**Toward a Regional Mechanism for the Comprehensive Protection of Migrant and Refugee Boys, Girls and Adolescents**

(Draft submitted to the Government of Guatemala by IOM and UNHCR)

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**I. Introduction**

In many regions, including the Americas, migration movements are becoming increasingly “mixed” and more complex[[1]](#footnote-1). Current migration flows include migrants – regular and irregular – with diverse profiles. Some of these persons may belong to various groups that can be in particularly vulnerable situations: asylum and refuge seekers; migrants victims of trafficking and migrant smuggling; stranded migrants; migrants and refugees victims of violence and psychological trauma during the migration process or other persons in vulnerable situations such as pregnant women; boys, girls and adolescents travelling with their parents or unaccompanied or separated from their families; persons with disabilities; or senior citizens[[2]](#footnote-2).

Every migration flow includes persons with different vulnerabilities that require special assistance. Migrants in vulnerable situations, often travelling in an irregular manner, are at risk of being subjected to violations of their rights. Persons most at risk include migrant boys, girls and adolescents – whether unaccompanied, separated, asylum or refuge seekers, victims of trafficking, economic migrants, or others.

Migrant and refugee boys, girls and adolescents are highly prone to suffering accidents and being subjected to labour or sexual exploitation; forced labour and the worst forms of child labour; maltreatment and physical and sexual abuse; and violence based on discriminatory and xenophobic attitudes and practices. In addition, they have difficulty gaining access to basic services such as health care, education and an adequate standard of living.

Furthermore, the populations described above are at risk of becoming victims of organized transnational crime – migrant smuggling and trafficking or abduction or being forced to transport drugs and other illegal materials.

In addition, these populations have difficulty gaining effective effective access to the justice system without any discrimination. Moreover, deprivation of liberty and expulsion without due process of law and without considering the Best Interest of the Child is another practice that directly affects the well-being of migrant boys, girls and adolescents.

As expressed by the Special Rapporteur on the Human Rights of Migrants, “Age is not a common variable of disaggregated statistical data on international migration, which remains as the most difficult component of population change to measure”[[3]](#footnote-3).As a result of the lack of disaggregated data, the specific problems faced by boys, girls and adolescents within the context of international migration tend to be overlooked, since the magnitude of such issues cannot be recognized[[4]](#footnote-4).

Furthermore, in regard to forced displacement (within or beyond the borders of States), almost half of the persons suffering this situation worldwide are boys, girls and adolescents. Thus, 46% of refugees worldwide and 47% of the internally displaced persons[[5]](#footnote-5) at a global level are boys, girls and adolescents. In 2012, close to 21.300 refugee status applications were submitted by unaccompanied or separated boys, girls and adolescents in 72 countries. This is the highest figure that has been recorded since UNHCR began collecting this type of data in 2006[[6]](#footnote-6). In fact, the situation of boys, girls and adolescents leaving their country of origin as a result of violence and crime also is a palpable reality in the region.

**II. Basic Concepts and Background**

Within the context of the Regional Conference on Migration (RCM), States have adopted guidelines that are essential to addressing the protection of migrant and refugee boys, girls and adolescents in the hemisphere. The guidelines include the following:

* 1. “Regional Guidelines for Special Protection in Cases of the Repatriation of Boys, Girls and Adolescents Victims of Trafficking” (April 2007).
	2. “Regional Guidelines for the Assistance to Unaccompanied Migrant Boys, Girls and Adolescents in Cases of Repatriation” (July 2009).
	3. “Regional Guidelines for the Preliminary Identification and Referral of Migrants in Vulnerable Situations” (June 2013).

Through these instruments, Member States of RCM have recognized the systemic vulnerability of boys, girls and adolescents at various stages of the migration process and have expressed their continuous commitment to provide protection and assistance, with the aim of implementing specific actions to ensure that the rights of boys, girls and adolescents are safeguarded.

At the Vice-Ministerial Meeting held in June 2011, Vice-Ministers decided to approve the initiative of the International Organization for Migration (IOM) to hold a “Regional Forum on policies based on studies by UNHCR, IOM and UNICEF, among others, on unaccompanied migrant boys, girls and adolescents, with collaboration from interested international organizations”. The workshop was held in San José, Costa Rica on March 27-28, 2012. The primary results include the identification of strategic issues relating to the protection of migrant boys, girls and adolescents and the development of national action plans to be implemented within one year.

