OBJECTIVE OF THIS DOCUMENT

UNICEF, together with colleagues at IOM and UNHCR, has been focusing recently on the issue of unaccompanied and separated child migrants (UASC). For the most part, this issue is currently being considered in the context of Afghan children in Europe. In early 2010, the three agencies formed an Inter-Agency Working Group in order to share information and facilitate joint advocacy on this issue. IOM in particular has been involved in the issue of the return and reintegration of child migrants and the development of reception centers in Afghanistan.

In this context, this document was prepared in reply to a request from IOM to prepare a compilation of human rights standards applicable to the repatriation of UASC. As such, this paper is not an in-depth consideration of UASC. Rather, the document considers the conditions under which repatriation can take place and the measures and steps required to enforce a repatriation decision in line with human rights standards. These standards are critical for harmonizing migration policies with human rights obligations and ensuring a child-sensitive approach to policies and practices.

In outlining the principal international human rights standards applicable to the repatriation of UASC, the paper considers the pronouncements of UN treaty bodies as well as regional treaty bodies (European Court, Inter-American Court of Human Rights, etc.) and other specialized bodies and mechanisms (i.e. rapporteurs, group of experts, etc). The key international instrument in this context is the Convention on the Rights of the Child (CRC).

SUMMARY OF KEY PRINCIPLES

The following is a list of key principles that must be fulfilled in any procedure relating to the repatriation of UASC:

I. A child-sensitive approach must be ensured in all policies and practices. UASC must be treated as children first and migrants second.

II. The guiding principles of the CRC must also be the guiding principles in any procedure relating to the repatriation of UASC as these represent the underlying requirements for
any and all rights to be realized. The four guiding principles of the CRC are: non-discrimination; adherence to the best interests of the child (BIC); the right to life, survival and development; and the right to participate.

III. A gender-sensitive approach must be ensured in all policies and practices.

IV. There must be adequate procedures for determining the BIC.

V. Repatriation must only be used as a protection measure, not a punitive measure.

VI. UASC must not be detained. Accommodation for UASC must be child-sensitive.

VII. The right to seek asylum (refugee status or other international protection categories) must be ensured.

VIII. States must respect the principle of non-refoulement.

IX. Due process must be ensured in all procedures relating to the repatriation of UASC.

X. Durable solutions must be sought for UASC.

XI. Repatriation mechanisms must be safe and child-sensitive.

LEGAL OBLIGATIONS OF STATES PARTIES REGARDING UASC AND MEASURES FOR THEIR IMPLEMENTATION

A child-sensitive approach must be ensured in all policies and practices. UASC must be treated as children first and migrants second.

All laws, policies, practices and decisions that affect children, directly and indirectly, must be in line with every provision of the Convention. In the context of UASC, the Committee on the Rights of the Child (the Committee) remarked that: “obligations deriving from the Convention vis-à-vis unaccompanied and separated children apply to all branches of government (executive, legislative and judicial)”.1 Furthermore, the Committee has stated that the provisions and principles of the treaty must be given legal effect in domestic legislation and, in light of article 27 of the Vienna Convention on the Law of Treaties, predominance should always be given to the Convention in the case of a conflict.2

The Committee has provided several points of clarification regarding the application of the CRC to UASC:

State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding

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1 UN CRC Committee, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, para. 13.
2 UN CRC Committee, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, para. 14.
zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.  

KEY PRINCIPLES

I. A child-sensitive approach must be ensured in all policies and practices

“A child-sensitive” means an approach that gives primary consideration to a child’s right to protection and that takes into account a child’s individual needs, rights and views. In terms of children’s social protection, it has been asserted that some principles should be considered in the design, implementation and evaluation of child-sensitive social protection programmes (UNICEF et al., 2009), such as:

- Avoid adverse impacts on children, and reduce or mitigate social and economic risks that directly affect children’s lives;
- Intervene as early as possible where children are at risk, in order to prevent irreversible impairment or harm;
- Consider the age- and gender-specific risks and vulnerabilities of children throughout the life-cycle;
- Mitigate the effects of shocks, exclusion and poverty on families, recognizing that families raising children need support to ensure equal opportunity;
- Make special provision to reach children who are particularly vulnerable, including children without parental care and those who are marginalized within their families or communities due to their gender, disability, ethnicity, HIV and AIDS or other factors.
- Include the voices and opinions of children, youth, and their caregivers in the understanding and design of social protection systems and programmes.

