

CLOSING THE PROTECTION GAP FOR MIGRANT CHILDREN

BACKGROUND PAPER

**DEFENCE FOR CHILDREN INTERNATIONAL (DCI) –THE NETHERLANDS
WITH THE SUPPORT OF PLATFORM MINORS IN EXILE AND DCI BELGIUM¹**

**COMMITTEE ON THE RIGHTS OF THE CHILD
2012 DAY OF GENERAL DISCUSSION, 28 SEPTEMBER 2012**



Picture of migrant children living in the Netherlands for more than five years without a residence permit. They are united in the group 'We stay' (I.D. Wij Blijven) and they advocate for their right to a residence permit.

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¹ This submission is also endorsed by Kerk in Actie.

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INTRODUCTION

The rights of migrant children are under pressure in practice, policies and legislation.

Former chair of the UN Committee on the Rights of the Child, Jaap Doek, calls it the largest children's rights problem at the moment.² Defence for Children³ welcomes the initiative of the Committee on the Rights of the Child to organize a Day of General Discussion (DGD) with the objective to promote the fulfilment of the rights of all children in the context of international migration.

In this written submission Defence for Children International⁴ will discuss⁵ the main barriers in the fulfilment of the rights of migrant children, will provide examples of good policies and practices, address standards aimed at protecting the rights of migrant children and will close this background report with recommendations for improving the implementation of the Convention on the Rights of the Child (CRC) in the area of migration.

1. IDENTIFIED CHILD RIGHTS ISSUES IN RELATION TO ALL CHILDREN IN MIGRATION SITUATIONS

1.1 Protection gaps in the implementation of the CRC

In this paragraph the main gaps in the States parties compliance with their legal obligations are described.

1.1.1 Non-discrimination set aside (article 2 CRC): Article 2 CRC states that children living in the country of the member states may not be discriminated against in their access to rights, as put forward in the CRC. Children in migration procedures and undocumented children should enjoy the same human rights as any other child.

The Netherlands: on the one hand the State authorities ensure access to the most basic social economic rights for undocumented children. For example, access to education, medical care and legal assistance are allowed by law (article 10 of the Aliens Law). Furthermore schools, healthcare workers and lawyers are compensated for the costs they make for their work for undocumented children. On the other hand the Netherlands has put discriminating legislation in place effecting migrant children at the same time. An example is the Benefit Entitlement (Residence Status) Act or so called Linking Law, which links access to social services to legal residence (in Dutch: Koppelingswet). This Law shows the existence of a general idea that undocumented children can be discriminated against on the basis of their migration status in the Netherlands. Undocumented children in the Netherlands are included in the Linking Law, which means that they are excluded from all social services, except education, healthcare and legal assistance. To fully implement article 2 of the CRC, children should be excluded from this discriminating Linking Law.

1.1.2 Best interest of the child not adequately integrated (article 3 CRC):

The Netherlands: The Committee on the Rights of the Child expressed its concern in the most recent Concluding Observations for the Netherlands that the Netherlands should take all appropriate measures to ensure that the principle of the best interest of the child, in accordance with article 3 of the Convention, is adequately integrated in all legal provisions and applied in judicial and administrative decisions and in projects, programmes and services which have an impact on children.⁶ Today the Dutch government and migration

² See the annual report on the children's rights situation in the Netherlands (Jaarbericht Kinderrechten 2012): available at: http://www.defenceforchildren.nl/p/21/2456/mo89-mc21/mo8-cg%7Ctxt=*jaarbericht*/aanbieding-jaarbericht-kinderrechten-2012-aan-de-commissie-jeugdzorg-

³ Defence for Children International provides information on the rights of children and the UN Convention on the Rights of the Child, investigates violations of these rights, and protects the collective and individual interests of children. Defence for Children International provides counsel and takes direct action on behalf of children whose rights are violated.

⁴ This submission is prepared by the Dutch and Belgian section of DCI.

