January 2019,<sup>247</sup> although the centre remains heavily supported by UNHCR. It hosts UASC and children with families awaiting the outcome of their refugee status determination.<sup>248</sup> Under Zambian law, inhabitants can access services from UNHCR's implementing partners pending a decision.<sup>249</sup> Within Makeni this includes physical and mental health care, reproductive services, counselling, legal advice, case support and case

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<sup>243</sup> *ibid.*

<sup>244</sup> *ibid.*

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid.*

<sup>247</sup> UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (5 October 2019) <<https://reliefweb.int/sites/reliefweb.int/files/resources/721116.pdf>> accessed 24 May 2022.

<sup>248</sup> *ibid.*

<sup>249</sup> Elizabeth Donger and others, *Refugee Youth in Lusaka: A Comprehensive evaluation of Health and Wellbeing* (Harvard FXB Center for Health and Human Rights, 2017) 21 <<https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2464/2018/05/UNHCR-ZAMBIA-Report1.pdf>> accessed 24 May 2022.



management.<sup>250</sup> It also accommodates vulnerable groups via a safe house for SGBV survivors and has child-friendly areas.<sup>251</sup>

Healthcare has been provided to inhabitants at Makeni since it opened, however, in September 2016 the healthcare clinic began welcoming Zambian nationals as well.<sup>252</sup> The benefits of this are two-fold, providing healthcare to a wider group and promoting integration. Action Africa Help Zambia (AAHZ) has been an implementing partner of UNHCR since 2001 and assists the Ministry of Health to provide and manage medical care within Makeni.<sup>253</sup> The Ministry provides new arrivals at reception and transit centres with basic health services.<sup>254</sup> UNHCR also collaborates with its implementing partners to provide further services, such as psychosocial counselling, which it provides alongside CARE International and the Commissioner for Refugees.<sup>255</sup> CARE International also has a referral system in place whereby victims of SGBV are referred to counselling, health services, and access to justice.<sup>256</sup> UNHCR provides child protection and case management services with the support of WorldVision.<sup>257</sup> They also provide food and core relief items to the transit centres.<sup>258</sup> The Commissioner for Refugees provides additional food provisions to

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<sup>250</sup> UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (n 247).

<sup>251</sup> *ibid.*

<sup>252</sup> AAHZ, 'Lusaka Clinic Launches Service for Host Community' (AAHZ, 6 May 2016) <[www.actionafricahelp.org/lusaka-clinic-launches-services-for-host-community/](http://www.actionafricahelp.org/lusaka-clinic-launches-services-for-host-community/)> accessed 24 May 2022.

<sup>253</sup> AAHZ, 'Zambia' <[www.actionafricahelp.org/zambia/](http://www.actionafricahelp.org/zambia/)> accessed 24 May 2022.

<sup>254</sup> UNHCR, *Public Health Briefing Note: Mantapala Settlement* (n 218).

<sup>255</sup> UNHCR, *Urban Refugee Programme in Zambia: Briefing Notes 2020* (September 2020)

<<https://reliefweb.int/sites/reliefweb.int/files/resources/Urban%20Refugee%20Programme%20in%20Zambia%20-%20Briefing%20Note%20SLS-Kel%20BALT%20final.pdf>> accessed 24 May 2022.

<sup>256</sup> *ibid.*

<sup>257</sup> *ibid.*

<sup>258</sup> UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (n 247).

Makeni.<sup>259</sup> Inhabitants have also benefited from recent water, sanitation and hygiene initiatives in the surrounding area.<sup>260</sup>

An assessment of the educational support provided to children at Makeni safe house was carried out in March 2020. It found that these children were included in an initiative to provide educational support to vulnerable children in Lusaka.<sup>261</sup> There are several additional initiatives designed to facilitate education in Makeni. For example, CARITAS Czech Republic supports livelihood and literacy programs in Makeni,<sup>262</sup> and the Pestalozzi programme provides cash and learning materials to 395 vulnerable children and scholarships to children from marginalised communities.<sup>263</sup> This year, 200 students will also have access to tertiary education following the signing of a memorandum of understanding between Cavendish University, Zambia and UNHCR covering 50 per cent of the tuition fees.<sup>264</sup>

The Zambian Government recognises a child's family environment as the best environment for them to thrive.<sup>265</sup> The 2017 Act commits the Government to assisting UASC trace their families.<sup>266</sup> In cases where the parents cannot be found they will be afforded the same protection as any other child permanently or temporarily deprived of liberty.

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<sup>259</sup> UNHCR, *Urban Refugee Programme in Zambia: Briefing Notes 2020* (n 255).

<sup>260</sup> AAHZ, 'Children at Makeni Transit Centre Receive a Treat' (AAHZ, 17 December 2021) <[www.actionafricahelp.org/children-at-makeni-transit-centre-receive-a-treat/](http://www.actionafricahelp.org/children-at-makeni-transit-centre-receive-a-treat/)> accessed 24 May 2022.

<sup>261</sup> UNHCR, *Fact Sheet: Zambia* (n 228).

<sup>262</sup> UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (n 247).

<sup>263</sup> *ibid.*

<sup>264</sup> UNHCR, *Operational Update: Zambia October 2021* (2021) <[https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Zambia\\_Operational%20Update\\_October%202021\\_3x.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Zambia_Operational%20Update_October%202021_3x.pdf)> accessed 24 May 2022.

