



UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR

1. Introduction*

1.1 By letters of 23 September 2011 (REF:CDH-OC-21/095) and 1 December 2011 (REF:CDH-OC-21/269) the Inter-American Court of Human Rights (hereinafter “the Court”) invited the Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) to submit a written opinion in the framework of a request made by MERCOSUR’s Member States and partner States, through its Institute of Public Policies on Human Rights for an Advisory Opinion on migrant children.

1.2 UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees.¹ According to its Statute, UNHCR fulfils its mandate inter alia by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”² UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.³

1.3 The Advisory Opinion requested of the Court raises several issues directly related to UNHCR’s mandate for the protection of asylum-seeking and refugee children. It also reflects the new challenging context in which international protection of refugees is provided whereby migration and international refugee protection are interlinked, particularly when dealing with mixed migratory flows.⁴ UNHCR welcomes the opportunity to provide its expert opinion on a number of issues that are referred to in the questions posed to the Court in the request for an Advisory Opinion and which are of particular relevance for the rights of asylum-seeking and refugee children.

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibidem*, para. 8(a).

³ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁴ UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, pp. 8-14, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>.

2. General principles for the protection of asylum-seeking and refugee children

2.1 The protection of asylum-seeking and refugee children is grounded in the **institution of asylum**. The modern institution of asylum, found in the Universal Declaration of Human Rights, is reaffirmed in the 1951 Convention and its 1967 Protocol, alongside a growing number of regional refugee and human rights instruments.⁵ At the heart of the 1951 Convention is the institution of international protection for people who are at risk of being persecuted. Originally conceived to replace the diplomatic protection normally provided to citizens abroad, today international protection/asylum is better characterized as ensuring that the range of rights and needs of people who are not protected by their own country are met. The preamble to the 1951 Convention underscores its purpose of assuring refugees the widest possible exercise of their fundamental rights and freedoms; while Article 5 insists that “Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention”. Central principles of the 1951 Convention include those of non-discrimination, *non-refoulement*, non-penalization for illegal entry or stay, and the enjoyment of basic human rights. Admission to safe territory is the start of the process which concludes with the attainment of a durable solution.⁶

2.2 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 broader definition of a refugee in the 1951 Convention relating to the Status of Refugees and its wide ratification by countries in the region.⁷ Both the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights formulate 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.⁸ The Inter-

⁵ See: Organization of American States, *Tratado de Derecho Penal Internacional de Montevideo*, 1889 (Article 15), available at: <http://www.unhcr.org/refworld/docid/4f3d15682.html>; Organization of American States, *Convención sobre Asilo de La Habana*, 1928 (Article 2), available at: <http://www.unhcr.org/refworld/docid/4f3d14952.html>; Organization of American States, *Convention on Political Asylum, Montevideo*, 1933 (Article 3), available at: <http://www.unhcr.org/refworld/docid/4f3d180a2.html>; Organization of American States, *Tratado sobre Asilo y Refugio Políticos de Montevideo*, 1939 (Articles 1 and 2), available at: <http://www.unhcr.org/refworld/docid/4f3d19712.html>; Organization of American States, *American Declaration on the Rights and Duties of Man*, 2 May 1948, (Article XXVII), available at: <http://www.unhcr.org/refworld/docid/3ae6b3710.html>; Organization of American States, *Convention on Territorial Asylum, Caracas*, 1954 (Articles 1 and 2), available at: <http://www.unhcr.org/refworld/docid/3ae6b36614.html>; Organization of American States, *Convention on Diplomatic Asylum, Caracas*, 1954 (Articles 1 and 2), available at: <http://www.oas.org/juridico/english/treaties/a-46.html>; and Organization of American States, *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, (Article 22.7).

⁶ UNHCR, *Note on international protection: report of the High Commissioner*, 28 June 2011, A/AC.96/1098, paras. 2 and 3, available at: <http://www.unhcr.org/refworld/docid/4ed86d612.html>.

