

IML Information Note on The Protection of Migrant Children

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“Promote the positive affirmation of children’s rights, in particular the right to their own identity, the right to grow up in secure conditions, the right to care, the right to a family, the right to be loved and to play, and the right to health, education, social inclusion, equal opportunities, sport and a clean and protected environment and the right to obtain information on such issues, with a view to establishing a child-friendly society, in which children can feel protected and actively involved”¹

INTRODUCTION AND PURPOSE

This IML Information Note discusses the protection of migrant children, with a focus on unaccompanied and separated migrant children. Its purpose is to set out the applicable legal framework and principles governing the rights of migrant children for all stakeholders or duty bearers working on or interested in issues concerning the protection of children in the migration context. The Note further aims to support the programmatic development of the IOM in this area by giving the latest stance of the international law on the subject matter and hereby serving as a basis for programming in line with current legal standards.

The Note is divided into five sections. The first section will provide definitions for and the distinction between unaccompanied and separated children. The second section covers the various principles under international law that protect the rights of migrant children and the specific protection they award to

unaccompanied and separated migrant children. Moreover, it introduces the Convention on the Rights of the Child (CRC) in its function as a comprehensive instrument setting out the rights of all children including migrant children. The third section focuses on the initial assessments and measures for the care and protection of unaccompanied or separated children that must be taken upon arrival of the child or as soon as his/her presence becomes known to the authorities in the country. The fourth section presents the specific protection of unaccompanied or separated children, both in terms of rights and basic needs such as education and health and regarding specific situations the children may find themselves in. It explains notably the prohibition of migration detention for children according to current international law. Finally, the fifth section discusses long term options for unaccompanied and separated migrant children and how it can be ensured that the children’s rights are protected in each one.

I. DEFINITION OF UNACCOMPANIED AND SEPARATED CHILDREN

‘Unaccompanied children’ (also called unaccompanied minors, although that is not the preferred or most adequate term)² are children, as defined in Article 1 of the Convention on the Rights of the Child of 20 November 1989 (CRC), “who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”³

¹ § A, European Parliament resolution of 16 January 2008: Towards an EU strategy on the rights of the child (2007/2093(INI)).

² See IOM, [International Migration Law Glossary on Migration](#), 2019: “The term is often used in national legislations, but its meaning varies greatly among States and can sometimes have a negative connotation. The term of “child/children” is thus to be favoured when referring to persons under the age of 18, as most notably done in the Convention on the Rights of the Child

((adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, 1989; see also Interagency Working Group on Sexual Exploitation of Children, [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse](#) (2016) p. 8”).

³ Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 1 September 2005, para. 7.

‘Separated children’ are children, as defined in Article 1 of the CRC, “who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.”⁴

A “child” as defined in Article 1 of the Convention” means “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.”⁵

II. PRINCIPLES

Migrant children are rights-holders under international human rights law, international refugee law, international humanitarian law⁶ and various regional instruments. Of these instruments, the Convention on the Rights of the Child (CRC, 1989) is a comprehensive instrument that sets out the rights of all children, including migrant children, in almost all aspects of their lives.

Unaccompanied and separated migrant children are entitled to specific protection and it is essential that they are provided with effective protection and assistance in a systematic, comprehensive and integrated way.⁷ The most important principles to be used in decision-making that concern the realization of the rights of the child, and which apply throughout the migration cycle are survival and development (Article 6, Convention on the Rights of the Child), non-discrimination (Article 2), best interests of the child (Article 3) and the views of the child (Article 12). Obligations deriving from the Convention on the Rights of the Child vis-à-vis unaccompanied and separated children include the obligation to

develop national legislation, establish administrative structures, carry out research and data compilation, and provide comprehensive training.

The following principles must be respected throughout the migration process of **all children**.

i. Principle of non-discrimination

States shall “respect and ensure” rights for children set out in the Convention to all children in their jurisdiction without discrimination (Article 2, CRC). Unless otherwise explicitly stated in the Convention, the enjoyment of rights is not limited to national children but must be available to all children, including asylum-seeking, refugee and migrant children, irrespective of their nationality, immigration status or statelessness.⁸ “This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender.”⁹ Children are to be treated as such first and foremost, before being considered migrants. Consequently, they must be integrated in the child protection system on the same basis as national children.¹⁰

ii. Best interests of the child

The best interests of the child are a primary consideration in all actions concerning children, including the search for short and long-term solutions. The best interests of the child cannot be considered on the same level as all other considerations¹¹ (Article 3, CRC). Accordingly, “the child’s interests have high priority and are not just one of several considerations”, and “a larger weight must be attached to what serves the child best”.¹² “The principle must be

⁴ Ibid., para. 8.