3 UN CRC Committee, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, para. 12.
When it comes to policies and practices regarding UASC migrants, asylum seekers and refugees in transit and destination countries, a child-sensitive approach is paramount and necessary, especially if it is taken into account their vulnerable circumstances as children, foreigners, unaccompanied and –in many cases- with an irregular migration status.

In this sense, some of the implications of this age-sensitive approach to this issue have been recommended by UNICEF, IOM and UNHCR (2011):

- the best interests of the child has to remain “at the heart of interventions related to unaccompanied migrant children and youth and that all procedures ranging from entry, identification, returns, guardianship, status determination, integration, third country resettlement, repatriation, interception (while en route), are child sensitive and gender responsive”;
- unaccompanied children and youth are treated as children and youth first and that their rights and immediate protection needs are identified and fully considered/addressed regardless of their migratory status;
- care, support, treatment and provision of services including promotion of access to health and other social services in destination settings in line with international norms and standards should be assured regardless of the child’s migration status;
- in cases of age disputes, a holistic approach should be adopted in assessing the age, which is culturally sensitive and age appropriate and is only undertaken as a measure of last resort in cases where serious doubt exists.

II. Application of the Guiding Principles of the CRC

The Special Rapporteur on the Human Rights of Migrants (2009:82) stated that “all policies and programmes aimed at addressing the situation of children in the context of migration should have a human rights-based approach and be based on fundamental principles, such as the best interest of the child, non-discrimination and the right of the child to be heard in all decisions that concern him or her.” This sub-section sets out the application of the Guiding Principles of the CRC to the situation of UASC, including repatriation measures.

Best Interest of the Child

Article 3 (1) of the CRC states, in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
Furthermore, the Committee has clarified that “[i]n the case of a displaced child, the principle must be 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.” 4 Non-rights-based arguments such as those relating to general migration control, cannot override a child’s best interests considerations. 5

In addition, the Committee has stated that “a determination of what is in the best interests of the child 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. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.” 6 Age assessment procedures should ensure this approach. 7

At the regional level, the European Commission has also established that the best interest of the child should be the primary consideration in all actions concerning unaccompanied children (European Commission, 2010). In addition, the Regional Conference on Migration (eleven countries from North and Central America) declared that the decision to repatriate unaccompanied children must always take into account their best interests (XIV Regional Conference on Migration, 2009).

Non-discrimination

The principle of non discrimination, a jus cogens principle, 8 is enshrined in Article 2 of the CRC:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

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4 UN CRC Committee, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, para. 19.
5 UN CRC Committee, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, para. 86.
6 UN CRC Committee, General Comment No. 6 (2005), para. 20.
7 See Save the Children, UNHCR, and UNICEF (2009: §D5).
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

This principle must be fully applied to any policy, decision, or action related to UASC, including repatriation. Thus, “it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.” However, the principle of non-discrimination may at times require differentiation on the basis of different protection needs such as those deriving from age and/or gender.⁹

The Committee has also noted that the principle of non-discrimination requires measures “to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on discrimination such measures can, therefore, never be applied on a group or collective basis.”¹⁰

**Right to be heard**

The right to be heard is enshrined in Article 12 of the CRC:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

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⁹ UN CRC Committee, General Comment No. 6 (2005), *Treatment of Unaccompanied and Separated Children outside their Country of Origin*, para. 18.

¹⁰ UN CRC Committee, General Comment No. 6 (2005), *Treatment of Unaccompanied and Separated Children outside their Country of Origin*, para. 18.
The effective fulfillment of the right to be heard is indispensable in procedures that will affect the life and the rights of unaccompanied children. As this right is intrinsically linked with due process safeguards, it will be addressed in further detail below.

**Right to life, survival and development**

The CRC contains an obligation in Article 6 to protect children from “violence and exploitation, to the maximum extent possible, which would jeopardize a child’s right to life, survival and development.”

This *right to development* must be seriously taken into account in procedures that could lead to the repatriation of UASC to a country of origin. Decisions to repatriate or provide residence in the destination country can significantly impact a child’s life and development. These issues must also be fully taken into account in cases of children’s asylum claims.\(^{11}\)

Furthermore, the issues of best interest determination, due process and durable solutions (see below), are inextricably linked to ensuring the right to development of UASC.