⁷ Both the American Declaration (Article XXVII) and the American Convention (Article 22.7) formulate the institution of asylum as an individual right with reference to other international instruments, which arguably includes the 1951 Convention and 1967 Protocol. See also: *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>. The *Contadora Act on Peace and Co-operation in Central America* (June, 1986); the *OAS GA Resolution 774* (XV-O/85) of 07 December 1985, available at: <http://www.unhcr.org/refworld/docid/4f3e0b702.html>, the *OAS GA Resolution 891* (XVII-O/87) of 14 November 1987, International Conference on Central American Refugees, *San Salvador Communiqué on the Central American Refugees*, 9 September 1988, available at: <http://www.unhcr.org/refworld/docid/4f3e0c442.html>, the *Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons (CIREFCA)*, 31 May 1989, available at: <http://www.unhcr.org/refworld/docid/3fbb5d094.html>; the *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, January 1990, available at: <http://www.unhcr.org/refworld/docid/4370ca8b4.html>; *OAS GA Resolution 1103* (XXI-O/91) of 07 June 1991, available at: <http://www.unhcr.org/refworld/docid/4f3d16e22.html>; the *OAS GA Resolution 1273* (XXIV-O/94) of 10 June 1994, available at: <http://www.unhcr.org/refworld/docid/4f3d09112.html>; the *San José Declaration on Refugees and Displaced Persons*, 7 December 1994, available at: <http://www.unhcr.org/refworld/docid/4a54bc3fd.html>; the *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America*, 16 November 2004, available at: <http://www.unhcr.org/refworld/docid/424bf6914.html>; and the *Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas*, 11 November 2010, available at: <http://www.unhcr.org/refworld/docid/4cdd44582.html>.

⁸ American Declaration (Article XXVII) provides: ‘Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.’ American Convention (Article 27.7) provides: ‘Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes.’

American Court⁹ and Commission¹⁰ on Human Rights have confirmed the link between the institution of asylum and the 1951 Convention.

2.3 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 it is applied generally under international law. Clarifying the scope and content of the right to asylum from a human rights perspective, including on the applicability of the 1951 Convention and its 1967 Protocol, as contemplated in Article 22.7 of the American Convention on Human Rights and Article XXVII of the American Declaration on the Rights and Duties of Man, would be an important prerequisite for the enjoyment of rights of asylum-seeking and refugee children in the region.

2.4 The **principle of non-refoulement** is a fundamental right and the cornerstone of international refugee protection. This principle is codified, *inter alia*, in Article 33(1) of the 1951 Convention. The principle of *non-refoulement* applies to any conduct resulting in the removal, expulsion, deportation, return, extradition, rejection at the frontier or non-admission, etc. that would place a refugee at risk. The principle of *non-refoulement* is not subject to territorial restrictions; it applies wherever the state in question exercises jurisdiction.¹¹ The principle of *non-refoulement* applies to all refugees, including those who have not been formally recognized as such, and to asylum-seekers whose status has not yet been determined.¹² The principle of *non-refoulement* is also codified in regional refugee law instruments¹³, forms a rule of customary international law¹⁴ and is complemented by *refoulement* prohibitions contained in and developed under international human rights law, prohibiting the removal

⁹ The Inter-American Court clarified that a measure of international protection embodied both refugee status pursuant to the pertinent instruments of the United Nations and the corresponding domestic laws, and territorial asylum pursuant to the various Inter-American conventions on the matter. See: *Caso Vélez Loor vs. Panamá*, Inter-American Court of Human Rights (IACrTHR), 23 November 2010, para.106 and footnote 105 as well as para. 153 and footnotes 156 and 157, available at: <http://www.unhcr.org/refworld/docid/4d2713532.html>.

