

**Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families’ draft General Comment on the human rights of children in the context of international migration**

1. Canada appreciates the Committees’ work on this draft General Comment, and welcomes in particular the draft’s strong emphasis on the key principle of the best interest of the child, and the recognition of the various types of discrimination and hardship that can be experienced by different groups of migrant children, including girls, racial minorities and LGBTI children.
2. Canada recognizes the independence and impartiality of the Committees and their ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Conventions that is necessarily agreed upon by States Parties.
3. Given that Canada is not party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW), our comments pertain to the interpretation of the *Convention on the Rights of the Child* (CRC) and do not indicate acceptance of the CMW or the Committees’ interpretation of that Convention.
4. As a general practice, we would recommend the Committees make clear when they are referring to State obligations and when they are referring to best practices. To avoid confusion, we would recommend use of the word “should” for best practices and “must” when referring to State obligations. In addition, to ensure legal accuracy, we would strongly suggest that the Committees use Convention language throughout the document when referring to specific rights under those treaties to avoid expanding or changing the scope of those rights.

***Comments concerning the principles of “best interests of the child” and role of child protection***

*Paragraphs 15, 16, 28, 75 and 76*

5. In paragraph 15, Canada disagrees that child protection authorities should have a “leading/deciding role on policies, practices and decisions that impact the rights of children in the context of migration”. Canada’s view is that child protection authorities should be consulted. The current wording removes the responsibility from States’ migration authorities, which may not be feasible for all States.
6. Canada has concerns with the Committee’s suggestion, at paragraphs 16, 28, 75 and 76 in particular, that States Parties have a duty to ensure that the principle of the best interests of the child take precedence over migration management objectives or other “non-rights-based” considerations in immigration-related decisions. Article 3 of the *Convention on the Rights of the Child* provides that the best interest of the child shall be a primary consideration in all actions concerning children. It does not suggest that the best interests of the child must be the

paramount consideration. Therefore, while recognizing that the best interests of the child must be treated as a significant factor in any decisions concerning children, Canada respectfully disagrees with the Committees that States Parties have an obligation to ensure that the principle of the best interest of the child always take precedence over migration-related objectives or other considerations.

7. Canada recommends the Committees to revisit the language in the above-mentioned paragraphs accordingly. For example, paragraph 16 could read:

“States shall ensure that children in the context of migration are treated first and foremost as children, and develop policies aimed at fulfilling the rights of all the categories of children in the context of migration, ensuring that the principles of the child’s best interest **[ADD: be a primary consideration in]** **[DELETE: takes precedence over]** migration management objectives or other administrative considerations.”

*Comments concerning the principle of “non-refoulement”*  
*Paragraphs 42 and 43*

8. At paragraphs 42 and 43 of the draft General Comment, Canada suggests that the Committee more clearly distinguish between the principle of non-refoulement, which obliges States to refrain from removing persons to serious risks of irreparable harm as contemplated by Articles 6 and 37(a) of the CRC (or Articles 6 and 7 of the *International Covenant on Civil and Political Rights*), and the principle of the best interest of the child, which may, in certain circumstances, oblige a State to refrain from removing a child to a country where there are substantial grounds for believing that the child would face other types of harm in their country of return.
9. While, in certain circumstances, respect for the best interest of the child may require refraining from removing a child to their country of origin because of specific socio-economic conditions in countries of origin, Canada does not accept the Committee’s proposition at paragraph 43 that the principle of non-refoulement “should be construed as including socio-economic conditions”. We would recommend replacing the reference to non-refoulement with a reference to the “best interests of the child”.
10. Canada proposes the following language for the Committee’s consideration:

Paragraph 42: “...States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner. **[DELETE: and should, for example, take into account**

~~the particularly serious consequences for children of the insufficient provision of food or health services~~ [ADD: Giving due consideration to the best interest of the child, States may, in certain circumstances, have to refrain from removing a child because of a risk of harm as contemplated in other provisions of the CRC.]

Paragraph 43: "... in the case of migrant children, [~~DELETE: the principle of non-refoulement, should be construed as including~~] [ADD: consideration of the best interests of the child should include] socio-economic conditions in countries of origin; and family reunification entitlements in countries of origin and destination<sup>1</sup> and migrant children and their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life.