**III. Ensuring Gender-Sensitive Policies and Practices**

All policies, practices and decisions regarding UASC in transit, receiving, and sending countries must be gender-sensitive (See, among others, UNHCR, 2006 and 2009; UNICEF, 2003; Irish Refugee Council, 2008). This gender-sensitive approach applies to:

- Best interest determinations;
- Refugee status determinations; and
- The training of public servants who may come across UASC in their work.

In this context, a gender-sensitive approach should include:

- Ensuring that gender-related root causes of unaccompanied child migration are taken into account when searching for a durable solution;
- Considering possible gender-related fears of persecution and other protection needs, including for victims of trafficking;\(^{12}\)

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\(^{11}\) UNHCR (2009), 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*, HCR/GIP/09/08, 22 December 2009.

\(^{12}\) See UNHCR (2006a), *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006.
Providing the proper resources, training, and mechanisms necessary to ensure the implementation of gender-sensitive policies;

Providing gender-sensitive accommodation during best interest determination and as part of a durable solution, if applicable; and

Providing gender-sensitive health services, including sexual and reproductive health services, and other social services.

IV. Best Interest Determination

The Best Interest Determination Procedure (BID) is the most important tool for ensuring the respect, protection and fulfillment of the rights of UASC. Relevant stakeholders, i.e. UN bodies, agencies, civil society experts, and governments, have been increasingly addressing highlighting the importance of the BID in the case of UASC. The Committee has pointed out that States should set up a uniformed process at the national level, to determine what constitutes the best interests of the child, particularly in cases of UASC and repatriation processes.\(^\text{13}\)

The BID is a formal process, with specific procedural safeguards and documentation requirements that is conducted, 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 in the CRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of the child in question (UNHCR, 2006).

UNHCR (2006) has pointed out that States shall establish and carry out fair BID procedures, guided by the standards developed by the Committee on the Rights of the Child in its General Comment No. 6, ensuring adequate child participation in the BID.

The CRC Committee affirmed that a BID requires a clear and comprehensive assessment of the child’s identity, including nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs and that allowing the child access to the territory is a prerequisite to this initial assessment process. Qualified professionals, who are trained in age and gender-sensitive interviewing techniques, should carry out the assessment process in a friendly and safe atmosphere.\(^\text{14}\)

\(^{13}\) See: CRC Committee: a) Concluding Observations, Spain, CRC/C/ESP/CO/3-4, 3\(^{rd}\) November 2010, §27; b) Concluding Observations, Japan, CRC/C/JPN/CO/3, 22 June 2010, §78.

\(^{14}\) UN CRC Committee, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, para. 20.
The BID is a process that has particular relevance for UASC:

“It starts from the moment they are identified, and continues throughout the displacement cycle until a durable or long-term solution is implemented. Any decision and action affecting the child, including, among others, identification and registration, family tracing, the determination of the most appropriate temporary care arrangement, the appointment of a guardian, monitoring of temporary care arrangements, refugee status determination procedures, family reunification, etc. must be instilled with considerations for the best interests of the child. Such decisions and actions cannot be taken unless an assessment is made by the responsible officer on what option is in the best interests of the child (UNHCR, 2006).”

These standards have to be effectively applied to UASC on a case-by-case basis and ensured more generally in policies and legislation. Several issues must be addressed, including: properly trained bodies/institutions, adequate budget, transparency, judicial oversight, participation of public human rights institutions, civil society and intergovernmental experts, etc. Civil servants in charge of carrying out BID procedures should have, to the maximum extent possible, the following expertise:

- An understanding of child rights;
- Knowledge of the practical implications of different stages in child and adolescent development and psycho-social well-being;
- Understanding of specific protection risks, such as trafficking and gender-based violence;
- Knowledge of the procedural aspects of the BID;
- Cultural, age and gender sensitivity;
- Understanding of legal context and protection implications of the BID;
- Understanding of cultural, religious and socio-economic background of the child.

V. UASC should not be deported as a punitive measure

15 Likewise, the Special Rapporteur (2009:35) stated that the “minimum measures that should be taken into consideration in the process of initial assessment once unaccompanied or separated children enter a country of transit or destination (...) include prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities including age assessment; prompt age appropriate and gender sensitive registration and determination of the identity of the child, in a language the child understands, by professionally qualified persons; the recording of further information in order to meet the specific needs of the child, including the reasons for being separated or unaccompanied; and an assessment of particular vulnerabilities, such as health, physical, psychosocial, material and other protection needs, including those deriving from domestic violence, trafficking or trauma”.

