



**Submission by the Office of the United Nations High Commissioner for Refugees in the case of *I.A. v. Hungary* (Application No. 38297/17) before the European Court of Human Rights**

**1. Introduction\***

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and together with Governments to seek solutions for refugees.<sup>1</sup> UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.<sup>2</sup> UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 4 December 2017.

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice applicable to the treatment of unaccompanied and separated asylum-seeking children held in transit zones at the border in Hungary (Part 2) and provides UNHCR's interpretation of the relevant principles of international refugee law and human rights law, pertaining specifically to the treatment of unaccompanied and separated children, penalization of illegal entry and detention of asylum seekers, to assist the assessment of the Court (Part 3).

**2. The legislative framework and practice in Hungary regarding the treatment of unaccompanied and separated asylum-seeking children of and above 14 years of age held in border transit zones**

***2.1. Legislation regarding the 'temporary accommodation' of unaccompanied and separated asylum-seeking children of and above 14 years of age in 'transit zones'***

2.1.1. While a series of safeguards protect unaccompanied and separated asylum-seeking children under Hungarian law, as elaborated upon below (paras 2.1.2 – 2.1.5), since September 2015, those safeguards are not applicable to those of and above fourteen years of age, in case of a 'crisis situation caused by mass immigration' (paras 2.1.6. – 2.1.8).

2.1.2. The Act on Asylum defining a 'person in need of special treatment' includes all unaccompanied children and is not limited to those under the age of fourteen, and provides that 'due consideration' must be given to the specific needs of such a person,<sup>3</sup> including when providing material reception conditions.<sup>4</sup> The Government Decree 301/2007 (XI. 9.) on the implementation of the Act on Asylum ('Decree') further confers a clear obligation on the asylum authority to assess whether the provisions applicable to 'persons in need of special treatment' apply. When assessing specific needs, the asylum authority may resort to the assistance of a medical or psychological expert. Such an expert examination can only be conducted with the consent of the person concerned. In case the applicant does not give his/her consent, the provisions do not apply.<sup>5</sup>

2.1.3. The Act on Asylum and the Decree require that the best interests and rights of the child shall be a primary consideration, including when providing reception.<sup>6</sup> The Decree specifies that food, clothing, mental hygiene and health care shall be provided, as well as education and care advancing the child's physical, mental, emotional and moral development, adequate for the child's age, health condition and other needs.<sup>7</sup> Pursuant to the Decree, applicants with specific needs, based on a medical expert's opinion, are eligible for free of charge health care services,

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\* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

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

<sup>2</sup> *Ibid.*, para. 8(a).

<sup>3</sup> Section 4(3) of the Act on Asylum.

<sup>4</sup> Section 29 of the Act on Asylum.

<sup>5</sup> Section 3 (1)-(2) and (4) of the Decree.

<sup>6</sup> Section 4(1) of the Act on Asylum.

<sup>7</sup> Section 33(3) of the Decree.

rehabilitation, psychological and clinical psychological<sup>8</sup> care or psychotherapeutic treatment required by the person's state of health.<sup>9</sup>

2.1.4. The asylum authority is required to initiate, within eight days, the temporary placement of the child and to request the guardianship authority to appoint a child protection guardian to represent the child.<sup>10</sup> Unaccompanied children are to be accommodated in children's homes within the national child protection reception system and appointed with a child protection guardian having a fully-fledged protection mandate.<sup>11</sup> The Decree also requires the tracing of the adult responsible for the child.<sup>12</sup>

2.1.5. Moreover, the law contains a provision ordering the release from asylum detention once it is established that the detainee is an unaccompanied asylum-seeking children,<sup>13</sup> and includes a specific procedural safeguard requiring the asylum authority to prioritize the asylum applications submitted by unaccompanied children.<sup>14</sup>

2.1.6. However, in September 2015, the Government of Hungary declared a 'state of emergency due to mass immigration'<sup>15</sup> and expedited legislation through Parliament<sup>16</sup> amending the Act on the State Border, to permit the establishment of "transit zones" at any of Hungary's land borders that constitute an external Schengen border (which includes those with Serbia). The legislation provides these "transit zones" 'shall function to temporarily accommodate individuals seeking refugee status or subsidiary protection... [and] to conduct asylum and immigration procedures [...]'.<sup>17</sup>

2.1.7. On 15 September 2015, two transit zones on Hungary's border with Serbia became operational, one at Röszke, the other at Tompa. The state of emergency, which has been in effect ever since, was recently extended until 7 March 2018.<sup>18</sup> The criteria that determine the existence of an 'emergency situation caused by mass immigration' are provided for in the Act on Asylum. UNHCR had expressed its concerns about related changes to Hungarian law and practice, including on the treatment and standards applicable to asylum-seekers in the border procedure in transit zones.<sup>19</sup>

2.1.8. Since 28 March 2017, under the 'state of emergency due to mass immigration', the general rule is that asylum applications may only be submitted in the transit zone.<sup>20</sup> All asylum applicants, whether irregular or not, including

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<sup>8</sup> A clinical psychologist has completed a further, specialized master training of 4 years in addition to the mandatory 5 five-year training required to become a psychologist. However, neither the psychologist nor the clinical psychologist can prescribe any medication.