*Comments concerning the application of the normative framework of CMW and CRC Conventions*

*Paragraphs 13 and 57*

11. In paragraph 13, Canada has concerns with language that implies that children outside a State's territory could come within its jurisdiction by attempting entry. An "attempt to enter the country" is not the same as entry into the country. Entry would normally create jurisdiction while a failed attempt would not. We respectfully recommend deletion of the following sentence: "Moreover, State obligations under the Conventions apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory."
12. In paragraph 57, Canada does not accept the Committees' view that a State's obligations apply in areas under its "effective control". A State party's obligations under the CRC extend to those within its jurisdiction. In addition, there is no "right to due process". We recommend the sentence be reworded to say: "The [~~DELETE: right to~~] due process [ADD: rights] of all migrants regardless of their status shall be protected and respected in all areas where the State exercises jurisdiction [~~DELETE: or effective control~~]."

*Comments on the obligation of States to protect and reduce migration-related risks to children*  
*Paragraph 31*

13. Canada would suggest emphasizing in this paragraph the vulnerabilities of refugees and migrant workers, and the special approaches and protections these persons may need, such as safe spaces. Canada would also suggest including here the recommendation that states need to put in place measures to identify child victims of exploitation and abuse, including victims of sexual exploitation and abuse, labour trafficking, and child marriage. These child victims can only be protected and supported if they are identified. As described in the document, migrant children are particularly vulnerable to exploitation or abuse; but, very few will themselves report the exploitation or abuse.

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### *Comments to strengthen drafting*

14. In paragraph 8, Canada agrees that the world is increasingly witnessing migration out of necessity, driven by root causes often directly related to severe and mass violations of human rights, including children's rights. However, Canada suggests acknowledging in this paragraph the fact that most migration takes place voluntarily and without incident.
15. In paragraph 20, we would strongly recommend using language from Article 2(1) of the CRC when listing prohibited grounds of discrimination. "Economic status" is captured by "property" in Article 2(1) of the CRC. In addition, "documentation status" is not a recognized ground for discrimination. There may be legitimate reasons why states would differentiate between different categories of documentation holders. Eg: A driver's license is a legal requirement to be able to drive.
16. Similarly, in paragraph 21, we would recommend using the language from Article 2(1) of the CRC when listing prohibited grounds of discrimination. "Health status" and "economic and social situation" are not recognized grounds for discrimination.
17. In paragraph 28(subparagraph 7), the Committees stress that States should conduct Best Interests Assessments to evaluate the impact of deportation on children's rights and development, including their mental health. Canada would suggest including "physical health", given that both areas of health may be impacted during migration.
18. Paragraph 37 overstates the right to be heard. We would ask that this sentence be identified as an opinion or include the phrase "in accordance with Article 12 of the CRC".
19. Paragraph 49 incorrectly paraphrases Article 37(b) of the CRC which states that "no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." We would recommend the Committees use the exact language from the CRC to avoid expanding or changing the scope of this right.
20. In paragraph 56, Canada has concerns with the sentence stating that "....child migration related detention constitutes in itself a violation of children's right to liberty...."  
While Canada does not seek to detain children, on rare occasions the detention of children for immigration purposes is at times necessary as a measure of last resort having taken into account in the best interest of the child and the totality of the circumstances. As such, the language provided by the Committees is too categorical and does not allow for carefully nuanced and tailored national procedures and practices with respect to the detention of children for immigration purposes.
21. In addition, in paragraph 56, the Committees claim that ".....States have the legal obligation to comply with international standards on detention conditions...." Canada respectfully asks for the source of this legal obligation as it disagrees with this assertion. We would recommend rephrasing as follows:

“Highlighting General Comment No.10 (CRC/C/GC/10, 2007) of the CRC Committee, it is reiterated that States [~~DELETE: have the legal obligation to~~] **[ADD: should]** comply with international standards on detention conditions, including the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) which apply to all forms of detention including administrative or non-criminal detention.

22. In paragraph 59, the guarantees of due process that are listed by the Committee are different from those listed in Articles 12 and 40 of the CRC. If the Committee is discussing best practices, these should be clearly identified to avoid confusion. We would also strongly urge the Committee to not refer to best practices as “rights” to reduce confusion about what is a treaty right and what is best practice.
23. In paragraph 60, Canada disagrees with the assertion that legal assistance forms part of regular consular assistance, and would suggest removing this idea from the paragraph.

### *Conclusion*

24. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft Joint General Comment on the Human Rights of Children in the Context of International Migration, and more generally its support of the work of the Committees. Canada avails itself of the opportunity to renew to the Committees the assurances of its highest consideration.

Ottawa  
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