



The  
CENTER for  
VICTIMS of  
TORTURE

*Submitted via email to ICE.Regulations@ice.dhs.gov*

November 6, 2018

Debbie Seguin  
Assistant Director  
Office of Policy  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security  
500 12th Street SW  
Washington, DC 20536

**Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children**

Dear Ms. Seguin:

We are writing on behalf of the Center for Victims of Torture (CVT) in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (proposed rule) to express CVT's strong opposition to the proposed rule to amend regulations relating to the apprehension, processing, care, custody, and release of alien juveniles published in the Federal Register on September 7, 2018.

By its terms, the proposed rule is designed to expand the government's ability to detain migrant families beyond currently prescribed limits in the hope of deterring future migration. More specifically, the proposed rule would authorize—and purposefully result in—prolonged, indefinite detention of traumatized asylum-seeking children and their parents.

For the reasons detailed in the comments that follow, DHS and the Department of Health and Human Services should immediately withdraw their current proposal and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of children and their families, not least through robust, good-faith compliance with the Flores Settlement Agreement.

Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact CVT with any questions or for further information.

Sincerely,

/s/  
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Director of the Washington, DC Office  
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**DETAILED COMMENTS in opposition to DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children**

The Center for Victims of Torture (CVT) welcomes the opportunity to comment on the Notice of Proposed Rulemaking on the Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket Number ICEB-2018- 0002 (“the Notice” or “the proposed rule”).

Founded in 1985 as an independent non-governmental organization, CVT is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the U.S., the Middle East, and Africa—involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses—CVT annually rebuilds the lives of nearly 25,000 primary and secondary survivors, including children. The vast majority of CVT’s clients in the United States are asylum seekers.

CVT also conducts research, training, and advocacy, with each of those programs rooted in CVT’s healing services. The organization’s policy advocacy leverages the expertise of five stakeholder groups: survivors, clinicians, human rights lawyers, operational / humanitarian aid providers, and foreign policy experts.

**I. CVT Objects Outright to the Proposed Rule**

By its terms, the proposed rule is designed to expand the government’s ability to detain migrant families beyond currently prescribed limits in the hope of deterring future migration.<sup>1</sup> More specifically, the proposed rule would authorize—and purposefully result in—prolonged, indefinite detention of traumatized asylum-seeking children and their parents. As such, the proposed rule is both inhumane and unlawful. CVT objects to it outright.<sup>2</sup>

**A. The Proposed Rule Would Profoundly and Unnecessarily Harm Children and Their Parents**

1. The proposed rule targets highly traumatized populations

Notwithstanding the often false and discriminatory rhetoric that has surrounded promulgation of the proposed rule, the Notice—in describing a previous increase in migration to the Southern border, and DHS’s response—contains a surprisingly clear-eyed description of the people it would impact:

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<sup>1</sup> Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486; 45,493 (September 7, 2018).

<sup>2</sup> CVT also objects to specific provisions of the proposed rule, including: the facility self-licensing scheme (which would prevent effective oversight of detention facility conditions); heightened parole standards; limits on bond hearings afforded to minors; the definition of “Non-Secure Facility” (which would permit more prison-like conditions); and the definition of “Emergency” (which would expand the government’s ability to significantly restrict detainees’ already limited rights). Each of these provisions would exacerbate the negative health consequences and legal concerns described below.

[W]hen an unprecedented number of families decided to undertake the dangerous journey to the United States in 2014, DHS officials faced an urgent humanitarian situation. DHS encountered numerous alien families and juveniles who were hungry, thirsty, exhausted, scared, vulnerable, and at times in need of medical attention, with some having been beaten, starved, sexually assaulted or worse during their journey to the United States.<sup>3</sup>

Indeed, according to the Department of Health and Human Services Office of Refugee Resettlement, research indicates that 44% of asylum seekers, asylees and refugees now living in the United States are torture survivors.<sup>4</sup> Many others among these populations, children included, have experienced different forms of trauma.