<sup>9</sup> Section 34 of the Decree.

<sup>10</sup> Sections 35 (6) and 80/J (6) of the Act on Asylum.

<sup>11</sup> Section 48 (2) of the Act on Asylum.

<sup>12</sup> Section 4 (1) of the Decree.

<sup>13</sup> Section 31/A (8)(c) of the Act on Asylum.

<sup>14</sup> Section 35 (7) of the Act on Asylum.

<sup>15</sup> The criteria that determine the existence of an 'emergency situation caused by mass immigration' are overly vague. Section 80/A (1) of the Asylum Act reads as follows: A crisis situation caused by mass immigration can be declared if: a) the number of those arriving in Hungary and seeking recognition exceeds aa) five hundred people a day as a month's average, or ab) seven hundred and fifty people per day as the average of two subsequent weeks, or ac) eight hundred people per day as a week's average, b) the number of people staying in the transit zone in Hungary - not considering those contributing to taking care of the foreigners - exceeds ba) one thousand people per day as a month's average, or bb) one thousand five hundred people per day as the average of two subsequent weeks, or bc) one thousand six hundred people per day as a week's average. (c) in addition to the cases specified in paragraphs (a) and (b), if any circumstance related to the migration situation occurs that (ca) directly endangers the protection of the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code, (cb) directly endangers the public security, public order or public health in a 60 m wide zone of the territory of Hungary measured from the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code and the border mark or in any settlement in Hungary, in particular the outbreak of unrest or the occurrence of violent acts in the reception centre or another facility used for accommodating foreigners located within or in the outskirts of the settlement concerned.

<sup>16</sup> See UNHCR, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016* ('Hungary as a country of asylum'), May 2016, <http://www.refworld.org/docid/57319d514.html>, wherein UNHCR expressed serious concerns about the compatibility of this legislation and related Decrees with international and European law, and in particular the case of the legal provisions and practice regarding the border procedures in special "transit zones" and the application of the safe third country concept. See also pages 5-8 for details on these legislative changes.

<sup>17</sup> Sections 5(1) and 15/A of Act LXXXIX of 2007 on the State Border (Act on State Border), 1 January 2008, (unofficial translation).

<sup>18</sup> Government Decree 247/2017. (VIII. 31.)

<sup>19</sup> UNHCR, *Hungary as a country of asylum*.

<sup>20</sup> Section 80/J of the Act on Asylum.

unaccompanied and separated children<sup>21</sup> of and above the age of fourteen,<sup>22</sup> are therefore obliged to stay in the transit zone until a final decision on their application is issued or in case a Dublin transfer becomes enforceable. For this purpose the asylum authority issues an interim decision, designating the territory of the transit zone as a ‘place of accommodation’ for the asylum-seeker. There is no distinct remedy in law to challenge this interim decision; it can only be challenged through a judicial review of the decision of the asylum authority on the asylum application itself.

2.1.9. In light of the above, unaccompanied and separated asylum-seeking children of and above fourteen years of age are not, in case of a ‘crisis situation caused by mass immigration’, exempted from the restrictive measures regarding accommodation in transit zones for the entire duration of the asylum procedure.<sup>23</sup> They are also deprived of the general and specific safeguards<sup>24</sup> contained respectively in the national child protection regime<sup>25</sup> and in the Act on Asylum and the Decree.

2.1.10. In this context, the proper determination of the age of the child is critical, especially whether the child has reached 14 years of age, as in the latter case she/he will be subject to automatic confinement in the transit zone for the entire duration of the asylum procedure. However, under the current Hungarian law, if ‘any doubt emerges’ on the part of the asylum authority regarding the status of the applicant as a ‘minor’, a medical expert examination may be initiated for the determination of the age.<sup>26</sup>

## **2.2. The relevant practice**

2.2.1. The transit zones are divided into segregated sectors between unaccompanied asylum-seeking children and children arriving in families, thus limiting the interaction of children across these sectors, which in turn limits the possibilities for socializing. Unaccompanied asylum-seeking children are required by law to be accommodated separately from adult asylum-seekers and separately by gender. In practice, UNHCR has observed a few cases where female unaccompanied children were accommodated in the transit zone, and were placed in sectors designated for families with children. UNHCR has further observed that there are no measures in place to prevent protection risks for children confined within the transit zones. For instance, power dynamics between unaccompanied children are not specifically monitored or pro-actively managed by the staff of the facility and as a result vulnerable children are at risk of issues such as abuse or bullying.<sup>27</sup> At the material time no psychological support was available for traumatized asylum-seekers in the transit zone, including unaccompanied children.

