

UNHCR's initial contribution to

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

1. UNHCR welcomes the decision of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child (“the Committees”) to prepare a *Joint General Comment on the human rights of children in the context of international migration* (“*Joint General Comment*”), and is grateful for the opportunity to provide comments.
2. Most of the specific categories of children in the context of migration, whose situation will be addressed in the *Joint General Comment*, are not within the specific mandate of UNHCR. Nevertheless, UNHCR wishes to offer its contribution to the development of the *Joint General Comment* based on a set of existing international standards and established procedures that, whereas primarily developed in relation to refugees and asylum-seekers, are also applicable in different settings, such as the situation of children in the context of international migration.

**UNHCR's mandate**

3. UNHCR is the global body with a mandate to provide international protection and to work for solutions for refugees and asylum-seekers, among others. It has been granted the authority to supervise the application of international instruments for the protection of refugees and asylum-seekers, in particular the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (hereinafter jointly referred to as the *1951 Convention*). State parties to these instruments are required to cooperate with UNHCR in the exercise of its functions. Over the years, the General Assembly has expanded UNHCR's mandate to various groups of people, who are not covered by the *1951 Convention*. Some of these people are qualified as “mandate” refugees; others are returnees, statelessness persons and, in some situations, internally displaced persons (IDPs).

**Best interest of the child**

4. All actions concerning children shall be guided by the principle of the best interests of the child. This principle applies to all children, including migrant, refugee, asylum-seeking, internally displaced and stateless children. Article 3, paragraph 1, of the *Convention on the Rights of the Child* (“*ICRC*”) establishes the child's right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of *ICRC*'s fundamental values.

5. A best interests- assessment procedure should be conducted, within the framework of the State's existing child protection systems.<sup>1</sup> This procedure requires an interview and consultation with the child, as well as the collection of any additional and useful information. The interview must be carried out by staff with relevant professional expertise in child welfare or protection. Moreover, since the best interests of the child may change over time and according to the situation, the assessment should be adjusted or revised periodically.<sup>2</sup> UNHCR has formalized and operationalized the best interest principle through a best interest procedure<sup>3</sup> that, while primarily implemented in refugee situations, represents a good practice that could also be adapted to other contexts.

### **Non-discriminatory access to national child protection systems and services**

6. All children, including migrant, refugee, asylum-seeking, stateless and unaccompanied and separated children (UASC), should have non-discriminatory access to national child protection systems and services. Immediate child protection needs should be addressed as quickly as possible and in a manner that reflects the best interests of the child. Services to prevent and respond to sexual exploitation and abuse against children, including trafficking, should be expanded and made easily accessible to girls and boys.
7. Girls and boys with urgent child protection needs have to be identified and receive age- and culturally-appropriate information. An effective, multi-sectoral and child-friendly response mechanism, working in a coordinated and accountable manner, should be implemented so as to meet their needs.<sup>4</sup>
8. Girls and boys should have access to age and gender-sensitive protection procedures.<sup>5</sup> Procedures and decisions relating to children should be adapted on the child's age, maturity, gender, language, social and ethnic background and take into account his or her individual experience. Consultation should take place in a confidential environment, where children feel safe and are able to express their views. UASC need to provide their informed consent so as to be engaged. An ethic of care and empathy, as opposed to an enforcement approach, should govern all interactions with children, including those seeking asylum, and their best interests should be a primary consideration. Examiners may assume a greater burden of proof, when handling children's asylum claims. Age assessments should only be conducted in cases where the child's age is questioned and take place in a safe, child- and gender-sensitive manner with due respect for human dignity.

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paragraph 52, available at: <http://www.refworld.org/docid/503489533b8.html>.

<sup>2</sup> UN High Commissioner for Refugees (UNHCR), *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, p. 7, available at: <http://www.refworld.org/docid/5523e8d94.html>.

<sup>3</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.refworld.org/docid/48480c342.html>, UN High Commissioner for Refugees (UNHCR), *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011, available at: <http://www.refworld.org/docid/4dda4cb02.html>.

<sup>4</sup> CPWG, *Minimum Standards for child protection in humanitarian action*, 2012, p. 135, available at: [http://cpwg.net/minimum\\_standards-topics/cpms-full-version/](http://cpwg.net/minimum_standards-topics/cpms-full-version/).

<sup>5</sup> UNHCR, *A Framework for the Protection of Children*, 2012, p. 22, available at: <http://www.unhcr.org/50f6cf0b9.html>.

