

UPDATES IN RELATION TO THE ALTERNATIVE REPORT

TO THE V AND VI IMPLEMENTATION REPORT TO
THE UN CONVENTION ON THE RIGHTS OF THE CHILD AND
THEIR OPTIONAL PROTOCOLS SUBMITTED BY SPAIN

UNACCOMPANIED MIGRANT CHILDREN IN SPAIN

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ADDITIONAL SUBMISSIONS

First of all, we will proceed to update the information already included in the alternative report submitted by Fundación Raíces and Noves Vies, to clarify issues already presented that may have been unclear and to add facts about them that have taken place since the submission of the Alternative Report. Thus, we would like to draw the Committee's attention to the lack of guarantees in the procedures related to foreign unaccompanied minors and to the conditions existing in the Child Protection Centres.

A. LACK OF GUARANTEES IN THE PROCEDURES RELATED TO THE ATTENTION AND PROTECTION OF FOREIGN UNACCOMPANIED MINORS

The lack of guarantees can be observed during the whole stay of the minors in Spain, being able to distinguish four different crucial moments:

- I. At the time of the location and identification
- II. During the age determination procedure
- III. In court proceedings to appeal subsequent resolutions
- IV. In the limbo of legal status in which minors with documentation are left

I. At the time of the location and identification of the minors

At the time of location and identification, the Spanish authorities do not provide the immediate attention required by foreign unaccompanied minors in breach of art. 35 of the Organic Law on Alien's Rights and Freedoms, and they leave these minors in a situation of absolute helplessness and lack of protection. Proof of this is what has been happening in Barcelona during the last 6 months. *A group of about 15 minors of Moroccan nationality, spent several nights sleeping in the waiting rooms of the headquarters of the Provincial Prosecutor's Office of Barcelona waiting to be transferred to a public reception centre.*

It is common that both the organizations that provide humanitarian attention on the border and on the coasts and the National Police Force itself or the Civil Guard that assists them and registers them later, do not adequately identify the foreign persons who enter the Spanish territory. On many occasions, upon arrival in Spain, minors tell their actual birth dates (indicative of their under-age status) and the policemen, either they record their correct day and month of birth but noting a year that would make them adults, write down a random date or write the day and month of entry into Spain, putting the year that would make them adults. * These minors become, therefore, foreign adults to whom no protection measure is applied because they are not even considered as presumed minors.

II. During the age assessment procedure

In the first place, the Spanish legal system has not normatively developed which is the procedure to be followed for the determination of age, nor the rights that assist them in it, which in itself causes a clear defencelessness to minors who are submitted to it.

The only development that the Kingdom of Spain has carried out in this regard is the so-called *Framework Protocol on certain actions in relation to foreign unaccompanied minors*, which aims to be a mere plan for intergovernmental coordination but, after observing its content, it is a true regulation of the age determination procedure. In addition, considering that this Protocol violates the rights of minors, Fundación Raíces has filed an appeal against it in the courts, which is pending resolution by the Supreme Court, whose vote and ruling will be held on January 23, 2018.

In accordance with International Law, the aforementioned Protocol violates the following rights:

1. The best interest of the child is the first consideration
2. To be heard in the procedure.
3. To have advice and legal representation
4. To have effective access to the courts to start a judicial procedure

Analyzing these four elements in the age determination procedure:

1. **The right and principle of the best interests of the minor are not being respected, insofar as the presumption of minority is violated**, by systematically testing age and not recognizing the validity of the documentation of the countries of origin and of the diplomatic representations of these countries accredited in Spain, even though:

- The Law provides that only undocumented minors should be tested
- It has been established as jurisprudential doctrine of the Supreme Court that *"the immigrant from whose passport or equivalent identity document shows his/her minority cannot be considered an undocumented foreigner to be submitted to additional tests of determination of his/her age, as it cannot be questioned without reasonable justification why such tests are carried out when one of those documents legally issued by the country of origin is available whose validity has not been questioned neither have been invalidated by any competent body"*.

On the other hand, it should be noted that:

- Despite not granting validity to such documentation, this is not prosecuted for forgery.
- Minors are required to prove their minority irrefutably, transferring to them the burden of proof. Neither birth certificates are accepted due to lack of biometric data,

nor passports provided afterwards that include them, as they are processed from said birth certificates in the corresponding Consulates.

