

Office of the High Commissioner for Human Rights (RRDD)

Written submission on the draft Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration (7 June 2017)

International migration is an increasingly complex phenomenon involving the often precarious movement of some 250 million people, of which nearly 50 million are children. Children traveling alone or with their families or caregivers can be at particular risk of being subject to various human rights violations. The Office thus welcomes this timely and important endeavour of the Committees to provide authoritative guidance on legislative, policy and other measures required to respect, protect and fulfil the rights of children in the context of migration.

OHCHR would like to draw to the attention of the Committees, tools, which OHCHR has developed to support States and other stakeholders. They are derived from international human rights and other relevant branches of law, relevant authoritative interpretations or recommendations by all international human rights treaty bodies and special procedure mandate holders of the Human Rights Council, and other expert sources. OHCHR's *Recommended Principles and Guidelines on Human Rights at International Borders*¹ provide guidance to States and other stakeholders on how to respect and protect the human rights of migrants, including children, in the context of rescue, screening and referrals, detention or return among others. OHCHR is further leading the development of a set of *principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements*,² which also include reference to the specific rights of children.

A number of reports of the High Commissioner for Human Rights further provide an analysis of the human rights situation of migrants, including children. These documents could also be useful in informing the Committees of the legal, policy and practical challenges to guaranteeing the rights of children in the context of migration, as well as of OHCHR's ongoing work in this respect.³

This input is provided by the OHCHR migration team (DESIB) and should be read in conjunction with previous comments provided by the migration team, as well as the Women's Human Rights and Gender Section (ROLENDDB) to the Zero Draft. We look forward to further supporting the process as required.

General observations

We welcome the holistic approach taken by the Committees in providing guidance on the human rights obligations of States Parties in a range of migration-related situations and circumstances, which may affect the rights of children⁴, including the negative impact that the non-realisation of the human rights of their parents or caregivers is likely to have on their rights.

I. Introduction

Para 2: OHCHR understands vulnerability to arise due to a range of factors that are often intersecting, can coexist simultaneously and can influence and exacerbate each other. Situations of vulnerability may change over time as circumstances change or evolve. Many children on the move are invisible and extremely

¹ Available at: http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

² <http://www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx>.

³ See *Human Rights of Migrants in Transit*, 2016 (A/HRC/31/35), available at: <http://www.ohchr.org/EN/Issues/Migration/Pages/StudyMigrantsinTransit.aspx>; *Promotion and protection of the human rights of migrants in the context of large movements*, 2016 (A/HRC/33/67), available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_67.docx; *The economic social and cultural rights of migrants in an irregular situation*, available at: http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf.

⁴ This document will hereafter refer to 'children' in the understanding that this includes all children affected by migration/in the context of migration.

vulnerable; they are not formally registered with the child protection authorities, best interest assessment and determination procedures are rarely carried out in decisions related to migrant children who may not be seeking asylum, and guardianship procedures are often lengthy or non-functional. Particular attention must therefore be paid to those factors of vulnerability relating to a) their reasons for leaving their place of origin, b) the circumstances they encounter en route, at borders and at destination, as well as c) their identity or circumstance, such as their age, gender, or lesbian, bisexual, transgender and intersex, health or disability status.⁵

While it is important to better understand and provide human rights protection to children in situations of vulnerability, the Committees may wish to specifically acknowledge, at the outset, that this does not detract from children's agency and that a human rights-based approach seeks to ensure that migration responses aim above all to empower children, rather than stigmatizing them and denigrating their agency.

B. Objective and scope

Para 9: We welcome the Committees' focus on the specific risks and human rights protection gaps faced by all children, whether they are migrating alone or with their families or caregivers, and regardless of their or their parents' migration status. We further note the important emphasis on the equal application of the rights under the CRC to all children, without discrimination and irrespective of specific other legal categories within which they may fall. In this regard, the Committees may wish to consider referring to 'children' or to 'girls and/or boys' to demonstrate the gender considerations as relevant, throughout the Joint General Comment. Current references to 'categories of children in the context of migration' are lengthy and could be misunderstood as referring only to certain recognised legal categories of children.

Para 10: In accordance with the understanding that the rights of the child apply to all children, including children in the context of migration, regardless of their status, we suggest the Committees to note that in a similar vein, all previous and future General Comments of the CRC may also be relevant to the rights of migrant children depending on their situation and circumstances.

