

## GENERAL COMMENT No. 6 (2005)

### Treatment of unaccompanied and separated children outside their country of origin

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## I. OBJECTIVES OF THE GENERAL COMMENT

The objective of the General Comment is to draw attention to the particularly vulnerable situation of unaccompanied and separated children; to outline the multi-faceted challenges faced by States and other actors in ensuring that such children are able to access and enjoy their rights; and, to provide guidance on the protection, care and proper treatment of unaccompanied and separated children based on the entire legal framework provided by the *Convention on the Rights of the Child* (the “Convention”), with particular reference to the principles of non-discrimination, the best interests of the child and the right of the child to express his or her views freely.

The issuing of this General Comment is motivated by the Committee’s observance of an increasing number of children in such situations. There are varied and numerous reasons for a child being unaccompanied or separated, ranging from: persecution of the child or the parents; to international conflict and civil war; to trafficking in various contexts and forms, including sale by parents; and the search for better economic opportunities.

The issuing of the General Comment is further motivated by the Committee’s identification of a number of protection gaps in the treatment of such children, including the following: unaccompanied and separated children face greater risks of *inter alia* sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention. They are often discriminated against and denied access to food, shelter, housing, health services and education. Unaccompanied and separated girls are at particular risk of gender based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice. In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials, and in other cases they are admitted but are denied access to asylum procedures or their asylum claims are not handled in an age and gender sensitive manner. Some countries prohibit separated children who are recognized as refugees from applying for family reunification; others permit reunification but impose conditions so restrictive as to make it virtually impossible to achieve. Many such children are granted only temporary status which ends when they turn 18, and there are few effective return programmes.

Concerns such as these have led the Committee to frequently raise issues related to unaccompanied and separated children in its Concluding Observations. This General Comment will compile and consolidate standards developed, *inter-alia*, through the Committee’s monitoring efforts and shall thereby provide clear guidance to States on the obligations deriving from the Convention with regard to this particular vulnerable group of children. In applying these standards, State parties must be cognizant of their evolutionary character and therefore recognize that their obligations may develop beyond the standards articulated herein. These standards shall in no way impair further-reaching rights and benefits offered to unaccompanied and separated children under regional human rights instruments or national systems, international and regional refugee law or international humanitarian law.

## II. STRUCTURE AND SCOPE OF GENERAL COMMENT

This General Comment applies to unaccompanied and separated children who find themselves outside of their country of nationality (consistent with art. 7), or, if stateless, outside their country of habitual residence. The General Comment applies to all such children irrespective of their residence status and reasons for being abroad, and whether they are unaccompanied or separated. However, it does not apply to children who have not crossed an international border, even though the Committee acknowledges the many similar challenges related to internally displaced unaccompanied and separated children, recognizes that much of the guidance offered below is also valuable in relation to such children, and strongly encourages States to adopt relevant aspects of this General Comment in

relation to the protection, care and treatment of unaccompanied and separated children who are displaced within their own country.

While the mandate of the Committee is confined to its supervisory function in relation to the Convention, its interpretation efforts must be conducted in the context of the entirety of applicable international human rights norms and, therefore, the General Comment adopts a holistic approach to the question of the proper treatment of unaccompanied and separated children acknowledging that all human rights, including those contained in the Convention, are indivisible and interdependent. The importance of other international human rights instruments to the protection of the child is also recognized in the Preamble to the Convention.

### III. DEFINITIONS

**Unaccompanied children** (also called unaccompanied minors) are children, as defined in article 1 of the Convention, 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 children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

A “child as defined in article 1 of the Convention”, means “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” This means that any instruments governing children in the territory of the State, cannot define a child in any way that deviates from the norms determining the age of majority in that State.

If not otherwise specified, the guidelines below apply equally to both unaccompanied and separated children.

**Country of origin** is the country of nationality, or, in the case of a stateless child, the country of habitual residence.

### IV. APPLICABLE PRINCIPLES

#### **a) Legal obligations of State parties for all unaccompanied or separated children in their territory and measures for their implementation**

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 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 are not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.