⁵ Ibid., para. 9.

⁶ See Principles, Protection Measures and Long Term Options in Annex.

⁷ See United Nations General Assembly, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, 19 December 2018, Objective 7(f).

⁸ General Comment No. 6, op. cit., para. 12.

⁹ Ibid., para. 18.

¹⁰ Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of

Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 11; Human Rights Council, Resolution adopted on 28 September 2017, A/HRC/RES/36/5, para. 1.

¹¹ General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para. 37.

¹² Joint General Comment No. 3, op. cit., para. 28.

respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life".¹³ This determination "requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs."¹⁴

The appointment of a competent guardian as expeditiously as possible is a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child.¹⁵ Legal guardians must be consulted and informed regarding all actions taken in relation to the child and should have the authority to be present in all planning and decision-making processes, to ensure that the best interests of the child are considered as a primary consideration.¹⁶ In large scale emergencies, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of unaccompanied and separated children should be safeguarded and promoted by States and organizations working on behalf of these children.¹⁷ In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.¹⁸ At all times children should be informed of arrangements with respect to guardianship and legal representation, and their opinions should be taken into consideration.¹⁹

iii. Life and full development

Under Article 6 of the CRC, the right to life, survival and development is recognized. Many of the obligations of the Convention, particularly those related to health, adequate standard of living, education, leisure and play (Articles 24, 27, 28, 29 and 31) are relevant to ensuring the maximum development of the child, as well as the prevention and reduction, to the maximum extent possible, of migration-related risks faced by children.²⁰ The Convention provisions protecting the child from violence and exploitation (in particular Articles 19 and 32-39) are as vital to maximum survival and development as those on the provision of services.²¹

iv. Family unity

No one shall be subjected to arbitrary interference with his or her family. The family, as the natural and fundamental group unit of society, is entitled to protection by the State (Article 16, CRC; Articles 14 and 44, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)).²²

States should not only refrain from actions which could result in family separation, but also make all efforts to reunite an unaccompanied or separated child with his or her parents except where further separation is necessary in the best interests of the child. These efforts should also take full account of the right of the child to express his or her views (Article 12, CRC).²³ Children during all phases of migration (for example at the border, upon entry or after

¹³ General Comment No. 6, op. cit., para. 19.

¹⁴ Ibid., para. 20.

¹⁵ Ibid., para. 21.

¹⁶ Ibid., para. 33; Article 3(2), CRC.

¹⁷ Ibid., para. 38.

¹⁸ Ibid., para. 36.

¹⁹ Ibid., para. 37.

²⁰ K. Touzenis, *Human Rights of Migrant Children*, International Migration Law Series No. 15, IOM, 2008, p. 23; Joint general comment No. 3, op. cit., paras. 40, 42.

²¹ Implementation Handbook for the Convention on the Rights of the Child, UNICEF, 2002, p. 104.

²² See Article 14, ICRMW, 18 December 1990, U.N.G.A. Res. 45/158, 2220 U.N.T.S. 3; See also Articles 12 and 16(3), Universal

Declaration of Human Rights (UDHR), 10 December 1948, U.N.G.A. Res. 217 A; Article 10(1), International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 U.N.T.S. 3; and Articles 17 and 23, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 U.N.T.S. 171.

²³ General Comment No. 6, op. cit., para. 81; 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 (2017) of the Committee on 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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 27. See also Articles 10(1), CRC and Article 44(2), ICRMW; Joint General Comment No. 3, op. cit., para. 38.

a disembarkation) shall not be separated from their parents or primary caregivers—unless this is in their best interests.

v. *Non-refoulement*

The receiving State must respect its international obligations, in particular its *non-refoulement* obligation. It must not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child (Article 33, Convention relating to the Status of Refugees;²⁴ Article 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);²⁵ Articles 6 and 37, CRC). The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services, the real risks of trafficking or recruitment in armed forces,²⁶ or the real risk of being submitted to female genital mutilation.²⁷

vi. *Evolving capacities*

Article 5 of the CRC mandates that State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention. The Committee on the Rights of the Child has frequently expressed concern where countries do not appear to have fully accepted the concept of the child as an active subject of rights, relating this to Article 5 and to Article 12 of the CRC. National lawmakers and administrators should be mindful of the

capacity of the child to exercise, for example, his or her rights to nationality (Article 5, CRC); and that a child should be considered a bearer of rights, entitled to protection and care as provided notably in the CRC.²⁸

vii. *Participation*

The views of children should be given “due weight in accordance with the age and maturity of the child” (Article 12, CRC).

