

Communication of the *Permanence juridique MNA/RMNA* to the Committee on the Elimination of Racial Discrimination (CERD) on the situation of unaccompanied minors (UM) in Switzerland

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PERMANENCE JURIDIQUE POUR MINEURS NON-ACCOMPAGNÉS

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عیادة قانونية لقصر غیر مصحوبین باولیاءهم

ایستگاه خدمات حقوقی برای کودکان بدون سرپرست

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I. Introduction and general context

Since November 2019, a legal advice service for unaccompanied minors and unaccompanied minor asylum seekers (Permanence mineur.e.s non accompagné.e.s (MNA)/ requérants d'asiles mineur.e.s non-accompagné.e.s (RMNA)", hereafter: the Permanence) has been set up by several lawyers registered with the Geneva Bar and several legal experts, in order to respond to a need of legal assistance.

The Permanence seeks to provide the many unaccompanied young migrants with free and accessible legal advice and legal representation before judicial and administrative authorities. The Permanence holds its legal advice service office hours once a week to meet unaccompanied minors and respond to their concerns. In addition to responding to individual requests, the Permanence also called upon the State Council of the Republic and Canton of Geneva to comply with its national and international obligations to protect the rights of the UMs and UMAs. The Permanence also regularly expresses opinions and its situational analysis in the local press¹.

With the current health crisis related to Covid-19, and even more so during the periods of semi-seclusion during which Switzerland faced in 2020, the lawyers and legal experts have seen a sharp increase in the UMs need for protection, a sign that their already difficult situation has only become more precarious with the pandemic. Despite our numerous requests² to the authorities and institutions, their situation remained precarious and their fundamental rights were not guaranteed in conformity with Switzerland's constitutional and international obligations.

The present communication focuses on the choice of the state of Geneva **to implement a repressive criminal and administrative policy**, openly using racial profiling and intimidation techniques to push UMs to leave the territory, instead of providing the adequate basic and socio-educational care to these young people in an extremely vulnerable situation.

¹ "A Genève, le ras-le-bol des mineurs non accompagnés", Le Temps, 14 January 2020, (<https://www.letemps.ch/suisse/geneve-raslebol-mineurs-non-accompagnes>); "Délinquance juvénile et mineurs vulnérables: risque d'amalgame", Le Temps, 28 July 2020, (<https://www.letemps.ch/suisse/delinquance-juvenile-mineurs-vulnerables-risque-damalgame>); "A Genève, ces jeunes migrants qui déconcertent les juges", Le Temps, 29 January 2021, (<https://www.letemps.ch/suisse/geneve-jeunes-migrants-deconcertent-juges>); "Les manquements de Genève face à ses jeunes migrants", Opinion des avocat-e-s et juristes de la Permanence MNA/RMNA, Le Temps, 8 February 2021, (<https://www.letemps.ch/opinions/manquements-geneve-face-jeunes-migrants>); "Les mineurs non accompagnés ont quasi disparu de Genève", La Tribune de Genève, 18 October 2021, (<https://www.tdg.ch/les-mineurs-non-accompagnes-ont-quasi-disparu-de-geneve-741911248911>).

² Publication of the last letter of the Permanence to the Government of the State of Geneva, 27 January 2021 (<https://asile.ch/2021/01/27/permanence-juridique-mna-rmna-lettre-ouverte-au-conseil-detat-genevois/>)

II. Stigmatization, racial profiling and other arbitrary treatment of unaccompanied minors and young migrants

During its legal service, the Permanence has observed that as soon as the UMs arrive in Geneva, they are subjected to a repressive policy, implemented in by the police. Identity checks, often accompanied by humiliating behavior on the part of police officers, are systematic and have become the daily routine for unaccompanied minors.

a) Reported incidents

In our roles as lawyers and jurists, we have received several testimonies from UMs who have been subjected to systematic searches, humiliation and even physical violence, such as: systematic and unfounded identity checks, based on the use of racial profiling and abusive practices while on the public domain:

- For instance, numerous police report simply mention "*we proceeded to the control of two individuals of Maghrebin origin*"³ without further explanation or elements showing any suspicion of infringement of the law (namely in violation of the art. 215 of the Swiss criminal procedure code, hereafter SCPC);
- When interrogations by the police take place, UMs are not systematically accompanied by a translator, while in most cases their knowledge of french is very limited, or even nonexistent; when given a criminal order, the later is not systematically translated into a language that they understand, which prevents them from understanding the legal process and lodging an objection, given that the delays to do so are particularly short (10 days) ;
- discriminatory and racist behavior and language from police officers towards UMs, namely using terms such as "dirty Arab", "you are only fit to take care of sheeps with your Arabic dabble", "Arabic parasites", etc.;
- systematic and unjustified searches;
- systematic seizure of various and often small amounts of money belonging to UMs – their only means of subsistence;

³ Extract of a confidential police report from the GVAR on the 20th of January 2021.