Following up on this first event and on the initiative of the Government of Guatemala and the Office of the First Lady of Guatemala, a Seminar on Migrant Boys, Girls and Adolescents was held in La Antigua, Guatemala in August 2013. A series of conclusions and recommendations were generated as a result of this meeting to address the risks and vulnerabilities of boys, girls and adolescents at every stage of the migration process, based on four central themes: (1) Prevention of irregular migration (awareness-raising on the risks of migration); (2) reception and psychosocial assistance; (3) consular protection and repatriation; and (4) reintegration and integration.

One of the most significant recommendations of the Seminar addresses the need to promote the development of a regional mechanism such as the establishment of a permanent committee on migrant boys, girls and adolescents, including representatives from each country in the region, with the aim of preventing violations of the rights of migrant boys, girls and adolescents and the risks they face throughout the migration process.

In addition, within the framework of the Meeting of the Regional Consultation Group on Migration of the Regional Conference on Migration (RCM) held in San José, Costa Rica on November 18-19, 2013, the following was confirmed in writing: “Take note of the proposal by Guatemala to submit a document entitled ‘*Esquema y principios hacia un eventual Mecanismo Regional de Protección Integral de niñez y adolescencia migrantes’* (Outline and principles toward a regional mechanism for the comprehensive protection of migrant boys, girls and adolescents) for consideration. The document will be disseminated by the Technical Secretariat in order to get input from the Member States within a period of two months.”

Thus, this document seeks to lay the groundwork for dialogue and discussion on the importance of advancing toward a mechanism such as the one proposed within the framework of RCM. Undoubtedly, the mechanism will place the challenges relating to the situation of migrant boys, girls and adolescents in the region at the centre of the discussions and common actions by Member States. It is only through sustained solidarity and continuous efforts of all involved actors that this issue can be addressed.

**III. Objectives**

The primary purpose of the proposed Regional Mechanism for the Comprehensive Protection of Migrant and Refugee Boys, Girls and Adolescents is to promote collaboration between Member States of RCM in providing protection, assistance and aid to migrant and refugee boys, girls and adolescents and to create a space for networking, information exchange and on-going dialogue, with the aim of fostering the development of effective actions to provide comprehensive protection to boys, girls and adolescents – whether separated, accompanied by their parents or unaccompanied – in migration processes, from the moment when they are identified and received in countries of destination to their integration, return and reintegration in countries of origin, always safeguarding their rights and considering the Best Interest of the Child.

**IV. Nature of the Regional Mechanism**

The proposed mechanism would be implemented as an Ad-hoc Working Group including relevant authorities, within the framework of the Regional Conference on Migration, and would be based on the methodologies of the existing Liaison Officer Networks for Migrant Smuggling and Trafficking and for Consular Protection.

To implement the proposed mechanism, a guiding document will be available as a framework for discussion and dialogue, to guide actions relating to the protection and assistance to migrant and refugee boys, girls and adolescents in the region (Appendix).

The guiding document will not affect the obligations and duties of countries under international law, including international humanitarian law, international human rights regulations, international refugee law and protection against non-refoulement, where applicable.

**V. Guiding Conceptual Framework**

The Ad-hoc Working Group could be based on the following definitions and basic principles for protection to migrant and refugee boys, girls and adolescents:

**VI. Definitions**

Child (Boy or Girl): The Convention on the Rights of the Child states that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” (Article 1)

Adolescent: For the purposes of this mechanism, an adolescent means every human being over the age of twelve years and below the age of eighteen years and will only be used to differentiate among different types of protection.

Migrant: This term applies to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family.[[7]](#footnote-7)

Unaccompanied Boys, Girls and Adolescents: Boys, girls and adolescents who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.[[8]](#footnote-8)

Separated Boys, Girls and Adolescents: Boys, girls and adolescents who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives .[[9]](#footnote-9)

Boys, Girls and Adolescents Victims of Trafficking: Boys, girls and adolescents that are victims of the behaviour of trafficking in persons as established in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which complements the United Nations Convention Against Transnational Organized Crime, and in accordance with the internal legislation of each State.

Refugee Boys, Girls and Adolescents: Boys, girls and adolescents that fulfil the requirements to be recognized as refugees under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and in accordance with the internal legislation of each State.