One of the consequences of adopting a child-sensitive approach to policies and practices that affect UASC is that UASC should never be deported through the enforcement of punitive-like decisions based on their immigration status or irregular entry into a country. In this regard, the Special Rapporteur on the Human Rights of Migrants, in his report on children’s rights in the context of migration (2009:57), noted that states should consider that UASC should only be repatriated if it is in their best interests, for the purpose of family reunification and after due process of law.\footnote{17}

The Special Rapporteur regretted that: “the European Union directive on return (2008/115/EC) authorizes the deportation of children migrants in the same sense as adults (art. 10), despite some specific protection measures. No distinction is made on the nature of the deportation, which in both cases is a “punitive approach” instead of a “protection approach”, as stressed by the Committee on the Rights of the Child and other human rights institutions.”\footnote{18}

The European Network on Ombudspersons for Children (ENOC) included in its institutional principles on UASC, that they should never be deported/expelled. Thus, re-integration into their social environment of origin (family, care institution or other) should be sought only through assisted voluntary repatriation and only if this is considered to be in their best interests, after careful assessment including due consideration of their views (2006:10).

In addition, Save the Children, UNICEF and UNHCR (2009, § D15), in their statement of good practices on UASC, asserted that a child should be returned if it is considered to be in the best interests of the child. All other considerations, such as the fight against irregular immigration, should be secondary. The best way for family reunification and returns to be carried out is on a voluntary basis.

It is clear that one of the key challenges in this area is that the enforcement of this principle requires appropriate laws and policies are in place in both origin and destination countries. Beyond the BID and what is mentioned below regarding durable solutions, these policies should ensure: effective family tracing mechanisms; tools for evaluating family and social environments where children might be repatriated, on a case-by-case basis; consular assistance, etc.).

\footnote{17} See also UNICEF TACRO / National University of Lanús (2010).
\footnote{18} Need reference – para 57, citing CRC Committee GC 6 and the European Network of Ombudspersons for Children, Statement on the EU Return Directive of 18 June 2008, 30 June 2008. See also STEPS consulting social study for the European Parliament, “The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones), with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states.”
VI. **UASC should never be detained solely on the basis of the being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Child-sensitive accommodation should be provided.**

When it comes to addressing the issue of the right to physical liberty, international human rights standards have been increasingly pointing out the following about migration control policies: 1) irregular migration should not be considered a crime, but rather an administrative offense; 2) during deportation procedures, migrants can exceptionally be detained as a measure of last resort, and for the shortest period of time possible; and 3) children should never be detained.

In the case of both adult and child migrants, there is a well-recognized principle by many states and international human rights bodies, which asserts that migration offenses (irregular stay or entry, overstay, among others) should not be considered a crime, thus migrants can not be sanctioned with a deprivation of their liberty.\(^\text{19}\) Similarly, the European Court of Justice has recently affirmed that EU regulations preclude “a Member State's legislation...which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.”\(^\text{20}\)

Regarding detention within migration procedures, the CRC Committee has stated that UASC should never be detained based on their immigration status or breaching immigration law (2005).\(^\text{21}\) Consequently the Special Rapporteur on the human rights of migrants established that alternative measures should be put in place, such as sheltered housing and alternative care with national child protection services (2009). Similarly, the Parliamentary Assembly of the Council of Europe (in its Resolution 1707, 2010) called on member states to fully comply with international human rights obligations in procedures with asylum-seekers and irregular migrants. These obligations, it followed, include that “vulnerable people should not, as a rule, be placed in detention and specifically unaccompanied minors should never be detained” (2010, § 9.1.9). Save the Children, UNICEF and UNHCR (2009a) have also affirmed that unaccompanied and separated children must never be detained for reasons related to their immigration status or irregular entry.

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21 Similarly, see Japan, CRC/C/JPN/CO/3, 22 June 2010, § 78.a.
Recently, the European Commissioner on Human Rights, Thomas Hammarberg stated that:

“[i]t is established that detention and restriction of movement have particularly negative psychological effects on minors, and these effects are compounded by time. Unaccompanied migrant children are especially vulnerable. Governments in the host countries need to rethink their approach; the present policy is not humane. It is also in conflict with the UN Convention on the Rights of the Child (….) Putting an end to the detention of asylum-seeking or migrant children should be seen as the first and most important step towards minimizing the use of detention in all immigration cases, including those of adults.”