## Right to family unity

9. Maintaining family unity and preventing separation should be a primary focus. The right to family unity or family life<sup>6</sup> is inherent to family's universal recognition as the fundamental group unit of the society, which is entitled to protection and assistance. This right is entrenched in universal and regional human rights instruments and international humanitarian law and it applies to all human beings, regardless of their status.<sup>7</sup>

As stated by the Human Rights Committee:

“The right to found a family implies, in principle, the possibility to procreate and live together... [T]he possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons”.<sup>8</sup>

10. The right to family unity for migrants intersects with the right of States to make decisions on the entry or stay of non-nationals. According to the Human Rights Committee:

“The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who will be admitted to its territory. However, in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. [...] [T]hey may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence”.<sup>9</sup>

The right not to be subject to arbitrary or unlawful interference with privacy, family, home or correspondence is protected, *inter alia*, by Article 17(1) of the *ICCPR* and Article 8 of the *1950 European Convention for the Protection of Human Rights and Fundamental Freedoms*.

11. Protection of the right to family unity frequently requires that States not only refrain from actions which could result in family separation, but also take positive measures to maintain the family unit, including the reunion of separated family members.<sup>10</sup> Refusing

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<sup>6</sup> The terms “family unity” and “family life” are used interchangeably in the context of this document.

<sup>7</sup> Article 16(3) of the *1948 Universal Declaration of Human Rights*; Article 23(1) of the *1966 International Covenant on Civil and Political Rights* (“*ICCPR*”); Article 10(1) of the *1966 International Covenant on Economic, Social and Cultural Rights*. At the regional level, Article 17(1) of the *1969 American Convention on Human Rights*; Article 16 of the *1961 European Social Charter* and the *1996 Revised European Social Charter*; Article 18 of the *1981 African Charter on Human and Peoples’ Rights*; Articles XVIII and XIX of the *1990 African Charter on the Rights and Welfare of the Child*.

<sup>8</sup> UN Human Rights Committee (HRC), *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, available at: <http://www.refworld.org/docid/45139bd74.html>.

<sup>9</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html>.

<sup>10</sup> According to the Human Rights Committee, separating a family by deporting or removing a family member from a State party's territory, or otherwise refusing a family member to remain on, may amount to arbitrary or unlawful interference with the right to family life, Human Rights Committee, *Francesco Madafferi and Anna Immacolata Madafferi v. Australia*, CCPR/C/81/D/1011/2001, 26 August 2004, paragraph 9, available at: <http://www.refworld.org/docid/4162a5a36.html>, Human Rights Committee, *Jonny Rubin Byahuranga v. Denmark*, CCPR/C/82/D/1222/2003, 9 December 2003, paragraph 11, available at: <http://www.refworld.org/docid/421f00260.html>, Human Rights Committee, *Ali Aqsar and Roqaiha Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, Communication No. 1069/2002, 6 November 2003, paragraph 11, available at: <http://www.refworld.org/docid/404887ed0.html>, Human Rights Committee, *Canepa v. Canada*, CCPR/C/59/D/558/1993, 06 November 2003, paragraph 14, available at:

family reunification may be at variance with the right to family life or family unity, especially in cases where the family has no realistic possibilities of enjoying that right elsewhere. Equally, deportation or expulsion could constitute an interference with the right to family unity, unless they are justified in accordance with international standards.

12. In cases of family unity involving children, the best interest of the child should be a primary consideration, as in all actions concerning children.<sup>11</sup> In Articles 8 and 9 respectively of the *ICRC*, States undertake to respect child's right to family relations as recognized by law without unlawful interference and to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. Article 10 of the *ICRC* provides, *inter alia*, that applications by a child or his or her parents for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner.
13. With regard to UASC seeking protection in Europe, facilitated access to family reunification, as required by the provisions of the *Dublin III Regulation*,<sup>12</sup> should be pursued through proactive efforts by State authorities. Existing family reunification procedures need to be streamlined and access to them should be ensured along the migratory routes currently being used. Applications for family reunification filed by UASC with relatives in Europe must be expedited and countries should adopt measures, including the increase of processing capacity, to ensure that family reunification for UASC occurs in the shortest possible timeframe.
14. An increased level of flexibility should be applied to family reunification eligibility criteria, allowing UASC to be reunified with extended family, when this is determined to be in a child's best interest. In the longer term, UNHCR has recommended that the EU *Family Reunification Directive*<sup>13</sup> should be amended, so as to include a broader range of family members, who often live in the same household in the country of origin, including elderly parents and dependent unmarried children between 18-25 years of age.