⁵ In line with the outline for participants of the Day of General Discussion.

⁶ *Concluding Observations of the Committee on the Rights of the Child: The Kingdom of the Netherlands*, 30 January 2009, 28 and 29.

authorities are reluctant and inconsistent in motivating the 'best interest of the child'. The authorities claim that the 'best interest of the child' has been taken into account in their policy and that no further individual assessment is required. Furthermore the Dutch authorities claim that the rights in the CRC do not override the investigation that the State authorities undertake on article 8 of the European Convention on Human Rights (ECHR).

1.1.3 The right to identity and the issue of age assessment (article 1 and 8 CRC)

Many unaccompanied minors arrive in Europe without documents of identification. There can be grounds to doubt the minority of the person involved. The recognition of minority is a central issue with regards to the access to rights of migrant children. Age assessment should only be undertaken by professionals who are independent, with appropriate expertise and who are familiar with the individual's ethnic and cultural background. The assessment should be gender appropriate. In cases of doubt, before and/or pending age assessment procedures, the person claiming to be under eighteen years should be treated as a child and a guardian should be appointed. Age assessment should only be undertaken as a measure of last resort and only when a serious motivated doubt has been raised concerning the age. A multi-disciplinary approach to age assessment should be adopted. Procedures applied should balance physical, developmental, psychological, environmental and cultural factors. Examinations should never be forced or culturally inappropriate and the least invasive option should be used. Individuals whose age is being assessed should always be given the benefit of the doubt.

1.2 Role of jurisprudence from international and regional courts: Negligence of the (Dutch) government

At the moment human rights do not seem to be the core business of all member States. The political climate is intolerant, especially towards undocumented migrants.

The Netherlands: State authorities do not feel ashamed at being criticised on human rights issues. In the Netherlands even important advisory institutions of the State have urged for immediate action on human rights for undocumented migrants, but so far they have been ignored.⁷ Instead of adjusting policies to improve the human rights standards, the Government keeps fighting against human rights of undocumented children as long as possible. This is illustrated by the response of the Dutch government to the decision of the European Committee on Social Rights in a complaint of Defence for Children-the Netherlands about the violation of the right to housing of families with children who were evicted from reception centres after their request for a residence permit was rejected.⁸ In the Decision the European Committee states that the Government is not allowed to make children homeless.⁹ The Minister for Immigration, Integration and Asylum responded that the Committee's decision was a non-binding advice.¹⁰ It was only after a landmark decision of The Hague High Court¹¹ (stating that the Dutch State is not allowed to leave children homeless, nor to separate parents and children for this sole reason of being homeless) a new policy was introduced providing undocumented families with children with accommodation in reception centres.¹² However, the family's freedom is restricted and social services are at a very basic level in these reception centres. Moreover the living circumstances do not comply with the standards of the CRC. Furthermore the State lodged an appeal against the landmark judgement of The Hague High Court and the Minister for Immigration, Integration and Asylum repeatedly wrote in his letters to Parliament that he could not agree with the judgment. The lodging of an appeal against all judgments concerning the human rights of undocumented children has become a standard reaction of the Government.

The same response as to the decision of the European Committee on Social Rights was expressed by the State on the decision of the United Nations Human Rights Committee in the case of X.H.L. (a separated child) against the Dutch state.¹³ The Human Rights Committee stated that the decision of the Dutch government to return X.H.L to China violated the International Covenant on Civil and Political Rights. In their formal response to the

⁷ For example: Advisory Committee on Migration Affairs (2012). *Right to protection of human dignity and the Children's Ombudsman* (2012), *Wachten op je toekomst* (Waiting for your future).

⁸ ECSR 20 October 2009, 47/2008.

⁹ ECSR 20 October 2009, 47/2008.

¹⁰ *Kamerstukken II (Parliamentarian documents)* 2009/10, 19 637, nr. 1356.

