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**Submission for the CMW-CRC Joint General Comment on the Human Rights of  
Children in the Context of International Migration**

**Justice for Children and Youth**

**February 29, 2016**

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**Executive Summary**

1. The information contained within this submission has been gathered through Justice For Children and Youth's (JFCY) ongoing work with children under 18, and with street-involved youth under 24, via their Street Youth Legal Services (SYLS) program.
2. These submissions will seek to inform the CMW-CRC Joint General Comment by addressing two issues identified within the Concept Note:
  - i. an absence of child-sensitive migration-related legislation, policies and practices, and;
  - ii. a lack of migration-related issues in laws and policies relating to children that take into account the special needs and the vulnerable situation of migrant children and children affected by immigration.
3. These submissions will use Canada as a case study, and focus on three primary areas: immigration detention; family reunification for unaccompanied minors that have sought asylum in Canada; as well as access to Canadian Citizenship for unaccompanied minors. We recommend that:
  - Consideration of the Best Interests of the Child ("BIOC") should be considered in *every* case where children are affected by an immigration detention order. This is whether the child is subject of the detention order or affected by their parents' detention;
  - States should be cautioned against the use of "deterrence" as a policy rationale for immigration-related legislation;
  - States should ensure access to family reunification for unaccompanied migrant children who receive positive refugee determination decisions;
  - States should exercise caution when placing age restrictions on children seeking citizenship and remove barriers for these children that prevent them from obtaining citizenship in their country of landing.

## About Justice for Children and Youth (JFCY)

4. JFCY was founded for the purpose of promoting the rights and legal interests of children throughout Canada. It has been involved in many consultations and projects involving the rights of young people under Canadian legislation, the *Canadian Charter of Rights and Freedoms* (“*Charter*”) and the United Nations *Convention on the Rights of the Child*<sup>1</sup> (“*Convention*”), as well as other child and youth rights issues. Advancing the *Convention* is a central objective of our organization.
5. JFCY has been granted leave to intervene in numerous proceedings, and has appeared in approximately 19 cases before the Supreme Court of Canada (SCC).<sup>2</sup> In each case, JFCY has argued for the advancement of the *Convention* into Canadian domestic law. Most recently, in *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, JFCY argued that the BIOC must be the primary consideration in the decision making process of a Humanitarian & Compassionate (“H&C”)<sup>3</sup> application where a child is the primary applicant.. The Supreme Court largely adopted JFCY’s arguments, finding that the BIOC were central and primary to H&C applications of children.
6. With respect to the rights of migrant children, JFCY is on the advisory committee for the Children’s Aid Society (CAS) of Canada and Centre for Mental Health Addiction (CAMH) project “Hidden in Our Midst” (now known as “What’s the Map”), that examines the situation of homeless newcomer youth in Canada. JFCY was also a party in the constitutional challenge, *Canadian Doctors for Refugee Care v. Canada (Attorney General)*<sup>4</sup> that led to the reinstatement of state-funded healthcare for refugee claimant children.

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<sup>1</sup> *Convention on the Rights of the Child*, 20 November 1989, 3 UNTS 1577, Can TS 1992/3 [*Convention*].

<sup>2</sup> *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61; *Moore v British Columbia (Education)*, 2012 SCC 61, 351 DLR (4<sup>th</sup>) 451; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 254; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44; *R v JZS*, 2010 SCC 1, [2010] 1 SCR 3; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181; *R v AM*, 2009 SCC 19, [2008] 1 SCR 569; *R v. SAC*, 2008 SCC 47, [2008] 2 SCR 675; *R v LTH*, 2008 SCC 47, [2008] 2 SCR 675; *R v DB*, 2008 SCC 25, [2008] 2 SCR 3; *R v BWP*; *R v BVN*, 2006 SCC 27, [2006] 1 SCR 941; *R v CD*; *R v CDK*, 2005 SCC 78, [2005] 3 SCR 668; *R v RC*, 2005 SCC 61, [2005] 3 SCR 99; *FN (Re)*, 2000 SCC 35, [2000] 1 SCR 880; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4<sup>th</sup>) 193; *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4<sup>th</sup>) 385; *R v O’Connor*, [1995] 4 SCR 411, 130 DLR (4<sup>th</sup>) 235; and *A (LL) v B(A)*, [1995] 4 SCR 536, 130 DLR (4<sup>th</sup>) 422.