- systematic searches of their (often shared) rooms in the shelters, despite the frequent absences of search warrants;
- systematic and unjustified seizure of cell phones of UMs- their only means of contact with the institutions of care, namely the Service for the protection of minors (hereafter SPMi), social workers or lawyers;
- prevention from accessing to the Permanence's legal services, through the increased presence of police officers around the Permanence's office and police behaviors comparable to harassment, thus violating the UMs fundamental right to access to justice, more specifically infringing the right to access to a lawyer as a defendant (art. 29 al. 3 of the Federal Constitution of the Swiss Confederation, hereafter FCSC; art. 6 al. 3 let. c of the European Convention on Human Rights, hereafter: ECHR);
- abusive controls and systematic visits to the police station for unjustified custody. UMs have namely reported:
 - being forced to follow police officers to the police station and being sprayed with cold water hoses to be "washed" during the Covid-19 period;
 - being subjected to unwarranted use of handcuffs;
 - being subjected to intimidating behavior from police officers and gestures that amount to physical violence
- such discriminatory behavior also arouses from the practice of the Police Commissioner, systematically ordering various coercive administrative measures against the UMs, namely entry or territorial bans, sometimes entering into force on the day the minor is supposed to reach majority, for a duration to up to 5 years onward, and sometimes immediately.

b) Creation of a special police unit based on discriminatory grounds

The aforementioned practices have intensified since the beginning of summer 2020 with the creation of a special police unit called “ *Groupe vols et agressions de rue*” (translating into “Unit for street robbery and aggressions”, hereafter GVAR).

It should be noted that in the beginning, no official public communication about the creation of this special unit or its legal justification had been.

Several months later (by the end of July 2021), the creation of the GVAR was publicly announced in the press⁴. It was said to be composed of six inspectors, who worked on “*collecting information and using it to coordinate permanent or ad hoc operations on the field*”, still without legal basis for such proceedings. Initially announced for a duration of three months, the special unit still operates to this day.

The work of the unit has led to systematic and abusive controls, massive arrests and incarcerations of UMs and young migrants.

c) Use of discriminatory terms and racial profiling

In the aforementioned press article, the police representatives explicitly stated that the GVAR’s aim was to target “*young men, minors or alleged minors, of North African origin*”, more specifically “*of Moroccan, Tunisian, Algerian or allegedly Algerian nationality, without documents*”. The term “*UM*” was also explicitly mentioned in the official communications of the Canton of Geneva and relayed in the press as a qualification for the concerned.

On the 17th of December 2020, the General Prosecutor for the State of Geneva Mr. Olivier Jornot (Public Ministry), the Chief of the Security Department, the State Counsellor Mr Mauro Poggia and the General police commander Ms. Monica Bonfanti, held a public conference, detailing the priorities of the common criminal policy for the next three years and making the fight against what has been qualified as “*the fake unaccompanied minors*” its main priority. The alleged emergence of a “*new criminal phenomenon*” was directly attributed to the so-called group.

Targeting a population on the basis of its ethnic origin and social affiliation is prohibited by the Swiss Federal Constitution (art. 8 al. 2 FCSC.), the Constitution of the State of Geneva (art. 15 al. 2 CS/Ge) and international law (14 ECHR, art. 26 International Covenant on Civil and Political Rights).

⁴ “La police ciblera les faux mineurs non accompagnés”, Tribune de Genève, 16 December 2020 (<https://www.tdg.ch/la-police-ciblera-les-faux-mineurs-non-accompagnes-209074726479>); “La lutte contre les faux mineurs non-accompagnés intensifiée”, 20min, le 16 December 2020 (<https://www.20min.ch/fr/story/la-lutte-contre-les-faux-mineurs-non-accompagnes-intensifiee-644747622393>).

Such a practice also constitutes racial profiling, which is also prohibited by domestic and international legal instruments (Cour européenne des droits de l'homme, *Lingurar c. Roumanie*, requête n° 48474/14, 16 avril 2019, § 76 ; Swiss Center of Expertise in Human Rights (SCHR), *Résumé de l'étude sur les contrôles de personne réalisé sur mandat du Département de la sécurité de la ville de Zurich*, 28 février 2017, p. 1 ; Committee on the Elimination of Racial Discrimination (CERD), *Observations finales concernant les septième à neuvième rapports périodiques de la Suisse*, 13 mars 2014, § 14). Finally, this policy violates the cardinal principle of the presumption of innocence (art. 10 al. 1 SCPC, art. 6 par. 2 ECHR, and art. 14 par. 2 International Covenant on Civil and Political Rights), since it defines young unaccompanied migrants as delinquents and presumes them as such, thus reversing the burden of proof and innocence.

The Permanence has repeatedly requested from the Authorities to namely:

- immediately instruct police officers to behave and use appropriate language with minors and end all abusive practices towards UMs;
- immediately ensure that UMs have access to places dedicated to legal aid, reception and that a support be guaranteed, without police intervention;
- to immediately order the dissolution of the GVAR unit specifically targeting young unaccompanied migrants;
- to immediately bring the criminal policy into conformity with the Swiss and international legal frame,

thus, without any result.

d) Administrative procedure

The Federal Act on Foreign Nationals and Integration (hereafter: FNIA), at its art. 64 al. 4 seq. allows the removal of minors under restrictive conditions.

