**Submission for the CMR-CRC Joint General Comment on**

**the Human Rights of Children in the Context of International Migration**

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| **Brief Summary**The Network for the Protection and Promotion of Human Rights of Migrant Children in Korea (hereinafter “Network”) is composed of human rights organizations and public interest lawyer groups that have been working to protect and promote the rights of migrant children in the Republic of Korea (ROK) by conducting research, calling for policy improvements and legislative changes, and engaging in public litigation. The present submission provides an overview of the human rights situation of migrant children living in the ROK, identifies the structural limitations preventing the full realization of fundamental rights and freedoms, and includes proposals and suggestions to be considered in the drafting of the Joint General Comment. The Network hopes that the Joint General Comment can urge all States Parties, including the ROK, to take practical and effective legislative and administrative measures that fully comply with international human rights norms and principles. |

February 29, 2016

**Network for the Protection and Promotion of Human Rights of Migrant Children in Korea**

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**I. Introduction**

1. According to the Immigration Statistics of Korea, there are approx. 120,000 migrant children and adolescent under the age of 20 living in the ROK, accounting for 6% of all migrants.[[1]](#footnote-1) However, no statistics are available on the number of migrant children under 18,[[2]](#footnote-2) while that of migrant children without immigration records or those who were born in the ROK but not registered as foreigners is altogether unavailable. Migration experts estimate that approx. 20,000 migrant children are unaccounted for in official statistics.[[3]](#footnote-3) This shows that the government has made limited effort to collect and analyze data regarding migrant children. The situation also implies the government’s indifference toward formulating adequate policies to protect and support migrant children and allocating sufficient budget for their implementation.
2. Article 2 of the Convention of the Rights of the Child (CRC) states that States Parties shall ensure the rights set forth in the CRC to each child “within their jurisdiction” without any kind of discrimination. Despite that the ROK has ratified the CRC, migrant children within the ROK’s jurisdiction are being excluded from or limited in the application of laws and policies for children on providing protection, support, and/or welfare, based on their nationality. This is because laws and policies for “all children” are, in practice, interpreted to exclusively cover children with Korean nationality. In particular, undocumented migrant children[[4]](#footnote-4) are even excluded from the limited protection and support entitled to documented migrant children, such as attending public schools or accessing basic healthcare. Categorized as “illegal residents” who cannot enjoy any rights, undocumented migrant children additionally face threats of arrest, detention, and deportation. Such an approach does not take into consideration that migrant children have been placed in their situation regardless of their will and, instead, discriminates against them based on their nationality or immigration status.
3. However, recalling the spirit of the Declaration of the Rights of the Child and the fundamental rights of the child protected under the CRC, a State Party would be violating its international human rights obligations if certain groups of children, based on their nationality or immigration status, are not ensured their basic rights and face barriers to survival, healthy growth and development. Therefore, States Parties should be advised to review and amend existing child-related legislation to include migrant children and to adopt a comprehensive legislation to protect the rights of migrant children, in consideration of their particular vulnerabilities.[[5]](#footnote-5)
4. In 2010 and 2014, a comprehensive bill on protecting the rights of migrant children was submitted to the National Assembly of the ROK. Both bills included the rights to birth registration, childcare, education, and health, as well as the right to stay of undocumented migrant children as a measure of humanitarian intervention. Despite the active involvement and support of civil society in all steps of the legislative process, both bills were discarded with the closure of the National Assembly’s sessions.[[6]](#footnote-6) Amendments to existing laws for children, namely the Child Welfare Act and the Medical Care Assistance Act, that expanded the eligibility to receive services to include migrant children were also discarded.
5. Such efforts were unsuccessful mainly due to widespread anti-migrant sentiments and xenophobia. The organized activities of anti-migrant and/or xenophobic groups opposing the passage of the bills[[7]](#footnote-7) prompted the government to perceive their position as the dominant public opinion and take a negative stance. Although the government claims that the rights of documented migrant children are fully protected by existing laws and policies and the basic rights of undocumented migrant children are also protected through humanitarian measures, research results and information collected so far indicate otherwise.