¹⁰ Specific mentions of the 1951 Refugee Convention can be found, *inter alia*, in the following cases before the IACHR: : *Joseph v. Canada*, Case 11.092, Report No. 27/93, Inter-American Commission on Human Rights, OAS/Ser.L/V/II.85 Doc. 9 rev. at 32 (1994), available at: <http://www.unhcr.org/refworld/docid/4f3d07c42.html>; *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b71b8.html>; *120 Cuban nationals and 8 Haitian nationals v. Bahamas*, Case 12.071, Inter-American Commission on Human Rights, Report No 6/02, available at: <http://www.unhcr.org/refworld/docid/4f3cfc42.html>. In its Annual Report of the year 2000, the Commission made a special mention to the institution of asylum, based on several sources of international law, stating that “asylum is an institution that provides for the protection of individuals whose life or liberty is threatened or endangered by acts of persecution or violence stemming from the acts or omissions of a State” in: *Asylum and International Crimes*, Inter-American Commission on Human Rights, 108th regular session, 20 October 2000, available at: <http://www.unhcr.org/refworld/docid/4f3cfaf92.html>.

¹¹ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 24, 26, 32-43, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, paras. 4.1.1-4.2.3, available at: <http://www.unhcr.org/refworld/docid/4b97778d2.html>.

¹² UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 3, para. 28.

¹³ See: Organization of American States, *American Convention on Human Rights*, *supra* note 5, Article 22(8); Organization of African Unity, *Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45,] art. II(3), available at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html>; and *Cartagena Declaration on Refugees*, *supra* note 7, pp. 190-93.

¹⁴ UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.unhcr.org/refworld/docid/438c6d972.html>; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, 87 at 163-164, available at: <http://www.unhcr.org/refworld/docid/3b3702b15.html>.

of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm¹⁵.

2.5 The 1989 Convention on the Rights of the Child (hereinafter “CRC”) provides a comprehensive framework for the responsibilities of its States Parties to all children within their jurisdiction, including asylum-seeking and refugee children. The CRC sets out a number of principles regarding the protection of children which apply throughout all stages of displacement¹⁶, including:

- The **best interests of the child** shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22);
- There shall be **no discrimination** on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members (Article 2);
- Each child has a **fundamental right to life, survival and development** to the maximum extent possible (Article 6);
- Children should be assured the **right to express their views freely** and their views should be given “due weight” in accordance with the child’s age and level of maturity (Article 12);¹⁷
- Asylum-seeking and refugee children are entitled to receive **appropriate protection and humanitarian assistance** in line with the CRC and other international instruments (Article 22).¹⁸

3. Early identification of children and their needs

3.1 Identification of children at risk should start as soon as possible after arrival with continued regular monitoring. According to UNHCR’s Executive Committee modalities must be put in place for early and continuous identification of children at heightened risk. Risk factors that put children in a situation of heightened risk can include both risks in the wider protection environment and risks resulting from individual circumstances, such as:

¹⁵ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Art. 3(1), available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 7, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>; *American Convention on Human Rights*, *supra* note 5, Article 5(2) and Art. 22.8; and; Organization of American States, *Inter-American Convention to Prevent and Punish Torture*, Art. 13, available at: <http://www.unhcr.org/refworld/docid/3ae6b3620.html>.

¹⁶ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 12-30, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

¹⁷ UNHCR, *Best Interests Determination Children - Protection and Care Information Sheet*, June 2007, p.2, available at: <http://www.unhcr.org/refworld/docid/46a076922.html>; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, para. 20, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>; UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011, available at: <http://www.unhcr.org/refworld/docid/4e4a57d02.html>; UNHCR, *Guidelines on International Protection No. 8: 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*, paras. 5, 22 December 2009, HCR/GIP/09/08, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

¹⁸ Article 22 provides: ‘1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.’