- Prevalence is given to the results of age determination tests on documentation, despite the great inaccuracy and the questioning of the results of these tests by scientists.
- The simple refusal to submit to the tests of determination of age is considered as an evidence or indication of legal age.

In addition, it should be noted that within the Office of the General Prosecutor, it is the Immigration Prosecutor's Office, and not that of Minors, which is functionally responsible for determining the age of foreign unaccompanied minors. It is, therefore, the Prosecutor's Office for Foreigners that has set the guidelines and procedures to be followed in relation to foreign unaccompanied minors and the one which gives priority to other considerations, such as the control of migratory flows, over the defence of the best interests of the minor.

2. The Protocol flagrantly violates the right to be heard of unaccompanied minors.

The Protocol does not foresee that the undocumented minor can be heard once the procedure is initiated, to argue what is appropriate to his or her right, or after carrying out all age determination tests, before a resolution decree is issued. Reference is made only to an act of communication at the time of providing informed consent in relation to the practice of medical tests, which, however, is not sufficient to guarantee that the child has actually been heard and duly informed, given that they are not allowed to have a legal representative of their choice.

In addition, in practice, they are denied the right to appear before the Office of the Prosecutor in the act in which their consent is obtained for the practice of evidence by means of the person designated by them for that purpose. This consent often takes place in the police units themselves, without a hearing before the Office of the Prosecutor, that is, without the Prosecutor seeing and hearing the minor.

3. The age determination procedure does not respect the right to legal assistance of foreign unaccompanied minors.

No reference is made in the aforementioned Protocol to the right to legal assistance for minors, the age determination procedure being an administrative file that, however, is intended to determine essential aspects that uniquely affect a person, such as identity, and who is also in a situation of extreme vulnerability. The procedure is carried out within a framework of **total defencelessness** for the presumed minor, leaving the interests of the minors at the discretion of the Administration, with which there is a conflict of interest.

III. In subsequent legal proceedings

Once their age is determined by Decree of the Public Prosecutor's Office, Foreign Minors cannot access judicial procedures with adequate legal guarantees, and the national remedies provided are ineffective in repairing the damage done to minors. The lack of guarantees of the procedures is due to the following aspects:

1. Impossibility to directly appeal the decrees for determining the age of the Office of the Prosecutor

The direct irrefutability of the age determination Decrees adopted by the Public Prosecutor's Office in relation to foreign unaccompanied minors implies a violation of their right to effective judicial protection, although, as the Spanish Constitutional Court has recognized, the effects that they produce can be appealed before the courts -through appeals challenging the cessation of guardianship of the child or through lawsuits requesting the constitution of the guardianship by the child protection services of the Administration-. The problem is that these resources, as we will now explain, are not effective.

On the other hand, the return orders have no possibility of judicial appeal. The planned remedy is before the Administration itself and does not suspend a possible return to the country of origin. They are therefore not effective impugnation processes to suspend the return of the child.

2. Lack of effective access to the Courts.

Unaccompanied minors do not have effective access to the Courts, mainly because they have not guaranteed legal assistance.

It is difficult to imagine that a foreign child who is alone in Spain, without points of reference, without support, who does not speak the local language, who does not have legal assistance, knows and can put in place the existing means to oppose a question as key and complex as the determination of their age. In addition to have resources available, they must be accessible.

3. The duration of the judicial proceedings.

In view of the impossibility of directly disputing the age determination Decrees, numerous cases of foreign unaccompanied minors have reached the civil jurisdiction either through appeals against the cessation of the guardianship of the corresponding minor (when the minor is expelled from a children's shelter) or through lawsuits for which the guardianship was requested by the Administration.

Although most of these appeals are won, recognizing the corresponding rights to minors, they are ineffective because the court decisions arrive when the minors are already of legal age, and indicating that they should have been recognized as minors and protected by the Administration. The internal procedural channels have shown to be totally ineffective in protecting the rights of these children, producing undue delays and causing irreparable damages to many children. These delays cannot be justified by the complexity of the procedures, since these procedures do not require a great effort of proof. In addition, being procedures presumably related to minors, they

should be characterized by their celerity, because the consequences can seriously affect them. However, the reality is that the procedures can last 1, 2 and up to 3 years.

