

FUTURES DETAINED

***Korea's Failure to Meet the Standards Required in
the Convention on the Rights of the Child in Its
Immigration Detention System***

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**Advocates for Public Interest Law (APIL)
Submission to the United Nations Committee on the Rights of the Child**

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About the Author

The Advocates for Public Interest Law¹ (APIL) is a non-profit public interest law firm working for underrepresented groups including refugees, immigration detainees and victims of human trafficking in South Korea. It also engages in various sectors of public interest area by promoting reform and creating policies.

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1. Introduction

The international community is increasingly decrying the detention of children, especially those confined in immigration detention facilities.

And rightly so.

According to the International Detention Coalition (IDC), an estimated 1 million children are affected by immigration detention policies worldwide, and these children who have been detained are found to suffer considerable psychological harm and even impaired cognitive development, IDC's ongoing international research concludes. Furthermore, it is a widely accepted truth that the detention of refugee and migrant children is in breach of international law, most notably, the 1989 UN Convention on the Rights of the Child which stipulates that detention of children should only be used as a 'last resort and for the shortest appropriate period of time.'

With the 58th session of the Committee on the Rights of the Child ahead in September, APIL would like to take the opportunity to reflect on Korea's adherence to its obligations under the Convention on the Rights of the Child (CRC). The *Futures Detained* Report presents supplementary comments to the reports submitted by the Korean government (combined third and fourth periodic reports) and to the NPO report submitted in response to it.

This Report finds that despite ratifying the Convention in 1991, Korea has neglected to protect the rights of migrant children in detention in accordance with the rights and principles enshrined in various international human rights instruments including the CRC. It is our view that the Korean government needs to better its effort to meet its commitments by fully incorporating the rights of children in its immigration detention law and practices.

2. Korea's Obligation under the Convention on the Rights of the Child

By ratifying the Convention in 1991, Korea has explicitly agreed to ensure that new laws be enacted or existing laws and practice be applied in accordance with its human rights obligations contained within the CRC. Thus, as a party to the CRC, Korea has a duty to respect and apply its obligations set out in the Convention and to ensure that children within its jurisdiction enjoy their basic human rights.

It is the contention of APIL, however, that Korea's current immigration detention system is failing to meet its obligations to protect human rights of children stipulated in various international human rights treaties, in particular with regard to its obligation to migrant children in detention.

The relevant principles in the CRC for the purpose of discussion in this report include:

- Detention should be a measure of last resort and for the shortest appropriate period of time (Article 37(b))
- Children should not be detained unlawfully or arbitrarily (Article 37(b))
- Children are entitled to prompt and effective review of the legality of detention (Article 37(d))
- The best interests of the child must be a primary consideration in all decisions concerning children (Article 3(1))
- Special protections for asylum-seeking and refugee children should be ensured in domestic law and procedures (Article 22(1))
- Children have the right not to be separated from their parents against their will (Article 9)
- Convention rights must be afforded to each child within their jurisdiction without discrimination of any kind (Article 2)
- Children should be provided the best opportunity to develop physically, mentally, morally, spiritually and socially in conditions of freedom and dignity (Article 27)

- Children have the right to the highest level of health and medical services (Article 24(1))

3. Korea's Current Law and Practice on Immigration Detention Violating the Rights of the Child

According to the Immigration Control Act of Korea(full articles of the Act is attached), Immigration Detention Centers confine the individuals suspected of visa violations, illegal entry or unauthorized arrival until a decision whether to deport them is made by immigration authorities, and the individuals ordered to be deported until removal is possible. There are three such centers in Korea: Hwaseong, Cheongju, Yeosu Detention Centers.

In its execution of the Immigration Control Act, the Korean government has violated its commitment to make the best interests of the child a primary consideration and its obligation to detain a child only as a "measure of last resort" for "the shortest appropriate period of time" under the CRC; has subjected children to arbitrary detention prohibited by the CRC and the International Covenant on Civil and Political Rights (ICCPR); and has infringed on the rights of refugee children protected under the CRC and the Convention relating to the Status of Refugees ("Refugee Convention").