Obligations deriving from the Convention *vis-à-vis* unaccompanied and separated children apply to all branches of government (executive, legislative and judicial). They include the obligation to establish national legislation; administrative structures; and the necessary research, information, data compilation and comprehensive training activities to support such measures. Such legal obligations are both negative and positive in nature, requiring States not only to refrain from measures infringing on such children’s rights, but also to take measures to ensure the enjoyment of these rights without

discrimination. Such responsibilities are not only limited to the provision of protection and assistance to children who are already unaccompanied or separated, but include measures to prevent separation (including the implementation of safeguards in case of evacuation). The positive aspect of these protection obligations also extend to requiring States to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border, to carry out tracing activities and, where possible and if in the child's best interest, to reunify separated and unaccompanied children with their families as soon as possible.

As reaffirmed in its General Comment No. 5 (CRC/C/GC/2003/5, paras 18-23), States parties to the Convention have to ensure that the provisions and principles of the treaty are fully reflected and given legal effect in relevant domestic legislation. In case of any conflict in legislation, predominance should always be given to the Convention, in light of article 27 of the 1969 *Vienna Convention on the Law of Treaties*.

In order to ensure a conducive legal environment and in light of article 41(b) of the Convention, States parties are also encouraged to ratify other international instruments that address issues relating to unaccompanied and separated children, including the two Optional Protocols to the Convention on the Rights of the Child (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography), the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the "CAT"), the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women*, the 1951 *Convention relating to the Status of Refugees* ("the 1951 Refugee Convention") and the 1967 *Protocol relating to the Status of Refugees*; the 1961 *Convention on the Reduction of Statelessness*, the 1954 *Convention relating to the Status of Stateless Persons*, the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption*, the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, the four *Geneva Conventions of 12 April 1949*, the *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) of 8 June 1977, the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) of 8 June 1977. The Committee also encourages States parties to the Convention and others concerned to take into account UNHCR's Guidelines on Protection and Care (1994) and the Inter-Agency Guiding Principles on Unaccompanied and Separated Children<sup>1</sup>.

In view of the absolute nature of obligations deriving from the Convention and their *lex specialis* character, article 2 paragraph 3 of the *International Covenant on Economic Social and Cultural Rights* would not apply with regard to unaccompanied and separated children. In application of article 4 of the Convention, the particular vulnerability of unaccompanied and separated children explicitly recognized in article 20 of the Convention, must be taken into account and will result in a prioritization of the assignment of available resources to such children. States are expected to accept and facilitate assistance offered within their respective mandates by UNICEF, UNHCR and other agencies (art. 22(2) of the Convention) in order to meet the needs of unaccompanied and separated children.

The Committee believes that reservations made by States parties to the Convention should not in any way limit the rights of unaccompanied and separated children. As is systematically done with States parties during the reporting process, the Committee recommends that, in light of the Vienna Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights in

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<sup>1</sup> These Guiding Principles are jointly endorsed by the International Committee of the Red Cross, the International Rescue Committee, Save the Children/UK, UNICEF, UNHCR, and World Vision International. They are intended to guide the work of all members of the Inter-Agency Standing Committee with respect to unaccompanied and separated children.

Vienna<sup>2</sup>, reservations limiting the rights of unaccompanied and separated children be reviewed with the objective of withdrawal.

### **b) Non-discrimination (art. 2)**

The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, 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. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken 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 non-discrimination, such measures can, therefore, never be applied on a group or collective basis.

### **c) Best interests of the child as a primary consideration in the search for short and long-term solutions (art. 3)**

Article 3(1) states that “[i]n 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”. In 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.

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 related interviewing techniques.

Subsequent steps such as 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 unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

Respect for best interests also requires that where competent authorities have placed an unaccompanied or separated child “for the purposes of care, protection or treatment of his or her physical or mental health”, the State recognizes the right of that child to a “periodic review” of their treatment and “all other circumstances relevant to his or her placement” (article 25 of the Convention).