More recently, the administrative authorities have collaborated with the police to set up a “process”, the legal conduct of which is not subject to any public regulation or directive, to establish each UM’s identity, their minority or majority, and decide if they can stay in Switzerland or if they should be removed from Switzerland through the aforementioned procedure.

Through the SPMi, the administrative authorities send summonses to all the UMs in the shelters for minors to present themselves to the asylum seekers' unit (in french: "*Cellule requérant d'asile*", hereafter: CRA), where their fingerprints are collected.

Once the CRA step is over, all UMs are called for an interview at the Migration Unit (located in the main police station in Geneva). This marks the beginning of an investigation. The specific procedure applied here is not described in the federal law, nor in the cantonal one.

UMs undergo an interrogation lasting several hours (sometimes up to eight hours including short breaks), in the presence of agents of the administrative authorities, police officers and a "trusted person", who has been named by the State (here a jurist, representing the association CARITAS) to accompany them through the procedure. He however meets them once before the interrogation and once after for the eventual follow up. He is then the only person informed of an eventual formal decision of administrative deportation.

According to the results of the investigation, solely interpreted by the administrative authorities, it has been considered that some UMs are of age (mainly based on the dates of birth given at the crossing of other European borders, being noted that UMs usually give other identities and/or dates of birth in order not to be traced or left to cross the border). No official age assessment/expertise is ordered.

At the end of the process, a detailed formal decision of removal/deportation (under art. 64 seq. FNIA) is notified to the UMs, either in their shelter if they are still sheltered, or sometimes solely to the trusted person from the association, or to them personally. The UMs considered of age are immediately expelled from the shelters and left on the street.

An appeal is possible within an extremely short period of 5 days (art. 64 al. 3 FNIA). The appeal has no suspensive effect and is therefore enforceable notwithstanding the appeal (Art. 64 al. 3 FNIA). The deadline for immediate departure from the country is set between 7 and 30 days but doesn't usually go over 7 days (art. 64d al. 1 FNIA).

As soon as the administrative decision considers that the concerned has reached the age of majority - solely based on the administrative authority's subjective assessment of the person's journey and the information provided by the CRA - the criminal authorities are immediately informed.

A procedure is initiated for the offense of art. 148a of the Swiss Criminal Code (hereafter: SCC) - unlawful obtaining of social assistance benefits - against the young person who has benefited from the assistance of the SPMi for a certain time.

This offense justifies a compulsory expulsion according to the SCC (art. 66a al. 1 let e). Individuals accused of such an offense are systematically detained for several months while awaiting their trial.

In reality, the benefits received from the SPMi are nothing more than food and a bed in a shared room, i.e. what can easily be qualified as the minimum subsistence guaranteed to all persons within the meaning of art. 12 FCSC, as well as art. 3 and 8 of the EHCR. The undue character of the collection of these benefits is not in our opinion realized and is justified by the state of necessity (art. 17 SCC).

Hence, several issues can be raised:

- Obviously, the intervention of a lawyer specialized in foreigners' law is essential to formulate such an appeal. Given the conditions of the notification and the mandate given to the trusted person – only one from an association – such rapid intervention by a lawyer is not granted.
- It is evident that one is incapable to appeal against all the rendered decisions, raising both judicial and procedural arguments, within 5 days.
- It is not clear if and how (language, details, possibilities of appeal) their rights are explained to them and if their wish to appeal is considered.

e) Actual situation

After more than two years of service, the Permanence bitterly observes that the number of UMs in Geneva has drastically decreased since the beginning of the summer 2021.

It is obviously the result of the policy of repression carried out by the State of Geneva, notably with the creation of the GVAR. The increased presence of police officers, massive arrests and massive incarcerations as well as a recent administrative offensive aiming at the

expulsion of young and UMs have had the effect of driving them out of the territory, which seems to have been the desired effect.

f) Future work

Recently, the European Bars Federation (hereafter: EBF) contacted the main Geneva Bar Association (Ordre des avocats de Genève, hereafter: ODAGE) to inform of its intention to submit a specific question to the European Commission about UMs in Europe. The Bars of several European countries have been asked to establish the legal situation in their respective countries and to proceed to a comparative legal opinion, allowing to underline the fundamental rights guarantees for UMs provided by each country, and spot the countries who eventually do not comply with national and international requirements. The work is currently in process.

III. Recommendations

In this regard, we wish to invite the Committee to address the following recommendations:

- The State of Geneva should immediately order the dissolution of the GVAR unit specifically targeting young unaccompanied migrants;
- The State of Geneva should immediately bring the criminal policy in compliance with the Swiss and international legal frame;
- The Parliament of the State of Geneva should investigate the treatment of unaccompanied minors by the police authorities, including racial profiling and systematic abusive practices;
- The State of Geneva should immediately ensure that UMs have access to places dedicated to legal aid, reception and that a support be guaranteed, without police intervention;
- The State of Geneva should hold back from administrative removal to ensure the compliance of the procedures with the international legal frame, especially children's rights.