Furthermore, the absence of child-sensitive accommodation facilities, and the fear of being deported to their country of origin, might place UASC at serious risks and increase their vulnerability, as was described about UASC from Afghanistan in some Asian and European countries (UNHCR and Mougne, 2010).

In sum, several standards must be met, including:

- The prohibition of detention and the provision of child-sensitive accommodation for UASC during BID must be specifically regulated by law;
- Due process safeguards must be fulfilled in any procedures where a decision is made on the accommodation of UASC (including detention). This includes: free legal aid; the right to be heard; effective remedies; access to justice; the right to an interpreter; the right to a guardian; the right to consular assistance; and effective periodic communication with legal counsel;
- Accommodation facilities must be child and gender-sensitive. Prison-like facilities, regulations, practices, and personnel are not appropriate;
- UASC must have access to child, gender, and culturally sensitive health, education, and other social services.

VII. Right to seek asylum

As it was pointed out by the UNHCR (2009: §2), “The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as part of a family unit rather than as individuals with their own rights and interests. This is explained partly by the subordinate roles, positions and status children still hold in many societies worldwide. The accounts of children are more likely to be examined individually when the children are unaccompanied than when they are

accompanied by their families. Even so, their unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account. Children may not be able to articulate their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so.”

Subsequently, policies and procedures must ensure that UASC are informed of their right to apply for asylum, and consequently, their right to a due process determination of their right to refugee status or other international protection.  

In this regard, the Special Rapporteur on the Human Rights of Migrants (2009, §101) affirmed that states should develop standardized procedures to ensure access to asylum procedures for UASC who cannot return to their countries of origin because their life, safety or freedom are at risk, and to ensure that this includes an assessment of the situation in the country of origin or habitual residence of the children.

The CRC Committee furthermore specified that states must build the capacities of those dealing with asylum claims on the specific needs of UASC, including immigration officials, border police and civil servants who may have the first contact with UASC in need of protection.

Evidently, these standards must be complemented by the rest of principles and standards described herein, including non-refoulement, due process safeguards, non-detention, etc.

VIII. Non Refoulement

The CRC Committee has extensively addressed the matter of how to apply this *jus cogens* principle of international law to the situation of UASC. In its General Comment No. 6 (2005, §26-27), the Committee stated the following:

“In affording proper treatment of UASC, States must fully respect non-refoulement obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33

23 For an in-depth review of standards in this area, see UNHCR (2006).

24 CRC Committee, Concluding Observations: Spain, CRC/C/ESP/CO/3-4, 3rd November 2010, § 60.

25 For instance, the CRC Committee stressed that child applicants for asylum must be provided with sufficient opportunities to participate in their application process and their views must be sufficiently taken into consideration. In addition, positive mechanisms, such as the appointment of individual guardians for each unaccompanied asylum-seeking child, should be implemented to their full extent (Concluding Observations, Norway, CRC/C/15/Add.126, 28th June 2000, § 48).
of the 1951 Refugee Convention and in article 3 of the Convention against Torture.

Furthermore, States shall 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, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. 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."

As stated above by the Committee, respecting the principle of non-refoulement of UASC includes a prohibition against indirect removal, i.e. against removing a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, which applies to any country to which the child may subsequently be removed.26

IX. Due Process Safeguards

Whether or not States have a BID procedure in place, respecting due process safeguards27 is paramount for ensuring that decisions regarding UASC are in line with the BIC and other applicable human rights principles and standards. Among these key safeguards, the following are particularly relevant in any repatriation process involving an UASC:

- Procedures must be child, gender and culturally sensitive (CRC, 2005; UNHCR, 2006);
- UASC must be afforded the right to be heard and to participate, in accordance with CRC article 12 (CRC, 2005). This might include the right of a child to appear independently from

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26 Indirect Removal (or chain refoulement) refers to the responsibility of not transferring anybody to a country where there might be a risk of a subsequent transfer to another unsafe country. It means that states are obliged not to send anybody to the control of a (intermediary) state from which he or she could be returned to another country where his or her life and physical integrity might be threatened (see, i.e., European Court of Human Rights, cases T.I. v. United Kingdom, and Hirsí and others v. Italy. See also the UNHCR statement on this case: http://www.unhcr.org/refworld/pdfid/42f7737c4.pdf).

