Chapter 36

Article 22: The Right to Protection for Refugee and Asylum-Seeking Children

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

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What Did Children Say?

‘Provide good nutrition for refugees especially children to ensure their growth.’ (*Africa*).

‘Government should provide shelters or housing for refugees’ and ‘Equal education, health care, etc., for refugees as for other children.’ (*Latin America/Caribbean*).

Give assistance to refugees’ parents so that they can improve their financial situation to take care of their children. (*Africa*).

‘Government should have support for children and their families affected by displacement or during migration as refugees, to provide them all necessities as required by the UN Code of conduct.’ (*Africa*).

Overview

Article 22 came about in the drafting of the Convention at a time when international law started to distinguish between refugee children and adult refugees (UNHCR, Notification to Executive Committee on Refugee Children, cited in Vučković-Šahović et al., 2012, pp. 231–232). Consensus on the text of Article 22 was found relatively rapidly following Denmark’s initial proposal in 1981, and the provision was reworked into its final form in the 1989 Working Group (Detrick et al. 1992, pp. 319–329). The provision captures the broad international consensus that:

- refugee children are owed appropriate protection and humanitarian assistance
- all their rights under the Convention as well as under other international human rights treaties and humanitarian law must be upheld
- States Parties must cooperate with the UN and related agencies to protect and assist such children
- family reunification is a priority obligation of governments serving the best interests of refugee children, having particular regard for unaccompanied and separated children.

Article 22 therefore guarantees the substantive application of all Convention rights to the particular situation of asylum seeking and refugee children, and also guarantees them protection and assistance in advancing their immigration and residency status claims and in overcoming the hurdles posed by international migration channels, including guarantees of due process (Ceriani Cerandas, 2015, p. 342). The particular concern for unaccompanied migrants and tracing and reuniting them with their parents is reinforced by Articles 9 and 10, and other provisions of the Convention and its protocols, including Articles 38 and 39 and the Optional Protocol on children and armed conflict.

Further to General Comment no. 6, on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee on the Rights of

the Child (the Committee) revisited this topic in a Day of General Discussion in 2012, which informed two joint General Comments with the Committee of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. General Comment no. 22 deals with the General Principles regarding the human rights of children in the context of international migration (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a) and General Comment no. 23 deals with States Parties obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017b). These new statements of the law reinforce how all the rights of the child must be upheld for migrant children at every stage of the migration journeys and that all decisions affecting them must be informed by the child's voice and determined in accordance with their best interests.

Article 22's focus on appropriate protection and humanitarian assistance to refugee children and children seeking refugee status is inherently tied to respect for children's rights both in the country of origin and in the country of refuge. It is often a violation of the core principles of child rights that may force children and their parents to flee persecution and it is all too often the denial of these same rights in the country of refuge that inform child rights claims in relation to Article 22 (Ceriani Cerandas, 2015, p. 338).

While the framing of Article 22 limits its application to the context of international migration by asylum seeking and refugee children (UNICEF, 2007, p. 311), the Committee has urged States Parties to provide assistance and protection to internally displaced children (2000, paras. 57, 68, 2006a, paras. 78, 79), consistent with the particular needs of these children as outlined by the UN in its *Guiding Principles on Internal Displacement* (Deng et al., 2004). Similarly, the Committee has expressed concern regarding States Parties' failures to take account of the particular needs of children as economic migrants (2006b, paras. 68, 69), even though they may have no particular claim to protection as refugees fleeing persecution within the meaning of the 1951 Refugee Convention or Article 22.

General Principles

Article 2 Refugee children or their parents are often forced into migration by patterns of discrimination, for example on the basis of ethnic or religious affiliation, language, or sexual orientation. All asylum seeking and refugee children are already at a disadvantage in relation to their peers and that very status attracts the protection of Article 2's non-discrimination principle (UN Committee on the Rights of the Child, 2005a, para. 18). Certain classes of marginalised children are at particular risk in migration contexts, for example disabled children, children of minorities, indigenous children, LBGTQ youth, and current and former child soldiers. States Parties

must take positive measures to ensure de facto equality of migrant children in host societies as well as in the case of children returned to their country of origin (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 21–26).

Article 3 The overarching consideration in implementation of child refugee claims under Article 22 will always be the best interests of the individual child or children in the case (Ceriani Cerandas, 2015, p. 339; Vučković-Šahović et al., 2012, p. 332). This basic principle must be respected during all stages of the displacement cycle, and decisions at any of these stages must be appropriately documented through a formal and rigorous best interests determination (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 27–33; UN Committee on the Rights of the Child, 2005a, paras. 19–22). The Committee has emphasised in particular that ‘the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with their own migration status’ (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 27–33; UN Committee on the Rights of the Child, 2005a, paras. 19–22).