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<http://www.refworld.org/docid/404887ed0.html>, Human Rights Committee, *Shirin Aumeeruddy-Czifrra and 19 other Mauritian women vs. Mauritius*, CCPR/C/12/D/35/1978, 9 April, 1981, paragraph 9, available at: <http://www.refworld.org/docid/3f520c562.html>, Cambridge University Press, *Summary Conclusions: Family Unity*, June 2003, paragraph 5, available at: <http://www.refworld.org/docid/470a33bed.html>. Likewise, the European Court of Human Rights has identified public authorities' "positive obligations inherent to an effective 'respect' for family life", ECHR, *Keegan v. Ireland*, Series A, No. 290, 26 May 1994, paragraph 49; ECHR, *Hansen v. Turkey*, Application No. 36141/97, 23 September 2003, paragraph 97; ECHR, *Sisojeva and Others v. Latvia*, Application No. 60654/00, 16 June 2005, paragraph 104. Concerning UASC, ECHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application 13178/03, 12 October 2006, paragraph 85.

<sup>11</sup> Though State practice frequently does not explicitly acknowledge the principle of the best interest of the child, in some cases such considerations have clearly been central to the decision. For example, ECHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application 13178/03, 12 October 2006. Regarding the applicability of principles of international law, ECHR, *Bankovic and Others v. Belgium*, Application no. 52207/99, 12 December 2001. The Court concluded herein that "[t]he Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part".

<sup>12</sup> *Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsibility for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast)*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>.

<sup>13</sup> *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=EN>.

15. With more legal alternatives to reach safely in Europe through expanded and facilitated family reunification, fewer UASC would be forced to resort to smugglers and undertake dangerous irregular journeys. It is crucial to explore innovative and flexible ways to streamline family reunification procedures, including with extended family. Within Europe, greater efforts should be made to reunify asylum-seeking children with family members under the provisions of the *Dublin III Regulation*.

## Detention

16. The rights to liberty and security of the person are fundamental human rights, reflected in the principle of prohibition on arbitrary detention and supported by the right to freedom of movement. In view of its associated hardship, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and constitutes a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention is only allowed when a legitimate purpose is pursued and when it is considered to be both necessary and proportionate in each individual case. Respecting the right to seek asylum entails the provision of open and humane reception arrangements for asylum-seekers, including the guarantee of a safe, dignified and human rights-compatible treatment.

17. Children's detention, including asylum-seeking children, should in principle be avoided and, in any case, used only as a last resort, as reflected in the *CRC's* general principles and in the *2012 UNHCR Detention Guidelines*.<sup>14</sup> All child-appropriate alternatives to detention must be evaluated prior to the detention of a child. When unavoidable, detention should only be imposed for the shortest appropriate period and all efforts must be taken to allow the immediate release of the child and the child's transfer to more appropriate forms of accommodation.<sup>15</sup>

18. When detention is unavoidable, children in detention should benefit from the same minimum procedural guarantees as adults. However, these procedural guarantees must be tailored to their particular needs. Children's right to education should be guaranteed during detention, as well as the right to play, including with other children. In the case of UASC, States should appoint a specific independent and qualified guardian, as well as a legal adviser.<sup>16</sup>

19. As a general rule, UASC should also not be detained. Detention cannot be justified solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.<sup>17</sup> Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities. Children should be given residential care for the shortest time possible, and only when family-based care

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<sup>14</sup> UN High Commissioner for Refugees (UNHCR), *Detention Guidelines- Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.unhcr.org/505b10ee9.html>.

<sup>15</sup> *Ibid*, paragraphs 54-57.

<sup>16</sup> *Ibid*, paragraph 56.

<sup>17</sup> *Ibid*, paragraphs 54-57.

arrangements are not possible or are not in the child's best interest.<sup>18</sup> Alternative care options are provisional, while family tracing is carried out, and lasts until children can be reunited with their family members. Alternative care should be frequently and periodically reviewed in order to ensure that the arrangement continues to be in the best interest of the child.<sup>19</sup>

20. UASC are at a heightened risk of abuse and exploitation. As such, specific monitoring and support mechanisms should be implemented to ensure their protection. The establishment of clear standards and procedures, by competent childcare authorities, are fundamental so as to guarantee their appropriate protection and supervision. All entities and individuals engaged in the provision of alternative care for children should receive due authorization from a competent authority, which should also be in charge of their regular monitoring and reviewing. Appropriate assessment criteria for the professional and ethical qualifications of care providers, their accreditations, monitoring and supervision should be developed.<sup>20</sup>
21. Children have the right to be cared for by their parents (Art. 7(1) of the *ICRC*), as well the right to family unity, family relations and protection against unlawful interference with these rights (Art. 5, 8 and 16 of the *ICRC*; *ExCom Conclusion No. 93*, 2002).<sup>21</sup> These principles should be taken into account in cases where children are accompanying their parents.
22. When restrictions on the freedom of movement of parents is found to be unavoidable (after the competent authority has undertaken an individual assessment regarding the necessity and proportionality of this measure), all appropriate alternatives should be considered prior to resorting to detention. Such alternatives to detention should apply to the whole family, in respect of the principles of family unity and the best interests of the child. The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child.
23. In cases where it is not in a child's best interest to remain with his or her family, the State should ensure that the child receives special protection and assistance.<sup>22</sup> A child should be separated from his or her parents against his or her will only by competent authorities and exclusively for the child's best interest. This delicate measure should be open to a judicial review.
24. Where the separation of children from their parents is unavoidable in the context of detention, both parents and children are entitled to essential information from the State on the whereabouts of the other, unless such information would be detrimental to the child

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<sup>18</sup> UN High Commissioner for Refugees (UNHCR), *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, p. 10, available at: <http://www.refworld.org/docid/5523e8d94.html>.