viii. *Confidentiality*

Confidentiality of the information received in relation to an unaccompanied or separated child should be protected, consistent with the obligation to protect the child’s rights, including the right to privacy (Article 16, CRC).²⁹

III. INITIAL ASSESSMENT AND MEASURES

Actions required for the care and protection of **unaccompanied or separated children** should include: early identification of a child as unaccompanied or separated; proper registration; temporary care arrangements and tracing of family members, assessment for family reunion and long term solutions such as family reunification (where possible and if in the child’s best interests) or alternative long-term placement. The children should also have access to education during the status assessment and family tracing. A State should have staff specifically qualified to deal with migrant children, particularly when unaccompanied or separated.

The specific situation of each child (cultural and migratory backgrounds, etc.) should be taken into consideration on a case by case basis. Particular attention should be given to the

²⁴ See Article 33, Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

²⁵ See Article 3, CAT, 10 December 1984, U.N.G. A. Res. 39/46, 1465 U.N.T.S. 85.

²⁶ General Comment No. 6, op. cit., para. 26-27.

²⁷ Human Rights Committee, *Kaba v. Canada*, CCPR/C/98/D/1465/2006, 25 March 2010, paras. 10.1 and 10.4; Committee on the Rights of the Child, *I.A.M. v. Denmark*,

CRC/C/77/D/3/2016, 25 January 2018, paras. 11.3, 11.4, 11.9 and 12; Committee on the Elimination of All Forms of Discrimination Against Women, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 14 November 2014, para. 15.

²⁸ K. Touzenis, op. cit., pp. 22-23.

²⁹ General Comment No. 6, op. cit., para. 29.

vulnerable situation faced by victims of trafficking (VoTs) or other crimes.

i. Identification

Identification of a child as separated or unaccompanied immediately upon arrival or as soon as his/her presence in the country becomes known to the authorities should be prioritized (Article 8, CRC).

ii. Registration

Registration and documentation must be carried out as soon as possible after a separated child is identified.³⁰ Establishing his/her identity and providing him/her with personal identity documentation are paramount. An initial interview should be conducted in an age-appropriate and gender-sensitive manner, in a language understood by the child, by professionally qualified persons in order to ascertain the identity of the child, including the identity of both parents, other siblings, as well as the nationality of the child. During the interview, particular attention shall be given to the reasons for being separated or unaccompanied (e.g. parents are still in the country of origin, were lost during travel or died) as well as to the identification of particularly vulnerable children (e.g. those with disabilities, victims of trafficking in persons, victims of trauma (former child soldiers) etc.). Asylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age.³¹

iii. Family tracing

Tracing of family members shall be commenced as early as possible after a child has been identified as separated or unaccompanied and be proactive. Even if immediate reunification is

not possible, tracing should be carried out on behalf of every separated child with a view to at least restoring contact with close or extended family members, or with previous primary caregivers.³²

However, the safety of the child and his/her family must be paramount. "Tracing is an essential component of any search for a durable solution and should be prioritized except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardize fundamental rights of those being traced."³³

IV. SPECIFIC PROTECTION NEEDS

i. Appointment of a guardian

In order to secure the proper representation of an unaccompanied or separated child's best interests, a guardian should be appointed as soon as the unaccompanied or separated child is identified. With a view to ensuring the respect of the best interests of the child, the guardianship should normally be assigned to an accompanying adult family member or non primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so. In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely.³⁴

ii. Accommodation arrangements

The Convention on the Rights of the Child imposes an obligation on States parties to also provide alternative care arrangements for unaccompanied children outside their country of origin.

When choosing among the options mentioned in article 20 para. 3 of the CRC, due regard should be given in particular to the religious, cultural and linguistic background of the

³⁰ ICRC, IRC, Save the Children, UNICEF, UNHCR, World Vision, Inter-agency Guiding Principles on Unaccompanied and Separated Children, January 2004.

³¹ General Comment No. 6, op. cit., para. 66. UNHCR Guidelines on International Protection: Child Asylum Claims under Articles

1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009.

³² Inter-agency Guiding Principles on Unaccompanied and Separated Children, op. cit., p. 35.

³³ General Comment No. 6, op. cit., para. 80.

