

UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

DAY OF GENERAL DISCUSSION

***“THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF
INTERNATIONAL MIGRATION”***

28TH SEPTEMBER 2012

JOINT SUBMISSION



9TH SEPTEMBER 2012

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Introduction

The core spirit of this Joint Submission rests on the need to ensure that migrant children have a right to a full and effective application of the principles and provisions of the *Convention on the Rights of the Child* in a manner equal to all other children.

Our experience in working with migrant and asylum-seeking children urges us to reiterate this point and to stress the urgency of adopting a human rights based approach to the interpretation and application of the best interests principle. Too often we have seen and continue to see this principle sacrificed for the sake of heightened securitisation of national and regional borders, exclusive attention to national interests, populism and xenophobic sentiment. On the basis of this understanding, we are presenting this Joint Submission with two main components.

Firstly, we would like to underline the need to adopt a horizontal application and inclusion of migrant child issues. We believe this is central to ensuring that all measures, policies, legal instruments, and practices in international, regional and national law are made equally applicable and accessible to all children, including migrant/asylum-seeking children, irrespective of their legal status and situation. We would like to encourage States to specifically include migrant children within policy and legal discussions on themes affecting children, through methodologies that ensure the mainstreaming of migrant children issues at all levels of dialogue, adoption and implementation. The best interests of the migrant child would be best secured in national and local contexts already structured on the best interests principle.

Secondly, we would like to present input with regard to measures relating to the specific situation of migrant and asylum-seeking children. These areas of particular concern broadly include the following: the asylum procedure, reception conditions, administrative detention, age assessment, and legal guardianship.

Our present input is largely inspired by existing international and regional legal instruments relevant to children's rights: primarily the *Convention on the Rights of the Child*. Yet it is to be noted and strongly reiterated that several other human rights instruments are also of direct relevance, including: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of Persons with Disabilities*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *European Social Charter*.

The specific instrument relating to refugees, including refugee children – the *1951 Convention relating to the Status of Refugees* – also forms the basis of our input.

Specific Themes

Together with the above general observations regarding the importance of the horizontal mainstreaming of migrant children issues, we have identified a number of specific areas that we feel should be taken into consideration when addressing the rights of the migrant child.

The asylum procedure

We acknowledge that legal challenges presented by asylum-seeking children may be of a highly technical nature, often requiring a particularly meticulous analysis of the refugee definition. Furthermore, asylum-seeking children often also present logistical challenges in terms of the skills required to interview them in what is by definition a sensitive and unfamiliar context.

Child-specific persecution remains a challenge for all States conducting refugee status determination proceedings, and we also note the difficulty in establishing the child's country of origin or of permanent

residence due to elements such as lack of memory, lack of maturity, communication hurdles, limited documentation or registration possibilities, etc. Trauma related to events experienced in countries of origin and/or countries of transit further exacerbates these challenges, compounded with the need to ensure appropriate psychological, psychiatric or other services for the child's well being.

Yet in the above context we strongly reiterate the fundamental nature of the right of all persons to seek asylum, underlining the utmost importance we attach to ensuring that children – as adults – be granted access to a safe territory where their asylum claims will be heard in a fair and effective manner.

Reception conditions

The best interests principle should also be the key consideration in all decisions relating to the reception conditions provided to migrant children, as established by CRC Article 37. In this regard, it is imperative to reiterate that the principle should be unaffected by the child's manner of entry or stay in a country, and that reception conditions – including those provided in administrative detention centres – should be provided in a manner that does not violate the Convention provisions but which, more importantly, promote and facilitate the child's physical and psychological well-being. They must therefore be child-friendly with due account being taken of the child's rights to civil, political, economic, social and cultural rights as, for example, the right to food and water, health, education, legal recognition, etc.

Administrative detention

We believe that the detention of migrant children is unacceptable and that alternative accommodation measures can and should be resorted to. We strongly support the Committee's *General Comment Number 6(2005)* establishing that the underlying approach should be one of care and not of detention, and that detention is never to be justified on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.

Detained children are exposed to an environment that is not only an obstacle to their personal and social development but also of serious detriment to their physical and psychological well-being. Detained children should not to be kept within confined spaces as they have a right to have access to fresh air, sunlight, recreation and an appropriate age-sensitive diet. The child is also entitled to privacy with his/her family. Friends, relatives, religious, social and legal counsel and guardians should be permitted regular contact and visits. Furthermore facilities should not be of hindrance to access to legal aid, they should provide for the child's right to education and should provide the opportunity for the child to receive all basic needs, including medical and psychological counselling.¹

We further wish to underline that the detention of migrants, including adults, is strictly regulated by international and regional human rights law whereby a series of mandatory conditions should be present throughout the entire duration of a migrant's detention. These mandatory conditions include that detention should be in accordance with national law and that national law and procedures should protect the individual from arbitrariness. To avoid arbitrariness the detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorised entry or deportation, the conditions of detention must be appropriate (highlighting that this form of detention is unrelated to the commission of a criminal offence) and lastly the duration of the detention must not exceed reasonable length required for the purpose pursued.²

With regard to children – whether accompanied or unaccompanied/separated – we believe that a stricter compliance with these mandatory conditions is required due to the particular vulnerability of children and the demonstrated psychological impact of detention of this category of migrants.