“i. [w]ider environmental risk factors include, but are not limited to: an insecure environment; lack of access to child-sensitive asylum procedures; situations of displacement, particularly protracted situations; statelessness; lack of sustainable solutions; poverty and families' lack of self-reliance opportunities; inadequate access to and use of services such as education and health care; disruption of family and community support structures; prevalence of traditional practices that are harmful to children; discrimination, intolerance, xenophobia, and gender inequality; and lack of documentation of the parent-child relationship through birth registrations and issuance of birth certificates;”

“ii. [i]ndividual risk factors include, but are not limited to: unaccompanied and separated children, particularly those in child-headed households as well as those accompanied by abusive or exploitative adults; stateless children; adolescents, in particular girl mothers and their children; child victims of trafficking¹⁹ and sexual abuse, including pornography, pedophilia and prostitution; survivors of torture; survivors of violence, in particular sexual and gender-based violence and other forms of abuse and exploitation; children who get married under the age specified in national laws and/or children in forced marriages; children who are or have been associated with armed forces or groups; children in detention; children who suffer from social discrimination; children with mental or physical disabilities; children living with or affected by HIV and AIDS and children suffering from other serious diseases; and children out of school.”

3.2 The Executive Committee has also recognized “that individual, careful and prompt registration of children can be useful for States, UNHCR and other relevant agencies and partners in identifying children at heightened risk”.²⁰

4. Appropriate and child-sensitive asylum procedures

4.1 Appropriate and child-sensitive procedures need to be in place. UNHCR’s Executive Committee has called on States to:

“utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”²¹

4.2 In particular, the Executive Committee has recommended States, UNHCR and other relevant agencies and partners to:

“develop child and gender-sensitive national asylum procedures, where feasible, and UNHCR status determination procedures with adapted procedures including relevant evidentiary requirements, prioritized processing of unaccompanied and separated child asylum-seekers, qualified free legal or other representation for unaccompanied and separated children, and consider an age and gender-sensitive application of the 1951 Convention through the

¹⁹ A regional good practice in the matter of identification of victims of trafficking is the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* of the United States of America, which requires that all unaccompanied Mexican children under the age of eighteen be screened for protection needs including actual or risk of trafficking and fear of return for asylum-based reasons. Available at: *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* [United States of America], Public Law 110-457, 23 December 2008, available at: <http://www.unhcr.org/refworld/docid/49805ae72.html>.

²⁰ UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, para. (e), available at: <http://www.unhcr.org/refworld/docid/471897232.html>.

²¹ *Ibidem*, para. g(i).

recognition of child-specific manifestations and forms of persecution, including under-age recruitment, child trafficking and female genital mutilation”.²²

4.3 UNHCR has issued Guidelines on Child Asylum Claims offering substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner.²³ The following procedural and evidentiary issues are relevant [note not all footnotes from the original have been included]:

“65. Due to their young age, dependency and relative immaturity, children should enjoy **specific procedural and evidentiary safeguards** to ensure that fair refugee status determination decisions are reached with respect to their claims.²⁴ The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure. They do not preclude the application of the detailed guidance provided, for example, in the Action for the Rights of Children Resources Pack,²⁵ the Inter-Agency Guiding Principles on Unaccompanied and Separated Children²⁶ and in national legislation or guidelines.²⁷

66. Claims made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, as they often will have special protection and assistance needs. **Priority processing** means reduced waiting periods at each stage of the asylum procedure, including as regards the issuance of a decision on the claim. However, before the start of the procedure, children require sufficient time in which to prepare for and reflect on rendering the account of their experiences. They will need time to build trusting relationships with their guardian and other professional staff and to feel safe and secure. Generally, where the claim of the child is directly related to the claims of accompanying family members or the child is applying for derivative status, it will not be necessary to prioritise the claim of the child unless other considerations suggest that priority processing is appropriate.²⁸

²² UNHCR, *Conclusion on Children at Risk*, supra note 20, para. g(viii).

²³ UNHCR, *Guidelines on International Protection No. 8: 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*, supra note 17. For regional good practices, see also: United States Bureau of Citizenship and Immigration Services, *Guidelines for Children's Asylum Claims*, 10 December 1998, available at: <http://www.unhcr.org/refworld/docid/3f8ec0574.html>; and United States Bureau of Citizenship and Immigration Services, *Guidelines for Children's Asylum Claims, Asylum Officer Basic Training Course*, March 21, 2009, available at: <http://www.unhcr.org/refworld/docid/4f3e30152.html>.