3.1 In Regard to the Principle on Detention as a "Measure of Last Resort" and for "the Shortest Appropriate Period of Time"

According to the investigation report from the National Human Rights Commission of Korea, the total number of children in Korea's immigration detention centers between 2007 and 2009 was 31, and total 277 detainees under age 19 between 2004 and 2009. The following statistics are provided by the National Human Rights Commission of Korea.

Number of Child Detainees in Immigration Detention Facilities (2007 - 2009)

Age	Hwaseong Detention Center	Cheongju Detention Center
17	4	10
16	5	7
15	1	1
14	-	-
13	1	1
1		1
Total	11	20

Average Detention Period of Child Detainees (2007 - 2009)*

Age	Hwaseong Detention Center	Cheongju Detention Center
17	6.5	21.4
16	11	11.2
15	13	5
14	-	-
13	4	3
6	-	-
1	-	2
Total Average	8.6	8.5

*The National Human Rights Commission has not published the data after 2009. However, APIL has found in March 2011 one detention case of a five-year-old migrant girl who was detained for 22 days. Her duration of detention period has been confirmed by the Ministry of Justice.

Children spent an average of 8.5 days in detention before being deported out of Korea. Not only is the detention period of 8.5 days not short for children, but also no alternatives to detention have been instituted for children, nor provisions to guarantee that detention is applied only as a last resort for the shortest time possible.

In effect, under the current immigration system in Korea, migrants including children may even be detained in prison-like facilities for an indefinite period of time, in theory, since the Immigration Control Act lacks a time limit provision of how long an individual ordered to be deported can be detained until removed. In a 2011 case, a five-year-old Chinese girl was detained with her mother for 22 days, remaining detained even after applying for refugee status as they had demonstrated that they would be in danger of arrest and persecution upon return to China. If it were not for the intervention of the Korean Bar Association, the child could have been detained for an even longer period of time, for the reason of having arrived without any identity documents.

Furthermore, during the 22 days of detention, the child was only allowed to go outside for fifteen minutes, twice a week. (Her mother's request that her daughter be allowed to go outside more often was later granted, but the officers had to accompany the child every time while the mother was prohibited from accompanying them.) Also, the prolonged detention drove the child to suffer from stress-induced insomnia as well as fever and lip swollenness toward the end of the confinement. This instance demonstrates that the Korean government has failed to ensure the child's right to enjoy a standard of living adequate for his or her development in violation of the CRC and to protect against inhumane and degrading treatment in violation of the Convention Against Torture (CAT). This case will be discussed in further detail in section 3.3.

The CRC requires the detention of children to be "a measure of last resort," but in Korea, immigration detention of children is "the first and only resort," and there are no alternatives to it. Also, although the CRC requires the detention of children to be "the shortest appropriate period of time," under the Korea's current law and practice,

migrant children may be detained for an extended period of time, even indefinitely. Such constitutes a breach of the following articles of the CRC and the CAT:

- The best interests of the child should be a primary consideration in all decisions concerning children (Article 3(1), CRC)
- Detention should be a measure of last resort and for the shortest appropriate period and humane and respectful treatment while in detention (Article 37(b), CRC)
- Children have the right to benefit from a standard of living adequate for the child's physical, mental, spiritual, moral and social development, and governments should assist parents to implement this right, including by providing material assistance and support programs, particularly with regard to nutrition, clothing and housing (Article 27, CRC)
- Children have the right to enjoy highest attainable standard of physical and mental health (Article 24(1), CRC)
- Governments have the obligation to prevent acts of cruel, inhuman or degrading treatment or punishment (Article 16(1), CAT)

3.2 In Regard to Arbitrary Detention

It is also argued that the Immigration Control Act also fails to protect children from arbitrary detention because even though a detention order made is administrative in nature, which necessitates a follow-up judicial intervention, there is no time limit on immigration detention as mentioned above, nor periodic judicial review on the legitimacy of the continuance of their detention once migrants are detained.