Trauma survivors present complex health needs. As CVT's Director of Client Services, Dr. Andrea Northwood, explained recently in a sworn affidavit on behalf of detained asylum seekers:

It is well established in the scientific literature that traumatized persons carry forward vulnerability from their traumatic experiences; research across types of trauma and cultures has consistently shown a significant correlation between the degree of vulnerability/impact and the chronicity or severity of trauma exposure. This vulnerability operates on both a psychological and physiological level. To cite one of the foremost experts on the effects of trauma on the brain and body:

“We have learned that trauma is not just an event that took place sometime in the past; it is also the imprint left by that experience on mind, brain, and body.... Trauma results in a fundamental reorganization of the way mind and brain manage perceptions. It changes not only how we think and what we think about, but also our very capacity to think.... Under normal conditions people react to a threat with a temporary increase in their stress hormones. As soon as the threat is over, the hormones dissipate and the body returns to normal. The stress hormones of traumatized people, in contrast, take much longer to return to baseline and spike quickly and disproportionately in response to mildly stressful stimuli,” [(van der Kolk, B. (2014). *The Body Keeps the Score: Brain, Mind and Body in the Healing of Trauma*. New York: Penguin Books, p. 21, p. 46)].

Post-traumatic Stress Disorder and Major Depressive Disorder are the two most common psychiatric disorders among CVT's asylum-seeking clientele who have survived life-threatening traumas and are enduring catastrophic losses of family, culture, career, and all property and material possessions in exile. These two disorders often co-occur (a majority of our clients are diagnosed with both), and

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<sup>3</sup> Id.

<sup>4</sup> Office of Refugee Resettlement, Services to Survivors of Torture Program, <https://www.acf.hhs.gov/orr/programs/survivors-of-torture> (“Research studies indicate a 44% prevalence of torture among refugees, asylees, and asylum seekers now living in the U.S.”).

are present even in the absence of [prison-like conditions typical of U.S. immigration detention facilities].

Post-traumatic Stress Disorder (PTSD) results in ongoing emotional suffering in the form of debilitating nightmares, flashbacks and other forms of re-experiencing the trauma as if it were happening again in the present; avoidance behaviors; negative changes to one's thoughts and mood; and various manifestations of increased physiological arousal that make it difficult to do things such as concentrate, sleep, and feel safe.

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Major Depressive Disorder results in ongoing emotional suffering in the form of (a) depressed or sad mood, and/or (b) loss of interest in life and daily activities, combined with some combination of the following additional symptoms: diminished ability to think or concentrate or make decisions, loss of appetite or over-eating (resulting in significant weight loss or gain), insomnia or hypersomnia, fatigue and loss of energy, feelings of worthlessness or excessive guilt, restlessness or feeling slowed down (to a degree observable to others) and recurrent thoughts of death or killing oneself.

For the reasons described below, the proposed rule would compound these harms, and would do so when cost-effective alternative policy options—ones that could facilitate ameliorating survivors' suffering—are readily available.<sup>5</sup>

## 2. Indefinite detention, especially when prolonged, causes physical and psychological trauma

CVT considers detention “indefinite” when it is without charge or trial for an undefined duration throughout which the individual does not know when or whether she will be released. In the immigration context, length of detention often depends on a variety of factors, most of which are entirely outside of detainees' control and are not clearly communicated or predictable. Individuals typically have limited access to information about their options or what they can do or expect at each stage, and the information they do receive may be in a language (or legal

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<sup>5</sup> For a description of such alternatives, see The Real Alternatives to Detention, a joint publication by the National Immigrant Justice Center, the Women's Refugee Commission, the American Immigration Council, Lutheran Immigration and Refugee Service, and Migration and Refugee Services (updated July 25, 2018), <https://www.womensrefugeecommission.org/rights/resources/1183-alternatives-to-detention> (“A spectrum of alternatives to detention has long existed as the option the government should use in place of mass detention. Many apprehended immigrants and asylum seekers already have strong community ties. Asylum seekers and those with credible legal claims and family and community in the United States have strong incentives to appear in immigration court and comply with requirements. Consequently, for many, release on recognizance or a minimal bond is appropriate because they pose little flight risk or risk to the community.”); see also, the Center for Victims of Torture & The Torture Abolition and Survivor Support Coalition, Tortured & Detained –Survivor Stories of U.S. Immigration Detention (2013) (hereinafter “Tortured and Detained”) at 17-19 (discussing community-based alternatives to detention), [https://www.cvt.org/sites/default/files/Report\\_TorturedAndDetained\\_Nov2013.pdf](https://www.cvt.org/sites/default/files/Report_TorturedAndDetained_Nov2013.pdf).

jargon) they do not understand.<sup>6</sup> Nothing in the proposed rule suggests that detention pursuant to it would be meaningfully—if at all—different, at least with respect to certainty of duration.

