



UNHCR’s Oral Statement to the Inter-American Court of Human Rights in the framework of a request for an Advisory Opinion on Migrant Children presented by MERCOSUR

Mr. President, Members of the Court,

Introduction

1. I wish to thank the Court for the opportunity to appear before it as an intervener or “friend of the Court” as this case raises important points of asylum and refugee law, including importantly the rights of asylum-seeking and refugee children, the most vulnerable group.
2. In addressing the Court, UNHCR would like to highlight three particular issues related to asylum-seeking and refugee children:
 - Firstly, the underlying principles, in particular that of the institution of asylum.
 - Secondly, the need for early identification of children and their specific protection and assistance needs; the importance of establishing appropriate child-sensitive asylum procedures; and establishing adequate reception conditions.
 - Thirdly, the inherent undesirable detention of asylum-seeking and refugee children.

Principles

3. We will now turn to the first issue, on the protection of asylum-seeking and refugee children, grounded in the institution of asylum. As underscored by the preamble of the 1951 Convention, asylum is best characterized as providing international protection and ensuring that the range of rights and needs of people who are not protected by their own country are met. Central principles of the 1951 Convention include: *non-refoulement*, admission to safe territory, non-discrimination, non-penalization for illegal entry or stay, enjoyment of basic human rights, and the attainment of a durable solution.
4. The right to asylum is both a well-established tradition and principle in the Americas – from the concept of “asilo”, referring to an inviolable right to sanctuary for those persecuted for their political beliefs; to the definition of a refugee in the 1951 Convention, which have been widely ratified by countries in the region. Both the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights include the institution of asylum as an individual right

to seek and receive/be granted asylum with reference to other international instruments, including thereby the 1951 Convention and its 1967 Protocol.

5. UNHCR takes this opportunity to note that in Latin America, the term “asilo” (asylum) has been at times erroneously replaced by the term “refugio” (refuge) to describe the concepts of asylum and international protection of refugees. In UNHCR’s view, this terminological confusion has led to a misinterpretation of the right to asylum embodied in the regional human rights instruments and has had the effect of limiting the scope of the concept of asylum and the rights of persons in need of international protection as embodied in those instruments, including the 1951 Convention. Therefore, UNHCR calls on the Inter-American Court to use the legal term “asilo” as applied generally under international human rights law and international refugee law.
6. UNHCR also reiterates that the principle of *non-refoulement* is a fundamental right and cornerstone of international protection and asylum, codified in regional refugee law instruments, forming a norm of customary international law, and complemented by refoulement prohibitions contained in and developed under international human rights law, prohibiting the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm.
7. Finally, UNHCR would also like to draw the Court’s attention to a number of principles relevant for the protection of asylum-seeking and refugee children included in the Convention on the Rights of the Child, in particular the best interest of the child, which we have highlighted in both our written submissions and UNICEF’s.

Appropriate identification, procedural and reception standards

8. With regard to our second point on identification, UNHCR wishes to highlight that the identification of children at risk, including through registration, should start as soon as possible after arrival with continued regular monitoring. Attention should also be given to factors putting children at a heightened risk in accordance with UNHCR’s 2007 Conclusion on Children at Risk.
9. Following this, due to their heightened risk situation, in the case of unaccompanied and separated children, tracing and family reunification efforts should start as soon as possible and an independent and qualified guardian should be appointed immediately. There are good regional practices on this matter, such as the case of Argentina, where a guardian is appointed after identification of an unaccompanied asylum-seeking child, and assumes the child’s legal representation in all stages of the refugee status determination procedure, reception arrangements and integration aspects.
10. Furthermore, the best interest of the child – as included in the Convention on the Rights of the Child – should be determined and understood as a formal process with strict procedural safeguards designed to determine the child’s best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option.

UNHCR's Guidelines on Determining the Best Interest of the Child can be a good reference in this regard.

11. With regards to asylum procedures in particular, appropriate and child-sensitive asylum procedures that include suitable communication and participation methods, procedures for the determination of the child's best interests, prioritized processing for unaccompanied and separated children, procedural and evidentiary safeguards and the assessment regarding the child's age need to be in place. Child-sensitive asylum procedures should also involve skilled decision-makers with relevant expertise.
12. Within child-sensitive asylum procedures the child should be allowed meaningful participation, for example, to express his or her views. Also, sufficient flexibility is needed regarding the burden of proof and to allow the name of the principal applicant to be changed if, for example, it emerges that the child is the more appropriate principal applicant than the child's parent. Furthermore, there shall be no age related limitation to a child being the main and/or sole applicant in a refugee status determination procedure.
13. It is also important, that asylum-seeking children have access to qualified and free legal representation during the refugee status determination procedure, and that an age and gender sensitive application of the 1951 Convention is applied with recognition of child-specific manifestations and forms of persecution, such as including under-age recruitment and child trafficking. In this regard, UNHCR would like to draw the Court's attention to the Office's Guidelines on Child Asylum Claims which offer substantive and procedural guidance to States on carrying out refugee status determination in a child-sensitive manner.
14. As mentioned, it is important to create a child-sensitive environment, which includes adequate and child-sensitive reception conditions. Hereby, UNHCR would like to refer to UNHCR's Executive Committee Conclusion on reception of asylum-seekers in the context of individual asylum systems as well as UNHCR's Guidelines on Protection and Care for Refugee Children; both are mentioned in our written submissions.

Detention

15. Finally, we would like to draw the Court's attention to the issue of detention of asylum-seekers, including asylum-seeking children. The detention of asylum-seekers is inherently undesirable. Children who are seeking asylum should not, as a general rule, be detained. An ethic of care – and not detention - needs to govern all interactions with asylum-seeking children. UNHCR welcomes and encourages the practice in countries such as Argentina, Costa Rica, and Nicaragua where alternatives to detention are practiced and children are not detained under any circumstance.
16. Further to the above, all appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity and this is judged to be in the child's best interests.

17. UNHCR's highly appreciates the opportunity given by the Inter-American Court of Human Rights to reflect on the protection concerns of asylum seeking and refugee children.

Thank you.