27 The Inter-American Court on Human Rights, in two paramount Advisory Opinions, has exhaustively described the due process safeguards that must be fulfilled within procedures that affect children’s rights and procedures related to undocumented migrants, including deportation (respectively, Advisory Opinion OC-17/02, and Advisory Opinion OC-8/03).
his or her legal guardians in a court, particularly in judicial and administrative procedures affecting the child; 28

- Similarly, a child’s views and wishes should be elicited and taken into account. To allow for a well-informed expression of such views and wishes, it is imperative that children are provided with all relevant information concerning, for example: their entitlements, services available (including means of communication), the asylum process, family tracing and the situation in their country of origin (CRC Committee, 2005, §25); 29

- The appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an UASC. Such a child should only be referred to asylum or other procedures after the appointment of a guardian (CRC Committee, 2005, §21); 30

- In cases where UASC are referred to asylum procedures or other administrative or judicial proceedings (such as repatriation), they should also be provided with a legal representative in addition to a guardian (CRC Committee, 2005, §21, 36); 31

- Child development specialists should be involved in the decision-making process in order to ensure that the procedure is focused on the welfare of the child (UNHCR, 2006);

- As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure (CRC Committee, 2005, §25);

- States parties must protect the confidentiality of information received in relation to an UASC, consistent with the obligation to protect the child’s rights, including the right to privacy (CRC Committee, 2005, §29);

- UASC must be informed of their right to communicate with consular representatives, and receive their assistance. 32 This also includes an obligation of states of origin to set up policies directed at providing child-sensitive consular assistance meant to fulfill the BIC in these kinds of procedures;

- UASC have a right to an effective remedy, including the right to appeal a repatriation measure, with suspensive effect 33;

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28 Spain, CRC/C/ESP/CO/3-4, 3rd November 2010, §29.

29 The CRC Committee also stated that “in guardianship, care and accommodation arrangements, and legal representation, children’s views should also be taken into account. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child” (2005:25).

30 For an in-depth review standards on the right to guardianship of unaccompanied children, see CRC Committee, General Comment No. 6, 2005, §33-38. According to UNHCR (2006), the child’s guardian shall have the authority to be present during the interview with the child. In general, such procedures should be carried out by the competent national authorities with NGO and expert participation where appropriate or foreseen in national legislation.

31 In its recommendations to Spain, the Human Rights Committee stressed that it should be ensured that the rights of unaccompanied children who enter the territory are respected. Among other things, it should ensure that every unaccompanied child receives free legal assistance for the duration of the administrative proceedings, and, more generally, the expulsion proceedings (CCPR/C/ESP/CO/5, 5th January 2009, §21).

32 For an in-depth analysis on this right, see Inter-American Court on Human Rights, Advisory Opinion OC-16/99.

33 On the right to an effective remedy on migrants’ repatriation measures, including the suspensive effect, see CCPR, France, CCPR/C/FRA/CO/4, 31/07/2008, §20; CAT (Convention Against Torture) Committee, Josu Arkaiz Arana v
I.  UASC have a right to access to justice, including legal protection.  

II.  The decision should be founded, documented and communicated to the children and their guardian and legal representative.

III.  Finally, child-specific reception measures and procedural guarantees should apply from the moment an UASC is identified, at the external border or within a Member State, until a durable solution is found (EU Commission, 2010, §6).

X.  Durable Solutions

As was stated by the CRC Committee (2005, §79), the ultimate aim in addressing the fate of UASC is to identify a durable solution that addresses all of their protection needs, takes into account their views and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.

A durable solution should be determined on the basis of an individual assessment of the BIC (EU Commission, 2010). Thus, according to the specific circumstances of each case, a durable solution can vary substantially. The main options being:

- Family reunification in the country of origin (immediate or delayed);
- Family reunification and integration in the country of transit or destination;  
- Integration in the country of transit or destination (either independently, with foster family or child-care institutions);  
- Resettlement in a third country (in EU countries, relocation).

A rights-based approach to the search for a durable solution begins with analysing the possibility of family reunification (CRC Committee, 2005, §79).