¹ Committee's General Comment 6 (2005).

² International Commission of Jurists (2011) *Migration and international Human Rights Law, Practitioners Guide no. 6*, p.150 and p.152. These principles have been often reiterated by the Human Rights Committee, the European Court of Human Rights, and other key human rights actors.

Regrettably, minors crossing borders in an irregular manner or found to be in an irregular situation are nonetheless automatically detained in many parts of the world. As established in the Committee's *General Comment 6 (2005)* we recommend that release from detention and placement into appropriate accommodation ought to be a priority for all stakeholders. However we also acknowledge that such placement may take a number of days and, under certain circumstances, weeks or months. This is particularly so in countries where the influx of migrants and asylum-seekers poses severe logistical challenges to the competent authorities, either due to their numbers, manner of entry or other aggravating factors. In such circumstances, we urge that the time spent waiting to be placed should be in an environment that is safe and appropriate for children.

Age assessment

All migrants claiming to be minors require efficient, fair and speedy processes to determine whether they are in fact minors or otherwise. In our view, these procedures ought to be characterised by transparency and accountability, as well as consistency. The procedure should be regulated by publicly available, written rules covering essential issues such as procedural timelines, assessment criteria, etc. We are concerned that in several countries the procedural information provided to persons undergoing age assessment is extremely limited, excluding the applicant from active participation in the process. Written decisions should be supported by clear reasons, providing a real possibility of appeal or review. It is important to ensure a real possibility of professional assistance or representation and adequate guarantees of independence and impartiality.

With regard to the quality of the assessment, there seems to be a tendency for the procedures to be conducted on the basis of purely subjective methods of assessment and of medical tests that are known to be unreliable. Moreover, to avoid potential conflicts of interests, the agencies conducting age-assessment procedures must be independent of other agencies dealing with the child's release from detention, accommodation following release, and legal guardianship.

It is also of concern that migrants claiming to be unaccompanied or separated children are at times detained throughout the age assessment procedure, a process that may last up to a number of months. These concerns are further aggravated when the migrant is detained with adults pending outcome of the age assessment procedures.

Legal Guardianship for unaccompanied or separated children

We stress the importance that entities or individuals tasked with the legal guardianship of unaccompanied or separated children be suitably trained and specialised, in order to secure the most appropriate decisions for children with different needs, such as refugee children, children with disabilities, etc. The highly technical issues related to children in a migration context further stress the importance of professional approach, particularly in view of issues such as: child-related persecution, child soldiers, FGM, culture sensitivity, etc.

The legal guardianship of an unaccompanied or separated migrant child should, as far as possible, be an individual relationship. The guardian's role should also extend to offering support to the child in the asylum procedure so as to ensure the full effectiveness of the refugee status determination process.

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Annex – Recommendations

Recommendation 1 – Ensure delivery of professional services

As a general principle, it ought to be ensured that all persons working directly or indirectly with children be appropriately skilled and trained to do so. Furthermore, due to the particular challenges posed by migrant children, especially in forced migration contexts and/or when children are travelling alone, it is imperative that the recognition and enjoyment of children's human rights do not suffer due to limited technical capacity of relevant stakeholders.

Recommendation 2 – Do not detain children

We strongly urge the Committee to reiterate that national or regional migration management measures should never authorise, condone or encourage the detention of children, irrespective of their immigration or asylum status. This is particularly relevant for unaccompanied or separated migrant children pending age assessment procedures, in which cases a presumption of minor age ought to be adopted to ensure that no children are detained.

Recommendation 3 – Age assessment procedures must be in the child's best interests

The Committee is urged to provide technical advice, including guidelines, on how to ensure that age assessment procedures and their implementation do not result in violations of the human rights of migrant children and that the best interests of the child should remain at the heart of such procedures. Furthermore, we urge the Committee to recall the importance of guaranteeing relevant procedural rights particularly providing the child and his/her guardian with information on the procedure's duration, assessment criteria, appeal/review criteria and procedure, representation and assistance, manner of conduct of the assessment, relevance of documentation, acknowledgment of imprecision of age assessment, etc.;

Recommendation 4 – The child must be an active participant in the asylum procedure

Together with recommending that asylum procedures be child-friendly in terms of, for example, inclusive interpretations of the 1951 refugee definition, use of appropriate interpreters, specialised interviewing techniques, acknowledgement of child-specific persecution, and use of experts in child behaviour and psychology, the Committee is also urged to reiterate the procedural rights of an asylum-seeking child. These would include, but are not limited to, appropriate and comprehensible information on the procedural steps, on rights and obligations within the procedure, on possibility to bring documents and other forms of evidence, of appeal/review criteria and procedure, of receiving decisions reasoned in fact and in law, access to lawyers/NGOs/UNHCR, etc.

Recommendation 5 – Appropriate legal guardianship measures are imperative

The Committee is urged to provide technical advice, including guidelines, on various models establishing legal guardianship for unaccompanied or separated children. In this regard, it is imperative that at all times legal guardian acts in the best interests of the child. We urge particular attention to situations where unaccompanied or separated migrant children run the risk of going missing, locally or overseas.