¹¹ *Gerechtshof Den Haag* 11 January 2011, *LJN BO9924*.

¹² *Kamerstukken II (Parliamentarian documents)* 2009/10, nr. 2010Z11092.

¹³ *CCPR/C/102/D/1564/2007*.

Committee, the Dutch government wrote that they *'will not take any measures to give effect to the Committee's Views'*.¹⁴

1.3 Right to adequate reception (article 6, 20 and 27 CRC)

State parties should assure an unconditional right to reception for all children and assure qualitative norms for the reception of minors. These norms include: qualified staff and necessary social workers, mentors, and psychologists; the appointment of a guardian for unaccompanied minors; a safe and secure place to stay; providing information on all aspects of life in the reception country; working towards a durable solution for the child.

The right to development is currently under pressure because migrant children have to move multiple times and have to live in child unfriendly conditions that harm their development.

The Netherlands: After a variety of Court decisions, the Dutch government was obliged to offer shelter to children in families whose asylum claims had been rejected, the Dutch State created a new set of difficulties for children by opening accommodation centres for undocumented families (I.D. Gezinslocaties). The children had to move again, leaving behind schools and friends. Normally they move from one asylum seekers' centre to another on an average of once a year. The freedom of the children is restricted in the centres (the children call these centres: 'prisons') and their parents have limited means to comply with the basic needs of the children. Even severely handicapped and heavily traumatised children live in these reception centres, which focus on the return to the country of origin. Defence for Children – together with other human rights organisations – urge the Dutch state to close these reception centres and accommodate children and their parents at one child-friendly location during their entire procedure until their deportation or integration in the Dutch society has been realized.¹⁵ The number of moves between the different asylum seeker centres should be reduced. Child friendly, small-scale reception should also be guaranteed for unaccompanied minors.

Belgium: Since 2009 non asylum seeking unaccompanied minors are (illegally according to national law) excluded from reception facilities, on the basis of their administrative status unless they go to court. This implies in the best of cases several weeks to months sleeping on the streets before a condemnation of the courts of the reception facilities. Other children, because they do not receive the information and the means to go to court, will remain on the streets and never enter the protection system.

1.4 Right to family reunification/ right be heard (article 9, 10 and 12 CRC)

Defence for Children emphasizes¹⁶ that a children's rights approach is required in family reunification procedures and advocates for an interpretative guideline to specify the interest of the child in family reunification procedures.

The Netherlands: In the first half of 2011, between 81 per cent and 97 per cent – depending on where the application had been filed - of the children got a negative decision on their request to be reunited with their parent who is already living lawfully in the Netherlands. The Dutch minister for Immigration, Integration and Asylum, states in response to parliamentary questions that the Dutch policy in general gives attention to 'the interest of the child' in family reunification procedures but he does not feel obliged to examine the individual interests of a child. With this interpretation and approach of the Minister, 'the interest of the child' keeps on being an abstract terminology and it is uncontrollable in which way and to what extent various actors apply the 'interest of the child'. Defence for Children often witnesses the consequences of this policy by the Dutch government and the protection gaps in decisions regarding children and family reunification. Defence for Children wants to emphasize that the requirements for partners (for example the income requirements) cannot be maintained when it comes to reunification of a child with their parent.

¹⁴ Response by the Government of the Netherlands to the Views of the Human Rights Committee in respect of Communication no. 1564/2007, paragraph 6.

¹⁵ Letter from the Working group on Children in asylum seekers centers, 8 May 2012 (in Dutch) <http://www.defenceforchildren.nl/images/20/1841.pdf>.

¹⁶ The written contribution of Defence for Children to the European Commission is available at http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0023_en.htm.

During a fact finding mission, the Dutch Refugee Council, Defence for Children-the Netherlands and a lawyer witnessed that the interviews of children who want to apply for family reunification with their parent in the Netherlands is not in line with article 12 CRC and General Comment No.12 of the Committee on the Rights of the Child. Strict rules on how to appropriately interview children are required.