Most of detainees in immigration detention centers are deported within 20 days of the start of their detention in Korea. But if there are problems with executing a deportation order, due to the absence of passport, the presence of risk of being persecuted in the countries of origin, or the pending of a detainee's refugee case in court, detainees including their children could be detained for long periods of time or even indefinitely until removed. And what makes this kind of arbitrary practice of immigration detention possible is Article 63 of the Immigration Control Act, which provides that "if it is

impossible to immediately repatriate a person who is subject to a deportation order out of the Republic of Korea, he or she may be detained until the repatriation is possible.”

In one of the recent cases, an Iranian migrant had been kept in an immigration detention center since December 2005 for more than 3 years without periodic judicial review before he was eventually released through interim measures issued by the UN Human Rights Committee. Likewise, no periodic judicial review was made while a Congolese migrant was detained since August 2008 for more than 2 years before being deported. This kind of immigration detention practice, which is also against the principles in the ICCPR, can lead to an arbitrary detention of migrant children, for the Korean law relating to immigration detention makes no distinction between an adult and a child.

The CRC and ICCPR require the protection of children against arbitrary detention; however, Korea’s immigration detention law and practices fail to exclude indefinite detention of children in absence of periodic judicial review. Such constitutes a breach of the following articles of the CRC and ICCPR:

- Children should not be detained unlawfully or arbitrarily and are entitled to prompt review of the legality of his or her detention before a court or other competent, independent and impartial authority (Article 37, CRC; Article 9, ICCPR)

3.3 In Regard to the Protection of Refugee Children

In 1992, Korea ratified the UN Refugee Convention and its 1967 Protocol, which requires Korea to adhere to the Convention and to protect those who fit the definition of refugee contained in Article 1 of the Convention.

Korea’s principal obligations to refugees are also derived from other sources of international law, which include the ICCPR, the CAT, and of particular relevance in this

Report, the CRC. Articles 3, 37 and 22 of the CRC make the Refugee Convention directly relevant to the consideration of the human rights of children in immigration detention because the CRC requires that detention be “a measure of last resort” for the “shortest appropriate period” and that a child who is seeking refugee status receive appropriate protection and assistance in the enjoyment of the rights contained in the CRC, their “best interest” being the primary consideration.

In the same vein, it is also stated in the UNHCR Guidelines that, “minors who are asylum-seekers should not be detained and all efforts must be made to have them released from detention and placed in other accommodation.” And “if this proves impossible, special arrangement must be made for living quarters which are suitable for children and their families” (*UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*).

Between December 1992 when Korea ratified the Refugee Convention and March 2011, the total of only 235 people among 3,078 applicants were formally recognized as refugees. This figure, which is substantially low compared to other countries of similar economic status, might have resulted from many different reasons including Korea’s exclusivistic nationalistic tendencies, mistrust of refugee applicants’ genuine motive, lack of proper due process, and a high standard of proof in asylum procedures. However, considering the fact that in the two decades since the ratification of the Refugee Convention, Korea has not protected refugees’ basic human rights and livelihood, this figure also shows that Korea’s effort to protect asylum seekers and refugees falls short of meeting the obligations of relevant international treaties including the CRC. Under such deplorable circumstances, children are, again, the biggest victims.