**VII Guiding Principles**

1. **The Boy, Girl or Adolescent as a Subject of Law**

An appropriate protection approach needs to be implemented to ensure that every boy, girl and adolescent is considered as a full subject of law. Boys, girls and adolescents are persons with the same rights as adults and with other special rights and needs, since they are still growing up.

1. **The Best Interest of the Child**

The best interest of the child is regulated in Article 3.1 of the United Nations Convention on the Rights of the Child (CRC) which establishes that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” At an international level it has been understood that “the principle of the Best Interest of the Child […] is based on the dignity of the human being, the specific characteristics of the boys, girls and adolescents and the need to promote their development, enabling them to fully realize their potential.”[[10]](#footnote-10)

This principle should be respected at all stages of the migration process. At these stages, the determination of the best interest of the child should be documented in order to inform every decision.[[11]](#footnote-11)

**c. Equality Before the Law and Non-Discrimination**

The Convention on the Rights of the Child (CRC) establishes in Article 2 that States Parties shall ensure that boys, girls and adolescents are not discriminated against for any reason whatsoever related to them, their parents or legal guardians. In addition, States shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. Consequently, States have the obligation not to introduce discriminatory regulations into their laws, to eliminate discriminatory regulations and to combat discriminatory practices.[[12]](#footnote-12)

The enjoyment of rights is not limited to boys, girls, and adolescents nationals of the country, but also includes alien boys, girls and adolescents irrespective of their migration status. In addition, this principle calls for differentiation between protection needs based on age, gender and diversity.

At an international level, it is stated that migrants are generally in a vulnerable situation as subjects of human rights[[13]](#footnote-13) and that “this leads to the establishment of differences in their access to the public resources administered by the State.”[[14]](#footnote-14) Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society.[[15]](#footnote-15) For migrant boys, girls and adolescents, given their twofold vulnerable situation as boys, girls and adolescents and as migrants, their rights and guarantees are particularly affected by discriminatory behaviour against them.

1. **Life, Survival and Development**

Article 6 of the CRC establishes that States Parties shall provide protection, to the maximum extent possible, against violence and exploitation (including physical, economic, psychological and emotional exploitation, among others) which would jeopardize a child’s inherent right to life, survival and development. Migrant boys, girls and adolescents may be exposed to “various risks that affect the life, survival and development; for example, trafficking for purposes of sexual or other exploitation or involvement in criminal activities which could result in harm to the child, or in extreme cases, in death.”[[16]](#footnote-16)

This principle is a key element in the procedure to determine the best interest of migrant boys, girls and adolescent in implementing appropriate actions to protect them from significant risks or dangers and assessing the different consequences of various solutions in the longer term (repatriation to the country of origin, staying in the country of destination, etc.) It is essential to assess the impact on the life and development of boys, girls and adolescents of decisions such as, for example, ordering the detention and expulsion of their parents; granting or denying a residence permit to a family of migrants with irregular migration status or to parents of children born in the country of destination; approving a request for family reunification and ensuring access to social rights.[[17]](#footnote-17)

1. **The Family Unit**

Article 9 of the CRC establishes that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.” As stated in international standards, “the child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs. Every person’s right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child, and it is also explicitly recognized by Articles 12(1) of the Universal Declaration of Human Rights.”[[18]](#footnote-18)

1. **Effective Access to Protection Procedures and Procedural Guarantees**

The adoption of special measures for the protection of boys, girls and adolescents is a responsibility of the State as well as the family, community and society to which the boy, girl or adolescent belongs. Every State, social or family decision involving any restriction to the exercise of any right of a boy, girl or adolescent should consider the principle of the Best Interest of the Child and rigorously observe the provisions governing this matter. Effective access to child protection procedures (for example, in cases of trafficking or potential trafficking; violations within the context of migrant smuggling; refugees or refuge seekers; or based on any other humanitarian reason) is essential, to safeguard the rights of boys, girls and adolescents.

These protection considerations and the regulations of due legal process, adjusted to the specific reality of each boy, girl or adolescent, should be reflected in regulations on legal or administrative procedures relating to the rights of boys, girls and adolescents and, as the case may be, of their legal guardians.