4. Lack of automaticity in precautionary measures

It is an issue of enormous concern the lack of automaticity of the precautionary measures requested in the civil proceedings initiated by these minors requesting the tutelage of the services of protection of minors or impugning the corresponding termination of the guardianship, since the absolute lack of protection produced by the undue delays of the procedures would not occur if, during the proceedings, such precautionary measures were adopted.

Domestic legislation does not provide for the automaticity of these measures in the protection of minors, making the requested judicial protection completely ineffective. The precautionary measures requested are either not adopted, or there is no pronouncement, or they are adopted after a long period of time has passed.

As a result, the foreign minor remains in a situation of total helplessness and abandonment, a situation that has serious physical and psychological consequences, until the adoption of the resolution on the merits that, as we have seen, may take 2 or 3 years. What is a violation of the presumption of minority and the right to be protected.

All this highlights the existing lack of guarantees that prevents an effective remedy for these minors and justifies, given the difficulty of **exhausting domestic remedies** in Spain that entails, de facto, the lack of the object of the appeal, which is appealed to the Committee of Children's Rights, in accordance with the Optional Protocol that regulates the procedure for individual communications.

IV. Legal and social limbo in which the minors remain after a Decree of legal age

The first consequence of the decrees of adulthood is the denial of their status as minors and, therefore, of the rights recognized as such, among which is the right of all children in abandonment to be protected by the Public Administration.

However, minors who have documentation that proves their minority and are declared of legal age by the Office of the Prosecutor will not be able to exercise their rights either as minors or as adults. Since their documentation is not prosecuted judicially the rest of Spanish Administrations consider that documentation as valid for all purposes. And so, in the event that one of these children intends to enrol in school, receive medical treatment, seek asylum, register, or put a complaint, they will not be able due to lack of tutor or legal representative authorizing it. That is, the Public Prosecutor's Office considers them adults simply for the purpose of not giving them protection as minors without parental care, but for the rest of the Administrations they are minors.

The abandonment and the lack of protection to which these minors are exposed is total, since in many occasions they are forced to live in the street because they cannot even rent a hostel room without having the authorization of a tutor.

B. CERTAIN ACTIONS OF THE MINOR PROTECTION ENTITIES.

The situation of minors who are under the protection of the Community of Madrid and residing in the Hortaleza First Reception Centre continues to worsen, especially in the case of foreign minors.

According to the complaints of the children themselves, the child protection entities, through their action or omission, exercise certain actions that can be considered as **institutional abuse**, such as:

- **Conditions of overcrowding:** as reported by the media on numerous occasions, the number of residents is greater than the number of places and, as a consequence, some of these minors do not have a bed and are sleeping on the floor of the corridors without mattress.
- **Psychological abuse:** there are continuous complaints about the degrading treatment, insults and threats received by many minors by the staff of the centre.
- **Conditions of isolation:** we continue hearing testimonies of children who, upon entering the Centre, are forced to remain under lock and key in the room called "the nest" for a few days without being able to leave.
- **Mistreatment by the staff:** minors have been subject to aggressions, by educators and security guards. It should be noted that there are security guards who are being investigated in judicial proceedings initiated for alleged ill-treatment of minors and who continue to work with the children they allegedly assaulted and with the rest of the minors, without any temporary protection action being taken.
- **There are no accessible complaint mechanisms** for minors in situations of violence and abuse in child protection centres. The complaints made by the children are not heard by the people in charge of the centres, and no protocol of mistreatment is activated, nor any investigation initiated. The minors are not taken to the Hospital, which prevents them from receiving medical care and obtaining a medical report of the possible injuries. When they have tried to report the facts in the Police they have been required to be authorized by a tutor to formalize the complaint, which was not possible, since their guardians were the alleged aggressors.

On the other hand, it is important to note that:

- the guardianship of minors is not automatic, which prevents from the first minute once the child enters the protection system that their needs are thoroughly identified, a formal

determination of their best interests is performed and an appropriate educational project is designed.

- impediments to access to the asylum procedure of minors are placed, since they are informed that in the centre minors they cannot request asylum, or they are not accompanied to the formalization of the asylum interview if the guardianship has not been formally constituted.
- The centre lacks translators for languages such as English, and sometimes, French, which prevents communication with some children.