³⁴ *Ibid.*, para. 34.

children, amongst other elements.³⁵ In addition, States should develop procedures and standards to establish firewalls between public or private housing providers and immigration enforcement authorities, and avoid criminalizing irregular migrant children for exercising their right to housing. Priority should be given to community-based solutions that build on existing social structures.³⁶

iii. Access to quality education

The access to quality and inclusive education should be maintained during all phases of the migration cycle, on the basis of equality with nationals of the country of residence. States have the obligation to eliminate any discrimination against migrant children and to adopt the necessary measures to overcome educational barriers and prohibit and prevent any kind of educational segregation.³⁷ Where educational training is not locally available, facilities provided to unaccompanied children should also be available to other children.³⁸ The education should also include vocational training for both girls and boys. Access to quality education should also be ensured for children with special needs, in particular children with disabilities. In case of planned return, the access to quality education must be guaranteed until the end of the stay and implementation of the return.

All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language.³⁹

iv. Health

Unaccompanied children should have the same right to access to health care as national children.

In line with the right of the child to the enjoyment of the highest attainable standard of health, recognized by article 24 of the CRC, the health facilities should be capable of taking in due consideration the particular mental and physical vulnerability of unaccompanied children and to properly address the psychological stress or traumas suffered by many of them. The mental health care provided should also be culturally appropriate and gender-sensitive. Qualified psycho-social counselling should also be provided.⁴⁰

Child protection systems and education systems should have in place protocols to identify children in need and a referral system to orient a child who needs healthcare, including for mental health issues.⁴¹

v. Legal and practical measures to address the particular vulnerability to exploitation of unaccompanied children

Unaccompanied or separated children in a country outside their country of origin are particularly vulnerable to exploitation and abuse. Necessary measures include identifying unaccompanied and separated children and register them for rights-based/protection case management ; regularly inquiring as to their whereabouts; and conducting information campaigns that are age-appropriate, gender-sensitive and in a language and medium that is understandable to the child.⁴² The adoption of an adequate legislation and protection measures to counter the activity of the criminal organisations responsible for human trafficking or other type of children exploitations should also be considered a priority.

vi. Specific measures for child soldiers

The special protection measures for child soldiers should include: prevention of

³⁵ *Ibid.*, para. 40.

³⁶ Inter-agency Guiding Principles on Unaccompanied and Separated Children, op. cit., p. 46; Joint General Comment No. 4, op. cit., para. 52.

³⁷ Joint General Comment No. 4, op. cit., paras. 60 and 62.

³⁸ Inter-agency Guiding Principles on Unaccompanied and Separated Children, op. cit., p. 49.

³⁹ General Comment No. 6, op. cit., para. 42.

⁴⁰ *Ibid.*, paras. 46-48.

⁴¹ States have the obligation to assess and address the particular vulnerabilities of unaccompanied and separated children in ensuring their access to health care, see General Comment No. 6, op. cit., para. 47.

⁴² *Ibid.*, para. 52.

recruitment (which is a form of child human trafficking), appropriate support services to former child soldiers to enable reintegration into normal life, strict application of the *non-refoulement* principle and granting of refugee status.⁴³

vii. Detention

As a general principle, under current applicable international law, in particular the CRC, **migrant children should never be deprived of liberty and detained for migration-related reasons**. Indeed, the detention of children on the basis of their migration status or that of their parents is never in the best interest of the child, even as a last resort.⁴⁴ In 2017, the Committee on the Rights of the Child (CRC) and the CMW Committee affirmed in their Joint General Comments (JGCs) that every child, at all times, has a fundamental right to liberty and freedom from immigration detention.⁴⁵ The Committees based this conclusion on both Conventions, and especially on Article 37 of the Convention on the Rights of the Child (CRC), which is almost universally ratified. Both Committees further emphasized that irregular entry and stay do not constitute crimes per se against persons, property or national security, and thus, criminalizing irregular entry and stay exceeds

the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.⁴⁶ Already in 2012, the CRC Committee had recommended that children should not be criminalized or subjected to punitive measures because of their or their parents' migration status and that detention of migrant children for reasons linked to their migration status or that of their parents was never in the best interests of the child.⁴⁷

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in its 2021 General Comment, further found that the detention of migrant children is unnecessary and disproportionate, and therefore constitutes a child-rights violation and contravenes the principles of non-discrimination, best interests of the child, right to life, survival and development, and participation, as well as every child's right to liberty and family life.⁴⁸

Since 2012, a growing number of UN and regional human rights experts, as well as States,⁴⁹ regional organizations⁵⁰ and regional human rights courts⁵¹ have joined the CRC Committee in finding that immigration detention is never in the best interests of the child, and therefore a clear violation of child

⁴³ *Ibid.*, paras. 54-60.

