

# ALTERNATIVE REPORT

TO THE V Y VI IMPLEMENTATION REPORT TO THE UN  
CONVENTION ON THE RIGHTS OF THE CHILD AND THEIR  
OPTIONAL PROTOCOLS SUBMITTED BY SPAIN

# UNACCOMPANIED MIGRANT CHILDREN IN SPAIN

February 2017

novesyies



## ORGANISATIONS INVOLVED

**NOVES VIES** is a non-profit social organization made of professionals from the social and legal field, whose main objective is to promote social justice and ensure the defence and promotion of Human Rights, especially children's rights. Specifically, the organisation defends and legally represents unaccompanied migrant children before the courts.

AND

**FUNDACION RAICES** is an organization that promotes and protects the rights of Spanish and migrant children, youth and their families. This NGO has been working for more than 20 years in the legal defence and the psychological, social and educational support of children suffering from or at risk of social exclusion in Spain, particularly defending those whose rights are vulnerated by the Public Institutions.

The abovementioned social entities submit this Alternative Report to the Government of Spain's V and VI Report on the Implementation of the Convention on the Rights of the Child of the United Nations and its Optional Protocols, submitted before the Committee on the Rights of the Child on 5 May 2016.

These organisations also wish to express the enormous importance of this channel for the submission of Alternative Reports, which give voice to civil society organizations that defend Children's Rights and, in this case, unaccompanied migrant children, who suffer from special vulnerabilities in their triple status as children, migrants and unaccompanied.

Furthermore, they wish to begin by denouncing the Spanish State, since Public Administration and Public institutions in charge of children's care are generally giving prevalence to the condition of foreigner over the status of child. This becomes real when legislation is implemented, as the policies of control of migration flows prevail over those referring to child protection; thus, the implementation of the legislation provided for foreigners applies before that of children care, overlooking the best interest of the child. It should be also stressed that in Spain the same Authorities assume the guardianship and legal representation of children, which means that unaccompanied migrant children do not have an independent guardian or representative. Therefore, the efforts of the organisations submitting this report aim at the defence and protection of the rights of unaccompanied migrant children against Public Authorities' interests when opposing the best interest of the child.

It is estimated that in Spain there are currently between 3,500 and 4,000 unaccompanied migrant children. These children come mostly from Morocco, Algeria, sub-Saharan African countries and Bangladesh. In general, they are children who leave their countries of origin seeking a better future, fleeing from poverty, child labour, family and social violence, terrorism, war or natural disasters. They decide to embark alone on a difficult migratory process which makes them extremely vulnerable, easy victims of organized crime and all kinds of abuses, labour and sexual exploitation, human trafficking, drug mafias or recruitment for violent actions. So much suffering is compounded by the fact that when they arrive to Spain, they see their dreams broken and their rights infringed by the public authorities of the Spanish State violating Spanish legal order and the Convention on the Rights of the Child.

The testimony of Unaccompanied migrant children in Spain have been recorded in video recordings, which will be sent to the Committee on the Rights of the Child. The organisations

involved in this alternative report want to expressly bring to light the case of an unaccompanied migrant child, whose guardian is the Government administration and who is living in a child reception centre, who wanted to participate in a video recording in order to explain her situation to the Committee, as declared previously to the video recording. Nevertheless, when representatives from the organisations involved in this alternative report met the minor to proceed to the recording, she seemed not to be willing to participate anymore. It is deduced from the events described that everything was prepared (by the Government administration and/or the centre in which she was living) to prevent the child from expressing herself and to exercise her right to participate. The facts are developed under **ANNEX I** of the Spanish version of the report, page 36 onwards).

The translation of the full alternative report will be sent to the Committee on the Rights of the Child.

## EXECUTIVE SUMMARY

The treatment that unaccompanied migrant children (hereafter, UAMC) receive in Spain violate many principles and rights as recognized in the Convention of the Rights of the Child (hereafter, CRC). On the one hand, we consider that there exists a flagrant violation of the basic principles contained in the CRC: non-discrimination, best interest of the child as a primary consideration in the search of short and long term solutions, right to life, survival and development, as well as the child's right to express freely his or her opinion. On the other hand, there exist violations of specific rights such as the right of unaccompanied migrant children to be granted with the appropriate protection, especially those seeking asylum, and also in particular cases, such as special protection against abuse and violence, as well as to the right to health, to education, the right to recovery and reintegration or the protection against trafficking and exploitation, etc.