Family tracing in the country of origin 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

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35 The special Rapporteur (2009, §58) also highlighted that the possibility of reunification in the country of destination, could also be considered.
36 On alternative care procedures, article 25 of the CRC asserts: “States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement”.
37 According to the European Commission (2010), durable solutions consist of return to the country of origin where reintegration of the child should be guaranteed, granting international protection status or another legal status allowing the child to integrate in the Member State of residence, or resettlement in another EU state member.
is conducted, would be contrary to the best interests of the child or jeopardize fundamental
rights of those being traced” (idem, §80). Family tracing requires specific public policies in both
destination and origin countries, as well as coordination mechanisms between them. States must
ensure that, when children are repatriated, they are returned to family members willing to care
for them or to an appropriate social service agency.  

According to the CRC Committee, “family reunification in the country of origin is not in the
best interests of the child and should therefore not be pursued where there is a “reasonable risk”
that such a return would lead to the violation of the fundamental human rights of the child”
(CRC Committee, 2005, §82). In this regard, “Where circumstances in the country of origin
contain lower level risks and there is concern, for example, of the child being affected by the
indiscriminate effects of generalized violence, such risks must be given full attention and
balanced against other rights-based considerations, including the consequences of further
separation. In this context, it must be recalled that the survival of the child is of paramount
importance and a precondition for the enjoyment of any other rights” (CRC Committee, 2005,
§82).

The Committee (2005, §84) also pointed out that return to the country of origin is not an option
if it should lead to a “reasonable risk” that such return would result in the violation of
fundamental human rights of the child, and in particular, if the principle of non-refoulement
applies. Return to the country of origin shall, in principle, only be arranged if such return is in
the best interests of the child. Such a determination shall, inter alia, take into account:

- Conditions of safety and security, as well as socio-economic conditions awaiting the child
  upon return (including through home study);
- The availability of care arrangements for that particular child;
- The views of the child expressed in exercise of his or her right to do so under article 12 and
  those of the caretakers;
- The child’s level of integration in the host country and the duration of absence from the
  home country;
- The child’s right “to preserve his or her identity, including nationality, name and family
  relations” (art. 8);
- The “desirability of continuity in a child’s upbringing and to the child’s ethnic, religious,
cultural and linguistic background” (art. 20).

39 Spain, CRC/C/ESP/CO/3-4, 3rd November 2010, §60.
40 Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities
on the applicability of non-refoulement obligations.
Subsequently, the Committee asserted that:

“Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country’s decisions on family reunification therein. In this context, States parties are particularly reminded that “applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner” and “shall entail no adverse consequences for the applicants and for the members of their family” (art. 10) (CRC Committee, 2005, §83).”

and

“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 rights that are fully applicable to all children who remain in the country, irrespective of whether this is due to their recognition as a refugee, other legal obstacles to return, or whether the best-interests-based balancing test has decided against return” (CRC Committee, 2005, §89).

XI. Repatriation mechanisms must be safe and child-sensitive

In cases that, following standards described below, the final best interest-based decision consists in the repatriation of an unaccompanied child, there must be put in place a child and gender-sensitive procedure aimed to ensure the safety and protection of these children during repatriation, as it was pointed out by the CRC Committee (2005, §87).

Therefore, the CRC and CCPR Committees recommended that states must take all necessary measures to prevent irregular procedures in the expulsion of unaccompanied children, including effective mechanisms meant to: a) monitor and ensure that children are not subjected to abuse;

41 International Covenant on Civil and Political Rights.
b) receive and address complaints from children in care; and c) investigate in an effective way reported cases of ill-treatment of children.\(^{42}\)

In addition, there should be put in place, in both sending and receiving countries, follow-up monitoring mechanisms meant to ensure child reintegration as an effective, durable solution. Children, family, and community comprehensive support policies, including an age-sensitive, short and long term approach, should be available and effectively implemented.

\(^{42}\) CRC Committee, Concluding Observations: Spain, CRC/C/ESP/CO/3-4, 3rd November 2010, §60; CCPR Committee, Concluding Observations: Spain, CCPR/C/ESP/CO/5, 5th January 2009, §21
ANNEX: Good Practices on UASC

Laws and policies

- Argentina introduced due process safeguards in its deportation procedures, including the right to appeal with suspensive effect, the right to free legal aid, and the right to access to justice (Law 25.871, 2004);
- Australia reformed its legislation in 2005 to specifically state that children cannot be detained due to their immigration status (Migration Act 1958 (Cth), s4AA; see also Australian Human Rights Commission, 2010);
- Mexico created Childhood Protection Officers who are in charge of protecting unaccompanied children in Mexico in detention centers and during deportation;\(^43\)
- Migration law in Panama prohibits the detention of children during deportation procedures (Decree 03/2008);
- In Spain, UASC cannot be deported due to their immigration status. They can only be repatriated if the decision is in their best interest (Law 4/2000, article 35);
- Some German Laender have incorporated the need to consider the best interest of children in their regulations governing residence decisions\(^44\);

- In May 2010, the United Kingdom announced that children will no longer be detained during deportation procedures;\(^45\)
- Venezuela has prohibited the detention of migrants during deportation/repatriation procedures, and included several alternatives to detention in its law (Law 37.944, 2004).