**II. Immigration Detention of Migrant Children**

1. Immigration detention of children refers to detention due to the immigration status of the child or his/her parents. Considering children’s physical and psychological vulnerability and the serious harm that could result from detention in a child’s health and development, detention of migrant children must be prohibited in principle. This principle of non-detention of migrant children is based on various hard and soft international laws and has been repeatedly affirmed by various legal and international bodies, including, most recently, the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/28/68), decisions and recommendations by European Court of Human Rights and Inter-American Court of Human Rights, and resolutions adopted by the Council of Europe and European Parliament.
2. However, only a few States adhere to the principle of non-detention of migrant children. The ROK is, unfortunately, no exception, despite having received a specific recommendation to implement the principle by the CRC Committee in 2011. The practice still remains, while the number of detained children is on the rise.[[8]](#footnote-8) This implies that the principle will be effective only when incorporated in relevant domestic laws.
3. Exceptions should only be allowed under the strictest conditions, must have legal grounds and must not be arbitrary. Detention of children should only be used as a measure of last resort and for the shortest appropriate period of time. The conditions of detention, including in regards to education, food, and environment, should be as child-friendly as possible and should ensure separation from adults other than the child’s parents. Meanwhile, alternatives to detention should be established, which not only allow children to stay in non-custodial, community-based settings, but also provide adequate protection and support.[[9]](#footnote-9),[[10]](#footnote-10)
4. In the ROK, however, the conditions of detention are not stipulated by law and alternatives to detention are non-existent. Temporary Release from Detention is not an alternative, as bail bonds are high and it depends on the arbitrary discretion of administrative authorities. Although the Immigration Control Act states that foreigners under the age of 19 shall be specially protected in the process of arrest, detention, and deportation, the provision is not supported by any specific guidelines for implementation. According to the Foreigner Detention Regulation, an administrative rule, detention centers should regularly communicate with detainees under the age of 17 and take special measures when necessary. Nonetheless, this does not relieve children from the negative effects of detention and it is unclear what kinds of special measures were actually taken. Although the Ministry of Justice argues that the detention or deportation of migrant children attending school is suspended until the academic term ends, according to its internal guideline, the guideline has no legal basis and is not being observed due to the lack of awareness among the police and immigration officers.[[11]](#footnote-11)
5. **Therefore, States Parties should:**
6. **explicitly prohibit the immigration detention of children in immigration-related laws and regulations. Even in exceptional cases, it should be carried out only as a measure of last resort, for the shortest amount of time, and in a child-friendly setting.**
7. **develop and adopt alternatives to detention for children. Such alternatives must include releasing children from detention facilities, allowing them to live in non-custodial, community-based settings, and providing them with various support services. Requirements to guarantee basic rights and safeguards include:**
	1. **identification procedures to determine whether the person concerned is a child and screening procedures to identify the child’s special needs and vulnerabilities;**
	2. **appointment of a caseworker or a guardian for unaccompanied migrant children;**
	3. **access to education and medical care;**
	4. **access to legal or other appropriate assistance for their immigration status to be resolved; and**
	5. **evaluation and determination processes that uphold the principle of the best interests of the child.**