1.5 Right to education including internships

The Netherlands: The Court in The Hague decided on 2 May 2012¹⁷ in favour of a student who filed a complaint against the Dutch State concerning the law which prohibits undocumented children from following internships. The Court declared that by prohibiting access to an internship during an educational programme, the State acts unlawfully, violating the right to education. After years of promises from the Government and a broad range of interventions at local and national level from politicians, human rights organisations, trade unions, the media and entrepreneurs, this judgment seemed to end the internship problem for children without a residence permit. However the Dutch government declared that they will fight this decision.¹⁸ It is again an example of how the government fights human rights of undocumented children as long as possible.

1.6 The prohibition of the detention of children for migration reasons (Article 22, 37 CRC)

As it is never in the best interests of a child to be detained for immigration purposes, States should ensure that a minimum level of protection and support for children is in place in the country of residence.

States should articulate in their legislation and policies that; children who are refugees, asylum seekers or irregular migrants are, first and foremost, children. The best interest of the child should be a primary consideration in any action taken in relation to the child and the liberty of the child is a human right.

States should develop legislation, policies and practices to ensure that refugee, asylum seeking and irregular migrant children are free to reside in the community during the resolution of their immigration status. States should be encouraged to explore the Child Sensitive Assessment and Placement model (CCAP) developed for this purpose by the International Detention Coalition.¹⁹

1.7 Right to a durable solution

1.7.1 End the uncertainty of integrated undocumented children (article 6 CRC)

Defence for Children International considers the deportation of children who have spent years in the Netherlands and who are rooted in the Dutch society not in the best interest of the child and it is therefore a violation of article 3 CRC. It violates their right to development (article 6 CRC) if no durable solution has been found after years of residence in the host country. When the return of a child to the country of origin could not be achieved within a timeframe of five years, starting from the moment of the asylum claim, a child should be able to apply for a residence permit based on their right to development. Scientific research²⁰ has shown that on average children cannot be expelled without being damaged after five years of living in the host country.

The Netherlands: More than 300 children who have been in the Netherlands for more than five years (some children are born in the Netherlands and are now 12 years old) but who do not have a residence permit have united to advocate for their right to a residence permit in the group 'We Stay' (see also paragraph 2).

¹⁷ Available at: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW4736>.

¹⁸ In 2011, the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe recommended that member states permit undocumented children to access internships when these are part of the education cycle. It was one of the recommendations in the report 'Undocumented migrant children in an irregular situation: a real cause for concern' of the Spanish rapporteur Mr Pedro Agramunt Font de Mora, which was published in September 2011.

¹⁹ www.idcoalition.org/ccap

²⁰ Kalverboer, M.E. and Zijlstra, E, *De Schade die kinderen oplopen wanneer zij na langdurig verblijf worden uitgezet*, April 2006, available (in Dutch) at: <http://ecpat.sitespirit.nl/images/20/274.pdf>.

1.7.2 Return: lack of monitoring and safety guarantees for unaccompanied minors (article 20 and 22 CRC)

Defence for Children International urges authorities to adjust the return of unaccompanied minors in line with the CRC.²¹ It is essential that child specific elements are researched when a child applies for asylum before a decision on return is made. When a child does not qualify for an asylum residence permit it is necessary to make an individual assessment to decide whether a durable solution is to return to the country of origin or integration in the country of residence. When a child is returned to a reception house in the country of origin it is essential that the child's wellbeing is monitored effectively. A careful assessment must be made when a child is reunited with family members. The family members must proof their identity and be able to provide care and safety in the best interest of the child. This will provide a safety net for returned children. To determine whether repatriation of unaccompanied minors is the most appropriate measure and in their best interests an independent panel should be established that decides on a durable solution on the basis of consensus. The authorities should assure a formal Best Interest of the Child determination according to a set methodology. The return of the child is only appropriate with the informed consent of the minor, the guardian and family (only when the family does not bring the child in a harmful situation). A qualitative social investigation in the country of origin should be carried out by independent actors who put security issues as a primary consideration.