From three decades of experience healing torture survivors, CVT knows that indefinite detention—especially, but not only, when prolonged—can cause such severe and protracted health problems that it rises to the level of cruel, inhuman, and degrading treatment.<sup>7</sup> The indeterminacy of indefinite detention can be overpowering—it creates such uncertainty, unpredictability, and loss of control over the basic aspects of one’s life that it seriously harms healthy individuals, independent of other aspects or conditions of detention. Indeed, as CVT has previously explained, “medical examinations have documented indefinite detention leading to profound depression and vegetative symptoms, with all the attendant degradation of multiple aspects of health.”<sup>8</sup> Indefinite detention’s harmful psychological and physical effects can include:

- Severe and chronic anxiety and dread;
- Pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well as on the central nervous system;
- Depression and suicide;
- Post-traumatic stress disorder (PTSD); and
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.<sup>9</sup>

Many of CVT’s clients who were subjected to detention without charge or trial speak of the absolute despair they felt, never knowing if their detention would come to an end. As CVT’s former International Clinical Advisor once put it, when discussing asylum seekers in U.S. immigration detention: “‘Imagine living with the constant question: Am I ever going to get out of here? . . . . And the demoralization that induces, along with the persistent feelings of threat—even if not directly expressed but present in the environment itself?’ In the context of everything that is happening—from apprehension at the border and throughout their time in detention—the indefinite nature of the detention experience is a destructive blanket over it all.”<sup>10</sup>

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<sup>6</sup> Tortured and Detained at 11.

<sup>7</sup> Brief for the Center for Victims of Torture as Amicus Curiae at 8, *Al Bihani et al. v. Trump*, 09-cv-00745-RCL (D.C. Dist. Ct., January 24, 2018) (hereinafter “CVT Guantanamo Amicus Brief”), <https://www.cvt.org/sites/default/files/Final%20Amicus%20Brief-4.Jan%202018.pdf> (citing Curt Goering, The Center for Victims of Torture, Testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights: Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications 1 (2013), <http://www.cvt.org/sites/default/files/attachments/u10/downloads/CVT-Testimony-SenateClosingGuantanamo-2013July.pdf>); see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) (by Juan Mendez) at 17 (calling on states to “expeditiously and completely, cease the detention of children, with or without their parents, on the basis of immigration status,” and concluding that “the deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity,” . . . “becomes grossly disproportionate,” and “may constitute cruel, inhuman or degrading treatment of migrant children.”), <https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session28/pages/listreports.aspx>.

<sup>8</sup> CVT Guantanamo Amicus Brief at 8.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> Tortured and Detained at 2-3.

### 3. Detention exacerbates pre-existing trauma

Multiple studies evaluating the detention of asylum seekers in various industrialized countries have demonstrated that detention—particularly when indefinite in nature—exacerbates trauma survivors’ severe mental health symptoms, and can be independently traumatic.<sup>11</sup> Indeed, a 2015 systematic study of research into the mental health impact of detention on asylum seekers concluded as follows:

All studies used in the data synthesis compared detained asylum seekers to a group of asylum seekers living in the community who had a more or less similar experience of traumatic events prior to arrival. All studies report adverse effects on the detained asylum seekers’ mental health. Effect sizes lies in a clinical important range despite the fact that the comparison groups used in the primary studies face a range of similar post-migration adversities and have been equally exposed to prior traumatic events. There is thus some evidence to suggest an independent deterioration of the mental health due to detention of a group of people who are already highly traumatised. Adverse effects on mental health were found not only while the asylum seekers were detained. The one study analysing asylum seekers after release suggest that the adverse mental health effect of detention may be prolonged, extending well beyond the point of release into the community.<sup>12</sup>

An October 2018 literature review conducted by Physicians for Human Rights (PHR) corroborates, and expands upon, those conclusions:

The data ... demonstrates that detention negatively impacts mental health outcomes for refugee children, adolescents, and adults. The marginalizing and restricting environment re-traumatizes asylum seekers, an already vulnerable population with a significant pre-history of trauma, instead of providing them with the safety that they need. The experience of detention is associated with increased rates of psychological and developmental disorders among refugees, which include PTSD, major depressive disorders, attachment disorders, separation anxiety, episodes of self-harm, and attempted and completed suicides.<sup>13</sup>

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<sup>11</sup> *Id.* at 13 n.26 (citing relevant studies).