⁴⁴ Joint General Comment No. 4, op. cit., para. 5; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 5 (2021) on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights, CMW/C/GC/5, 23 September 2021, para. 40.

⁴⁵ Joint General Comment No. 4, op. cit., para. 5.

⁴⁶ *Ibid.*, para. 7; General Comment No. 5, op. cit., para. 37.

⁴⁷ Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, 78, November 2012, para. 78.

⁴⁸ General Comment No. 5, op. cit., para. 40.

⁴⁹ Global Compact for Safe, Orderly and Regular Migration, op. cit., Objective 13(h).

⁵⁰ The Parliamentary Assembly of the Council of Europe has stated that unaccompanied migrant children should never be detained because of migration grounds, see Resolution 1707 (2010) Detention of asylum seekers and irregular migrants in Europe, para. 9.1.9, and Resolution 1810 (2011) Unaccompanied children in Europe: issues of arrival, stay and return, para. 5.9; See also Parliamentary Assembly of the Council of Europe, Recommendation 2056 (2014) The alternatives to the immigration detention of children, para. 2.

⁵¹ The Inter-American Court of Human Rights stated that the deprivation of liberty of a child migrant, solely based on its

migration status is arbitrary and contrary to the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, see Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014, para. 154. The European Court of Human Rights has adopted a less strict interpretation but has acknowledged that "the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children", and that it can only constitute a measure of last resort and if no other measures less restrictive of liberty can be put in place, see *Popov v. France* (2012), Applications No. 39472/07 and 39474/07, para. 147; *G.B. and Others v. Turkey* (2019), Application No. 4633/15, para 168, *Nikoghosyan and Others v. Poland* (2022), Application No. 14743/17, para. 86. Furthermore, the Court has stated that the child's situation of extreme vulnerability takes precedence over considerations relating to his or her status as an irregular migrant, see *Khan v. France* (2019), Application No. 12267/16, para. 74. When children are placed in detention, the European Court of Human Rights has taken into account elements such as the age of the children, the length of their detention, the material conditions in the detention facilities and their appropriateness for accommodating children, the particular vulnerability of children caused by previous stressful events and the effects of detention on the children's psychological condition to determine if a violation has occurred, see *M.H. and Others v. Croatia* (2021), Applications No. 15670/18 and 43115/18, para. 186.

rights. What has emerged is a growing clarity and international consensus around the non-detention of refugee, asylum seeker and migrant children when the justification for the use of detention is based on the migration or residency status of the child or of their parent(s) or guardian(s).⁵²

As stated by the Special Rapporteur on the human rights of migrants, detention of children, even for short periods, can have severe physical and psychological consequences and adverse effects on their development. Consequently, the CMW Committee stated that, even a short period of detention is a violation of child rights and can constitute cruel, inhuman or degrading treatment. Any kind of child and family immigration detention should thus be prohibited by law and its abolishment ensured in policy and practice.⁵³

To prevent that migrant children are placed in migration detention, the Committee stated that child protection or welfare officials should immediately be informed and be in charge of screening the child for protection, shelter and other needs.⁵⁴ Migration detention being contrary to child rights and international law, States must adopt alternatives and 'solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return.'⁵⁵ The non-custodial solutions should meet all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children's holistic

development, as well as be carried out by competent child protection actors engaging with the child and, where applicable, his or her family.⁵⁶

If a child is deprived of his or her liberty, for reasons not related to their or their parent's migration status, he or she must be treated with humanity and with respect for the inherent dignity of the human person, and in a manner which takes into account the particular needs of the child's age and rights. The child should: not be separated from adults unless it is considered to be in the child's best interests; be allowed contact with family, through correspondence and visits, save in exceptional circumstances; have prompt access to legal and other appropriate assistance; be able to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority; and to have a prompt decision.⁵⁷

viii. Juvenile offenders

Unfortunately, it may happen that criminal proceedings need to be brought against a child non-national – either based on irregular entry or due to illegal activities in the host state.

In these cases, it is important to follow the international standards laid down in the CRC and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules).⁵⁸

Article 40 of the CRC covers the rights of all children charged or sentenced under the penal law. Thus, it embraces treatment from the moment an allegation is made, through the investigation, arrest, charge, any pre-trial period, trial and sentence. The Article requires

⁵² Inter-Agency Working Group (IAWG) to End Child Immigration Detention, Summary of normative standards and recommendations on ending child immigration detention, August 2016.