1. Non-discrimination

Para 20: We welcome the emphasis that all children are entitled to the enjoyment of their rights. However, we caution against the use of 'in both voluntary and involuntary migration situations' as it is OHCHR's view that these terms are not defined and that migration is not a dichotomous phenomenon, but rather sits along a continuum between 'voluntary' and 'involuntary' and as we currently witness it, is rarely entirely voluntary in the true sense of that term. We suggest replacing the phrase with, 'regardless of their reasons for moving' to also acknowledge the complex combination of factors that may compel a child or a family with children to move.

Para 21bis: We suggest including an additional paragraph relating to gender-specific concerns and the importance of States Parties to conduct robust gender analysis of the differential impacts of migration policies and programmes on children of all genders. States Parties should review and amend any gender discriminatory restrictions on migration in law or practice that limit opportunities for women and girls or which do not recognise their capacity and autonomy to make their own decisions.

2. Best interest of the child

The CRC has previously explained that, "the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best" (CRC GC No. 14, para 39). The Committees may wish to consider reflecting this in the current Joint General Comment in order to provide further clarity to States Parties and ensuring consistency when referring to situations in which a child's best interests are weighed against other interests. In addition, the Committees may wish to add that the

⁵ OHCHR report on the promotion and protection of the human rights of migrants in the context of large movements, /HRC/33/67, para 15. See also GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (draft), available at: <http://www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx>

best interest principle considers the short-, medium- and long-term effects of actions related to the development of the child.

3. Life, survival and development

Paras 35: We suggest emphasising that return and reintegration measures should be sustainable from the perspective of the child's life, survival and development.

4. Right to be heard

Given the inextricable link between the child's right to be heard, express her or his views and participation with the operationalisation of the principle of the best interest of the child, the Committees may wish to consider moving this section immediately after the section relating to the best interest of the child.

5. Protection against expulsion: non-refoulement, prohibition of collective expulsion

The principle of non-refoulement and prohibition of arbitrary and collective expulsion are two distinct but closely connected principles. Given the heightened risks for children in relation to expulsion and returns, the Committees may wish to further emphasise a) the absolute prohibition of non-refoulement applicable to all, regardless of status; b) what constitutes harm as indicated in paragraphs 44 and 45; c) how States Parties should assess these risks and the procedural guarantees in this regard (essentially the prohibition of arbitrary and collective expulsion). We therefore suggest reordering the paragraphs under this section and elaborating on States Parties' obligations in this regard.

The principle of non-refoulement, an absolute norm of customary international law, represents an essential protection under international human rights law prohibiting States from removing individuals, regardless of status, from their jurisdiction when they would be at risk of irreparable harm upon return.

At the outset, the Committees may wish to consider strengthening their reference to this important protection under international human rights law (explicitly contained in CAT and international refugee law, but also guaranteed through the jurisprudence of other treaty bodies).

The prohibition of collective expulsion is distinguishable from the principle of non-refoulement in that it is a fair trial and due process right. It requires any State considering expelling a group of non-nationals to review, with due diligence and in good faith, and decide individually each case of expulsion. It is a guarantee that must be considered in its own regard and that entitles every non-national to an individualised examination of all arguments militating against his or her expulsion. At the same time, the purpose of this guarantee is closely connected to the broader concept of non-refoulement, in light of the protection of an individual from return to harm.⁶

The draft principles and guidelines on the human rights protection of migrants in vulnerable situations suggest:

- Children should only be returned when it has been determined that is in the best interest of the child. Considerations such as those relating to general migration control, cannot override best interests considerations. When determining whether a child will be returned (whether he or she is unaccompanied or separated, or accompanied by parents or other caregivers), give due weight to the principle of the best interests of the child as a primary consideration. Such determinations should:
 - Be a formal procedure involving competent officials.
 - Contain appropriate safeguards. These include, inter alia, the rights of the child to be heard, and to have competent and independent legal representation.
 - Assess fairly and equally all the solutions that are available to the child.
 - Give full consideration to the child's development and survival.

⁶ See •Amicus brief filed by the UN High Commissioner for Human Rights in the case of N.D. and N.T. v Spain in the European Court of Human Rights, para 11, available at: <http://www.ohchr.org/Documents/Issues/Migration/ThirdPartyIntervention.pdf>.