2.2.2 Further, children’s development, psycho-social and recreational needs are not met, especially in the case of teenage boys and girls who do not have access to age-appropriate leisure activities or any consistent psycho-social programmes. Only simple recreational activities are offered, targeting mainly the youngest children. The lack of programmes organized for teenage unaccompanied children, combined with confiscation of stationery, especially pens and pencils<sup>28</sup> causes boredom and emotional distress amongst the children. The open-air courtyard is equipped with a playground for children and a ping-pong table, but it is not equipped with shading protecting against the elements. Accommodation containers are not equipped with air-conditioning. The container designated as a common room is equipped with a television. At the time of the detention of the applicant (18 May - 14 July 2017), children were not provided with access to any educational activities. An education programme was initiated by the authorities

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<sup>21</sup> Section 2 (f) of the Act on Asylum.

<sup>22</sup> While the Hungarian Civil Code provides that ‘children’ are those below 18 years of age, provisions of the Child Protection Act are not applicable to children of or above 14 years of age, in case of a state of emergency situation.

<sup>23</sup> On 19 May 2017 (date of entry in the transit zone) out of a total 129 asylum-seekers detained in the Rószke transit zone, 17 were unaccompanied children. On 14 July 2017 (date of release), of a total 262 applicants, 22 were unaccompanied children.

<sup>24</sup> With the exception of the obligation to prioritize the examination of the asylum claim and the requirement of tracing family members, (Section 35 (7) of the Act on Asylum and Section 4 (1) of the Decree).

<sup>25</sup> Section 4 (1)(c) of Act 1997 of XXXI on the protection of the child and on the guardianship agency (Child Protection Act).

<sup>26</sup> Section 44(1) of the Act on Asylum and Section 36/B of Decree 301/2007 (XI.9.). See also, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, June 2015, <http://www.refworld.org/docid/55759d2d4.html>.

<sup>27</sup> The risk of exposure to others forms of harm, including sexual and gender-based violence, are also significant in many detention contexts. Lanzarote Committee (Committee of the Parties to the Convention on the Protection of children against Sexual Exploitation and Sexual Abuse) following its visit to the transit zones in Hungary in July 2017; <https://www.coe.int/en/web/children/-/lanzarote-committee-delegation-to-visit-transit-zones-in-hungary>; Council of Europe calls on Hungary to reconsider new law that risks exposing unaccompanied asylum-seeking children to sexual violence; <https://www.coe.int/en/web/children/-/council-of-europe-calls-on-hungary-to-reconsider-new-law-that-risks-exposing-migrant-children-to-sexual-exploitation>.

<sup>28</sup> At the material time, unaccompanied children were not allowed to keep pens and pencils with them for security reasons and could only use them under the supervision of the staff of the facility.

in September 2017.<sup>29</sup> Lack of consistent internet connectivity, lack of access to public telephone or computers with internet access further limit children's contact with the world outside the transit zone. The above deficiencies taken together are likely to have long-term impact and affect the psycho-social well-being of asylum-seeking girls and boys.<sup>30</sup>

2.2.3. UNHCR observed that the age determination process for unaccompanied children, done primarily through medical assessments, is insufficient to provide an accurate assessment of age. The medical examination is merely confined to physical observation, without any examination into the psychological maturity of the applicant, neither into the relevant ethnic and cultural components. There are no quality standards set out in law as to who is eligible to conduct a medical expert examination of the age, nor does the law specify the standards for the methodology of the medical examination and there is no standard operating procedure applied in practice. Unaccompanied children reported that the age assessment examinations performed both by military doctors in the transit zones and by the forensic medical expert outside the transit zone were similarly superficial (often limited to two or three minutes and were only based on physical observation).<sup>31</sup>

2.2.4. Furthermore, there is no formal, individualized best interests assessment and best interests determination taking place in practice. In the absence of procedural guidelines, there is also a real risk that the authorities responsible for protecting the child's best interests might act arbitrarily, based on what they deem appropriate. This is further aggravated in practice by the lack of specific safeguards for unaccompanied and separated asylum-seeking children of and above fourteen of age, who are only appointed with a temporary/ad hoc guardian solely mandated to represent the child within the asylum procedure.<sup>32</sup> The role of the temporary guardian in practice is superficial, and does not address the children's needs in support of their emotional, social and cognitive development. Designated temporary guardians are not trained on issues relating to asylum, child protection, cultural contexts; they do not have access to trained interpreters, and often only meet the children at the time of the asylum interview. In this context, UNHCR has observed numerous cases when unaccompanied children withdrew their asylum application and left the transit zone towards Serbia without any best interests assessment conducted by the relevant authorities.

2.2.5. As a result of the above legislative reforms and the significant gaps in practice, unaccompanied and separated asylum-seeking children of and above fourteen of age in Hungary are exposed to a risk of unlawful and arbitrary detention as they are subject to prolonged periods of administrative detention in inappropriate conditions without their best interests and their specific needs being properly assessed and met in line with international and European standards.