⁵³ General Comment No. 5, op. cit., paras. 42, 43; Joint General Comment No. 4, op. cit., para 12.

⁵⁴ General Comment No. 5, op. cit., para. 45.

⁵⁵ Joint General Comment No. 4, op. cit., para. 11; Report of the 2012 Day of General Discussion, op. cit., para. 79; Implementation Handbook for the Convention on the Rights of the Child, op. cit., p. 540.

⁵⁶ Joint General Comment No. 4, op. cit., para. 11; Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, 78, November 2012, para. 79.

⁵⁷ The Special Rapporteur on the human rights of migrants, Statement by the UN human rights mechanisms on the occasion of the UN High Level Summit on large movements of refugees and migrants, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20516&LangID=E> (accessed October 2016).

⁵⁸ GA Resolution A/RES/40/33 from 1985.

States to promote a distinctive system of juvenile justice for children (i.e. up to 18 years or the age of majority), with specific positive rather than punitive aims set out in paragraph 1.⁵⁹ Article 40 lists minimum guarantees for the child and requires States Parties to set a minimum age of criminal responsibility, to provide measures for dealing with children who may have infringed the penal law without resorting to judicial proceedings and to provide a variety of alternative solutions to institutional care. In all cases, it is important to apply a child-focused approach, so that migrant children are not seen as delinquents but rather as individuals in need of protection, as reflected in the development of international law, which has merged juvenile justice with welfare services and protection.⁶⁰ In any case involving a child, States should ensure that the child is treated in a manner consistent with their sense of dignity and worth.

ix. Employment of children

It has to be recognized that children who migrate very often do so with an economic project in mind and put this into a context of protection. National children often have jobs before they turn 18 and as long as this is carried out without harm to the child it is acceptable. There has to be a difference between “work” and “exploitation”.

Article 10 of the ICESCR states that:

“Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful

to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”

This Article is integrated into the CRC. Article 32 states that:

“ States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development ... States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: a) Provide for a minimum age or minimum ages for admission to employment; b) Provide for appropriate regulation of the hours and conditions of employment; c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.”

Minimum age and regulation of hours and conditions of employment are especially crucial with regard to children. The fact that the Article does not provide details for the content of these regulations is a weakness.⁶¹ Detailed regulations should be enacted and enforced for all children who find themselves on the labour market. The ILO Convention No. 138 establishes that States should set a minimum age for employment or work, which should be no lower than the age of compulsory schooling and in any case not lower than 15 years.⁶² Moreover, the

⁵⁹ CRC, Art. 40(1): States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

⁶⁰ G. van Bueren, *The International Law on the Rights of the Child*, p. 199.

⁶¹ The details are to be found in ILO Recommendation n. 146, para. 12, which recommends that the conditions under which persons under the age of 18 are employed should be maintained at a satisfactory standard and supervised closely. However, the Recommendation does not specify the exact number of hours permissible. It does recommend that the hours be strictly limited both on a daily and a weekly basis. Such limitations are obviously valid for *all* children. Nevertheless, the provisions leave much too broad a margin of appreciation.

⁶² ILO Convention 138, Article 2(4) allows for an initial minimum age of 14 years in relation to States with an insufficiently

ILO Convention aims to protect children from any type of employment or work, which by its nature is likely to jeopardise the health, safety or morals of children.⁶³

x. *Training of personnel dealing with unaccompanied children*

The training of officials working with separated and unaccompanied children and dealing with their cases is of the utmost importance for an effective implementation of the rights of unaccompanied children. The training programmes should include the following elements: principles and provisions of the Convention, knowledge of the country of origin of separated and unaccompanied children, appropriate interview techniques, child development and psychology, cultural sensitivity and intercultural communication.⁶⁴