### **d) The right to life, survival and development (art. 6)**

The obligation of the State party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardize a child’s right to life, survival and development. Separated and unaccompanied children are vulnerable to various risks that affect their life, survival and development such as trafficking for purposes of sexual or other exploitation or

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<sup>2</sup> World Conference on Human Rights, Vienna, 14-25 June 1993, “Vienna Declaration and Programme of Action”, A/CONF.157/23.

involvement in criminal activities which could result in harm to the child, or in extreme cases, in death. Accordingly, article 6 necessitates vigilance by States parties in this regard, particularly when organized crime may be involved. While the issue of trafficking of children is beyond the scope of this General Comment, the Committee notes that there is often a link between trafficking and the situation of separated and unaccompanied children.

The Committee is of the view that practical measures should be taken at all levels to protect children from the risks mentioned above. Such measures could include: priority procedures for child victims of trafficking, the prompt appointment of guardians, the provision of information to children about the risks they may encounter, and establishment of measures to provide follow-up to children particularly at risk. These measures should be regularly evaluated to ensure their effectiveness.

#### **e) Right of the child to express his or her views freely (art. 12)**

Pursuant to article 12 of the Convention, in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (art. 12(1)). To allow for a well-informed expression of such views and wishes, it is imperative that such 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 (arts. 13, 17 and 22(2)). 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. As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.

#### **f) Respect for the principle of *non-refoulement***

In affording proper treatment of unaccompanied or separated children, 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 of the 1951 Refugee Convention and in article 3 of the CAT.

Furthermore, in fulfilling obligations under the Convention, 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 under-age recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, entail extra-territorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.

#### **g) Confidentiality**

States parties must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child's rights, including the right to privacy (art. 16). This obligation applies in all settings, including health and social welfare. Care must be taken that information sought and legitimately shared for one purpose is not inappropriately used for that of another.

Confidentiality concerns also involve respect for the rights of others. For example, in obtaining, sharing and preserving the information collected in respect of unaccompanied and separated children, particular care must be taken in order not to endanger the well-being of persons still within the child's country of origin, especially the child's family members. Furthermore, information relating to the whereabouts of the child shall only be withheld *vis-à-vis* the parents where required for the safety of the child or to otherwise secure the "best interests" of the child.

## V. RESPONSE TO GENERAL AND SPECIFIC PROTECTION NEEDS

### a) Initial assessment and measures

The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:

- A. 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 (art. 8). Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such.
- B. Prompt **registration** by means of an initial interview conducted in an age-appropriate and gender sensitive manner, in a language the child understands, by professionally qualified persons to collect biodata and social history to ascertain the identity of the child, including, wherever possible, identity of both parents, other siblings, as well as the citizenship of the child, the siblings and the parents.
- C. In continuation of the registration process, the **recording of further information** in order to meet the specific needs of the child. This information should include:
  - Reasons for being separated or unaccompanied;
  - Assessment of particular vulnerabilities, including health, physical, psycho-social, material and other protection needs, including those deriving from domestic violence, trafficking or trauma;
  - All available information to determine the potential existence of international protection needs, including those: due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" in the child's country of origin (art. 1A(2), 1951 Refugee Convention); deriving from external aggression, occupation, foreign domination or events seriously disturbing public order (art. 1(2), Convention Governing the Specific Aspects of Refugee Problems in Africa); or relating to the indiscriminate effects of generalized violence.

- D. Unaccompanied and separated children should be provided with their own personal identity **documentation** as soon as possible.
- E.. **Tracing** of family members to be commenced as early as possible (arts. 22(2), 9(3) and 10(2)).

Any further actions relating to the residence and other status of the child in the territory of the State should be based on the findings of an initial protection assessment carried out in accordance with the above procedures. States should refrain from referring unaccompanied and separated children into asylum procedures if their presence in the territory does not raise the question of international refugee protection needs. This is without prejudice to the obligation of States to refer unaccompanied or separated children into relevant procedures serving child protection, such as those foreseen under child welfare legislation.

### **b) Appointment of a guardian or adviser and legal representative (arts. 18(2) and 20(1))**

States are required to create the underlying legal framework and take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of child care, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, *inter alia*, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

In the case of a separated child, guardianship should regularly be assigned to the accompanying adult family member or non-primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so, for example, where the accompanying adult has abused the child. In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely. If such a guardian is able and willing to provide day-to-day care, but unable to adequately represent the child's best interests in all spheres and at all levels of the child's life, supplementary measures (such as the appointment of an adviser or legal representative) must be secured.

Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.

In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration.

In large scale emergencies, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of separated children should be safeguarded and promoted by States and organizations working on behalf of these children.

### **c) Care and accommodation arrangements (arts. 20 and 22)**

Unaccompanied or separated children are children temporarily or permanently deprived of their family environment and, as such, are beneficiaries of States' obligations under article 20 of the Convention and shall be entitled to special protection and assistance provided by the relevant State.

Mechanisms established under national law in order to ensure alternative care for such children in accordance with article 22 of the Convention, shall also cover unaccompanied or separated children outside their country of origin. A wide range of options for care and accommodation arrangements exist and are explicitly acknowledged in article 20(3) as follows: "...*inter alia*, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children." When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process. Such care and accommodation arrangements should comply with the following parameters:

- Children should not, as a general rule, be deprived of liberty.
- In order to ensure continuity of care and considering the best interests of the child, changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child.
- In accordance with the principle of family unity, siblings should be kept together.
- A child who has adult relatives arriving with him or her or already living in the country of asylum should be allowed to stay with them unless such action would be contrary to the best interests of the child. Given the particular vulnerabilities of the child, regular assessments should be conducted by social welfare personnel.
- Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities.
- States and other organizations must take measures to ensure the effective protection of the rights of separated or unaccompanied children living in child-headed households.
- In large scale emergencies, interim care must be provided for the shortest time appropriate for unaccompanied children. This interim care provides for their security and physical and emotional care in a setting that encourages their general development.
- Children must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration.

### **d) Full access to education (arts. 28, 29(1)(c), 30 and 32)**

States should ensure that access to education is maintained during all phases of the displacement cycle. Every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered in line with articles 28, 29(1)(c), 30 and 32 of the Convention and the general principles developed by the Committee. Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal education, including vocational training at all levels. Access to quality education should also be ensured for children with special needs, in particular children with disabilities.

The unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing learning opportunities. All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language. All adolescents should be allowed to enrol in vocational/professional training or education, and early learning programmes should be made available to young children. States should ensure that unaccompanied or separated children are provided with school certificates or other documentation indicating their level of education, in particular in preparation of relocation, resettlement or return

States shall, in particular where government capacity is limited, accept and facilitate the assistance offered by UNICEF, UNESCO, UNHCR and other UN agencies within their respective mandates, as well as, where appropriate, other competent inter-governmental organizations or non-governmental organizations (art. 22(2)) in order to meet the educational needs of unaccompanied and separated children.

#### **e) Right to an adequate standard of living (art. 27)**

States should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in art 27(2) of the Convention, States shall in particular provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

States shall, in particular where government capacity is limited, accept and facilitate the assistance offered by UNICEF, UNESCO, UNHCR and other UN agencies within their respective mandates, as well as, where appropriate, other competent inter-governmental organizations or non-governmental organizations (art. 22(2)) in order to secure an adequate standard of living for unaccompanied and separated children.

#### **f) Right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health (arts. 23, 24 and 39)**

When implementing the right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health under article 24 of the Convention, States are obligated to ensure that unaccompanied and separated children have the same access to health care as national children.

In ensuring their access, States must assess and address the particular plight and vulnerabilities of such children. They should, in particular, take into account the fact that unaccompanied children have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence. Many of such children, in particular, those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war. This may have created deep-rooted feelings of helplessness and undermined a child's trust in others. Moreover, girls are particularly susceptible to marginalization, poverty and suffering during armed conflict, and many may have experienced gender based violence in the context of armed conflict. The profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation.

The obligation under article 39 of the Convention sets out the duty of States to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflicts. In order to facilitate such recovery and reintegration, culturally-appropriate and gender sensitive mental health care should be developed and qualified psycho-social counselling provided.

States shall, in particular where government capacity is limited, accept and facilitate assistance offered by UNICEF, WHO, UNAIDS, UNHCR and other agencies (art. 22(2)) within their respective mandates, as well as, where appropriate, other competent inter-governmental organizations or non-governmental organizations in order to meet the health and health care needs of unaccompanied and separated children.