### **3. The relevant principles of International and European refugee and human rights law on the treatment of unaccompanied and separated children**

#### **3.1. General International refugee and human rights law**

3.1.1. The right to seek and enjoy asylum is a basic human right under Article 14(1) of the *Universal Declaration of Human Rights*,<sup>33</sup> and is supported by the legal framework of the 1951 Convention and its 1967 Protocol, to which

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<sup>29</sup> The Government of Hungary only started to provide organized lessons for children between the age of 6 and 16 as of September 2017. The lessons are provided by school teachers from Mondays to Fridays from 9:00 am to 11:45 am.

<sup>30</sup> 'Children's emotional and behavioral responses to separation and to detention suggest that the experience is acutely stressful and, in some cases, traumatic-even when detention is brief. Distress and impairment may persist months after release.' See Kronick, Rousseau and Cleveland, American Journal of Orthopsychiatry 85(3):287-294 · May 2015, [https://www.researchgate.net/publication/276849648\\_Asylum-Seeking\\_Children%27s\\_Experiences\\_of\\_Detention\\_in\\_Canada\\_A\\_Qualitative\\_Study](https://www.researchgate.net/publication/276849648_Asylum-Seeking_Children%27s_Experiences_of_Detention_in_Canada_A_Qualitative_Study). For more information on the negatives effects of detention on children, see: <http://endchilddetention.org/impact/> and also <http://www.fmreview.org/detention/farmer.html>. See also: Corlett, D., with Mitchell, G., Van Hove, J., Bowring, L., Wright, K. (2012) *Captured Childhood: Melbourne*, International Detention Coalition, chapter 5, <https://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>; Human Rights Watch (2016), 'Children Behind Bars: The Global Overuse of Detention of Children', <https://www.hrw.org/world-report/2016/children-behind-bars>. Human Rights Watch (HRW) has documented, over more than 10 years in Europe and beyond, serious violations of children's rights arising from immigration detention of children; highlighting that children may be arbitrarily detained, held in cells with unrelated adults, and subjected to brutal treatment by police, guards and other authorities and are often held in poor conditions that fall far short of international standards governing appropriate settings for children deprived of their liberty. See: <https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.

<sup>31</sup> Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary 12-16 June 2017, para. 4.3, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=090000168075e9b2#\\_Toc494960731](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168075e9b2#_Toc494960731)

<sup>32</sup> Sections 80/I(b) and (d) of the Act on Asylum set out that sections 35(6) and 48 are not applicable in case of a state of emergency situation.

<sup>33</sup> UNGA, *Universal Declaration of Human Rights*, 10 December 1948, <http://www.refworld.org/docid/3ae6b3712c.html>.

Hungary is a State party. Seeking asylum is not, therefore, an unlawful act.<sup>34</sup>

3.1.2. As elaborated upon below, Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees having entered or stayed irregularly if they come directly from a territory where their life or freedom was threatened,<sup>35</sup> present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country. In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of migrants in that they may not be in a position to comply with the legal formalities for entry.<sup>36</sup> The drafters of the 1951 Convention were aware of such difficulties and the Executive Committee of the High Commissioner's Programme ('ExCom')<sup>37</sup> itself recognised "the importance (...) to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens".<sup>38</sup>

3.1.3. The effective implementation of Article 31 requires that it applies to any person seeking international protection.<sup>39</sup> In consequence, a person seeking international protection is presumed to benefit from the obligation not to impose penalties as stipulated under Article 31 until found not to be in need of international protection following a fair procedure.<sup>40</sup> Regarding the material scope of Article 31, it is generally accepted that the term 'penalties' as referred to in this article are to be broadly understood<sup>41</sup> as including administrative detention in the immigration context.<sup>42</sup> Similarly, disadvantages in the asylum procedure as a consequence of irregular entry or presence may also

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<sup>34</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* ('Guidelines on Detention'), 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>. As António Guterres, the UN Secretary General and former UN High Commissioner for Refugees said, "[i]t is not a crime to cross a border to seek asylum". <http://www.unhcr.org/news/press/2015/9/55f9a70a6/unhcr-urges-europe-change-course-refugee-crisis.html>.

<sup>35</sup> The expression "coming directly" in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "coming directly" and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay". "Illegal entry" would, *inter alia*, include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. "Illegal presence" would cover, for example, remaining after the elapse of a short, permitted period of stay.

<sup>36</sup> They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. UNHCR, *Guidelines on Detention*, Guideline 1, para. 11.

<sup>37</sup> ExCom was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as "ExCom Conclusions"). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 101 States are Members of the Executive Committee, including Hungary which has been a member since 1993.

<sup>38</sup> ExCom Conclusion No. 44 (XXXVII), 1986, para. (d), <http://www.refworld.org/docid/3ae68c43c0.html>.

<sup>39</sup> "That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt." *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, at 527. This was upheld in *R. v. Asfaw* [2008] UKHL31, at para 26.

<sup>40</sup> The prohibition of refoulement applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. See ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); and ExCom Conclusion No. 81 (XLVIII), 1997, para. (i), all of which are available at <http://www.refworld.org/docid/4b28bf1f2.html>. See also, *Note on International Protection*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.refworld.org/docid/3ae68d5d10.html> and Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, <http://www.refworld.org/docid/470a33b20.html>.