1. **Participation and the Right to an Opinion**

Article 12 of the CRC establishes that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

In this regard, to allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available, especially including means of communication, the right to consular notification (for refugee status applicants expressly requested by the boy, girl or adolescent or his or her legal guardian the principle of confidentiality should be observed), the asylum process or the process to be protected as a victim of trafficking, family tracing and the situation in their country of origin. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child. As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.[[19]](#footnote-19)

1. **Confidentiality**

States parties must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child’s rights, including the right to privacy (Article 16 of the CRC). This obligation applies in all settings, including health and social welfare. Care must be taken that information sought and legitimately shared for one purpose is not inappropriately used for that of another. In obtaining, sharing and preserving the information collected in respect of unaccompanied and separated children, particular care must be taken in order not to endanger the well-being of persons still within the child’s country of origin, especially the child’s family members.[[20]](#footnote-20)

In this regard, it is essential to respect at all stages the confidentiality of refugee status applications involving boys, girls and adolescents.[[21]](#footnote-21) Every refugee status applicant should be informed as soon as possible during the procedure, in a language that is understood by the applicant, about his or her right to confidentiality of the procedures. The interviewer should ensure that the applicant is aware that not only the interview but the entire procedure shall remain completely confidential[[22]](#footnote-22), with the aim of creating an atmosphere of trust for the applicant.[[23]](#footnote-23)

1. **Detention as a Measure of Last Resort**

Article 37 of the CRC establishes that no child shall be deprived of his or her liberty unlawfully or arbitrarily and that detention of a boy, girl or adolescent shall be used only as a measure of last resort and for the shortest appropriate period of time. In addition, international standards establish that the irregular entry of a migrant to the country should not lead to penal actions and therefore, detention should not be the rule but a measure of last resort and only for the purpose of immigration control.[[24]](#footnote-24)

For the specific cases of boys, girls and adolescents victims of trafficking or refugee status applicants, and especially due to their extremely vulnerable situation, detention is inherently undesirable and should be seen as a measure of last resort that may only be applied when it has been established that it is absolutely necessary in a specific case[[25]](#footnote-25). A code of ethics of protection, assistance and non-detention should govern every interaction with boys, girls and adolescents in situations of this kind, and the primary consideration should be to ensure the best interest of the child[[26]](#footnote-26).

1. **Non-refoulement**

Appropriate measures shall be taken to ensure that a child who is applying for 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 (Article 22, CRC). In this regard, the express prohibition of placing in any way a refugee or refuge seeker at the borders of the territories where his or her life or liberty are in danger should be respected. This principle applies to any behaviour leading to devolution, expulsion, deportation, return, extradition, rejection at the border or non-admittance, and that would place the refugee or refuge seeker in a risk situation.

Furthermore, boys, girls and adolescents that are refuge seekers should enjoy specific procedural and evidentiary guarantees to ensure that fair decisions are made in processing their refugee status applications. To this end, appropriate and safe procedures should be developed and integrated for boys, girls and adolescents, and an atmosphere of trust should be created at all stages of the process. Clearly, for this right to be effective and in order to ensure the best interest of boys, girls and adolescents the prohibition of devolution (non-refoulement) should be fully respected, and migration authorities should take care to use all available information in determining the situation or status of the boy, girl or adolescent.

The obligation of non-refoulement, which is a basic norm of international refugee law, is supported in addition by customary international law[[27]](#footnote-27) and complemented by the prohibitions of devolution contained in and developed under international human rights law, which prohibits the expulsion of any person when there are grounds to believe that he or she will be subjected to torture or other cruel, inhuman or degrading treatment or other forms of serious harm.[[28]](#footnote-28)

1. **Presumption of Minority**

For the purposes of the CRC, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Some laws guarantee protection for underage persons to individuals under 21 years of age. This is not against any of the provisions of the Convention. In ensuring the best interest of the child, if in doubt whether a person is underage, it shall be presumed that he or she is a boy, girl or adolescent until the contrary is proven, with the intention of ensuring under all circumstances the provision of the protection and care required for the well-being of the person.