The aforementioned five-year-old Chinese girl and her mother were deprived of the access to adequate information on refugee application procedures, even after they informed the immigration authorities of the risk of persecution they would face upon return to China. The mother had been assisting North Korean defectors to escape to South Korea, and when found out by the Chinese public security, the mother and her

daughter smuggled themselves into South Korea along with the North Korean defectors they were helping but were caught at the sea by the South Korean maritime police. Even after they applied for refugee status on March 31, 2011, with the help of an APIL attorney who found them by chance at the detention center during his annual field research at immigration detention centers, the Immigration Authority refused to grant them release unless they paid bail of approximately 17,000 CHF. However, with the intervention of the Korean Bar Association, they lowered the amount of bail from 17,000 CHF to 80 CHF. If it were not for the intervention of the Korean Bar Association, the child and her mother would have been detained for more than 22 days as she arrived without any identity documents even after they informed the immigration authorities of the danger of harm they would face upon return to China.

The CRC and the Refugee Convention require that refugee children not be detained and all efforts be made to “have them released from detention and placed in other accommodation”; however, Korea’s immigration detention system fails to safeguard refugee children’s rights. Such constitutes a breach in the following articles of the CRC and the Refugee Convention:

- Children should be protected from all form of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child’s parents, legal guardians, or family members (Article 2, CRC)
- The best interests of the child must be a primary consideration in all decisions concerning children (Article 3(1), CRC)
- Children have the right not to be separated from their parents against their will (Article 9, CRC)
- Governments should take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee receive appropriate protection and humanitarian assistance in the enjoyment of their rights (Article 22, CRC)
- Detention should be a measure of last resort and for the shortest appropriate period (Article 37(b), CRC)
- Children should not be detained unlawfully or arbitrarily (Article 37(b), CRC)

- Children are entitled to prompt and effective review of the legality of detention (Article 37(d), CRC)
- Governments cannot impose penalties on refugees, on account of their illegal entry or presence (Article 31, Refugee Convention)

4. Conclusion and Recommendations

Deprivation of liberty can cause serious long-term harm to the development of a child. The *Futures Detained* Report has shown that Korea's current immigration detention law and practices have deprived migrant children of liberty and human rights. Migrant children are subject to prolonged detention as a "first and only resort." They are also subject to arbitrary detention, due to absence of periodic judicial review and of a maximum detention period provision. Furthermore, refugee children in detention are not adequately protected, as asylum-seekers' access to the information on refugee procedures is restricted and alternatives to detention for refugee applicants are practically unavailable.

These laws and practices violate the rights of the child under the CRC, CAT, ICCPR, and the Refugee Convention, all of which Korea, as a party to these treaties, is obligated to abide by.

In order to remedy this situation, policy and legal changes need to be put in place to respect and safeguard the rights of children detained for immigration control purposes in a way consistent with international human rights law including the CRC. Such measures should include the following:

- Article 63 of the Immigration Control Act which allows for indefinite detention of migrant detainees including children should be revised to include a "maximum period of detention" of less than six months. Migrant detainees including should have access to periodic judicial review on the legitimacy of the continuance of their detention.

- Children should not be detained for immigration control purposes. If detention for a child is inevitable as a last resort, the maximum period of detention of three days should be explicitly stipulated in relevant law and strictly carried out in practice, as the example in the Swedish immigration law.
- In particular, children who are seeking asylum should never be detained. Moreover, the minimum standards of welfare benefits for those who are released into the community should be established. In addition, the officers at immigration detention centers should be properly trained so that those who potentially qualify as refugees are properly made aware of their rights to seek asylum.
- The minimum standards for treatment of children in immigration detention should be established, which, for instance, include appropriate facilities and food, sanitary environment, and medical services to ensure the child's health, as well as age-appropriate education and recreational activities for their development. In addition, the officers at detention centers should be trained so that the specific needs of child detainees can be well-supported. If a woman with an infant is detained, special provisions should be made to support the mother and to give age-appropriate food and supplies for the infant.
- Appropriate alternatives to detention for vulnerable groups including children should be provided. Temporal release on bail, which is the sole existing alternative to detention, should be amended to impose only a reasonable amount of bail. Also, the Korean government should provide financial assistance to existing NGO-run shelters for migrant children and families.