Research on non detention and accommodation conditions

European Union Parliament Research on Detention Centers: In December 2006, the European Parliament Committee on Civil Liberties, Justice and Home Affairs, commissioned a study on the conditions for migrants and asylum seekers in reception, detention or transit centres in twenty-five European Union countries.

The final report of this survey, carried out by Steps Social Consulting, was submitted to the Parliament in December 2007.\(^46\) The report concluded that: minors should never be subject to forced return procedures and all forms of detention for minors and families, particularly for

\(^43\) See official website of the National Migration Institute (www.inm.gob.mx).

\(^44\) On the issue of unaccompanied children repatriation from Germany to Kosovo, see Knaus, Widmann, and UNICEF Kosovo (2010).

\(^45\) See Gover (2010).

\(^46\) STEPS Social Consulting, The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states, Brussels, December 2007
unaccompanied minors, should be banned. Alternative solutions such as the obligation to report regularly to police authorities have been tested in some countries and should be considered.

Case law

Spain - Constitutional Court: STC 183/2008 (22nd December 2008): Unaccompanied children should be granted procedural safeguards within the repatriation process, including the right to a guardian and free legal advisor, the right to be heard at both administrative and legal procedures, and the right to an effective remedy before a Court.\(^\text{37}\)

South Africa - High Court of South Africa (Transvaal Division), in its Judgment of September 13, 2004 (Case 22866/04), granted an interdict preventing the execution of any deportation measure against unaccompanied children. The Court also appointed a curator for the children who was appointed to investigate the circumstances of their detention and repatriation.

The Court concluded that: a) persons within our territorial boundaries benefit from the protection of the courts and the Constitution; b) a child’s best interests are of paramount importance in every matter concerning a child; c) any child who appears to have no parent or guardian must be brought before a Children’s court for an inquiry to determine whether the child is a child in need of care or whether the child should be removed to a place of safety; d) unaccompanied foreign children who find themselves in the country irregularly should have legal representation appointed to them by the state; e) detention of children in the Repatriation Centre is unlawful and invalid, and should cease immediately; f) “the way in which these children are being deported is not unlawful, it is shameful”; g) the respondents have a duty to liaise with each other, to find a solution, and to work on detailed practical arrangements to ensure that unaccompanied foreign children are dealt with in accordance with the principles set out in legal instruments, such as the Constitution, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.

France - Constitutional Council: Décision n° 2010-614 DC, 4th November 2010: The Council declared the unconstitutionality of a section of a Bilateral Agreement signed between France and Romania on cooperation regarding isolated Romanian children in France, their return to Romania, and the fight against child exploitation. The Council stated that the agreement is contrary to the French Constitution, as it does not establish an effective judicial remedy against the decision of child removal to Romania.

Public Human Rights Institutions

European Network of Ombudspersons for Children, ENOC - In 2006, this regional network of Ombudspersons adopted the ENOC principles on guidelines and standards on unaccompanied

\(^{37}\) Constitutional Court, Case 183/2008, 22nd December, 2008.
children. These include: non detention, non deportation, due process (guardian, legal aid, remedies), child assessment, best interest determination, confidentiality, right to be heard, right to information, right to asylum, training on child rights for civil servants, durable solutions, and family tracing.

Defensor del Pueblo (Ombudsperson, Spain, 2005) - This public institution produced a report on the right of migrants to receive free legal aid during procedures related to their entrance, stay, or deportation from the country. The report explicitly stresses that policies must effectively fulfill this right with regard to unaccompanied children.

Defensoría General de la Nación (National General Defender, Argentina) - In 2007, this institution, in charge of providing free legal defense, created a Commission to protect migrants and asylum seekers in vulnerable condition. Consequently, the Commission developed a mechanism that provides a guardian and free legal representative to UASC, in order to promote the adoption of durable solutions in the BIC.48

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