<sup>41</sup> For an analysis of the scope of Article 31 see: Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, <http://www.refworld.org/docid/59ad55c24.html>.

<sup>42</sup> In September 2015, Hungary's Criminal Code was amended to add the offence of unauthorised crossing of the border fence, vandalism of the border fence and obstruction of the construction works related to the border fence carrying a prison term of between 2 – 10 years depending on the nature and manner of the offence (sections 352/A – 352/C of Act C of 2012 on the Criminal Code). See UNHCR, *Hungary as a country of asylum*, paras 46 – 49. See also, UNHCR, *Guidelines on Detention*, Guideline 4.1.4, para. 32 and UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council*, A/HRC/7/4/, 10 January 2008, which states: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.", para. 53, <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

amount to a ‘penalty’ within the meaning of Article 31, particularly where procedural safeguards are not met. It should be further noted that the material scope of Article 31 extends to the territory under a State’s control, which would include border crossings. Article 31 is therefore aimed at reinforcing the rights contained in the 1951 Convention through safeguarding access to asylum.

3.1.4. The fundamental rights to liberty and security of the person and freedom of movement are proclaimed in the Universal Declaration of Human Rights, namely: Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence) as well as in all major international and regional human rights instruments, such as Articles 6, 9 and 12 of the International Covenant on Civil and Political Rights (ICCPR).<sup>43</sup> Art. 9(1) ICCPR materially provides that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”<sup>44</sup> In its General Comment No. 8 on Article 9, the Human Rights Committee (HRC) made it clear that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in others cases such as ... immigration control etc.”<sup>45</sup>

3.1.5. As elaborated in UNHCR’s *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (‘Guidelines on Detention’), which reflect the state of international law on detention for immigration-related purposes, these rights taken together – the right to asylum, the non-penalization for irregular entry or stay and the rights to liberty and security of the person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.<sup>46</sup>

3.1.6. Restrictions on movement of refugees and asylum-seekers must be necessary, reasonable and proportionate.<sup>47</sup> In addition, detention can only be justified on a limited number of grounds, namely public order, public health or national security.<sup>48</sup> The notion of “public order”<sup>49</sup> encompasses the following purposes:

- To prevent absconding and/or in cases of likelihood of non-cooperation;
- In connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
- For initial identity and/or security verification;
- In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention.

3.1.7. The Guidelines on Detention also provide that maximum limits on detention need to be established in law to protect the individual from arbitrary detention<sup>50</sup> and that once the initial justification invoked for the person’s detention is no longer valid, the asylum-seeker should be released immediately.<sup>51</sup> Analysis of potential arbitrariness must consider whether there are less restrictive or coercive measures that could be applied to the individual concerned. The availability, effectiveness and appropriateness of alternatives to detention must be considered before

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<sup>43</sup> UN General Assembly, *ICCPR*, 16 December 1966, UNTS, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>44</sup> *Ibid.*. The Human Rights Committee considered the application of Article 9 in *A v. Australia* (1997), CCPR/C/59/D/560/93), concerning the prolonged detention of an asylum-seeker. The HRC, while agreeing that there was no basis for the claim that it is *per se* arbitrary to detain individuals requesting asylum, observed that “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.” (paras 9.3 - 9.4, <http://hrlibrary.umn.edu/undocs/html/560-1993.html>). See also, *Samba Jalloh v. Netherlands* (2002), CCPR/C/74/D/794/1998, <http://www.refworld.org/docid/3f588ef3a.html>; *Omar Sharif Baban v. Australia* (2003), CCPR/C/78/D/1014/2001, <http://www.refworld.org/docid/404887ee3.html>; *Danyal Shafiq v. Australia* (2006), CCPR/C/88/D/1324/2004, <http://www.refworld.org/docid/47975af921.html>.

<sup>45</sup> UN Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, para. 1, <http://www.refworld.org/docid/4538840110.html>.

<sup>46</sup> UNHCR, *Guidelines on Detention*, Guideline 2, para. 14.

<sup>47</sup> UNHCR, *Guidelines on Detention*, Guideline 4 para. 18.

<sup>48</sup> UNHCR, *Guidelines on Detention*, Guideline 4.1 para. 21.

<sup>49</sup> Within the backdrop of the context that led to the legislative amendments the concept of public order is of particular relevance. See UNHCR, *Hungary as a country of asylum*, paras 6 and 7.

<sup>50</sup> In *Saadi v. United Kingdom* (no. 13229/03), the Court emphasized that “detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion.” The Court held that “to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued.” Paras 66 and 74.