V. LONG TERM OPTIONS

i. *Return to the country of origin*

All returns must be consistent with respect for the rights, including the rights to dignity, privacy and family unity of the child, as well as the principle of non-refoulement, and in conformity with the best interests of the child.⁶⁵ Steps to ensure sustainable return include evaluating the safety, security and other conditions, including reunification with the parents, socio-economic conditions (effective access to basic social rights such as education, training and health) awaiting the child upon return, which may require home study conducted by social network organizations. Separated or unaccompanied children may only be returned to their country of origin if, on arrival, adequate reception and care are available (based on their

needs, age and degree of independence). Care can be provided by parents or other adults responsible for the child, or by governmental or non-governmental bodies. However, in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.⁶⁶ Furthermore, returning an unaccompanied child to reception facilities in his or her country of origin should only be decided if part of an agreed plan to reunite with family members or when there are exceptional reasons for believing such return to be in the child's best interests.⁶⁷ It should be obligatory to ensure that a legal guardian is available in the country of origin. To examine all these conditions and whether they are adequately met, a formal Best Interest Determination (BID) must be conducted prior to any return, forced or voluntary, of a separated or unaccompanied child migrant. A Best Interests Determination is a formal process with specific procedural safeguards and documentation requirements that is conducted for migrant children when unaccompanied or separated, whereby a decision-maker is required to weigh and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognized in the CRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of children. A BID is made by a panel of relevant stakeholders, to determine the child's best interests regarding an important decision on durable solutions (local integration, return, family reunification etc). A report and an assessment made by a specialist

developed economy; Article 2(5) goes on to state that: Each Member which has specified a minimum age of 14 years in pursuance of the provisions of the preceding paragraph shall include in its reports on the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation a statement: (a) That its reason for doing so subsists; or (b) That it renounces its right to avail itself of the provisions in question as from a stated date. One hundred and fifty-seven States are parties to this Convention.

⁶³ ILO Convention 138, Art. 3.

⁶⁴ General Comment No. 6, op. cit., para. 96.

⁶⁵ See IML Information Note on the principle of *non-refoulement*.

⁶⁶ General Comment No. 6, op. cit., para. 85.

⁶⁷ European Commission, Return Handbook (2017), p. 123; European Union Agency for Fundamental Rights, [Returning unaccompanied children: fundamental rights considerations](#) (2019), p. 25; UNICEF clearly discourages this practice, considering it as only a last resort and not as an adequate form of long-term care for returned children. IOM is of the same view, emphasising that a child-welfare institution should be the last option, to be taken only if it is part of an agreed plan to reunite with family members in a timely fashion, or there are exceptional reasons for believing such return to be in the child's best interest.

on protection, community services, or child welfare, to a multi-disciplinary panel capable of considering each child on a case-by-case basis, is the most appropriate mechanism for undertaking a BID.⁶⁸ The BID is based on a best interests' assessment, which evaluates and balances all the elements necessary to take a decision in a specific situation for a specific child. Elements, such as the child's views, identity, family environment, the protection, care and safety of the child, his or her situation of vulnerability, his or her right to health and to education must be taken into account when assessing and determining the child's best interests. The content and weight of each element will depend on each individual child, and may have to be weighed against each other in some cases.⁶⁹

Ideally, the return of unaccompanied or separated children, regardless of their status, should be on a voluntary basis. Return will be more realistic if it is voluntary because the child will assist in the necessary processes. This should facilitate better preparation and planning, which in turn should serve to safeguard the child's immediate wellbeing and to ensure a long term and durable solution. Regardless of the level of support, separated and unaccompanied children facing forced or involuntary return may opt out of official procedures and avoid statutory support.⁵³ The consequence of such action is that some separated and unaccompanied children may find themselves "under that radar", often in the "underground" economy, where the likelihood of harm or abuse, including human trafficking, will increase. When it is believed that there are exceptional circumstances, the decision to return a separated child against his or her will should always be made in a court rather than during immigration procedures, and on the basis of the BID.

Return should be pursued after all other durable solutions have been considered, and the child must be given relevant information about the return procedure and access to all the rights, including education until the implementation of the return.⁷⁰ A plan should exist for the child's reintegration following their return. Removal practices must be appropriate and proportionate regarding the situation of the child, and separated and unaccompanied children must be escorted throughout their return journey either by their guardian or another person the child finds appropriate. In the country of return, procedures should exist for formal transfer of care and custodial responsibilities for the returned child and appropriate reintegration support should be available to the child. Formal monitoring of the outcomes of the impact of return on children should exist in countries of origin.⁷¹ Before any return, the deciding authority must ascertain that each returning child is able to access education, health care, psychosocial support, child protection and social services without discrimination upon return.⁷²

ii. Local integration

Local integration is the primary option if return to the country of origin is impossible on either legal or factual grounds. Local integration must be based on a secure legal status (including residence status) and be governed by the Convention on the Rights of the Child's rights that are fully applicable to all children who remain in the country. Once it has been determined that a separated or unaccompanied child will remain in the community, the relevant authorities should conduct an assessment of the child's situation and then determine the appropriate long-term arrangements within the local community and other necessary measures to facilitate such integration.⁷³

⁶⁸ United Nations High Commissioner for Refugees, *Guidelines on Formal Determination of the Best Interests of the Child* (2006), pp. 5 and 21.