<sup>12</sup> Filges, T., Montgomery, E., Kastrup, M., Jorgensen, A.K., The impact of detention on the health of asylum seekers: A systematic review at 40, *Campbell Systematic Reviews* (2015).

<sup>13</sup> The Impact of Immigration Detention on Migrant Mental Health at 5, PHR Issue Brief, October 2018, [https://s3.amazonaws.com/PHR\\_other/factsheets/PHR\\_Asylum\\_Issue\\_Brief\\_Immigration\\_Detention\\_Impact\\_on\\_Mental\\_Health.pdf](https://s3.amazonaws.com/PHR_other/factsheets/PHR_Asylum_Issue_Brief_Immigration_Detention_Impact_on_Mental_Health.pdf); see also From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers at 10, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, June 2003, <https://phr.org/wp-content/uploads/2003/06/persecution-to-prison-US-2003.pdf>.

Other studies have shown similar negative impacts even when detention was relatively brief (approximately 30 days).<sup>14</sup> These findings are consistent with CVT’s clinical experience. According to Dr. Northwood:

One of the features of PTSD is that its re-experiencing symptoms (nightmares, flashbacks, feeling the same terror one felt during a previous trauma, etc.) are often triggered by exposure to reminders of that trauma. Immigration detention facilities are replete with these reminders: uniformed guards, institutional settings, guns, limited control or movement, shackles, wearing a prison-like uniform, being threatened with forced removal (routinely regarded as a death sentence for CVT asylum-seeking clients), being under the control of a government authority – these are all common features of traumatic events that persons who are fleeing political persecution and human rights violations have already experienced. In my experience, trauma survivors in institutional settings such as locked hospital wards or prisons experience significant exacerbation of their PTSD re-experiencing and hyper-arousal symptoms in the presence of these triggers, with accompanying heightened distress and emotional dysregulation.

It has been my consistent clinical observation in treating asylum seekers that symptoms of Major Depression and PTSD increase substantially in environments of deprivation and boredom.... Sitting around all day with nothing to do is described as a major stressor (at best) and even a cause of insanity (“going crazy”) by our asylum-seeking trauma survivors, as they use “keeping busy” and meaningful activity to distract themselves from involuntary, disturbing traumatic memories as well as profound sadness and loss. One of the first priorities of rehabilitation at CVT is to rebuild meaningful activity into the lives of asylum seekers who have applied for asylum but are not yet eligible for a work permit. This is because this change alone produces a reduction in emotional distress and calms people down.<sup>15</sup>

#### 4. Children are particularly susceptible to detention’s harmful impacts

Perhaps not surprisingly, the impact of immigration detention on children is especially acute. A 2017 policy statement from the American Academy of Pediatrics (AAP) describes research showing that detained children suffer both physical and emotional damage, and warns that posttraumatic symptoms can and do persist beyond release.<sup>16</sup> “Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school,” the AAP explains.<sup>17</sup> Moreover, “[q]ualitative reports about detained unaccompanied

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<sup>14</sup> Cleveland, J., Rousseau, C., Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada at 58, *The Canadian Journal of Psychiatry*, 409-416 (2013).

<sup>15</sup> See affidavit referenced on page 2 of this submission.

<sup>16</sup> American Academy of Pediatrics, Policy Statement: Detention of Immigrant Children at 6, April 2017, <http://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>.