²⁴ The relevant applicable age for children to benefit from the additional procedural safeguards elaborated in this section is the date the child seeks asylum and not the date a decision is reached. This is to be distinguished from the substantive assessment of their refugee claim in which the prospective nature of the inquiry requires that their age at the time of the decision may also be relevant. Examples of such safeguards can be found in Canadian regulations, in which minors are exempted from the general rule where the person's co-operation or lack of with authorities in trying to find proof of his/her identity are considered in the decision to detain (Para. 247.2), see *Immigration and Refugee Protection Regulations* (consolidation current to 12 January 2010) [Canada], SOR/2002-227, 11 June 2002, available at: <http://www.unhcr.org/refworld/docid/4b6aa4082.html>.

²⁵ Action for the rights of children, *ARC Resource Pack, a capacity building tool for child protection in and after emergencies*, produced by Save the Children, UNHCR, UNICEF, OHCHR, International Rescue Committee and Terre des Hommes, 7 Dec. 2009, available at: <http://www.savethechildren.net/arc>.

²⁶ Inter-Agency, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004, available at: <http://www.unhcr.org/refworld/docid/4113abc14.html>.

²⁷ In the case of Latin America, special provisions for the protection of asylum seeking and refugee children, particularly unaccompanied children, have been incorporated in national refugee legislation in countries such as Argentina, Colombia, Costa Rica, Chile, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela. See also, United Kingdom Asylum Instruction, *Processing an Asylum Application from a Child*, 2 Nov. 2009, available at: <http://www.unhcr.org/refworld/docid/4f3cf5922.html>; United Kingdom: Home Office, *UK Border Agency Code of Practice for Keeping Children Safe from Harm*, December 2008, available at: <http://www.unhcr.org/refworld/docid/4948f8662.html>; Finland: Directorate of Immigration, *Guidelines for Interviewing (Separated) Minors*, March 2002, available at: <http://www.unhcr.org/refworld/docid/430ae8d72.html>; United States Bureau of Citizenship and Immigration Services, *Guidelines For Children's Asylum Claims*, supra note 23; Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues*, 30 September 1996, No. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b31d3b.html>.

²⁸ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 20 November 2003, pp. 3.25, 4.21–4.23, available at: <http://www.unhcr.org/refworld/docid/42d66dd84.html>.

67. There is no general rule prescribing in whose name a child's asylum claim ought to be made, especially where the child is particularly young or a claim is based on a parent's fear for their child's safety. This will depend on applicable national regulations. Sufficient flexibility is needed, nevertheless, to allow the name of the **principal applicant** to be amended during proceedings if, for instance, it emerges that the more appropriate principal applicant is the child rather than the child's parent. This flexibility ensures that administrative technicalities do not unnecessarily prolong the process.²⁹

68. For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate **tracing and family reunification** with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution.³⁰

69. An independent, **qualified guardian** needs to be appointed immediately, free of charge in the case of unaccompanied or separated children. Children who are the principal applicants in an asylum procedure are also entitled to a **legal representative**.³¹ Such representatives should be properly trained and should support the child throughout the procedure.

70. **The right of children to express their views and to participate in a meaningful way** is also important in the context of asylum procedures.³² A child's own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express these views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process. It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them.³³ This includes information about their right to privacy and confidentiality enabling them to express their views without coercion, constraint or fear of retribution.³⁴

²⁹ This is especially relevant in relation to claims, such as female genital mutilation or forced marriage, where parents flee with their child in fear for his/her life although the child may not fully comprehend the reason for flight.

³⁰ Family tracing and reunification have been addressed in a number of ExCom Conclusions, including most recently in: UNHCR, Conclusion on Children at Risk, *supra* note 20, para. (h)(iii). See also UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, *supra* note 17, para. 81.