<sup>51</sup> UNHCR, *Guidelines on Detention*, Guideline 6.

recourse to detention.<sup>52</sup> The Guidelines on Detention further provide that decisions to detain or to extend detention must be subject to minimum procedural safeguards,<sup>53</sup> including access to a fair and efficient asylum procedure<sup>54</sup> in order to ensure that persons in need of international protection are properly identified. Access to asylum procedures must be realistic and effective, providing for timeframes for lodging supporting materials that are appropriate for someone in detention, and access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.<sup>55</sup>

3.1.8. In UNHCR's view, holding applicants in a transit zone severely restricts their freedom of movement and can qualify as detention.<sup>56</sup> 'Detention' refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.<sup>57</sup> Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of "degree or intensity and not one of nature or substance".<sup>58</sup> Individuals under the border procedures (described in section 2 above) are effectively prohibited from further entering the country and must remain "temporarily accommodated" in the transit zone.<sup>59</sup> However, the Hungarian authorities claim that they are not "detained" since they are free to leave the transit zone at any time in the direction from which they came.<sup>60</sup> However, it must be noted that departure from the transit zone results in the termination of the asylum application without any examination on the merits, thus depriving the applicant from access to the asylum procedure.

3.1.9 In *Amuur v. France*, this Court held that despite its name the international transit zone of an airport does not have extraterritorial status, and that the holding of asylum-seekers in such a zone can amount to a deprivation of liberty within the meaning of Article 5 of the ECHR even if they are free to leave for another country. The Court recognised expressly that holding asylum-seekers in the transit zone of an airport is "acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations", particularly the 1951 Convention and the ECHR, highlighting that "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions".<sup>61</sup> Furthermore, it is noteworthy that the transit zones were recently visited by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe (CPT), the mandate of which is, by means of visits, to "examine the treatment of persons deprived of their liberty".<sup>62</sup>

## 3.2. Relevant EU standards on detention

3.2.1. Article 18 of the Charter of Fundamental Rights of the European Union (the Charter)<sup>63</sup> provides for the right to asylum. Article 6 emphasizes that "everyone has the right to liberty and security of person" while Article 52 specifies the necessity and proportionality requirements applicable in relation to "any limitation on the exercise of the rights and freedoms recognized by this Charter".<sup>64</sup>

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<sup>52</sup> In *C v. Australia*, the HRC observed that: "the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1." HRC, Comm. No. 900/1999, <http://www.unhcr.org/refworld/docid/3f588ef00.html>. See also, *Sahin v. Canada, (Minister of Citizenship and Immigration)* [1995] 1 FC 214 <http://reports.fja.gc.ca/eng/1995/1995fca0233.html>.

<sup>53</sup> UNHCR, *Guidelines on Detention*, Guideline 7 para. 47.

<sup>54</sup> UNHCR, *Guidelines on Detention*, Guideline 7, para. 47(vi).

<sup>55</sup> *Ibid.*

<sup>56</sup> See UNHCR, *Hungary as a country of asylum*, para 19. See also UNHCR, *Guidelines on Detention*, paras 5-7.

<sup>57</sup> UNHCR, *Guidelines on Detention*, paras 5-7.

<sup>58</sup> ECtHR, *Guzzardi v. Italy*, App. No. 7367/76, para. 93.

<sup>59</sup> Pursuant to Sections 5(1)(a) and 71/A(2) of the Act on Asylum and Section 15/A(2) of the Act on the State Border.

<sup>60</sup> UNHCR, *Hungary as a country of asylum*, para. 19.

<sup>61</sup> ECtHR, *Amuur v. France*, 17/1995/523/609.

<sup>62</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126, <http://www.refworld.org/docid/3ae6b36314.html>. See also *CPT returns to Hungary to assess the situation of foreign nationals detained under aliens legislation*, Press release of 30 October 2017, <https://www.coe.int/en/web/cpt/-/cpt-returns-to-hungary-to-assess-the-situation-of-foreign-nationals-detained-under-aliens-legislati-2?desktop=true>.

<sup>63</sup> Charter of Fundamental Rights of the European Union, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>64</sup> *Ibid.*. Article 52(3) further provides that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention" while this provision "shall not prevent Union law providing more extensive protection."

3.2.2. The Reception Conditions Directive (recast) (“RCD (recast)”) which is unequivocally applicable to asylum-seekers “at the border (...) or in the transit zones of a Member State”<sup>65</sup> requires that an asylum-seeker can only be detained where “it proves necessary and on the basis of an individual assessment of each case [...] and if] other less coercive alternative measures cannot be applied effectively”.<sup>66</sup> The Directive further provides a detailed list of procedural safeguards in favour of the persons concerned.<sup>67</sup>

3.2.3. The Court of Justice of the EU (CJEU) highlighted the importance of the principles of proportionality and necessity in applying the relevant provisions of the RCD (recast), with reference notably to UNHCR’s Guidelines on Detention.<sup>68</sup> According to the CJEU, the detention of applicants, constitutes a serious interference with those applicants’ right to liberty, and needs to comply with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.<sup>69</sup>

3.2.4. Given that the Government of Hungary denied that the stay in the transit zone amounted to detention, it consequently failed to apply relevant safeguards and ensure the necessary predictability, clarity and protection against arbitrariness required under EU and international law.

