

# **SITUATION OF CHILDREN THAT MIGRATE UNACCOMPANIED OR SEPARATED FROM THEIR PARENTS: LEGAL FRAMEWORK AND EVIDENCE FROM PRACTICE IN GREECE**

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CMW-CRC Joint General Comment on the Human Rights of Children in the Context of International Migration

## **1. Executive Summary**

The present submission addresses the situation of children that migrate unaccompanied or separated from their parents. The submission reviews the legal recognition of the vulnerability of these children and claims that the situation of these migrant children is still very unstable in the vast majority of countries of transit and destination. Therefore, we argue that it is not enough to just impose obligations upon States, but that there should be a general recognition of the necessity to improve States' compliance with such obligations.

We provide evidence from the practice in Greece, a country particularly important to the reception of refugees and migrants arriving in Europe. We note that legal provisions are rarely implemented in practice in Greece, and that the situation of unaccompanied or separated migrant children is alarming.

We suggest that the present joint general comment could lay the foundations of a common strategy in relation to the protection of unaccompanied or separated migrant children's rights, taking into account their specific situation of vulnerability vis-à-vis the multiple risks of exploitation and abuses while on the move and once at the destination country.

We recommend that the following legal obligations should be recognised as the minimum legal requirements for the protection of unaccompanied or separated migrant children in transit and destination countries:

- Age assessment must be conducted in a scientific and safe manner, respecting human dignity and using gender-based and culturally appropriate approaches.
- States should refrain from using detention as a measure of immigration control and notably abolish children detention.
- States should provide accommodation in an environment of non-deprivation of liberty, allowing entry into and exit from the place where the child is lodged.
- States should provide material conditions and an adequate regime, consistent with the respect of human dignity and ensuring the comprehensive protection of migrant children's rights.

- States should adopt special measures of protection, if necessary and pertinent in view of the best interest of the child. These should include measures to trace the members of an unaccompanied or separated child's family, if this is in his or her best interest.
- States should adopt all necessary measures to prevent and combat human trafficking and take action to effectively investigate and protect victims of trafficking.
- States should ensure that all due process guarantees are respected, including the right of the child to be heard and to participate at different stages of the proceedings before a tribunal.
- States should appoint as soon as possible a legal guardian to unaccompanied or separated migrant children.
- States should conform to the reasonable recommendations of an independent monitor of their compliance, such as UNHCR.

## **2. Legal recognition of the vulnerability of unaccompanied and separated migrant children and imposition of legal obligations upon States**

According to article 3 of the Convention on the Rights of the Child (CRC), the best interests of the child shall be a primary consideration in all actions concerning children.<sup>1</sup> This principle provides a normative framework for the delimitation of the concept<sup>2</sup> and for the subsequent analysis of the substantive provisions of the CRC. It is commonly accepted that it is in the child's best interest, for instance, to acquire a nationality and have his or her birth registered,<sup>3</sup> receive adequate education,<sup>4</sup> have his or her application for family reunification dealt with by States "in a positive, human and expeditious manner",<sup>5</sup> not be arbitrarily separated from his or her parents or carers,<sup>6</sup> or to receive adequate protection against all forms of physical and mental violence or abuse.<sup>7</sup> These considerations should also apply to unaccompanied or separated migrant children,<sup>8</sup> including in relation to conditions of reception, treatment and access to basic rights in countries of transit and destination.<sup>9</sup>

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<sup>1</sup> Article 3 CRC.

<sup>2</sup> See UNHCR Guidelines on Formal Determination of the Best Interests of the Child (2008) available at <http://www.unhcr.org/4566b16b2.pdf> (defining the term best interest as broadly describing the well-being of a child at page 14), and Inter-agency Guiding Principles on Unaccompanied and Separated Children (2004) available at <http://www.unhcr.org/4098b3172.html> (considering the principle of best interest of the child as "the basic standard for guiding decisions and actions taken to help children, whether by national or international organizations, courts of law, administrative authorities, or legislative bodies" at page 16).

<sup>3</sup> Article 7 CRC.

<sup>4</sup> Article 28 CRC.

<sup>5</sup> Article 10 CRC.

<sup>6</sup> Article 9 CRC.

<sup>7</sup> Articles 19, 32, 34-36 CRC.

<sup>8</sup> According to the Committee on the Rights of the Child, General Comment no 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, Thirty-ninth session, 17 May-3 June 2005, CRC/GC/2005/6, [7-8]: unaccompanied children are defined as those individuals below the age of 18 years old "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". Separated children are those who "have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives".