- Take into account the socio-economic conditions in the child's country of origin and the family environment, and whether he or she can return to safe and adequate conditions and be provided proper care and custody.
- Where return is deemed not to be in the child's best interest, keep families together in the country of residence rather than deport parents without their children. When unaccompanied and separated children are returned, States of origin and destination should cooperate to continue family tracing efforts after return.
- Before each child returns, prepare a plan for his or her sustainable reintegration and continued evaluation. Such a plan should include targeted measures such as effective access to justice, education, health, family life, and protection against all forms of violence. Return should not cause children to become homeless; nor should they be housed in orphanages, residential care facilities, or any situation that will compromise their development or lead to social exclusion. Migrants should not be returned to areas that are consistently subject to extreme weather or slow onset events.

Para 42: The Committees may wish to consider emphasising more strongly that return or repatriation is one of *various* possible options which all have to be considered equally, rather than return being the default or preferred option from the outset. We also suggest moving this paragraph further down and to include further information in relation to sustainable return and reintegration. In this regard, the CESC Committee has noted that sustainable returns should include: equal enjoyment of covenant rights, especially in the field of social protection, health care, education and employment.⁷

B. Legal obligations

2. Right to liberty and non-detention

We welcome the reiteration that children should never be detained for immigration purposes, whatever their status or the status of their parents, and not even for short periods of time, and that States Parties should expeditiously and completely cease the detention of children.

Para 50: We seek to clarify whether the Committees intended to state that Article 37 (b) does not apply to immigration related detention, assuming that the other paragraphs (a, c, and d) would still apply.

Para 54: We seek to clarify whether the reference to the 'limitation to the right to liberty' in the context of alternatives to detention relates to the parents or the children and whether 'restrictions on the freedom of movement' would be more adequate.

3. Due process and access to justice

We note the potential overlap with access to justice and redress mechanisms under the section 'protection from violence'. The Committee may wish to consider strengthening the elements on access to justice and redress in this section in the context of children who have suffered human rights violations and/or crimes.

6. Protection from all forms of violence and abuse

The Committees may wish to consider noting that restrictive migration policies, including criminalization, the absence of sufficient safe, accessible and affordable regular migration channels or lack of adequate child protection systems render migrant children, including unaccompanied or separated children, particularly vulnerable to suffering violence and abuse during their migration journey and in the country of destination. In addition, we suggest including reference to States Parties' obligations to ensure that children are protected from sexual and gender-based violence, including domestic violence. Children who are victims of torture, violence and exploitation should have access to safe accommodation and appropriate care.

8. Adequate standard of living

Given the incidences of planned relocations or evictions from formal and informal settlements, the Committee may wish to consider including guidance on ensuring free, prior and informed consent, in accordance with the

⁷ See CESCR, Concluding Observations on Bosnia Herzegovina, U.N. Doc. E/C.12/BIH/CO/2 (2013), para 11

best interests of the child and due process guarantees, as well as general principles of reasonableness and proportionality, and only after alternatives to evictions have been duly considered. Children should not be subjected to forced eviction.⁸

9. Right to health

We suggest including specific reference to the right to physical *and mental* health care. In this regard, the Committees may wish to acknowledge that children may experience severe emotional distress and may have particular and often urgent mental health needs. Children should therefore have access to specific care and psychological support, recognizing that children experience stress differently from adults.⁹

The Committees may further wish to include a stronger gender-dimension, ensuring girls have equal access to quality health services, goods and facilities, including access to rights-based, comprehensive and integrated sexual and reproductive health information and services. This should include inter alia, menstrual hygiene products, safe and effective methods of modern contraception; emergency contraception; safe and accessible abortion care; prevention, treatment, care and support for sexually transmitted infections including HIV; and specialised care for girls and boys who are survivors of sexual violence and abuse, including psycho-social support.¹⁰

IV. International cooperation

The Committees may wish to encourage States Parties to establish or strengthen multi-stakeholder partnerships and cooperation for the purpose of upholding the rights of children in the context of migration. Stakeholders include national human rights institutions, intergovernmental, international and regional organizations, States, civil society organizations including representative migrants' associations, women's organizations, trade unions, representative employers' organizations, and private sector actors, at local, national, regional and international level.

⁸ See draft Principles and Guidelines on the human rights protections of migrants in a vulnerable situation, 13.4; CESCR, General Comment No. 7 on the Right to adequate housing (Article 11(1) of the Covenant): Forced evictions, 1997; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Basic Principles and Guidelines on development-based evictions and displacement, A/HRC/4/18, Annex 1, at <http://www.ohchr.org/Documents/>.

⁹ See draft Principles and Guidelines on the human rights protections of migrants in a vulnerable situation, 12.7.

¹⁰ See draft Principles and Guidelines on the human rights protections of migrants in a vulnerable situation, 12.4.