The following Executive Summary includes in detail the different vulnerations of UAMC's rights currently occurring in Spain and the recommendations proposed by Noves Vies and Fundación Raíces to put and end to them and prevent future violations of rights and principles contained in the CRC.

### I. UAMC LOCATION AND IMMEDIATE ATTENTION (CRC principles and rights violated: arts. 2,3,6,12,20,22,24,34 and 35)

When UAMC are located, they are not provided with the immediate attention that they might need by the competent child care services. Furthermore, their access to the child care system is conditional on the age assessment procedure in case there are doubts about whether he or she is actually a minor, procedure that will determine whether the child is in fact a child (under 18) or an adult (more than 18) depending on medical tests being undertaken. Despite the fact that those medical tests' results should be carefully analysed and read, as they present a marge of error of +/- 2 years, more factors should be considered, and the condition of minor should be always presumed, in practice, these medical tests often result that the child is over 18, preventing him from enjoying his rights as a child, specially his right to access the Children Care system.

Considering this, the following **RECOMMENDATIONS** are made:

- When the border police authorities locate an UAMC, even when his or her age cannot be certainly assessed, they should **first provide** the alleged child **with adequate attention by the children care services**, and assume his provisional guardianship, thus respecting presumption of minority until the age assessment procedure concludes.
- When the child asks for it and/or when he or she is in a poor physical or psychical condition, a **health professional** must provide him or her with **the necessary medical and psychological assistance and support**.
- Once verified that the minor is in good physical and psychical conditions and in a safe and secure environment, **the child should be heard**. When the child does not know or master the language used in the proceedings, he or she must be provided with **a professional interpreter** who masters the language the child speaks.

- From the very first moment, **the child must be provided with a legal aid lawyer specialized in UAMC** who will ensure child's best interest and his rights are respected, thus representing him before any Public or private institution in any proceedings in which he or she might be involved.
- In case of undocumented unaccompanied migrant children, whose underage cannot be determined with certainty, children should be **provisionally considered as such and kept within the child care system** until the age assessment procedure is concluded.

## **II. IDENTIFICATION AND DOCUMENTATION of UAMC (CRC principles and rights violated: Articles 2 and 3.)**

In many cases, when Spanish Public Authorities locate UAMC, despite that they hold an original birth certificate and a valid passport or equivalent document as proof of identity (including date of birth) and confirming that they are minors, Public Authorities do not consider the validity of the documents and are identified UAMC as "undocumented aliens", thus transferring them to the Public Prosecutor who will begin the age assessment procedure. It does not matter whether they have official documents or not, whether they look like minors or not, and whether they actually tell they are minors, that they are considered as "undocumented aliens". Public Authorities ignore the fact that they are under the legal age according to their official documents and, without questioning the validity of the documents they hold or proving its falsification, UAMC are systematically subjected to medical tests to assess their age; and the results of these tests (usually, a radiological test of the left wrist, a test of the collar bone, an assessment of teeth development, genital explorations, etc.) prevail over the age proved in the documents.

Therefore, the following **RECOMMENDATIONS** are made:

- **Only when undocumented migrant children** whose minority cannot be established with certainty, a procedure for determining the age might begin, ensuring at all times an independent guardian and a legal representation of the UAMC.
- Before subjecting **undocumented migrant children** to medical tests for determining their age, the Spanish Public Authorities should **contact the diplomatic representations** (embassies and consulates in Spanish territory) of the children's countries of origin and request their documentation.
- The UAMC holding his or her passport or equivalent identification document proving their condition of minor, should not be considered in any case as "undocumented", therefore under no circumstances must he or she be subjected to medical tests to have his or her age assessed.

## **III. AGE ASSESSMENT PROCEDURE (CRC principles and rights violated: Articles 3, 6, 20, 24, 27, 28, 34 and 35)**

In all cases, medical tests to assess the age of a person are carried out to the "undocumented" UAMC consisting of bone radiographs (left wrist and collar bone usually), exploration of teeth development and in some cases exploration of the genitals. Additional tests are never performed, neither are considered other elements that might influence the

age of a person, such as the race or ethnic group he or she belongs to, the socio-economic context of the country of origin, etc.