Article 6 The protection of child rights in many states is at its weakest in immigration contexts (Harris et al., 2009; van Bueren, 2007, p. 123; Vučković-Šahović et al., 2012, pp. 165–170), and it is often the denial of the child’s right to maximum survival and development that is the major root cause of migration (legal and illegal) of children, adolescents, and their parents (Ceriani Cerandas, 2015, p. 338). This underscores the importance of appropriate safeguarding of Article 6 rights in addressing the root causes of mass migrations of children and families the world over. At the same time, children in transit engage in threatening and extremely dangerous migration journeys and States Parties have obligations to take special measures to protect and assist children. Immigration policies should focus on facilitating and regulating mobility rights rather than on repressive detention and deportation practices, so as to advance Article 6 rights and not violate them (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 40–44). The child’s right to optimum development also must inform Article 22 rights in relation to immigration policy affecting the deportation or detention of a child’s parent (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, para. 44).

Article 12 Children in migration contexts are vulnerable in relation to their participation rights. They are regularly denied standing and treated as mere dependents of adult asylum seekers. The Committee, in its Joint General Comment no. 22, strongly

reinforces the States Parties' obligation to ensure child participation in immigration matters affecting both children and their parents, as their best interests will be in play in both instances and children often have 'their own migration projects and migration-driving factors' (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 34–39).

Articles Related or Linked to Article 22

Article 7 proclaims the child's right to a name and nationality and to be cared for by his or her parents, both aspects of which come into play in every child migration journey.

Article 8 protects children's right to preserve their name, nationality, identity, and family relations and to be reconnected with family if these relations are disrupted, as may happen during migration.

Article 9 establishes the right to not be separated from one's parents unless it is necessary in one's best interests as determined by competent authorities and therefore intersects with the family reunification principle in Article 22.

Article 10 establishes the child's right to family reunification, to be dealt with in a positive, humane, and expeditious manner, a right which will almost invariably be read jointly with Article 22.

Article 11 establishes the child's right to be protected from international abduction, another situation which will attract scrutiny in relation to Article 22.

Article 16 affirms the child's right to privacy and the inviolability of his or her family life, rights which are often jeopardised during child migration journeys.

Article 20 establishes the child's right to alternative care if deprived of his or her family, as may happen as a result of immigration detention practices.

Article 21 elaborates the child's rights in relation to adoption, rights which are not diminished by a child's migrant status.

Article 35 establishes the child's right to be protected from abduction, sale, or trafficking which may intersect with Article 22 rights in relation to international trafficking.

Article 37 establishes protection of children from deprivation of liberty, except as a measure of last resort, including in relation to immigration processes where detention of children should be strictly avoided.

Article 38 asserts the child's right to protection from early enlistment, and these rights may intersect with Article 22 rights of children whose migration journeys cross conflict zones.

Article 39 establishes the right to recovery and reintegration for child victims of neglect, exploitation, abuse, torture, cruel treatment, or armed conflict, and migrant children may be at higher risk of abuse and their rights to recovery and rehabilitation should not be overlooked.

Optional Protocol on the involvement of children in armed conflict.

Optional Protocol on the sale of children, child prostitution and child pornography.

Relevant Instruments

UN Convention Relating to the Status of Refugees (1951).

UN Convention relating to the Status of Stateless Persons (1954).

UN Convention on the Reduction of Statelessness (1961).

International Covenant on Civil and Political Rights (1966), Articles 12 and 13.

UN Protocol Relating to the Status of Refugees (1967).

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

UNHCR Refugee Children: Guidelines on Protection and Care (1994).

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000).

UNHCR Inter-agency Guiding Principles on Unaccompanied and Separated Children (2004).

UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2009).

The Geneva convention for the amelioration of the condition of the wounded and sick in armed forces in the field (1949), and their Protocols I and II.

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).

European Convention on Human Rights (1950), Protocols 4 and 7 on non-expulsion of nationals and foreigners.

American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32) (1978), Article 22, Freedom of Movement and Residence.

African Charter on Human and Peoples' Rights (1981), Article 12, Freedom of Movement and Residence.

African Charter on the Rights and Welfare of the Child (1990), Article 23, appropriate protection and humanitarian assistance for Refugee Children.

Attributes

Attribute One: Appropriate Protection and Humanitarian Assistance

The first attribute guarantees to asylum seeking and refugee children the same substantive rights as are guaranteed to all children. This is the meaning of

‘appropriate protection’ as opposed to ‘special protection’ as first proposed in the *Travaux Préparatoires* (UNICEF, 2007, p. 306). Refugee children are not granted a special status under the Convention, but they are not given any lesser status. They are to be treated as children first and foremost and not as migrants per se (Ceriani Cerandas, 2015, p. 339), in the sense that national immigration policy cannot trump child rights. The basic rights to education, health, and child welfare of these children needs to be protected to the same extent, and as much as possible, as children who are nationals of the host country (Ceriani Cerandas, 2015, p. 339). The criterion of humanitarian assistance amplifies the concept of appropriate protection. For example, in addition to mainstreaming refugee children in regular school classrooms, they may need therapy to assist with their recovery from traumatic journeys and successful integration into a new host culture (UNICEF, 2007, p. 306; UN Committee on the Rights of the Child, 2005b, para. 42). Humanitarian assistance should avoid discriminatory consequences as between categories of entrants in family reunification cases (UN Committee on the Rights of the Child, 2005c, paras. 63, 64); it should avoid detention of children for immigration purposes (UN Committee on the Rights of the Child, 2005a, paras. 61–63) and possibly also of their parents (Ceriani Cerandas, 2015, pp. 347–348); it should help defend the principle of non-deportation of children (Ceriani Cerandas, 2015, pp. 342–343); and reinforce the child’s right to preserve his or her family life (Ceriani Cerandas, 2015, pp. 348–349; UN Committee on the Rights of the Child, 2005a, paras. 82, 83).