### **g) Prevention of trafficking and of sexual and other forms of exploitation, abuse and violence (arts. 34, 35 and 36)**

Unaccompanied or separated children in a country outside their country of origin are particularly vulnerable to exploitation and abuse. Girls are at particular risk of being trafficked, including for purposes of sexual exploitation.

Articles 34 to 36 of the Convention must be read in conjunction with special protection and assistance obligations to be provided according to article 20 of the Convention, in order to ensure that unaccompanied and separated children are shielded from trafficking, and from sexual and other forms of exploitation, abuse and violence.

Trafficking of such a child or “re-trafficking” in cases where a child was already a victim of trafficking is one of many dangers faced by unaccompanied or separated children. Trafficking in children is a threat to the fulfilment of their right to life, survival and development (art. 6). In accordance with Article 35 of the Convention, States parties should take appropriate measures to prevent such trafficking. Necessary measures include identifying unaccompanied and separated children; regularly inquiring as to their whereabouts; and conducting information campaigns that are age-appropriate, gender-sensitive and in a language and medium that is understandable to the child. Adequate legislation should also be passed and effective mechanisms of enforcement be established with respect to labour regulations and border crossing.

Risks are also great for a child who has already been a victim of trafficking, resulting in the status of being unaccompanied or separated. Such children should not be penalised and should receive assistance as victims of a serious human rights violation. Some trafficked children may be eligible for refugee status under the 1951 Convention, and States should ensure that separated and unaccompanied trafficked children who wish to seek asylum or in relation to whom there is otherwise indication that international protection needs exist, have access to asylum procedures. Children who are at risk of being re-trafficked should not be returned to their country of origin unless it is in their best interests and appropriate measures for their protection have been taken. States should consider complementary forms of protection for trafficked children when return is not in their best interests.

### **h) Prevention of military recruitment and protection against effects of war (arts. 38, 39)**

#### ***Prevention of recruitment***

State obligations deriving from article 38 of the Convention and from articles 3 and 4 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* also apply to unaccompanied and separated children. A State must take all necessary measures to prevent recruitment or use of such children by any party to a conflict. This also applies to former child soldiers who have defected from their units and who require protection against re-recruitment.

#### ***Care arrangements***

Care arrangements for unaccompanied and separated children shall be made in a manner which prevents their recruitment, re-recruitment or use by any party to a conflict. Guardianships should not be given to individuals or organizations who are directly or indirectly involved in a conflict.

#### ***Former child soldiers***

Child soldiers should be considered primarily as victims of armed conflict. Former child soldiers who often find themselves unaccompanied or separated at the cessation of the conflict or following defection, shall be given all the necessary support services to enable reintegration into normal life, including necessary psycho-social counselling. Such children shall be identified and demobilized on a priority basis during any identification and separation operation. Child soldiers, in particular, those who are unaccompanied or separated, should not normally be interned, but rather, benefit from special protection and assistance measures, in particular, as regards their demobilization and rehabilitation. Particular efforts must be made to provide support and facilitate the reintegration of girls who have been associated with the military, either as combatants or in any other capacity.

If under certain circumstances, exceptional internment of a child soldier over the age of 15 years is unavoidable and in compliance with international human rights and humanitarian law, for example, where s/he poses a serious security threat, the conditions of such internment should be in conformity with international standards, including article 37 of the Convention and those pertaining to juvenile justice, and should not preclude any tracing efforts and priority participation in rehabilitation programs.

### ***Non-refoulement***

As under-age recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, entail extra-territorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment or participation, directly or indirectly, in hostilities.

### ***Child-specific forms and manifestations of persecution***<sup>3</sup>

Reminding States of the need for age and gender-sensitive asylum procedures and an age and gender-sensitive interpretation of the refugee definition, the Committee highlights that under-age recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on “reasons of race, religion, nationality, membership of a particular social group or political opinion.” (art. 1A(2), 1951 Refugee Convention).

### ***Rehabilitation and recovery***

States shall develop, where needed, in cooperation with international agencies and NGOs, a comprehensive age appropriate and gender sensitive system of psychological support and assistance for unaccompanied and separated children affected by armed conflict.

## **i) Prevention of deprivation of liberty and treatment in cases thereof**

In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to

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<sup>3</sup> More generally on child-specific forms and manifestations of persecution, see below: Section VI(d), Child sensitive assessment of protection needs, taking into account persecution of a child-specific nature

the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.