The Netherlands: researchers, scientists, NGO's and the guardianship organization in the Netherlands advocate for a role for a children's judge especially with regard to return and appropriate reception facilities for children. Currently the Dutch authorities do not apply criteria to determine whether repatriation of unaccompanied minors is most appropriate and in the best interest of the child. Monitoring and follow-up should be guaranteed.

1.7.3 The guardian as an advocate for the rights of the unaccompanied child (article 5 and 18 CRC)

Guardians of unaccompanied minors need to work in a complex environment in which their position is often under pressure. State parties should ensure that due weight is given to the view of the guardian in relation to the best interests of an unaccompanied minor. As expressed in Core Standard 6 for guardians of separated children in Europe²² (see for more information paragraph 3) the role of the guardian is essential to ensure the timely identification and implementation of a durable solution.

Core Standard 6: The guardian ensures the timely identification and implementation of a durable solution. The guardian ensures the identification of a durable and safe solution and challenges others to prove that their proposed solutions take the best interest of the child as a primary consideration, supports the reunification of the child with his/her family and supports the integration of the child in the host country when this is in the best interest of the child, defends safety guarantees when a child is returned and prepares the child for all predictable changes which will occur after turning eighteen.

The Netherlands: It occurs that migration authorities take decisions that guardians do not find in the best interest of the child. The possibilities for guardians to influence the decisions of migration authorities are limited while the guardians of Dutch children seem to have much influence on the decisions made by courts. The current practice where the interests of the migration authorities seem to prevail the best interest of the child and the opinion of the guardian who is responsible for the child is a violation of multiple articles of the CRC, amongst others a violation of the best interest of the child principle (article 3 CRC), the right to development (article 6 CRC) and the States obligation to respect the responsibilities, rights and duties of the legal guardians responsible for the child (article 5 CRC). The fact that the child protection measures differ in relation to the measures used for children with the Dutch nationality and the difference in the weight that is given to the views of the guardian in formal procedures is a violation of the non-discrimination principle (article 2 CRC) and a violation of article 22 paragraph 2 CRC which states that the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment.

²¹ Defence for Children-ECPAT the Netherlands and UNICEF-the Netherlands, *Position paper on the return of separated children to reception houses in the country of origin*, 22nd April 2010, available at: <http://www.defenceforchildren.nl/images/20/1085.pdf>.

²² The Core Standards for guardians of separated children are available in multiple languages. The international report is available at: <http://www.defenceforchildren.nl/images/69/1632.pdf>.

1.7.4 Support stateless children to acquire a nationality (article 7 CRC)

Several thousand children live in the Netherlands who are *de facto* or *de jure* stateless. The largest group of these children are the undocumented Roma children. They often stay for years in the Netherlands illegally and cannot be deported because no country recognizes the Roma as their nationals. An appeal to the treaties for avoiding statelessness often fails because children are not always born in the Netherlands and because they have not been formally admitted to the Netherlands. Article 7 CRC obliges the State to help the child to acquire a nationality so that the child cannot remain stateless. It is recommended that stateless children who stay in a country for several years and thus should be considered as a resident, should acquire the nationality of that country.

2. EXAMPLES OF GOOD POLICIES AND PRACTICES

A tool for the assessment of the interests of children is the Best Interest of the Child (BIC) model developed by M.E. Kalverboer and E. Zijlstra at the Department of Special Needs Education and Youth Care of the University of Groningen.²³ This BIC-model is a psychological and pedagogical conceptual framework, in which a number of major factors in the child's rearing environment can be described and explained. The model establishes a connection between on the one hand the pedagogical environmental conditions identified and on the other hand the rights of the child, as drawn up in the CRC. The model has been put into practice in the form of a questionnaire for professionals: the BIC-Questionnaire (BIC-Q) to interpret the best interest of the child in a standardised manner for decision-making.