<sup>17</sup> *Id.*

immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.”<sup>18</sup>

Detention of the sort the Notice proposes would also negatively impact children indirectly, by further harming their parents (and as such their parents’ ability to provide the type of care, guidance, and communication that the proposed rule claims is an “advantage” to indefinite family detention).<sup>19</sup> As the AAP explains, “detention itself undermines parental authority and capacity to respond to their children’s needs; this difficulty is complicated by parental mental health problems.” In other words, at crucial periods of their development, children are traumatized in a context that undercuts their parents’ ability to provide comfort and protection.<sup>20</sup>

For all of these reasons—and because “there is no evidence indicating that any time in detention is safe for children”—the AAP recommends that children in the custody of their parents should never be detained.<sup>21</sup>

## **B. The Proposed Rule Would Violate U.S. Treaty Obligations**

In addition to its harmful health effects—and in large part because of them—the proposed rule runs afoul of U.S. treaty obligations, in particular those arising under the 1967 U.N. Protocol Relating to the Status of Refugees (which binds the United States to articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention)), the International Covenant on Civil and Political Rights (ICCPR), and the U.N. Convention on the Rights of the Child (CRC). As explained in section A.2. above, detention pursuant to the proposed rule could also rise to the level of cruel, inhuman or degrading treatment in violation of the U.N. Convention Against Torture.<sup>22</sup>

Article 31 of the Refugee Convention prohibits contracting states from “impos[ing] penalties” on the basis of how a refugee arrived to the U.S.—whether through illegal entry, presence, or without authorization—and from restricting her movement more than “necessary.”<sup>23</sup> Indeed, the United Nations High Commissioner for Refugees’ guidelines on the detention of asylum seekers emphasize that employing detention to deter asylum seekers is “generally unlawful.”<sup>24</sup> Similarly, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) affords all people “the right to liberty and security of person” and prohibits “arbitrary arrest or detention.”<sup>25</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> 83 Fed. Reg. at 45,492-93.

<sup>20</sup> Mares, S., Newman, L., Dudley, M. et al., Seeking refuge, losing hope: parents and children in immigration detention, *Australasian Psychiatry* 10(2):91 - 96 (June 2002).

<sup>21</sup> American Academy of Pediatrics, Policy Statement: Detention of Immigrant Children at 7, April 2017, <http://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>.

<sup>22</sup> See note 7 *supra*.

<sup>23</sup> Protocol Relating to the Status of Refugees, Jan. 13, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, entry into force by the United States (by accession) on Nov. 1, 1968, Article 31, <http://www.unhcr.org/en-us/1951-refugee-convention.html>.

<sup>24</sup> United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) at 6, <http://www.unhcr.org/505b10ee9.html>.

<sup>25</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, ratified by the United States on June 8, 1992, Article 9, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.



Detention that is unreasonable, unnecessary, or disproportionate to a state’s lawful objective, or that is imposed absent an individualized assessment subject to timely judicial review—such as that contemplated by the proposed rule—violates this prohibition.

Finally, the proposed rule would violate the CRC. Although the U.S. has not ratified this treaty (the only country in the world not to have done so), as a signatory the U.S. is bound to not engage in actions that “defeat” the CRC’s “object and purpose.”<sup>26</sup> According to the Committee on the Rights of the Child:

[D]eprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured. The lawful arrest or detention of children can only take place under certain circumstances. It must be proportionate and only carried out in certain situations, including, for example, detention following court conviction; arrest or detention for failing to observe a court order/legal obligation; and arrest or detention on remand.<sup>27</sup>

## II. Conclusion

In late 2016, after almost a year of investigation, an Advisory Committee on Family Residential Centers established by DHS itself made the following recommendation:

DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.<sup>28</sup>

CVT agrees. The proposed rule would operationalize just the opposite and should not be implemented.

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<sup>26</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 18, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en). Although the United States is not a party to the Vienna Convention, “many commentators claim that Article 18 reflects customary international law that is binding on nations that have not joined the Convention, a claim that the United States has not denied.” Curtis A. Bradley, Unratified Treaties, Domestic Politics, and the U.S. Constitution, 48 Harv. Int’l L. J. 307, 307-308 & n.1 (2007); see also *Roper v. Simmons*, 543 U.S. 551 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty,” including the direct prohibition in Article 37 of the CRC).

<sup>27</sup> UN Convention on the Rights of the Child (CRC), Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, Sept. 28, 2012, <http://www.refworld.org/docid/51efb6fa4.html>; see also CRC Article 37, <https://www.crin.org/en/home/rights/convention/articles/article-37-torture-and-deprivation-liberty>.

<sup>28</sup> Department of Homeland Security, Immigration and Customs Enforcement, Report of the ICE Advisory Committee on Family Residential Centers, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.