Attribute Two: Preservation of Rights

The second attribute preserves the rights of refugee children not only under the Convention but under all other international human right treaties and humanitarian instruments binding on the relevant States Party. These may include, for many governments, the 1951 *Refugee Convention*, the *Convention on the Reduction of Statelessness*, the *Geneva Conventions* and the *Hague Convention for the Protection of Minors*, 1961, among others. Careful consideration must be given in interpreting and determining claims in relation to Article 22 to the many other public and private international law provisions that may bear on the child’s status.

The United Nations High Commissioner for Refugees has published guidelines in relation to child asylum claims that adapt the fear of persecution standard under the 1951 *Refugee Convention* and/or its 1967 Protocol to:

- the specific rights of children, for instance under Articles 9, 19, 24, 27, 37, or 38
- the manner in which children experience persecution differently than adults and may be more susceptible due to their level of maturity, vulnerability, dependency or limited coping mechanisms
- child-specific forms of persecution which must be considered separately from forms of persecution to which adults may or may not also be open, and which include underage recruitment into armed forces, child trafficking, female genital

mutilation, forced or underage marriage, hazardous child labour, forced prostitution, family and domestic violence, and child pornography (UN High Commissioner for Refugees, 2009, paras. 13–18).¹

With respect to unaccompanied and separated children, the Inter-agency Guiding Principles on Unaccompanied and Separated Children are especially helpful in clarifying priority focus areas for intervening effectively with these vulnerable youth, but they should not be interpreted as minimum standards or used to read down any of the rights of unaccompanied minors under the Convention. More recently, the Office of the High Commissioner for Human Rights developed *The Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations*. It provides specific child protection measures for unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance, regardless of their status, and giving primary consideration at all times to the best interests of the child (UN High Commissioner for Human Rights and Global Migration Group, 2018).

Attribute Three: Duty to Protect and Assist at National and International Level

The obligation to protect and assist contains a clear duty to provide children with appropriate due process rights throughout the several stages of their asylum and refugee claims procedures. These would include the child's right to be heard and participate in all the processes determining the child's residence or immigration status, including border admission, deportation, repatriation, detention, alternative measures, or placement, including best interest determination processes. It would also include the child's right to an interpreter, a legal representative, and to a guardian. Interviews and hearings should be conducted in a child-friendly manner and should include similarly child-friendly appeal mechanisms (Vučković-Šahović et al., 2012, p. 233). Legal aid should be provided freely to child asylum seekers by lawyers trained in child rights and accustomed to working in culturally sensitive multidisciplinary teams involving psychologists, social workers and trauma-informed care providers (Ceriani Cerandas, 2015, p. 347).

States Parties' also have obligations to protect and assist asylum seeking and refugee children in cooperation with UN agencies and other international organisations. From the outset, the framers of the Convention recognised the pivotal role played in this field by the High Commissioner for Refugees, as well as by the several organisations involved in the development of the *Inter-agency Guiding Principles*, such as the Red Cross, Save the Children, UNICEF, and World Vision. This

¹ With reference to the relationship between the Convention and the larger system of provisions on refugee protection, see also 'Article 22: Refugee Children' (Pobjoy, 2019, pp. 822–824).

cooperation, including with the International Organization for Migration, is particularly important in tracing family members, promoting family reunification, and monitoring child migration patterns.

Attribute Four: Best Interests and Family Reunification Principles

Finally, two basic principles should guide each activity with the refugee child: the best interests of the child and the principle of family unity (Vučković-Šahović et al., 2012, p. 232). After extensive field testing, the Commissioner for Refugees adopted, in May 2008, its *Guidelines on Determining the Best Interests of the Child* (United Nations High Commissioner for Refugees, 2008). While they are only one reference tool in the practitioners' toolkit, they have helped standardise and provide practical guidance in operationalising the best interests principle in child refugee determination processes in many states (Ceriani Cerandas, 2015, p. 342). Best interests procedures require a holistic child rights-based approach child refugee determination processes that factors in human and budget resources, training in children's rights and inter-institutional coordination, drawing upon the cooperation and evidence available from countries of origin, transit, and destination (Ceriani Cerandas, 2015, p. 342).

Family reunification has to comply with the principle of non-refoulement: a child cannot be returned to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed (UN Committee on the Rights of the Child, 2005a, para. 27). Family reunification should be based on a robust assessment of upholding the child's best interests as a primary consideration and should not be delayed because of a best interests procedure, considering family reunification as one aspect, not the sole aspect, and with a sustainable reintegration plan and after guaranteeing the child's right to participate in the process (UN Committee on the Rights of the Child, 2005a, paras. 79–83).

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