A good practice in relation to the right to participation is the establishment of the group 'We stay'.²⁴ As expressed in the previous paragraph this group consists of migrant children residing in the Netherlands for more than five years without a residence permit. The children advocate for a right to a residence permit based on their integration in the Dutch society and their right to private life.

3. STANDARDS PROTECTING THE RIGHTS OF MIGRANT CHILDREN

Closing a protection gap: Core Standards for guardians of separated children in Europe

The current differences in the level of protection separated children (unaccompanied minors) receive in European countries is not acceptable. All European countries have signed the CRC and have the obligation to take into account the special needs of separated children. Proper guardianship systems are essential to assist in finding a durable solution for separated children, whether that be return to their country of origin, transfer to another country (for example for family reunification) or integration into the host country. When all guardians have sufficient qualifications to work in the best interest of the child, the level of protection children receive in the different European countries will harmonize. To strengthen the qualifications of a guardian who takes the special needs and rights of separated children into account, the Core Standards for guardians of separated children in Europe were developed based on interviews with unaccompanied minors, guardians and other professionals in eight European countries, reflecting the right to participation (article 12 CRC). The ten Core Standards aim to provide a guardianship instrument to all European countries, irrespective of the guardianship system. They should empower all guardians to work towards common goals and they should inspire State authorities to offer the guardian the work environment and mandates needed to meet the Core Standards. The Council of Europe Commissioner for Human Rights and Members of the European Parliament expressed their support for the Core Standards for guardians of separated children.²⁵

²³ E. Zijlstra (2012), *In the best interest of the Child? A study into a decision-support tool validating asylum-seeking children's rights from a behavioural scientific perspective*, Groningen: Wöhrmann Print Service.

²⁴ See for more information (only available in Dutch): <http://www.defenceforchildren.nl/p/74/2152/mo89-mc21/mo45-mc52>.

²⁵ See for more information 'Core standards for guardians of separated children in Europe: goals for guardians and authorities', available at: <http://www.defenceforchildren.nl/images/69/1632.pdf>.

4. FURTHER SUBSTANTIVE INFORMATION

The Dutch NGO Coalition for Children's Rights presented in April 2012 an independent NGO-report 'Children's Rights in the Netherlands 2008-2012'. An English summary is available at: <http://ecpat.sitespirit.nl/images/68/1886.pdf>. The full report is available at: <http://www.defenceforchildren.nl/images/68/1760.pdf>.

5. RECOMMENDATIONS

Defence for Children International recommends the following actions for the Committee on the Rights of the Child to close the protection gaps for migrant children:

- Develop specified and concrete guidelines on how to examine and balance the best interest of the child for State authorities. For example in return, family reunification and reception decisions. Provide guidance to State authorities on the criteria which should be applied to determine whether repatriation of unaccompanied children is the most appropriate measure and in their best interest; and stimulate monitoring mechanisms by authorities to evaluate if the return policy provides sufficient safety guarantees in the best interest of the child.
- Develop guidelines for adequate, small-scale and child friendly, reception facilities. Encourage governments to minimize the number of moves of children between different reception facilities to guarantee their continued development.
- Encourage State parties to apply the Core Standards for guardians of separated children in Europe and guarantee that due weight is given to the views of the guardian of unaccompanied minors.
- Establish a maximum period to the uncertainty of migrant children and establish a right to residence after five years due to the integration of the child. Provide stateless children who stay in a country for several years and thus should be considered as a resident, the nationality of that country.
- Continue to inspire State authorities: Instead of waiting for criticism from human rights monitoring bodies or judgments, State authorities should pro-actively support and fulfil children's rights in all practice, policy and legislative measures affecting the lives of children.

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