<sup>9</sup> Article 2 CRC specifies that States should protect rights of all children within their jurisdiction and the Committee on the Rights of the Child has confirmed that this obligation applies to all children irrespective of their nationality, immigration status or statelessness. Committee on the Rights of the Child, General Comment no 6, above note 8 [12].

The situation of unaccompanied and separated migrant children has also been recognised as particularly vulnerable. In its General Comment no 6, the United Nations Committee on the Rights of the Child (UNCRC) had already drawn attention to this condition.<sup>10</sup> The Inter-American Court of Human Rights (IACtHR) went further in affirming that migrant children may find themselves in a “situation of additional vulnerability” as they are at the same time migrants and children.<sup>11</sup> Likewise, the European Court of Human Rights (ECtHR) drew attention to the particular situation of “extreme vulnerability” of unaccompanied children.<sup>12</sup>

In spite of the theoretical framework of vulnerability as a universal and equalising concept,<sup>13</sup> the nature of the identification of migrant children’s vulnerability in the jurisprudence of international human rights courts relates to a general sense of belonging to vulnerable social groups.<sup>14</sup> Although it has been heavily criticised as leading to stigmatisation and patronisation,<sup>15</sup> from a purely legal perspective the use of the concept of vulnerable groups by international human rights courts leads to the imposition of compelling obligations upon States.

While these obligations should not hinder States’ “undeniable sovereign right to control aliens’ entry into and residence in their territory”,<sup>16</sup> they should be seen as a minimum standard of treatment of unaccompanied and separated migrant children as they are intrinsically placed in a situation of vulnerability. States should fulfil, respect, and protect human rights of those who find themselves within their jurisdiction, including non-nationals.<sup>17</sup> Besides this general obligation, the recognition of vulnerability of migrant children should lead to the imposition of specific obligations upon States.

The UNCRC and the United Nations Committee on Migrant Workers (UNCMW) have now the opportunity to strengthen the protection of migrant children’s rights by reinforcing States’ obligations and urging them to take action in order to adopt a child-based and migrant-friendly approach to the treatment of unaccompanied and separated migrant children.

### 3. Necessary developments to the law and practice of States

Notwithstanding the recognition of the necessity of protecting unaccompanied and separated migrant children’s rights by international courts and United National quasi-judicial treaty bodies, the situation of these migrant children is still very unstable in the vast majority of countries of

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<sup>10</sup> Committee on the Rights of the Child, General Comment no 6, above note 8 [5].

<sup>11</sup> *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights (19 Aug. 2014) at para. 71.

<sup>12</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* App no. 13178/03 (ECHR, 12 Oct. 2006) at para. 55. See also *M.S.S. v. Belgium and Greece* App no. 30696/09 (ECHR, 21 Jan. 2011).

<sup>13</sup> Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’(2010-2011) *Emory Law Journal*, 60, 251-275, at 255.

<sup>14</sup> See Advisory Opinion OC-21/14, Inter-American Court of Human Rights, above note 11 at para. 71; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, above note 12 at para. 55.

<sup>15</sup> See Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’, *International Journal of Constitutional Law* 11 (2013), 1056–1085 [1072].

<sup>16</sup> *Saadi v. The United Kingdom* App no. 13229/03 (ECHR, 29 Jan. 2008) at para. 64.

<sup>17</sup> See article 1 European Convention on Human Rights, article 2 American Convention on Human Rights, article 2 International Covenant on Civil and Political Rights, article 2 Convention on the Rights of the Child, article 7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

transit and destination, including in Europe and in the Americas.<sup>18</sup> It is therefore not enough to just impose obligations upon States. There should be a general recognition of the necessity to improve States' compliance with such obligations. The UNCRC and the UNCMW have now the opportunity to contribute to the reinforcement of compliance monitoring mechanisms.

It is therefore suggested that United Nations Treaty Bodies adopt a common strategy in relation to the protection of unaccompanied migrant children's rights, taking into account their specific situation of vulnerability vis-à-vis the multiple risks of exploitation and abuses while on the move and once at the destination country. This strategy should be embedded in the Universal Periodic Review mechanism. States should be held accountable of their lack of action or violation of migrant children's rights. The present joint general comment could lay the foundations of the proposed common strategy.

#### **4. Evidence from the practice in Greece**

Because of its geographical position, Greece has always had a significant role to play in the reception of refugees and migrants who arrive in Europe from Asia or Africa. Since the summer of 2015 in particular, this role has become much more crucial as the country has been struggling to handle an influx of hundreds of thousands of refugees fleeing from war and hardship in the Middle East.

In this context, Greece is the unaccompanied and separated children's first contact with Europe and, thus, the European country which first bears the responsibility to take into consideration their vulnerability and guarantee their rights.