³¹ "Guardian" here refers to an independent person with specialized skills who looks after the child's best interests and general well-being. Procedures for the appointment of a guardian must not be less favourable than the existing national administrative or judicial procedures used for appointing guardians for children who are nationals in the country. "Legal representative" refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters. See UNHCR, Conclusion on Children at Risk, *supra* note 20, para. (g)(viii). For further details, see CRC, CRC General Comment No. 6, *supra* note 16, paras. 33–38, 69. See also UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, p. 2 and paras. 4.2, 5.7, 8.3, 8.5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>. Good practices of legal representation of unaccompanied minors can be found in Argentina (*Resolución DGN N° 1071/07*, available at: <http://defenpo3.mpd.gov.ar/defenpo3/def3/direcciones/comisiones/refugio.htm>), Canada (S.167 .2 of the *Immigration and Refugee Protection Regulations*, Canada, *supra* note 24; *Refugee Protection Division Rules* (consolidation current to 12 January 2010) [Canada], SOR/2002-228, 11 June 2002, rules 15, 18 and 19, available at: <http://www.unhcr.org/refworld/docid/4b6aa4792.html>); and Colombia (*Decreto No. 4503 del 19 de noviembre de 2009. Por el cual se modifica el procedimiento para el reconocimiento de la condición de refugiado, se dictan normas sobre la Comisión Asesora para la determinación de la condición de refugiado y se adoptan otras disposiciones* [Colombia], 4503, 19 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b20bb112.html>). See also Canada's Designated Representative's Guide, available at: <http://www.irb-cisr.gc.ca/Eng/tribunal/drrd/Pages/index.aspx>).

³² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 12, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>. The CRC does not set any lower age limit on children's right to express their views freely as it is clear that children can and do form views from a very early age.

³³ CRC, CRC General Comment No. 6, *supra* note 16, para. 25; CRC, General Comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, paras. 123–124, available at: <http://www.unhcr.org/refworld/docid/4ae562c52.html>.

³⁴ UN General Assembly, *Convention on the Rights of the Child*, *supra* note 32, Arts. 13, 17.

71. **Appropriate communication methods** need to be selected for the different stages of the procedure, including the asylum interview, and need to take into account the age, gender, cultural background and maturity of the child as well as the circumstances of the flight and mode of arrival.³⁵ Useful, non-verbal communication methods for children might include playing, drawing, writing, role-playing, story-telling and singing. Children with disabilities require “whatever mode of communication they need to facilitate expressing their views”.³⁶

72. **Children cannot be expected to provide adult-like accounts** of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary **training and skills** to be able to evaluate accurately the reliability and significance of the child’s account.³⁷ This may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre.

73. Although the **burden of proof** usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children’s claims, especially if the child concerned is unaccompanied.³⁸ If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt.³⁹ Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.⁴⁰

74. Just as **country of origin information** may be gender-biased to the extent that it is more likely to reflect male as opposed to female experiences, the experiences of children may also be ignored. In addition, children may have only limited knowledge of conditions in the country of origin or may be unable to explain the reasons for their persecution. For these reasons, asylum authorities need to make special efforts to gather relevant country of origin information and other supporting evidence.

75. **Age assessments** are conducted in cases when a child’s age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.⁴¹ It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in

³⁵ Separated Children in Europe Programme, *SCEP Statement of Good Practice*, March 2010, Fourth edition, March 2010, para. 12.1.3, available at: <http://www.unhcr.org/refworld/docid/415450694.html>.

³⁶ CRC, *General Comment No. 9 (2006): The rights of children with disabilities*, 27 February 2007, CRC/C/GC/9, para. 32, available at: <http://www.unhcr.org/refworld/docid/461b93f72.html>.

³⁷ UNHCR, Conclusion on Children at Risk, *supra* note 20, para. (d).

³⁸ *Ibidem*, para. (g)(viii), which recommends that States develop adapted evidentiary requirements.

³⁹ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 3, paras. 196, 219.

⁴⁰ Inter-Agency, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, *supra* note 26, p. 61.

⁴¹ UNHCR, Conclusion on Children at Risk, *supra* note 20, para. (g)(ix).

such a manner that, in case of uncertainty, the individual will be considered a child.⁴² As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child.