Therefore, the following **RECOMMENDATIONS** are made:

- The age assessment procedure of "undocumented" UAMC should be undertaken with the following guarantees: a **multidimensional and multidisciplinary reliable assessment, it should be based on scientific reliable methods whose results must be adequately considered and analyzed, it should be child-friendly, it should consider other factors such as gender and any type of vulnerability the child might present**, always respecting **the best interest of the child**, their **right to be properly informed and heard** and preventing any risk of violation of **human dignity**.
- The Public Prosecutor should not encourage the realization of medical tests to assess a person's age without the aforementioned guarantees.
- **When identifying a possible conflict or discrepancy** between the age claimed by the child and the results of the medical tests, Public Authorities should consider and respect the best interest of the child and make sure that the age assessment is carried out through **an urgent judicial process with all guarantees and brief**.
- **Public Prosecutor's Decree of Age**, the document containing the Public Prosecutor's decision on age assessment, must be subjected to direct appeal in respect of the due process of law. Nowadays it is only possible to directly appeal their effects, such as the denial of entry in the Children Care System. Therefore, legal mechanisms with all guarantees should be created and made available in order to directly appeal that decision and prevent defenselessness.

#### **IV. IMMIGRATION DETENTION CENTRES (CIES) (CRC principles and rights violated: articles 3, 6, 20, 24, 27, 28, 37)**

As UAMC are usually considered adults after performing simple medical tests. As a result, an expulsion procedure back to their countries is often initiated and they are confined to migrant detention centers ("Centros de Internamiento de Extranjeros", CIE) and deprived of their liberty.

Therefore, the following **RECOMMENDATIONS** are made:

- The Spanish State must prevent, in all cases and under all circumstances, that any UAMC is deprived of liberty and confined to a Detention Center. They should always be allocated in a care center for minors and protected by the correspondent Children Care System. In case of doubts on their age they should always be provisionally considered as minors and be provided with the correspondent care by the children care services and relocated in a care center.
- From the moment an inmate in the Detention Center expresses that he or she is minor and/or holds any document proving his/her age, Police Authorities managing the detention center should communicate by virtue of office with the surveillance court on the existence of a presumed minor, and behave accordingly with the presumption of minority and in respect of the best interest of the child.

## **V. RESIDENCE AND WORKING PERMITS (CRC principles and rights violated: Articles 2, 3 and 27)**

The competent authorities, the Children Care Institutions that hold children legal representation, do not request the UAMC residence permits automatically after UAMC join the children care system. They usually make the request several months after, even in cases when the child is close to turn 18.

On the other hand, those who are or have reached 16 years old, which is the legal minimum age to work in Spain, are prevented by law from applying for a working permit, and even if they request it they have it denied. Sometimes, even when they turn 18 and must abandon the Children Care System their request for a working permit is denied, being lead to their direct social exclusion and marginalization, as they are left as adults with no ways of living to survive with dignity.

Likewise, despite the fact that the law contains the right of UAMC to apply for the Spanish nationality once they have been 2 years guarded by the State, they are almost never informed of this right and of how to initiate the procedure to obtain.

Therefore, the following **RECOMMENDATIONS** are made:

- The residence permit must be requested right after the child enters the Children Care System, as soon as possible, in order to make sure children's rights become effective. Besides and according to the law, the residence permit, must be applied for and granted with retroactive effects since the day the child accesses the Care System. Plus, from the time the UAMC turns 18, the residence permit should be automatically renewed as a residence and working permit.
- In case the UAMC is already 16 or more when accessing the Children Care System, the permit to be requested must always be the residence and working permit.
- A modification of the Spanish current law should be urgently made to end up with UAMC discrimination, automatically granting UAMC under the protection of the State their right to be entitled with a working permit once they turn 16, thus receiving the same treatment as Spanish children in the Children Care System do.
- UAMC guarded by the State must have their competence to request by themselves their residence and working permits recognized. In any case, they must also have an independent guardian to ensure that their legal representative is indeed acting in the best interest of the child. At present, as it has been stated, the guardianship, the legal representation and the ability to apply for the residence and working permits are functions allocated to the Public Administration, which puts ahead the immigration policies to the childhood policies
- Once an UAMC has been guarded by the Children Care System for two years should be properly informed about his/her right to obtain the Spanish nationality, therefore allowing him/her to exercise his/her right if he/she considers it of his/her own interest.

## **VI. INFORMATION (CRC principles and rights violated: Articles 12 and 13)**

The Spanish State does not guarantee UAMC the right to be informed on their rights, on measures of protection, legal and welfare opportunities. Neither offers them any forms, protocols and communication channels on any type of abuse and violence that may affect them, nor appoints any human rights national organizations to effectively defend UAMC's rights.