INFORMATION ON NEW DEVELOPMENTS AND EVENTS

In this section we want to highlight new facts that have occurred since the submission of the alternative report, especially the failure of the Spanish State to comply with the precautionary measures adopted by the Committee in individual communications procedures and the approval of a non-law proposition to reform the protection system for foreign unaccompanied minors in Spain.

C. NON-COMPLIANCE OF PRECAUTIONARY MEASURES ADOPTED BY THE CRC IN INDIVIDUAL COMMUNICATIONS PROCEDURES

The association Noves Vies and Fundación Raíces have already submitted 17 individual communications before the Committee on the Rights of the Child for cases of foreign unaccompanied minors in Spain. Of these communications, in 13 cases the Committee agreed to the adoption of said precautionary measures. However, such measures requested to the Spanish State **have not been adopted in any of these cases.**

The lack of commitment presented by the Kingdom of Spain in this regard is obvious, as it is not complying with what was requested by a United Nations Committee.

As a direct consequence of the non-adoption of precautionary measures by Spain, some of these children are not longer in Madrid and we currently do not know where they are or under what circumstances.

D. LEGISLATIVE INITIATIVE REGARDING FOREIGN UNACCOMPANIED MINORS

On a separate issue, it is worth mentioning the **legislative initiative to reform the system of protection of foreign unaccompanied minors.**

Violations of the rights of foreign unaccompanied minors in Spain have not only been revealed by social organizations, the Ombudsman and by the Judiciary (Sentences of the Supreme Court), but

also the legislature itself is working and urging the Government to carry out various reforms that affect, among others, these minors. Thus, it has been approved, with the support of all the groups and the exception of the group in the government that abstained, a **Non-Law Proposition by the Children Commission in which, with respect to foreign unaccompanied minors**, the following proposals have been agreed upon, which we totally subscribe (records: No. 161/001190 and 161/002170, BOCG No. 248, of November 15, 2017):

1. Reform the Law on the Legal Protection of Minors (LO 8/2015) in its art. 12.4 to ensure that no child or adolescent who has documentation proving their age is submitted to an age determination procedure, in accordance with the Immigration Law and the Supreme Court's Jurisprudence.
2. Reform the Immigration Regulations in their art. 190.1 to guarantee the assistance of a lawyer with specific training on foreign unaccompanied minors in the age determination procedure, from the moment they arrive in Spanish territory.
3. Overtake the Framework Protocol on certain actions in relation to Foreign Unaccompanied Minors and prepare a new Protocol that coordinates the actions of all Administrations, to guarantee the rights of minors in accordance with national legislation and the Convention on Child Rights of the United Nations.
4. Strictly comply with the review and registration of all children who access the national territory, regardless of whether or not there are doubts about their age and the documentation they carry.
5. Guarantee that, regardless of nationality, the administrations assume the guardianship ex lege of all minors who are in a situation of helplessness.
6. Reform the Organic Law on Foreigners and its development Regulations to grant the automatic granting of the residence permit at the time of declaration of abandonment of the minor, and ensure authorization for those over 16 years of age to access the labour market under the same conditions as the Spanish minors.
7. Guarantee the right to education, healthcare and basic social services and benefits under the same conditions than the Spanish minors.
8. Urgently address, in coordination with the Autonomous Communities and the City Councils, the situation of children living on the streets through community, social and psychological intervention programs to avoid possible situations of helplessness.
9. Promote the transfer of unaccompanied children who are in the cities of Melilla and Ceuta to the Peninsula, always in accordance with their best interest and after being heard, with the corresponding economic allocation to the Autonomous Communities to guarantee their rights and material conditions of life.

10. Promote follow-up and support programs for the development of these minors once they reach the age of majority, which includes the guarantee of access to health care, youth guarantee programs and training for employment.
11. Strengthen resettlement and relocation policies to welcome as many asylum-seeking minors in Spain as can be assisted by our Administrations.