76. In normal circumstances, **DNA testing** will only be done when authorized by law and with the consent of the individuals to be tested, and all individuals will be provided with a full explanation of the reasons for such testing. In some cases, however, children may not be able to consent due to their age, immaturity, inability to understand what this entails or for other reasons. In such situations, their appointed guardian (in the absence of a family member) will grant or deny consent on their behalf taking into account the views of the child. DNA tests should be used only where other means for verification have proven insufficient. They may prove particularly beneficial in the case of children who are suspected of having been trafficked by individuals claiming to be parents, siblings or other relatives.⁴³

77. **Decisions need to be communicated to children in a language and in a manner they understand.** Children need to be informed of the decision in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment. If the decision is negative, particular care will need to be taken in delivering the message to the child and explaining what next steps may be taken in order to avoid or reduce psychological stress or harm.⁴⁴

5. Child appropriate reception standards

5.1 According to UNHCR's Executive Committee, the implementation of reception arrangements should be guided by the following general considerations, which may need to be adapted to the particular circumstances of the child:

- While there is scope for flexibility in the choice of reception arrangements to be put in place, it is important that the various reception measures respect human dignity and applicable international human rights law and standards;
- Asylum-seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs, including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met;
- Gender and age-sensitivity should be reflected in reception arrangements. These should address in particular the educational, psychological, recreational and other special needs of children, especially unaccompanied and separated children. They should also take into account the specific needs of victims of sexual abuse and exploitation, of trauma and torture, as well as of other vulnerable groups;

⁴² *Ibidem*, para. (g)(ix); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 31, paras. 5.11, 6.

⁴³ UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <http://www.unhcr.org/refworld/docid/48620c2d2.html>.

⁴⁴ UNHCR, *Guidelines on International Protection No. 8: 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*, *supra* note 17, paras. 65-77. See also: UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>; UNHCR, *Refugee Children*, 12 October 1987, No. 47 (XXXVIII) - 1987, available at: <http://www.unhcr.org/refworld/docid/3ae68c432c.html>; UNHCR, *Refugee Children*, 13 October 1989, No. 59 (XL) - 1989, available at: <http://www.unhcr.org/refworld/docid/3ae68c4398.html>; and UNHCR, *Refugee Children and Adolescents*, 17 October 1997, No. 84 (XLVIII) - 1997, available at: <http://www.unhcr.org/refworld/docid/3ae68c68c.html>. See also: UN General Assembly, *Convention on the Rights of the Child*, *supra* note 32, Articles 3, 7, 22, 24 and 27 of the CRC. For regional examples see Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 159(1)h of the Immigration and Refugee Protection Act: Guideline 8 - Guideline on Procedures With Respect to Vulnerable Persons Appearing Before the IRB*, 15 December 2006, No. 8, available at: <http://www.unhcr.org/refworld/docid/462e14b72.html>.

- Reception arrangements should allow for the unity of the family as present within the territory, particularly in the context of reception centres;
- For the purpose, inter alia, of protection against *refoulement*, as well as access to reception arrangements, both male and female asylum-seekers should be registered and be issued appropriate documentation reflecting their status as asylum-seeker, which should remain valid until the final decision is taken on the asylum application;
- The range and scope of relevant social and economic benefits may vary, depending on the nature of the asylum procedure, and the type of reception arrangements in place;
- Reception arrangements can be mutually beneficial where they are premised on the understanding that many asylum-seekers can attain a certain degree of self-reliance, if provided with the requisite opportunities;
- In the context of facilitating cooperation between States and UNHCR, and in accordance with data protection and confidentiality principles, UNHCR should be given access to asylum-seekers in order to exercise its function of international protection, taking into account the well-being of persons entering reception or other refugee centres; and asylum-seekers are entitled to have access to UNHCR;

Key to the effective operation of any reception arrangement are public opinion favourable to asylum-seekers and refugees and confidence and trust in the asylum system, the promotion of both is an important responsibility to be pursued in tandem with the arrangements themselves.⁴⁵

5.2 In addition to the above general safeguards, the reception of the children should be well planned, positive and humane to meet the needs of each child. When designing and implementing reception policies, States should be guided by the principle of the best interests of the child. This may include the appointment of a representative for all child asylum applicants, ensuring that child applications are given special and priority consideration.