### 3.3. *Specific principles and standards regarding the treatment of unaccompanied and separated children*

3.3.1 All of the above general principles relating to detention apply *a fortiori* to children.<sup>70</sup> The Convention on the Rights of the Child (‘CRC’) sets out a number of principles regarding the protection of children<sup>71</sup> which apply throughout all stages of displacement,<sup>72</sup> including:

- The best interests of the child shall be a primary consideration in all actions affecting children, (Article 3);
- There shall be no discrimination on 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);<sup>73</sup>
- States Parties shall, in accordance with their national laws, ensure alternative care for such a child. Such care could include, inter alia, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background (Article 20(2) and (3));
- 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).<sup>74</sup>

<sup>65</sup> RCD (recast), Article 3, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=en>.

<sup>66</sup> *Ibid.*, Article 8(2) RCD (recast).

<sup>67</sup> *Ibid.*, Article 9 RCD (recast).

<sup>68</sup> CJEU, *J.N.*, C-601/15, 15 February 2016, paras 54, 56 and 63.

<sup>69</sup> CJEU, *Al Chodor*, C-528/15, 15 March 2017, paras 39-40.

<sup>70</sup> UNHCR, *Guidelines on Detention*, Guideline 9.2.

<sup>71</sup> The definition of the child under the Convention on the Rights of the Child provides rights and protection until the age of 18.

<sup>72</sup> UN Committee on the Rights of the Child, CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, (‘CRC GC No. 6’) 1 September 2005, CRC/GC/2005/6, paras 12-30, <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

<sup>73</sup> UNHCR, Best Interests Determination Children – Protection and Care Information Sheet, June 2007, <http://www.unhcr.org/refworld/docid/46a076922.html>; UNHCR, Guidelines on Determining the Best Interests of the Child, May 2008, para. 20, <http://www.unhcr.org/refworld/docid/48480c342.html>; UNHCR, Field Handbook for the Implementation of UNHCR BID Guidelines, November 2011, <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, 22 December 2009, HCR/GIP/09/08, (‘GIP No. 8: Child Asylum Claims’), para. 5, <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

<sup>74</sup> In its *Rahimi v. Greece* ruling the Court emphasized that, owing to the applicant’s particular situation as an unaccompanied Afghan asylum-seeking minor of 15 years old, he belonged “undoubtedly to the category of the most vulnerable persons of the society” and that the Greek authorities had a positive obligation under Article 3 ECHR to take care of him through adequate measures. In addition, drawing from Article 19 of the Receptions Conditions Directive and the relevant provisions of the CRC, the Court further recognized a large consensus, including in international law, about the primacy of the best interests of the child. As a result, in the Court’s view, the authorities’ disregard for such principle in relation to the applicant’s detention and notably their failure to consider any alternative to detention raised doubts about their good faith. (No. 8687/08, ECtHR, 5 April 2011, <http://www.refworld.org/docid/4d9c3e482.html>.)



3.3.2. Furthermore in their recent joint comments,<sup>75</sup> the Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families ('CMW') recalled the following, of particular relevance to the underlying case:

- 'Immigration detention is understood (...) as any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents', migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty';<sup>76</sup>
- 'Children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents' migration status' 'criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention';<sup>77</sup>
- 'The possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development';<sup>78</sup>
- 'Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, (...). When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation'.<sup>79</sup>

3.3.3. In light of these principles,<sup>80</sup> UNHCR's position is that children should not be detained<sup>81</sup> for immigration related purposes, as detention is never in their best interests.<sup>82</sup> This applies whether the child is accompanied or unaccompanied<sup>83</sup> or separated, and irrespective of their legal/migratory status or that of their parents.<sup>84</sup> An ethic of care – not detention or enforcement – needs to govern all actions taken and the principles of minimal intervention and the best interests of the child should govern any measures taken by States.<sup>85</sup>

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<sup>75</sup> UN CMW, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, ('CMW and CRC Joint GC 2017'), 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, <http://www.refworld.org/docid/5a12942a2b.html>.

<sup>76</sup> *Ibid.*, para. 6.

<sup>77</sup> *Ibid.*, para. 7.

<sup>78</sup> *Ibid.*, para. 10.

<sup>79</sup> *Ibid.*, para. 11.

<sup>80</sup> In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, drawing from relevant provisions of the CRC the Court set out a number of specific principles and standards regarding the detention of unaccompanied or separated children and stated that, '[t]he States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied, of the protection their status warrants.' The Court went on to recognize that the detention of unaccompanied or separated children in the same conditions as adults was in violation of Article 5(1) ECHR because of the 'extremely vulnerable situation' they find themselves in as illegal immigrants in a foreign land. (No. 13178/03, ECtHR, 12 October 2006, para. 81 and paras 55 and 103, <http://www.refworld.org/docid/45d5cef72.html>).

<sup>81</sup> UNHCR notes that no other qualifications should be added to the baseline position of non-detention of children for immigration related purposes. References to the application of Art. 37(b), 'exceptional circumstances / measure of last resort', are not appropriate for cases of detention of any child for immigration related purposes. It is understood from the commentaries of the CRC that while Art. 37 (b) may apply in other contexts (such as in cases of children in conflict with the law – see 2007 - CRC/C/GC/10), its application to detention in the immigration context would be in conflict with the principle of best interests of the child. *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, ('UNHCR's position regarding the detention of children') January 2017, <http://www.refworld.org/docid/5885c2434.html>.