**III. Right to Health**

1. The current healthcare system of the ROK fails to fully encompass migrant children under its jurisdiction, and thus substantially violates the relevant provisions of the CMW[[12]](#footnote-12) and the CRC.[[13]](#footnote-13) The main reasons for the failure are twofold. On the one hand, there is a lack of adequate and affordable protection, especially for undocumented migrant children and, on the other hand, there is a lack of sufficient access to healthcare services.
2. The cornerstone of the healthcare system in the ROK is the National Health Insurance Service (NHIS), which requires mandatory enrollment of and contribution from all eligible nationals, and provides coverage to all Korean nationals. Documented migrants may enroll in the NHIS, and receive coverage therefrom. However, the coverage of the NHIS does not extend to undocumented migrants and their children,[[14]](#footnote-14) or documented migrants and their children, who cannot afford the monthly insurance premiums due to unemployment, etc. Although the Medical Care Assistance Act aims to provide healthcare to uncovered and marginalized populations, most migrants and their children fall outside of its scope of protection.[[15]](#footnote-15) As a result of the legal and economic barriers to the NHIS and the exclusion from the Medical Care Assistance Act, migrant children often lack access to adequate[[16]](#footnote-16) and affordable[[17]](#footnote-17) healthcare services.
3. In terms of policy, the Ministry of Health and Welfare operates the “Medical Care Assistance Program for Foreign Workers and the Underprivileged” (hereinafter “Program”), which provides medical expenses for hospital treatment to uncovered migrant workers, refugees, etc. and their children. For children, outpatient treatment is also compensated. The Program, however, fails to fully encompass migrant children in following aspects: 1) only “workers” and their children are eligible for the Program, thus excluding children whose parents have not worked in the ROK or failed to receive proof of employment from their former/current employers; 2) access is limited due to the lack of hospitals participating in the Program; and 3) the Program is based on an administrative rule and does not have a legal basis, which implies a vulnerability to discontinuance or interruption based on the government’s discretion.
4. **Therefore, States Parties should:**
5. **ensure access to healthcare for all migrant children on an equal basis with national children in law and in practice. For instance, eligibility to enroll in national healthcare schemes and receive healthcare services should be extended to include migrant children, regardless of the immigration status of the child or his/her parents. In particular, essential vaccinations and urgent medical assistance should be available free of charge or at an affordable cost; and**
6. **ensure that existing and foreseeable barriers to accessing healthcare are addressed, such as by providing financial assistance or public translation and interpretation services, and exempting healthcare institutions from the obligation to report a child’s immigration status to the government.**

**IV. Right to Education**

1. Migrant children living in Korea cannot fully enjoy their right to compulsory education. Article 8 of the Framework Act on Education limits the subject of compulsory education to Korean nationals. Articles 19 and 75 of the Enforcement Decree to Elementary and Secondary Education Act refer to the education of migrant children, yet merely provide for the processes of admission, transfer, and special admission of foreigners, falling short of ensuring educational rights. The Manual for School Registration of Multicultural Students, an internal guideline of the Ministry of Education, mentions that migrant children are granted the right to compulsory education regardless of their residence status. However, this manual is not open to the public and cannot be enforced through legal recourse. The consequence has been an inconsistent processing of migrant students’ cases, the worst of which results in a refusal to admit or transfer students based on the principal’s discretion. Of particular concern are undocumented migrant children; even if attempts to receive public education were successful, they are excluded from receiving basic support and services for students, due to the impossibility of identification.
2. Article 28(1) of the CRC provides that primary education must be available, free of charge to all, and that secondary education needs to be available and accessible to every child. Article 30 of the CMW also declares that “each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned”, explicitly prohibiting refusal or limitations based on either parent’s immigration status. Building on this provision, the CMW Committee’s General Comment No. 2 provides that “States Parties must provide free and compulsory primary education for all, including children of migrant workers, regardless of their migration status. As such, States Parties have an obligation to eliminate all direct costs of schooling, such as school fees, as well as alleviate the adverse impact of indirect costs, such as expenses for school materials and uniforms.” States Parties, including the ROK, need to duly comply with its international human rights obligations on providing compulsory education.
3. The CRC further stipulates that higher education and vocational education shall be available and accessible on a non-discriminatory basis.[[18]](#footnote-18) However, migrant children’s entry into high school is not legally ensured and completely depends on the discretion of the school principal. Undocumented migrant children are prohibited from entering into university and thus deprived of their opportunity for education regardless of their abilities. This severe limit on access to higher education has implications beyond being a violation of the right to education; there are further risks concerning the right to be protected from economic exploitation[[19]](#footnote-19), should they be forced to leave school and engage in labor activities.
4. **Therefore, States Parties should:**
5. **explicitly by law, ensure access to compulsory education for all migrant children free of charge, regardless of their country of origin, immigration status, race, ethnicity, etc. Beyond being physically present in the classroom, migrant children should be able to enroll as regular students and be treated on an equal basis with national students;**
6. **ensure equal opportunity for all migrant children to access higher education, if so desired, and allow them to obtain corresponding academic degrees or diplomas;**
7. **implement policies and allocate an adequate budget to provide support to schools that is necessary to accommodate migrant children, such as in regards to language;**
8. **inform migrant children of school age and their parents on their right of access to compulsory education; and**
9. **educate officials to ensure that migrant children are not subject to undue discrimination in their admission, transfer, and entry into higher education.**