1. Today the number of international migrants worldwide is higher tan ever before. 214 million international migrants were recorded in 2010. If this population group continues to increase at the same pace as in the past 20 years, the number of international migrants could reach 405 million worldwide in 2050. See IOM, World Migration Report 2000. The Future of Migration: Building Capacities for Change. Preface. [↑](#footnote-ref-1)
2. See IOM: Irregular Migration and Mixed Flows: IOM’s Approach. 98th Session of the Council. MC/INF/297. October 19, 2009, p. 1. [↑](#footnote-ref-2)
3. Ibid, paragraph 20. [↑](#footnote-ref-3)
4. IACHR. Comments on the Advisory Opinion on Boys, Girls and Adolescents before the Inter-American Court of Human Rights, op. cit., pp. 7 & 8. [↑](#footnote-ref-4)
5. See in this regard: UNHCR. Policy Development and Evaluation Services. A Global Review: UNHCR’s Engagement with Displaced Youth. Geneva, 2006, p. 20. [↑](#footnote-ref-5)
6. See UNHCR Global Trends 2012: Displacement, The New 21st Century Challenge. 2012 in Review: Trends at a glance, p. 3. [↑](#footnote-ref-6)
7. International Migration Law. Glossary on Migration, IOM, 2006, p. 41. [↑](#footnote-ref-7)
8. Committee on the Rights of the Child (CRC): General Comment No. 6 (2005). Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 39th Session, CRC/GC/2005/6, September 1, 2005, paragraph 7. [↑](#footnote-ref-8)
9. Ibid, paragraph 8. [↑](#footnote-ref-9)
10. Inter-American Court of Human Rights. The Case of Bulacio Vs. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Ser. C, No. 100, paragraph 163. [↑](#footnote-ref-10)
11. Committee on the Rights of the Child, Articles 18, 19 & 20. [↑](#footnote-ref-11)
12. Inter-American Court of Human Rights. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, September 17, 2003. Ser. A, No. 18, paragraph 88. [↑](#footnote-ref-12)
13. Inter-American Court of Human Rights. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, September 17, 2003. Ser. A No. 18, paragraph 112. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Ibid, paragraph 112. [↑](#footnote-ref-15)
16. Committee on the Rights of the Child (CRC): General Comment No. 6 (2005). Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 39th Session, CRC/GC/2005/6, September 1, 2005, paragraph 23. Available at: http://www.unicef.org/protection/files/CRCGC6\_EN.pdf

 See UNHCR. Refugee Protection and Mixed Migration: The 10-Point Plan in action. Introduction. Geneva, 2010. Available at: http://www.unhcr.org/50a4c2b09.pdf. [↑](#footnote-ref-16)
17. Written Comment by UNICEF on Migrant Boys, Girls and Adolescents in Latin America and the Caribbean. Request for an Advisory Opinion on Migrant Boys, Girls and Adolescents submitted by Argentina, Brazil, Paraguay and Uruguay to the Inter-American Court of Human Rights, paragraph 46. [↑](#footnote-ref-17)
18. Inter-American Court of Human Rights. Juridical status and human rights of the child. Advisory Opinion OC-17/02, August 28, 2002, Ser. A No. 17, paragraph 71. [↑](#footnote-ref-18)
19. Committee on the Rights of the Child (CRC): General Comment No. 6 (2005). Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, Op. cit., paragraph 25. [↑](#footnote-ref-19)
20. Committee on the Rights of the Child (CRC): General Comment No. 6 (2005). Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, Op. cit., paragraph 29 & 30. [↑](#footnote-ref-20)
21. UNHCR. Asylum Processes (Fair and efficient asylum procedures). Global Consultation on International Protection. EC/GC/01/12. May 31, 2001. [↑](#footnote-ref-21)
22. See UNHCR. Improving asylum procedures: comparative analysis and recommendations for law and practice, Detailed Research on Key Asylum Procedures Directive Provisions. A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, op. cit., paragraph 99. [↑](#footnote-ref-22)
23. See UNHCR. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, op. cit., paragraph 200. [↑](#footnote-ref-23)
24. Inter-American Court of Human Rights. The Case of Vélez Loor Vs. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Ser. C, No. 218, paragraph 171. [↑](#footnote-ref-24)
25. See in this regard: UNHCR, Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 26, 1999, Guideline No. 6. [↑](#footnote-ref-25)
26. Committee on the Rights of the Child (CRC): General Comment No. 6 (2005). Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, op. cit., paragraph 63. [↑](#footnote-ref-26)
27. UNHCR, Note on the Principle of Non-Refoulement, November 1997, available at: <http://www.unhcr.org/refworld/docid/438c6d972.html>, and UNHCR, Declaration of States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, January 16, 2002, HCR/MMSP/2001/09, paragraph 4. [↑](#footnote-ref-27)
28. United Nations Assembly, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, United Nations, Treaty Series, Vol. 1465, page 85, Article 3(1); United Nations General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations, Treaty Series, Vol. 999, page 171, Article 7; and Organization of American States, Inter-American Convention to Prevent and Punish Torture, Article 13. [↑](#footnote-ref-28)