In spite of the outstanding and remarkable efforts coming from NGOs, Greek citizens and individual Greek officials, and aiming at taking care of the children, Greece is not able to guarantee these children's rights and lacks an effective national policy relating to their vulnerable situation.

Greece's inability to respond to unaccompanied and separated children's needs is a reflection of its general inefficiency to protect adequately children's rights. Indeed, Greece lacks a clearly structured body for the coordination of the implementation of children's rights policies and programmes<sup>19</sup>. It also lacks a national plan of action for children's rights<sup>20</sup> and a national database with comprehensive and disaggregated data on children<sup>21</sup>. Furthermore, Greece lacks training on children's rights for all professionals working for and with children, including social workers, law enforcement officials and health-care personnel<sup>22</sup>. Additionally, the recession and the current financial and economic crisis are making things more difficult: they are taking their toll on public social investment relating to children's rights<sup>23</sup>.

Therefore, a country, which faces serious economic problems and does not have the necessary fundamental structure to protect and promote its own children's rights, is obviously incapable of answering the needs for particular protection of unaccompanied and separated children, especially during a major refugee and migrant crisis.

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<sup>18</sup> See notably International Organization for Migration (IOM), *Children on the Move, 2013*, available at <http://publications.iom.int/books/children-move>; UNHCR, *World at War. Global Trends Forced Displacement in 2014* (2015) available at <http://unhcr.org/556725e69.html>.

<sup>19</sup> Committee on the Rights of the Child, *Concluding observations: Greece*, 13 August 2012, CRC/C/GRC/CO/2-3, at 3.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, at 5.

<sup>22</sup> *Ibid.*, at 5 – 6.

<sup>23</sup> *Ibid.*, at 2.

More specifically, in Greece, age assessment is not properly conducted, because the legislation framework is inadequate and its implementation presents important flaws. Therefore, the attempt to identify unaccompanied children often fails.

Moreover, the country is unable to provide material reception conditions suitable for unaccompanied children while the number of shelters, which are appropriate to accommodate them, is limited. It should be pointed out that, very often, children are being detained in bad conditions until they can be transferred to a shelter, despite the fact that the Greek State does not consider them officially as detainees at this precise moment.

Even though Greece has ratified the Convention on the Rights of the Child, which underlines the importance of the best interests principle<sup>24</sup>, in practice, there is a lack of effective best interests assessment in all actions concerning unaccompanied children.

According to Greek legislation<sup>25</sup>, appropriate measures should be taken immediately in order to ensure the unaccompanied children's necessary representation through the appointment of a guardian independently of the child's status as asylum seeker. Nevertheless, these provisions are rarely implemented in practice, mainly because there is no body in place that could undertake the duties of a guardian of unaccompanied children.

Furthermore, serious concerns regarding the protection of unaccompanied children rise as they are occasionally detained with adults and, in overcrowded reception sites, they do not sleep in a separate space from men and they share with them inadequate washroom and sanitation facilities. Thus, the children are at high risk of sexual harassment and physical violence. Additionally, there are no concrete measures taken to protect unaccompanied children from human trafficking.

## **5. Conclusions and recommendations**

It is submitted that in line with the present state of the law (and notably as it is interpreted by the UNCRC in its General Comment no 6, the European Court of Human Rights in its jurisprudence and the Inter-American Court of Human Rights in its Advisory Opinion no 21), the following legal obligations should be recognised as the minimum legal requirements for the protection of migrant children in transit and destination countries:

- Age assessment must be conducted in a scientific and safe manner, respecting human dignity and using gender-based and culturally appropriate approaches.
- States should refrain from using detention as a measure of immigration control and notably abolish children detention.
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- States should provide material conditions and an adequate regime, consistent with the respect of human dignity and ensuring the comprehensive protection of migrant children's rights.

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<sup>24</sup> See *supra*, para. 2.

<sup>25</sup> Article 19 para. 1 of the Presidential Decree 220/2007.

- States should adopt special measures of protection, if necessary and pertinent in view of the best interest of the child. These should include measures to trace the members of an unaccompanied or separated child’s family, if this is in his or her best interest.
- States should adopt all necessary measures to prevent and combat human trafficking and take action to effectively investigate and protect victims of trafficking.
- States should ensure that all due process guarantees are respected, including the right of the child to be heard and to participate at different stages of the proceedings before a tribunal.
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- States should conform to the reasonable recommendations of an independent monitor of their compliance, such as UNHCR.

It is suggested that the present joint general comment could lay the foundations of a common strategy in relation to the protection of unaccompanied or separated migrant children’s rights, taking into account their specific situation of vulnerability vis-à-vis the multiple risks of exploitation and abuses while on the move and once at the destination country.

## **6. About the authors**

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