<sup>19</sup> *Ibid.*

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

<sup>21</sup> UN High Commissioner for Refugees (UNHCR), *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, available at: <http://www.refworld.org/docid/3dafdd344.html>.

<sup>22</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 51 available at: <http://www.refworld.org/docid/503489533b8.html>.

(Art. 9 (4) of the *ICRC*).<sup>23</sup> Children have the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to their own best interest.<sup>24</sup>

## Statelessness

25. Accession to the *1954 Convention relating to the Status of Stateless Persons* (the *1954 Convention*) and the *1961 Convention on the Reduction of Statelessness* (the *1961 Convention*) to complement relevant provisions in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (*ICMW*) and the *ICRC* would establish a stronger framework to prevent and reduce statelessness and avoid the detrimental effects of statelessness on individuals and society, including on migrant workers and their children, by ensuring minimum standards of treatment for stateless persons. The *1954 Convention* safeguards minimum standards of treatment for stateless persons in respect to a number of fundamental rights. These include, but are not limited to, the right to education, employment, housing and public relief. Importantly, the *1954 Convention* also guarantees stateless persons a right to identity and travel documents and to administrative assistance. The *1961 Convention* establishes an international framework to ensure the right of every person to a nationality by establishing safeguards to prevent statelessness at birth and later in life. The Convention requires State parties to confer nationality to a child, who is born on the territory and would otherwise be stateless. This treaty is therefore complementary to standards contained in other human rights instruments related to birth registration and the right to a nationality, such as Article 29 of the *ICMW*. An increase in the number of State parties to the *1954 Convention* and the *1961 Convention* is essential to strength international efforts to prevent and reduce statelessness and ensure the full enjoyment of a number of these rights.
26. Article 29 of the *ICMW* notes the importance to prevent statelessness. To an extent, it also mirrors Article 7(1) of the *ICRC*. Article 7 of the *ICMW* is also relevant as children of migrant workers, particularly those who are undocumented and at risk of statelessness, are often denied other rights set out in the *ICMW*.
27. Birth registration is fundamental to children's protection and to the prevention of statelessness. Failure to document a person's legal existence can prevent the effective enjoyment of a range of human rights, including access to education and health care. In recognition of the above, in 2013, the Human Rights Council adopted a *Resolution on birth registration and the right of everyone to recognition everywhere as a person before the law*, calling upon "States to ensure free birth registration, including free or low-fee late birth registration, by means of universal, accessible, simple, expeditious and effective registration procedures without discrimination of any kind."<sup>25</sup> Similarly, in 2013 UNHCR's Executive Committee issued a *Conclusion on Civil Registration* urging States

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<sup>23</sup> UN High Commissioner for Refugees (UNHCR), *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, p. 15 available at: <http://www.refworld.org/docid/5523e8d94.html>.

<sup>24</sup> *Ibid.*

<sup>25</sup> Humans Rights Council, *Birth registration and the right of everyone as a person before the law- Report of the Office of the United Nations High Commissioner for Human Rights*, 27<sup>th</sup> session A/HRC/27/22 17 June 2014, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/22/7](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/22/7).

to “ensure civil registration” and emphasizing that “every child shall be registered immediately after birth without discrimination of any kind.”<sup>26</sup>

28. Birth registration is the first step towards ensuring recognition as a person before the law. Since birth registration legally establishes the place of birth, proof of age, and parental affiliation, it serves as important documentary proof to acquire the parents’ nationality or the nationality of the State in which the child is born. It also provides children with a degree of protection against child labour, illegal adoption, early marriage, sexual exploitation and trafficking. As such, States should ensure universal birth registration and access to documentation, including for children of migrant workers, among others, in order to prevent statelessness, in line with Article 29 of the *ICMW* and Article 7 of the *ICRC*.

**Division of International Protection**  
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<sup>26</sup> UN High Commissioner for Refugees (UNHCR), *Conclusion on civil registration, 17 October 2013, No.111(LXIV)-2013*, available at: <http://www.refworld.org/docid/525f8ba64.html>