<sup>265</sup> Ministry of Community Development, Mother and Child Health, 'Minimum Standards of Care for Child Care Facilities: Regulations and Procedures' (*Better Care Network*, 1 July 2014) <<https://bettercarenetwork.org/library/the-continuum-of-care/residential-care/minimum-standards-of-care-for-child-care-facilities-regulations-and-procedures>> accessed 24 May 2022.

<sup>266</sup> The Refugee Act 2017 No 1 of 2017 13 April 2017 s 23.

### **5.5. Evaluation of the Well-Being of Children in Makeni Transit Centre**

Zambia's Best Interest Guidelines demonstrate a commitment from the Government to uphold the best interests of the child. This is reinforced by the Minimum Standards of Care for Child Care Facilities, which incorporates the best interests principle into the foundations of facilities providing care to children in Zambia, including transit centres like Makeni.

These efforts are further reinforced by their steps to end the immigration detention of children. Although a prohibition of the practice remains absent from their domestic law, ATD are being used to keep children out of immigration detention which is in their best interests. In many cases ATD are considered before detaining asylum seekers, especially children as UNHCR have reported no UASC being detained since 2017, although statistics could not be found for 2020-21. UNHCR has also noted that single mothers with children are not detained for immigration purposes, suggesting they are trying to maintain family unity and are thus taking steps to ensure children's right to family life. This is supported by the fact that children can reside in reception centres, transit centres and refugee settlements with their families.

Some ATD report orders and asylum seekers' permits are provided for in law and allow the recipient to exercise their right to liberty, but these fall short of ensuring their basic human rights. It is unclear from the available data whether children and families accommodated at Makeni are able to freely move in and out of the centres. What is clear is that those residing in refugee settlements will have their freedom of movement restricted. At present, the only way to exercise free movement outside the refugee settlements is by obtaining an Urban

Residency Card,<sup>267</sup> which is only available to those with refugee status and is notoriously difficult to secure.<sup>268</sup>

Children have no explicit right to health in Zambia; however, basic physical and mental health services are provided at Makeni, successfully promoting the physical and mental well-being of children. Physical well-being is ensured by AAHZ, who provide medical care to Makeni, whereas the Commissioner for Refugees and CARE International ensure mental well-being by providing psychosocial counselling. Makeni takes this a step further by welcoming the local community at the health centre, as children's well-being will benefit from developing ties with their local community. The Best Interest Guidelines require meaningful child participation during the Best Interests Assessment.<sup>269</sup> It is unclear whether this requirement is fulfilled, but it creates the potential to make a further positive impact on the child's well-being.

The needs of women have clearly been considered when deciding which services to provide at Makeni, as reproductive services are provided and there is a safe house and referral system for survivors of SGBV. Further, 170 vulnerable women were selected to be beneficiaries of *The Women and Girls at Risk* programme in the three refugee settlements in Lusaka.<sup>270</sup> The aim of this programme is to support the participants' economic participation.<sup>271</sup> This is evidence of an intersectional approach. However, as Gilleri and De Beco highlight, the quality of these services cannot be measured by the indicators alone. Primary research would be required to fully understand the extent to which these services address the needs of women and girls and thus positively impact their well-being. The

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<sup>267</sup> UNHCR, *Operational Update: Zambia July 2021*, 30 August 2021 <<https://data2.unhcr.org/en/documents/details/88390>> accessed 24 May 2022.

<sup>268</sup> Donger and others (n 249)

<sup>269</sup> Government of Zambia (n237) para 3.1

<sup>270</sup> UNHCR, *Operational Update: Zambia October 2021* (n 264)

<sup>271</sup> *ibid.*

specific needs of children have also been considered, as shown through the child-friendly areas and child protection services.

Once again, the position of the girl-child is vague. This could either be a result of inadequate data or a lack of consideration to her needs. A coordinated, tailored approach from the implementing partners at Makeni would benefit her by responding to the specific needs of young refugee girls. A coordinated approach would allow WorldVision, the partner providing child protection, to work with CARE International to respond to the intersectional needs of the girl-child. The available data regarding the education provided at Makeni is limited and insufficient to apply many of the child well-being outcomes. Whilst some level of education is provided by partners such as CARITAS Czech Republic, the available data suggests there is a lot of room for improvement. Drawing on the fact that access to services appears to be better across all the child well-being outcomes at refugee settlements, and gaps remain in the access to education at these settlements, it can be implied that the education provided at Makeni is inadequate and not fulfilling children's educational well-being. The material well-being of children is catered for by UNHCR who provide food and other core items to Makeni. Once again, the data does not allow for a thorough qualitative analysis of the situation.

Overall, the services provided at Makeni support the well-being of UASC and children with families. The Government of Zambia is taking significant steps to improve the liberty afforded to children and ensure they are not placed in immigration detention. The health service addresses both the physical and mental healthcare needs of residents, adopting an intersectional response by providing gender-and-child-specific services. The education services provided could be improved upon significantly, with the data suggesting the poor quality is a result of a lack of funding in this area. The data did not go beyond identifying the fact that material supplies were provided at Makeni, suggesting the provision of these could be improved upon.