**V. Right to Family Life**

1. In the ROK, family reunification of non-professional migrant workers is prohibited. This means it is not possible for them to be accompanied by their spouse or child(ren) from their country of origin when entering the country. Considering that the employment scheme for non-professional migrant workers, the Employment Permit System (EPS), allows migrant workers to stay for up to 9 years and 8 months, EPS workers’ children may be deprived of either parent for almost 10 years. This violates Article 10 of the CRC, which states that States Parties shall process applications for entry permits with the purpose of family reunification in a positive and humanitarian manner.[[20]](#footnote-20)
2. Children of EPS workers born in the ROK, however, can be issued a visa for dependents. In reality, this does little to ensure the right to family reunification, as little or no support to raise the child is provided. Migrant children are excluded from childcare allowances or government subsidies, despite that their parents, under the EPS, do not earn enough income to afford childcare costs. [[21]](#footnote-21) In addition, there are often no family members in the household to care for the child other than the working parent(s).[[22]](#footnote-22) Although migrant children have the legal right to stay with their parents, there is a lack of support systems for them to enjoy the right in practice.[[23]](#footnote-23)
3. Undocumented migrants neither have the opportunity to bring their child(ren) from their country of origin, nor to apply for a dependent visa for their child(ren) born in the ROK. Therefore, their options are limited to either sending their child(ren) back home and live separately, or staying together as undocumented migrants. In the latter case, there are no laws concerning the treatment of the undocumented child, when his/her parent has been subject to arrest, detention, or deportation. The children are either detained, then deported together with their parents, or they are left alone without their parents in the ROK. This means that the child must either go through abrupt environmental changes while living with the family or be entirely responsible for one’s own survival and development. Although the Child Welfare Act provides special protection and assistance for children who are deprived of a family environment, the scope of protection is limited to children with Korean nationality. The resulting situation faced by migrant children thus constitutes a violation of Article 20 of the CRC.
4. As of today, there has not been a single case in which deportation has been cancelled or an entry ban withdrawn for reasons of family reunification. Although the Immigration Control Act indicates the possibility for those under deportation orders to receive a special residence permit issued by the Minister of Justice in particular circumstances on humanitarian grounds,[[24]](#footnote-24) it is unclear what constitutes such “humanitarian grounds.” Consequently, issuance of the permit remains at the sole discretion of the Minister of Justice.
5. **Therefore, States Parties should:**
6. **take all necessary measures for family reunification to ensure that migrant children are not separated from their family against their will;**
7. **ensure equal opportunity to migrant parents in a regular situation to be accompanied by their under-aged children and/or spouse regardless of visa type, and consider the implementation of regularization programs for migrants in an irregular situation residing with their under-aged children, particularly when the child has lived in the country of destination for an extended period of time and return to the parent’s country of origin would be against the child’s best interest; and**
8. **provide protection and care in a family-like environment for migrant children, who have been separated from their parents, and provide support to migrant families for childcare on an equal basis with children with Korean nationality, regardless of employment type or immigration status.**