In addition to national requirements, international obligations constitute part of the law governing detention. With regards to asylum-seeking, unaccompanied and separated children, States must, in particular, respect their obligations deriving from article 31(1) of the 1951 Refugee Convention. States should further take into account that illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child. More generally, in developing policies on unaccompanied or separated children, including those who are victims of trafficking and exploitation, States should ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country.

In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37(a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. Indeed, the underlying approach to such a program should be "care" and not "detention". Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.

## **VI. ACCESS TO THE ASYLUM PROCEDURE, LEGAL SAFEGUARDS AND RIGHTS IN ASYLUM**

### **a) General**

The obligation stemming from article 22 of the Convention to take "appropriate measures" to ensure that a child, whether unaccompanied or accompanied, who is seeking refugee status receives appropriate protection entails, *inter alia*, the responsibility to set up a functioning asylum system and, in particular, to enact legislation addressing the particular treatment of unaccompanied and separated children and to build capacities necessary to realize this treatment in accordance with applicable rights codified in the Convention and in other international human rights, refugee protection or humanitarian instruments to which the State is a party. States facing resource constraints in staging such capacity-building efforts are strongly encouraged to seek international assistance, including that provided by UNHCR.

Taking into account the complementary nature of the obligations under article 22 and those deriving from international refugee law, as well as the desirability of consolidated standards, States should apply international standards relating to refugees as they progressively evolve when implementing article 22 of the Convention.

### **b) Access to asylum procedures, regardless of age**

Asylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age. In the case that facts become known during the identification and registration process which indicate that the child may have a well-founded fear, or even if unable to explicitly articulate a concrete fear, may objectively be at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, otherwise be in need of international protection, such a child should be referred to the asylum procedure and/or, where relevant, to mechanisms providing complementary protection under international and domestic law.

Unaccompanied or separated children for whom there is no indication of being in need of international protection should not automatically, or otherwise, be referred to asylum procedures, but shall be protected pursuant to other relevant child protection mechanisms such as those provided under youth welfare legislation.

### **c) Procedural safeguards and support measures (art. 3(3))**

Appropriate measures required under article 22(1) of the Convention must take into account the particular vulnerabilities of unaccompanied and separated children and the national legal framework and conditions. Such measures should be guided by the following considerations.

An asylum-seeking child should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests (see Section V(b), Appointment of a guardian or adviser or legal representative). The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults.

Refugee status applications filed by unaccompanied and separated children shall be given priority and every effort should be made to render a decision promptly and fairly.

Minimum procedural guarantees should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters. Where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made. Wherever the child is unable to directly communicate with the qualified official in a common language, the assistance of a qualified interpreter should be sought. Moreover, the child should be given the "benefit of the doubt" should there be credibility concerns relating to his or her story as well as a possibility to appeal for a formal review of the decision.

The interviews should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child. The assessment process should comprise a case-by-case examination of the unique combination of factors presented by each child, including the child's personal, family and cultural background. The guardian and the legal representative should be present during all interviews.

In cases of large-scale refugee movements where individual refugee status determination is not possible, States may grant refugee status to all members of a group. In such circumstances, all unaccompanied or separated children are entitled to be granted the same status as other members of the particular group.

### **d) Child-sensitive assessment of protection needs, taking into account persecution of a child-specific nature.**

When assessing refugee claims of unaccompanied or separated children, States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by UNHCR in exercising its supervisory functions under the 1951

Refugee Convention. In particular, the refugee definition of the 1951 Refugee Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of the kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status determination procedures.

Staff involved in status determination procedures of children, in particular, those who are unaccompanied or separated, should receive training on adopting a child-, cultural-, and gender-sensitive application of international and national refugee law. To properly assess asylum claims of children, information on the situation of children, including those belonging to minorities or marginalized groups, should be included in government efforts to collect country of origin information.

#### **e) Full enjoyment of all international refugee and human rights by children granted refugee status (art. 22)**

Unaccompanied or separated children recognized as refugees and granted asylum do not only enjoy rights under the 1951 Refugee Convention, but are entitled to the fullest extent, to the enjoyment of all human rights granted to children in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory.