COMMENTS ON THE WRITTEN REPLIES OF SPAIN

E. ABOUT THE RESPONSES OF SPAIN TO THE QUESTIONS MADE BY THE COMMITTEE ON THE RIGHTS OF THE CHILD AT THE SESSION Nº 77 (CRC/C/ESP/Q/5-6/Add.1)

Again, the answers offered by the Kingdom of Spain to the questions asked by the Committee on the Rights of the Child in Session Period No. 77 show the lack of commitment of the State to the group of foreign unaccompanied minors.

Regarding question number 6, in which the Spanish State was requested to provide information on the measures adopted to eradicate discrimination against Romany minors, foreign unaccompanied minors, children of irregular migrants and minors with disabilities; the State limits to mention measures related to racism in general and to the Roma population in particular. **No specific mention is made to foreign unaccompanied minors.** In fact, in Spain there is no specific measure that seeks the integration of foreign unaccompanied minors, who are *de facto* discriminated, mainly because they cannot access the labour market on equal terms with Spanish minors.

With regard to question 12, in which the State is requested to report on the measures envisaged to guarantee the non-return of foreign unaccompanied minors at the border and the possible inclusion in the Asylum Regulation of the right of minors of formulating independent asylum applications; the State indicates that **no reforms are being carried out in the international child protection system.** It is necessary to carry out a reform of the system that allows minors to make asylum requests as such, without the need of the consent of their legal tutor, to guarantee that foreign unaccompanied minors who are not recognized as such by the State, can access without problems to the asylum procedure with all the guarantees corresponding to a minor.

Regarding foreign unaccompanied minors, with respect to the allegations expressed by the Kingdom of Spain, it is clearly evident that, at the time of explaining the actions derived from the aforementioned Framework Protocol, it is clear that **at no time during the proceedings the minor has the appropriate legal assistance**, since the assistance of a lawyer is not mentioned in any action.

In respect of question number 23, in the list of **topics considered a priority** by the Spanish State, **foreign unaccompanied minors are not mentioned**, despite being such an unprotected collective

in Spain, and that the vast majority of complaint procedures that are being substantiated before the Committee on Children's Rights affect that group. It only mentions immigrant minors and refugee minors in general.

OTHER RECOMMENDATIONS AND PROPOSALS FOR THE SPANISH STATE

F. PROPOSALS AND RECOMMENDATIONS FOR THE SPANISH STATE

- Reform the Organic Law on the Legal Protection of Minors (LO 8/2015), the Immigration Law and the Framework Protocol on certain actions in relation to foreign unaccompanied minors to guarantee:

- That if a minor carries documentation proving their identity, an age determination procedure is not initiated
- In other case, that the procedure is initiated with due guarantees, especially those contained in the Convention on the Rights of the Child, especially including legal assistance and the right to be heard
- That the documentation proving the identity of the minors always prevails over the results of the age tests, rectifying the Decrees of the Office of the Prosecutor in case the documentation is provided afterwards.

- Allow that the Age Decrees, issued by the Prosecutor, are appealable directly before judicial bodies, in a procedure with all the guarantees

- Guarantee the automaticity of the precautionary measure of entry of minors in Protection Centres and automatic constitution of guardianship during any procedure in which the age of the same is questioned, in compliance with the presumption of minority of age.

- Establish mechanisms for prevention, detection, reporting and intervention of any situation of violence in the centres, taking into account the special vulnerability of foreign unaccompanied minors, such as the appointment of a lawyer for each child under guardianship, who can defend their interests, and create and make available to minors effective complaints mechanisms.

- In order to guarantee the proper integration of foreign unaccompanied minors in Spain and eliminate all types of discrimination, it is recommended that an integration plan is drawn up, guaranteeing access to educational resources and to the labour market under equal conditions than the rest of minors and especially when they reach 18 years.

- Reform article 35 of the Organic Law 4/2000 on the rights of foreign minors for the automatic grant, at the time of declaration of abandonment, of the authorization of long-term or permanent residence with the possibility of working when they reach the age of 16, on equal terms with Spanish minors.

- Regarding the asylum procedure, it is necessary to carry out a reform of the system that allows minors to make asylum applications without the need of the consent of their legal tutor, to guarantee that foreign unaccompanied minors who are not recognized as such by the State, can access without obstacles the asylum procedure with all the guarantees corresponding to a minor.
- In connection with the proposals for legislative amendment included in the Non-Law Proposition included in section D, we subscribe to all of them.