**VI. Right to Birth Registration**

1. International human rights law and various UN entities uphold universal birth registration (UBR), under which all children’s births are registered, as the international standard. The absence of a birth registration “can impact negatively on a child’s sense of personal identity and children may be denied entitlements to basic health, education and social welfare,” as birth registration is “a first step in ensuring the rights to survival, development and access to quality services.”[[25]](#footnote-25) In addition, “children of migrants in an irregular situation, particularly those born in a host State that does not recognize their existence, are vulnerable throughout their lives.”[[26]](#footnote-26) For such reasons, UBR is an obligation of UN Member States.[[27]](#footnote-27)
2. The ROK adopts a *jus sanguinis* principle for the acquisition of nationality, while birth registration onto the official registry is only accessible by children with Korean nationality. The government maintains that children of foreign nationality born in the ROK can register their birth through the embassy of their country of origin stationed in the ROK. However, there exist barriers for children of undocumented migrants or refugees under this system, which, in many cases, leaves them with no official record of their birth or even existence. The international community has continuously expressed its concern over this problem and has demanded for the situation to be amended.[[28]](#footnote-28) However, no intentions of introducing a UBR system in accordance with international human rights standards have been expressed by the government. The following are particularly problematic aspects that urgently need to be resolved.
3. Firstly, there are limits to birth registration through foreign embassies. Refugees, in many cases, do not maintain smooth relationships with their country of origin and exposing their current location may be threatening. As foreign embassies generally receive pressure from the Korean government, as well as their own, to repatriate “illegal stayers,” undocumented migrants can be discouraged from visiting their embassies.
4. Secondly, migrant children born in Korea cannot hold a birth certificate. There does not exist an official birth certificate issued by the government, as the ‘Registry of Family Relationships’ assumes its role. However, this system exclusively applies to those with Korean nationality; those without Korean nationality can only receive the ‘Receipt of Application for Refugee Status,’ ‘Proof of Receipt of Birth Report,’ and ‘Foreigner Registration Card,’ depending on one’s residency status. These documents are fundamentally different from a birth certificate and none fulfill the requirements of a birth certificate, *inter alia* the child’s name, birthdate, birthplace, the name of the child’s parents, etc.
5. Lastly, even if a UBR system is established, its effectiveness can be limited due to the obligation to report[[29]](#footnote-29) of civil servants. As a result, undocumented migrants become *de facto* unable to approach the birth registration system due to the threat of crackdowns or forced deportation.
6. **Therefore, States Parties should:**
7. **officially recognize their obligation to ensure universal birth registration, regardless of immigration status of the child or his/her parents;**
8. **conduct a comprehensive review of all related legislation and establish or amend relevant laws and provisions in accordance with international human rights standards; and**
9. **align policies and systems that serve as barriers against universal birth registration, such as the obligation to report of civil servants, to international human rights standards.**
1. Korea Immigration Service, Monthly Statistics Report December 2015 (2016), p.16. [↑](#footnote-ref-1)
2. According to the article 1 of the Convention on the Rights of the Child, “a child means every human being below the age of 18 years.” However, official statistics in the ROK provided by the Korea Immigration Service only disaggregate by age groups in 5-year increments. [↑](#footnote-ref-2)
3. Network for the Enactment of the Framework Act on the Protection of the Rights of Migrant Children, Policy Brief on the Guarantee of Migrant Children’s Human Rights (2015), p.5. Hereinafter the term “migrant children” refers to children under the age of 18 who live in the ROK without Korean nationality, unless mentioned otherwise. Migrant children include the children of migrant workers, refugees, asylum seekers, or humanitarian status holders, as well as unaccompanied children. [↑](#footnote-ref-3)
4. Hereinafter the term “undocumented migrant children” refers to the migrant children in an irregular situation as defined in article 5, subparagraph (b) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). [↑](#footnote-ref-4)
5. Up to the present, not many countries have ratified the CMW and especially rare are countries of destination. In contrast, almost all countries have ratified the CRC. Therefore, at this point in time, emphasizing the obligation of countries under the CRC was considered to be a more effective approach to protect and promote the rights of migrant children. [↑](#footnote-ref-5)
6. The Framework Act on the Protection of the Rights of Migrant Children, which was submitted to the National Assembly in 2014, is still pending at the National Assembly as of February 2016, but it is expected to be discarded as the 19th session of the National Assembly is soon to end. [↑](#footnote-ref-6)