5.3 In UNHCR's view:

“Unaccompanied children should be provided with all the social services and legal protections available to children in the host country who are not in the care of their parents (CRC, art. 22.2).

The care and placement of unaccompanied children should be supervised by national or local child welfare services to ensure that they receive care that meets at least the minimum standards provided for national children.

Siblings must be kept together. Children who have developed close ties should also be kept together.

The most appropriate form of placement must be determined for each unaccompanied child. The age, personality, needs and preference of the child must be considered. For some children, family care will be most desirable. For other children, group care may be more appropriate. The most important criterion is that children are provided care that is age appropriate, loving and nurturing, by continuous care-givers.

Every effort must be made to place children in foster families or groups of similar ethnic, cultural, linguistic, and religious background (CRC, art. 20.3).

⁴⁵ UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, para. b(i) to (ix), available at: <http://www.unhcr.org/refworld/docid/3dafdd344.html>.

Communications between the child and the family are vital. Special efforts must be taken to facilitate such communication.”⁴⁶

6. Detention

6.1 The detention of asylum-seekers is, in the view of UNHCR, inherently undesirable, a measure of last resort, and can only be applied where it has been determined that it is necessary in an individual case and otherwise meets international standards. Children who are seeking asylum should not, as a general rule, be detained.⁴⁷ An ethic of care – and not detention - needs to govern all interactions with asylum-seeking children, with the best interests of the child a primary consideration.⁴⁸

6.2 In respect of unaccompanied minors, where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for, while longer term solutions are being considered.⁴⁹ State shelter or reception arrangements should only be temporary.⁵⁰

6.3 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 unity⁵¹ and this is judged to be in the child’s best interests.

6.4 Alternatives to detention are practiced in the Americas, where countries such as Argentina, Costa Rica⁵², and Nicaragua⁵³ accept no detention of children under any circumstances. Other countries, such as Canada, have several safeguards for the detention of children, such as the availability of alternative arrangements with local child-care agencies or child protection services, the establishment of an anticipated length of detention, the type of detention facility and the conditions of detention, as well as the availability of services in the detention facility, including education, counselling and recreation.⁵⁴

6.5 If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.⁵⁵

⁴⁶ UNHCR, *Refugee Children: Guidelines on Protection and Care*, supra note 44, p. 92.

⁴⁷ UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, guideline no. 6, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

⁴⁸ CRC, *CRC General Comment No. 6 (2005)*, supra note 16, para. 63.

⁴⁹ UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, supra note 47, p. 44.

⁵⁰ UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, supra note 17, p. 34.

⁵¹ UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, supra note 47, guideline no. 6.

⁵² *Decreto N° 36831-G, Reglamento de Personas Refugiadas*, 28 septiembre 2011, Art. 47, available at: <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2011/8171>.

⁵³ *Ley de Protección a Refugiados, No. 655* [Nicaragua], No. 655, 3 June 2008, article 10, available at: <http://www.unhcr.org/refworld/docid/4884470a2.html>.

⁵⁴ *Immigration and Refugee Protection Regulations*, Canada, para. 249, supra note 24; *Immigration and Refugee Protection Act* (consolidation current to 14 December 2011) [Canada], 14 December 2011, section 30 (2), available at: <http://www.unhcr.org/refworld/docid/4f0dc8f12.html>.

⁵⁵ UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, supra note 47, guideline no. 6.

6.6 If children who are asylum-seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.⁵⁶

6.7 During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma.⁵⁷

6.8 Children who are detained benefit from the same minimum procedural guarantees as adults.⁵⁸ A legal guardian or adviser should be appointed for unaccompanied minors.⁵⁹

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⁵⁶ *Ibidem.*

⁵⁷ *Ibidem.*

⁵⁸ *Ibidem.*

⁵⁹ An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.