Therefore, the following **RECOMMENDATIONS** are made:

- From the moment they are located, Public Authorities must respect **UAMC's right to freely express their opinion**, their **right to be heard** in all administrative, judicial and other kind of proceedings involving them and their interests, whether by himself or by a trusting person named by them, and that **their wishes, opinions and desires in all matters which affect them are duly taken into account**.
- The **creation of national human rights bodies and the recognition of their capacity and legitimate interest to effectively defend UAMC** who are under the guardianship of the child protection authorities is strongly recommended. Additionally, to ensure independence in the exercise of guardianship and legal representation of UAMC, guardianship and/or the legal representation might be also attributed to these organisations and not necessarily to the Public Administration.

#### **VII. EDUCATION (CRC principles and rights violated: arts. 27, 28 and 29)**

In terms of education, human, material and professional resources available at the child care services are scarce and are not adapted to the curricular and learning needs of UAMC, nor do they aim at attaining their labour insertion and inclusion in society.

Therefore, the following **RECOMMENDATIONS** are made:

- The Spanish State should provide the child care services with the necessary and appropriate human, material and professional resources to guarantee every child accesses an adequate education, adapted to their curricular and learning needs-, especially right after the care centre.
- In addition, training and vocational guidance must be provided to UAMC in order to ease their insertion to the labour market.

#### **VIII. SOME ACTIONS OF THE CHILD PROTECTION AUTHORITIES: INSTITUTIONAL VIOLENCE (CRC principles and rights violated: arts. 3, 6, 19, 20, 24, 27, 28, 34 y 35)**

Child protection authorities, through their act or omission, develop certain actions that might be considered as institutional violence, such as:

- 1) Violence from children care centres' staff: some UAMC under the State's guardianship and living in a child care centre, have been victims of violence from the staff of the centre, concretely by security officers.
- 2) There have been several cases of UAMC leaving the child care centres where they lived because of this violence, choosing to live in the streets and parks in the nearby areas



without any kind of protection, instead of keeping on suffering mistreatment in the centre.

- 3) Additionally, it has also been denounced the transfer of children guarded by the government of an Autonomous Community to other territory. They usually ask the child informally whether he knows somebody in Spain to be with or not, and when the child mentions a friend or just people he knows, they automatically send him there without accompaniment, without informing him of what he must do or who he must meet at the arrival.
- 4) Furthermore, six months after a child leaves the child care centre in which he was living and he is in an unknown location, the Public Administration puts an end to the guardianship and the legal representation of the child. Moreover, in the recent reform of art. 172 of the Spanish Civil Code has been given legal coverage to this practice.

Therefore, the following **RECOMMENDATIONS** should be made:

- The Spanish State must set up effective mechanisms to prevent, detect, intervene and monitor any situation of violence against UAMC, especially in reception centres.
- Additionally, the Public Administration must follow up on children and ensure that they are protected immediately when they disappear from reception centres, and they, as legal representatives of the child, should make sure that he is fine. The Administrations cannot extinguish the guardianship or the legal representation of a child until the moment when it is taken over by another person.

#### **IX. PUSH-BACKS (CRC principles and rights violated: art.6)**

The *de facto* deportation without guarantees of migrant people, often known as *push backs*, at the border fences of Ceuta and Melilla, two enclaves in Moroccan territory, prevents identifying potential UAMC, especially those seeking international protection.

Therefore, the following **RECOMMENDATIONS** are made:

- The Spanish government should modify the Citizen Protection Act (“Ley de Protección Ciudadana”) in order to stop the push-backs systematically carried out in Ceuta and Melilla, which prevent the identification of UAMC, among who there might be children seeking asylum, and set up mechanisms and guarantees to avoid children’ expulsions.

#### **X. LACK OF RESOURCES AT THE CHILD PROTECTION SYSTEM (CRC principles and rights violated: art. 4)**

Public powers do not undertake an adequate protection of UAMC’s special needs, plus there exists an insufficiency of the resources invested by the Spanish government in the protection of this specific group of minors.

Therefore, the following **RECOMMENDATIONS** are made:

- Sufficient resources must be allocated to satisfy UAMC’s needs even as a priority,

considering their special (triple) vulnerability as children, unaccompanied and migrant.

- A damage claim mechanism should be set up by the Public Administration to hold it accountable in case of breach of their legal duties regarding child protection. For instance, creating a reparation procedure available to claim damage caused by the public institution itself.