7. These groups have objected the legislation for the following reasons: 1) ensuring the rights of migrant children will increase the financial burden of taxpayers; 2) granting the right to stay to undocumented migrant children will be used as an opportunity to extend the stay of their undocumented parents; and 3) embracing migrant children and their parents will heighten social tension and conflict stemming from an increasingly diversified ethnic and racial composition. [↑](#footnote-ref-7)
8. According to our statistical research on the immigration detention of migrant children in the ROK, 31 children had been detained in two detention centers from 2007 to 2009. After the Committee’s recommendation in 2011, the Korean Bar Association conducted another research in 2013 and found out 80 migrant children had been detained for the past three years. Our recent request of information disclosure also revealed that 98 migrant children had been detained in various detention facilities from January 2013 to June 2015, and among them were a three-year-old boy and a two-year-old girl who had been detained for 30 days and 81 days respectively. [↑](#footnote-ref-8)
9. Alternatives to detention in the form of simple release cannot be regarded as complying with international human rights norms and standards on the rights of the child. [↑](#footnote-ref-9)
10. There are three common misunderstandings with regard to alternatives to detention (ATD). First is to take ATD as alternative forms of detention. If children are released from detention facilities but are still restricted in movement, then they are under an alternative detention, not under an alternative to detention. Second is to approach ATD solely from the perspective of facilities, although ATD should be understood as a comprehensive set of laws, policies and practices that allow migrant children to live in community-based settings, while enjoying the freedom of movement until their immigration status is resolved. Third is to assume ATD to be falling wholly under the mandate of the civil society, because ATD include community arrangements. While there are roles for civil society to play, the ultimate responsibility of ATD should fall under the state. [↑](#footnote-ref-10)
11. There was a case in 2012 where a 16-year-old migrant child attending high school was transferred to the immigration office by the police and forcibly deported after four days of detention. [↑](#footnote-ref-11)
12. Article 28 of the CMW provides that migrant workers and members of their families have the right to receive medical care. Article 45 of the CMW also requires the state to allow equal “access to social and health services.” General Comments 2 of the CMW interprets Art. 28 as conferring onto signatory states broader obligations of “primary health care, preventive, curative and palliative health services.” Signatory states should also “ensure that all migrant workers and members of their families have access to essential medicines and that migrant children are provided with immunization against the major infectious diseases.” [↑](#footnote-ref-12)
13. Article 3 and 24 of the CRC provide for the children’s right to the “enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”, with the “best interests of the child” as a “primary consideration”. [↑](#footnote-ref-13)
14. Art. 109, National Health Insurance Act. Art. 76, Enforcement Decree of the National Health Insurance Act. [↑](#footnote-ref-14)
15. As for migrants, only refugees and their children can be the beneficiaries of the Act (Art. 3-2). [↑](#footnote-ref-15)
16. Article 28 and 45, CMW [↑](#footnote-ref-16)
17. General Comments No. 15 of the CRC, expanding on the scope of Article 24 of the CRC, provides that affordable health service should be available to migrant children. [↑](#footnote-ref-17)
18. Article 28.1 (b), (c), CRC. [↑](#footnote-ref-18)
19. Article 32, CRC. [↑](#footnote-ref-19)
20. This also violates Article 44 of the CMW, which provides for the obligations of States Parties for ensuring the right of family reunification. However, Korea has not ratified the Convention. [↑](#footnote-ref-20)
21. According to a survey conducted by the National Human Rights Commission of Korea (2012) on the child rearing environment of migrant workers, many migrant workers had sent their children born in the ROK back to their home country due to the absence of family support and/or the burden of childcare costs. [↑](#footnote-ref-21)
22. Although rare, there are migrant couples, both working under the EPS. However, it is almost impossible for them to raise children together because there is no guarantee that they will work in the same workplace or in the same region. [↑](#footnote-ref-22)
23. This means that Korea does not comply with Article 10, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, and Article 23, paragraph 1 of the International Covenant on Civil and Political Rights, both of which define the duty of State Parties on extensive protection of family life. [↑](#footnote-ref-23)
24. Article 61-1, The Immigration Control Act, Article 76-1-3, Enforcement Decree of the Immigration Control Act. [↑](#footnote-ref-24)
25. CRC General Comment No.7, para. 25 (2005). [↑](#footnote-ref-25)
26. CMW General Comment No2, para. 79 (2013). [↑](#footnote-ref-26)
27. ICCPR Art.24(2), CRC Art.7(1) and (2), CMW Art.29 [↑](#footnote-ref-27)
28. CRC/C/KOR/CO/3-4, para 36 (2011), CERD/C/KOR/CO/15-16, para. 13 (2012), A/HRC/22/10, para. 29, 124. [↑](#footnote-ref-28)
29. When a civil servant of the ROK identifies an unregistered migrant, he/she holds the obligation to report that person to the Immigration Office. [↑](#footnote-ref-29)