⁶⁹ General Comment No. 14, op. cit., paras. 52-84; General Comment No. 3, op. cit., para. 31.

⁷⁰ General Comment No. 3, op. cit., paras. 32(k) and 33.

⁷¹ See UNICEF, [Return of separated children to return houses in countries of origin](#), May 2012.

⁷² See UNICEF, [Building Bridges for Every Child: Reception, Care and Services to Support Unaccompanied Children in the United States](#), February 2021.

⁷³ General Comment n. 6, op. cit., para. 89.

iii. Resettlement in a third country (emigration)

Resettlement (emigration) in a third country may offer a durable solution for an unaccompanied or separated child who cannot return to his/her country of origin and for whom no long term solution can be envisaged in the host country.⁷⁴

Resettlement is particularly appropriate if it is the only means to effectively and sustainably protect a child against *refoulement*, persecution or other serious human rights violations in the country of stay. Resettlement is also appropriate if it serves family reunification in the resettlement country.

iv. Adoption

Adoption⁷⁵ should only be envisaged once it has been established that all efforts with regard to tracing and family reunification have failed, or

that the parents have consented to the adoption in conformity with the standards set up in the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.⁷⁶ The consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed. This supposes notably that such consent has not been induced by payment or compensation of any kind and has not been withdrawn.

Unaccompanied or separated children must not be adopted in haste at the height of an emergency.

Priority must be given to adoption by relatives in their country of residence. Where this is not an option, preference will be given to adoption within the community from which the child came or at least within his or her own culture.⁷⁷

⁷⁴ Ibid., para. 92.

⁷⁵ See Article 21, CRC.

⁷⁶ Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 29 May 1993.

⁷⁷ General Comment n. 6, op. cit., para. 91.

PRINCIPLES, PROTECTION MEASURES AND LONG-TERM OPTIONS

Principles:

- Non-discrimination
- Life and full development
- Evolving capacities
- Confidentiality
- Best interests of the child
- Family unity
- Participation

Measures to prevent separation

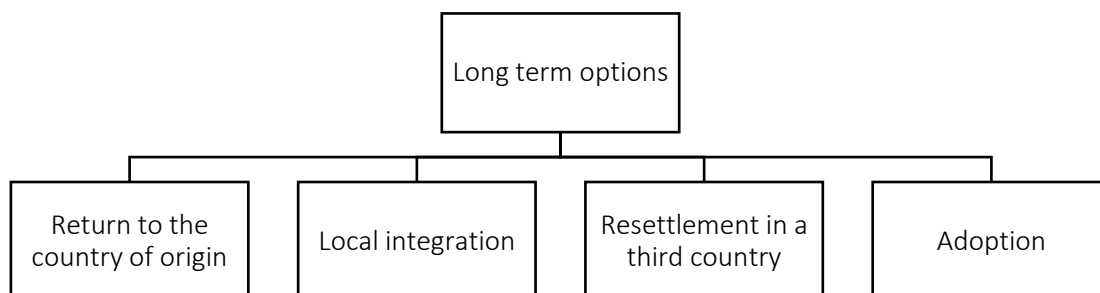
Initial assessment and measures:

- *Non-refoulement* obligation
- Identification of child as separated or unaccompanied / specific vulnerable groups (e.g. victims of trafficking)
- Registration
- Family tracing

Specific protection needs:

- Temporary care arrangements, including appointment of a guardian, child-appropriate accommodation, access to education, access to health care

Best Interests Determination (BID) /Long Term Options



SELECTED INSTRUMENTS

- Committee on the Rights of the Child, Report of the 2012 Day of General Discussion, The Rights of All Children in the Context of International Migration.
- Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
- ILO Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 20 November 1989.
- Convention on the Rights of Child, 20 November 1989.
- CRC General Comment No.6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 2005.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000.
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.
- Joint General Comment No. 3 of the CMW and No. 22 of the CRC on the general principles regarding the human rights of children in the context of international migration, November 2017.
- Joint General Comment No. 4 of the CMW and No. 23 of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, November 2017.
- CMW General Comment No. 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights, September 2021.
- Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations Convention against Transnational Organized Crime.

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