<sup>82</sup> *UNHCR's position regarding the detention of children*. See also, UN Human Rights, OHCHR, 'Children and families should never be in immigration detention', which states: '[l]et us be clear: immigration detention is never in the best interests of the child'. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E#sthash.fwKB9IJR.dpuf>. Similarly, the UN Special Rapporteur on the human rights of migrants has held that detention of children will never be in their best interests. UN, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/HRC/11/7*, 14 May 2009, para. 62. See also CMW and CRC Joint GC 2017, note 75 above, para. 9.

<sup>83</sup> ECtHR, *Abdullahi Elmi and Aweys Abubakar v Malta*, App. nos. 25794/13 and 28151/13.

<sup>84</sup> '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.' CRC GC No. 6, note 72 above, para. 61. Furthermore, the 'detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.' CRC, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, <http://www.refworld.org/docid/51efb6fa4.html>. See also United Nations General Assembly – Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Twenty-eighth session, March 5, 2015, A/HRC/28/68, para. 80, concluding that 'Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.

<sup>85</sup> *UNHCR's position regarding the detention of children*.

3.3.4. Thus, ‘all efforts, including prioritization of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.’<sup>86</sup> UNHCR has long advocated for the priority processing of all aspects of a child’s claim, including the reduction of waiting times.<sup>87</sup> The Inter-American Court of Human Rights (IACtHR) has held that ‘the principle of the best interest entails both its priority consideration in the design of public policies and the drafting of laws and regulations concerning childhood, and in its implementation in all the spheres that related to the life of the child.’<sup>88</sup> In the context of migration, any immigration policy that respects human rights, as well as any administrative or judicial decision concerning the entry, stay or expulsion of a child, or the detention, expulsion or deportation of her or his parents associated with their own migratory status, must give priority to the assessment.<sup>89</sup>

3.3.5. Furthermore, pursuant to the non-discrimination principle, detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.<sup>90</sup> Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements.<sup>91</sup> This is in accordance with international standards.<sup>92</sup>

#### **3.4. Relevant EU standards regarding the treatment of unaccompanied and separated children**

3.4.1. Article 24 (2) of the Charter highlights that ‘in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.’ This principle is reiterated under EU asylum law in Article 11(2) of the RCD (recast) while Article 23(1) and (2) spell out specific safeguards in relation to this principle.

3.4.2. With regards to the detention of unaccompanied and separated children seeking asylum, Article 11(3) of the RCD (recast) provides in particular the following:

- Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible;
- Unaccompanied minors shall never be detained in prison accommodation;
- As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age;
- Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

## **4. Conclusion**

4.1. UNHCR is concerned that the current legislation and practice in Hungary mandating the ‘accommodation’ of unaccompanied and separated asylum-seeking children of and above fourteen in the transit zones, without any appropriate safeguards and conditions, are at variance with relevant international and European standards. UNHCR is of the view that this accommodation and its concomitant restriction of movement qualifies as detention. UNHCR further considers that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests. Instead, the prioritization of children's rights including those of and above fourteen years of age, includes ensuring appropriate care arrangements and community-based programmes are in place in theory and in practice for the adequate reception of children. In light of the well-documented deleterious effects of detention on children, UNHCR further underlines that liberty and freedom of movement of children should always be the preferred solution.<sup>93</sup>

**UNHCR, 22 January 2018**

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<sup>86</sup> UNHCR, *Guidelines on Detention*, Guideline 9.2, para 57.

<sup>87</sup> UNHCR, GIP No. 8: Child Asylum Claims, para. 66.

<sup>88</sup> *Advisory Opinion OC-21/14, ‘Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection’*, IACtHR, para. 70, 19 August 2014, <http://www.refworld.org/cases,IACRTHR,54129c854.html>. CMW and CRC Joint GC, note 75 above, para. 14.

<sup>89</sup> *Ibid.*, *Advisory Opinion OC-21/14*, IACtHR.

<sup>90</sup> UNHCR, *Guidelines on Detention*, Guideline 9.2, paras 54-57.

<sup>91</sup> Regarding alternatives to detention, see UNHCR, *Guidelines on Detention*, Annex A, and UNHCR, *Options for governments on care arrangements and alternatives to detention for children and families*, 2015, <http://www.refworld.org/docid/5523e8d94.html>.

<sup>92</sup> *Advisory Opinion OC-21/14*, IACtHR, note 88 above, para. 6; CRC GC No. 6, note 72 above; UN Committee on the Rights of the Child, *Report on the 2012 Day of General Discussion*, note 84 above, para. 78; UN Special Rapporteur on Torture, *Thematic Report on torture and ill-treatment of children deprived of their liberty*, note 84 above, para. 80.

<sup>93</sup> *UNHCR's position regarding the detention of children*.