#### **f) Children to benefit from complementary forms of protection**

In the case that the requirements for granting refugee status under the 1951 Refugee Convention are not met, unaccompanied and separated children shall benefit from available forms of complementary protection to the extent determined by their protection needs. The application of such complementary forms of protection does not obviate States' obligations to address the particular protection needs of the unaccompanied and separated child and, therefore, children granted complementary forms of protection are entitled, to the fullest extent, to the enjoyment of all human rights granted to children in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory.

In line with the generally applicable principles and, in particular, those relating to the responsibilities of States with regard to unaccompanied or separated children finding themselves in their territory, children who are neither granted refugee status nor benefitting from complementary forms of protection, will still enjoy protection under all norms of the Convention as long as they remain *de facto* within the States' territories and/or subject to its jurisdiction.

## **VII. FAMILY REUNIFICATION, RETURN AND OTHER FORMS OF DURABLE SOLUTIONS**

### **a) General**

The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being

unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analyzing the possibility of family reunification.

Tracing is an essential component of any search for a durable solution and should be prioritised except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardise fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee. Subject to all of these conditions, such tracing efforts should also be continued during the asylum procedure. For all children who remain in the territory of the host State, whether on the basis of asylum, complementary forms of protection or due to other legal or factual obstacles to removal, a durable solution must be sought.

## **b) Family reunification**

In order to pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art.12) (see also Section IV(e), Right of the child to express his or her views freely). While the considerations explicitly listed in article 9, paragraph 1, sentence 2; namely, cases involving abuse or neglect of the child by the parents, may prohibit reunification at any location, other best interests considerations can provide an obstacle to reunification at specific locations only.

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 fundamental human rights of the child. 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 (including those deriving from article 3 of the CAT and articles 6 and 7 of the ICCPR). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the 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.

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(1)). Countries of origin must respect “the right of the child and his or her parents to leave any country, including their own, and to enter their own country” (art. 10(2)).

## **c) Return to the country of origin**

Return to the country of origin is not an option if it would 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 the:

- Safety, security and conditions, including socio-economic conditions awaiting the child upon return including through home study, where appropriate, conducted by social network organizations.
- Availability of care arrangements for that particular child.
- 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).

In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.

Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non rights-based arguments such as, those relating to general migration control, cannot override best interests considerations.

In all cases return measures must be conducted in a safe, child-appropriate and gender sensitive manner.

Countries of origin are also reminded in this context of their obligations pursuant to article 10 of the Convention and, in particular, to respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country".

#### **d) Local integration**

Local integration is the primary option if return to the country of origin is impossible on either legal or factual grounds. Local integration must be based on a secure legal status (including residence status) and be governed by the Convention rights which 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.

Once it has been determined that a separated or unaccompanied child will remain in the community, the relevant authorities should conduct an assessment of the child's situation and then, in consultation with the child and his or her guardian, determine the appropriate long-term arrangements within the local community and other necessary measures to facilitate such integration. The long-term placement should be decided in the best interests of the child and at this stage, institutional care should, wherever possible, serve only as a last resort. The separated or unaccompanied child should have the same access to rights (including to education, training, employment and health care) as enjoyed by national children. In ensuring that these rights are fully enjoyed by the unaccompanied or separated child, the host country may need to pay special attention to the extra measures required to address the child's vulnerable status, including, for example, through extra language training.

#### **e) Inter-country adoption (art. 21)**

States must have full respect for the preconditions provided under article 21 of the Convention as well as other relevant international instruments, including in particular the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption* and its 1994 *Recommendation concerning the application to Refugee and other Internationally Displaced Children*

when considering the adoption of unaccompanied and separated children. States should, in particular, observe the following:

- Adoption of unaccompanied or separated children should only be considered once it has been established that the child is in a position to be adopted. In practice, this means *inter alia* that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption. The consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed. This supposes notably that such consent has not been induced by payment or compensation of any kind and has not been withdrawn.
- Unaccompanied or separated children must not be adopted in haste at the height of an emergency.
- Any adoption must be determined as being in the child's best interests and carried out in keeping with applicable national, international and customary law.
- The views of the child, depending upon his/her age and degree of maturity, should be sought and taken into account in all adoption procedures. This requirement implies that he/she has been counselled and duly informed of the consequences of adoption and of his/her consent to adoption, where such consent is required. Such consent must have been given freely and not induced by payment or compensation of any kind.
- Priority must be given to adoption by relatives in their country of residence. Where this is not an option, preference will be given to adoption within the community from which the child came or at least within his or her own culture.
- Adoption should not be considered:
  - Where there is reasonable hope of successful tracing and family reunification is in the child's best interests;
  - If it is contrary to the expressed wishes of the child or the parents;
  - Unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members has been carried out. This period of time may vary with circumstances, in particular, those relating to the ability to conduct proper tracing; however, the process of tracing must be completed within a reasonable period of time.
- Adoption in a country of asylum should not be taken up when there is the possibility of voluntary repatriation under conditions of safety and dignity in the near future.

#### **f) Resettlement in a third country**

Resettlement to a third country may offer a durable solution for an accompanied or separated child who cannot return to the country of origin and for whom no durable solution can be envisaged in the host country. The decision to resettle an unaccompanied or separated child must be based on an updated, comprehensive and thorough best interests assessment, taking into account, in particular, ongoing international and other protection needs. Resettlement is particularly called for if such is the only means to effectively and sustainably protect a child against *refoulement* or against persecution or other serious human rights violations in the country of stay. Resettlement is also in the best interests of the unaccompanied or separated child if it serves family reunification in the resettlement country.

The best interests assessment determination prior to a decision to resettle, needs also to take into account other factors such as: the envisaged duration of legal or other obstacles to a child's return to his or her home country; the child's right to preserve his or her identity, including nationality and name (art. 8), the child's age, sex, emotional state, educational and family background; continuity/discontinuity of care in the host country; the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20), the right of the child to preserve his or her family relations (art. 8) and related short-, mid- and long-term possibilities of family reunion either in the home, host, or resettlement country. Unaccompanied or separated children should never be resettled to a third country if this would undermine or seriously hamper future reunion with their family.

States are encouraged to provide resettlement opportunities in order to meet all the resettlement needs related to unaccompanied and separated children.

## **VIII. TRAINING, DATA AND STATISTICS**

### **a) Training of personnel dealing with unaccompanied and separated children**

Particular attention should be paid to the training of officials working with separated and unaccompanied children and dealing with their cases. Specialized training is equally important for legal representatives, guardians, interpreters and others dealing with separated and unaccompanied children.

Such training should be specifically tailored to the needs and rights of the groups concerned. Nevertheless certain key elements should be included in all training programmes, including:

- Principles and provisions of the Convention
- Knowledge of the country of origin of separated and unaccompanied children
- Appropriate interview techniques
- Child development and psychology
- Cultural sensitivity and inter-cultural communication

Initial training programmes should also be followed up regularly, including through on-job learning and professional networks.

### **b) Data and statistics on separated and unaccompanied children**

It is the experience of the Committee that data and statistics collected with regard to unaccompanied and separated children tends to be limited to the number of arrivals and/or number of requests for asylum. This data is insufficient for a detailed analysis of the implementation of the rights of such children. Furthermore, data and statistics are often collected by a variety of different ministries or agencies, which can impede further analysis and presents potential concerns with regard to confidentiality and a child's right to privacy.

Accordingly, the development of a detailed and integrated system of data collection on unaccompanied and separated children is a prerequisite for the development of effective policies for the implementation of the rights of such children.

Data collected within such a system should ideally include but not be limited to: basic biographical data on each child (including age, sex, country of origin and nationality, ethnic group); total number of unaccompanied and separated children attempting to enter the country and the number that have been refused entry; number of requests for asylum; number of legal representatives and guardians assigned to such children; legal and immigration status (i.e. asylum-seeker, refugee, temporary resident permit); living arrangements (i.e. in institutions, with families or living independently); enrolment in school or vocational training; family reunifications; and, numbers returned to their country of origin. In addition, States parties should consider collecting qualitative data that would allow them to analyse issues that remain insufficiently addressed, such as for instance, disappearances of unaccompanied and separated children and the impact of trafficking.