<sup>3</sup> A Humanitarian & Compassionate (“H&C”) application is a process provided for within Canada’s immigration system that allows for individuals who do not meet the requirements of formal immigration procedures to receive an exemption to the rules and ultimately gain Permanent Residency to Canada and remain in the country.

<sup>4</sup> *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, 28 Imm LR (4<sup>th</sup>) 1.

## SUBMISSIONS

### A. CHILDREN SUBJECT TO IMMIGRATION DETENTION IN CANADA

7. Detention of children for immigration purposes in Canada is not new, nor is concern regarding Canada's immigration detention practices. In 1995, the UN Committee of the Rights of the Child expressed concern that Canada did not give the BIOC sufficient weight with respect to immigration detention.<sup>5</sup> These concerns were echoed in 2003 by the Committee,<sup>6</sup> as well as in 2012 in Canada's periodic review.<sup>7</sup>
8. Nevertheless, the use of immigration detention on children is common. Reports estimate that between 2005 and 2010, approximately 650 children were detained each year due to their migratory status.<sup>8</sup> According to Canada Border Services Agency ("CBSA") statistics, many of the detained minors (approximately 279 from 2009–2010, and 196 from 2010–2011) accompany their detained parent or guardian and are not the subject of the detention order themselves<sup>9</sup>. Some academics and other researchers, however, believe that these numbers may be higher as many children unofficially accompany their parent into detention and are undocumented because they are not subject to a deportation order themselves.<sup>10</sup>
9. It is particularly difficult to ascertain the exact statistics as it is difficult to gain access to the detention facilities the vulnerabilities of detained people make them weary to speak with journalists, or researchers.<sup>11</sup> What appears clear by the numbers available, however, is that the number of children in immigration detention centres in Canada is hundreds each year.

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<sup>5</sup> UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 20 June 1995, CRC/C/15/Add.37 at 11.

<sup>6</sup> UN Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Canada*, 27 October 2003, CRC/C/15/Add.215 at 24 [*Concluding Observations*, 2003].

<sup>7</sup> UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session*, 6 December 2012, CRC/C/CAN/CO/3-4 at 34, 73.

<sup>8</sup> Janet Cleveland, Cecile Rousseau & Rachel Kronick's submission to the House of Commons, "Bill C-4: The impact of detention and temporary status on asylum seekers' mental health" (January 2012), cites official CBSA figures. Online:

<[https://www.csssdelamontagne.qc.ca/fileadmin/csss\\_dlm/Publications/Publications\\_CRF/Executive\\_summary\\_Impact\\_of\\_Bill\\_C-4\\_on\\_asylum\\_seeker\\_mental\\_health.pdf](https://www.csssdelamontagne.qc.ca/fileadmin/csss_dlm/Publications/Publications_CRF/Executive_summary_Impact_of_Bill_C-4_on_asylum_seeker_mental_health.pdf)> at 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> Canadian Council for Refugees, *Detention and Best Interests of the Child* (November 2009) online:

<<http://ccrweb.ca/files/detentionchildren.pdf>> at 2.

<sup>11</sup> Rachel Kronick, Cecile Rousseau & Janet Cleveland, "Asylum-Seeking Children's Experiences of Detention in Canada: A Qualitative Study" (2015) 85 *American Journal of Orthopsychiatry* 287 at 288 [*Experiences of Detention*].

## Legislative Framework

10. Canada's immigration policies, including those on immigration detention, are set out in the *Immigration and Refugee Protection Act (IRPA)* and its regulations (IRPR). Arrest, detention, and removal of non-Canadian citizens is controlled by the CBSA.
11. The IRPA allows for the detention of minors in instances where a CBSA Officer believes that the minor may be a "flight risk" (meaning the officer believes that the person will not present themselves in the future); where the officer has doubt as to the person's identity; or where the officer believes that person is inadmissible and a danger to the public.<sup>12</sup> Detainees have set reviews of their detention - "Detention Reviews". Most minors are detained for one of the first two reasons.<sup>13</sup>
12. Where a minor child is the subject of the detention, the reviewing officer (responsible for the decision of release) *must* consider the BIOC. Section 60 of the IPRA states:

**60** For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.<sup>14</sup>
13. Despite this, we have observed that the BIOC are rarely the central consideration with respect to the release of the child. This fact was first raised by the Canadian Council of Refugees in their 2009 report, "Detention and Best Interests of the Child".<sup>15</sup>
14. In a recent example that made national headlines in Canada, a 16-year-old Syrian boy was held in isolation in an immigration detention centre for 3 weeks until being granted humanitarian relief.<sup>16</sup> He had been sent to Canada by his family to claim refuge, as he faced a risk of being returned to Syria from Egypt where the family was residing to escape the war. Legal representatives were told that the reason the boy was held in isolation was because he was considered too young to be placed with the adult male inmates, yet too old to be placed with the women and children. The boy had no access to education and had limited recreation time.
15. This example shows that despite immigration policy that requires consideration of BIOC principles, in practice the BIOC are not the primary consideration with respect to

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<sup>12</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 ss 55(2), (3) [IRPA].

<sup>13</sup> Canadian Council for Refugees, *Detention and Best Interests of the Child* (November 2009) online: <<http://ccrweb.ca/files/detentionchildren.pdf>> at 3.

<sup>14</sup> IRPA, *supra* note 13 at s 60.

<sup>15</sup> Canadian Council for Refugees, *Detention and Best Interests of the Child* (November 2009) online: <<http://ccrweb.ca/files/detentionchildren.pdf>> at 12.

<sup>16</sup> "16-year-old Syrian boy awaits decision on deportation", *CBC News* (16 February 2016) online: CBC News <<http://www.cbc.ca/news/canada/toronto/programs/metromorning/16-year-old-syrian-boy-awaits-decision-on-deportation-1.3449078>>.

immigration detention. It further demonstrates that Canada is not meeting the objectives set out in the General Comment No. 6,<sup>17</sup> nor following previous recommendations made by the Committee on the Rights of the Child (“the Committee”).

### Recent Legislative Developments

16. In 2012, the Federal Government of the day enacted Bill C-31, the *Protecting Canada’s Immigration System Act*, which amended the detention provisions of the *IRPA*. Parliament stated that the goal of the Act was to deter individuals from using human smugglers to cross borders and claim asylum.<sup>18</sup> The Act allows for any irregular arrivals travelling in a “group” to be classified “designated foreign nationals” (DFNs).<sup>19</sup> DFNs receive restricted access to detention reviews. Once a group is classified as such, the provision calls for *mandatory* detention of two weeks upon arrival for persons 16 years of age and older. If the Minister is not satisfied of their identity, designated individuals could be detained for 6 months and possibly 12 months, without any court review of their detention.<sup>20</sup> This compares to an initial review 48 hours after first being detained, a second one week later, and then each 30 days thereafter, for non-designated individuals.<sup>21</sup> To date, at least five groups of persons have been identified as designated foreign nationals.
17. This development in the immigration detention provisions is highly concerning. It allows for the mandatory detention of children age 16 and over due to irregular migrant status, creating increased possible detention of children with fewer protections. There is nothing restricting these children from being held in adult detention facilities. These concerns raised in Canada’s Periodic Review by the Committee in 2012 have yet to be addressed.

### Children in Detention not Subject to Detention Order

18. Where it is the parent of a child that is the subject of the detention, no BIOC considerations are made at the Detention Review. This is true whether the child is separated from their parent while the parent is in detention, or resides in the detention facility with the parent.<sup>22</sup>

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<sup>17</sup> UN Committee on the Rights of the Child (CRC), *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 1 September 2005, CRC/GC/2005/6 at 39-41.

<sup>18</sup> *House of Common Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 15 (19 September 2011) at 1250 (Rick Dykstra).

<sup>19</sup> *IRPA*, *supra* note 13 at ss 20.1(1), 55(3.1).

<sup>20</sup> *IRPA*, *supra* note 13 at s 57.1(1), (2).

<sup>21</sup> *IRPA*, *supra* note 13 at s 57(1).

<sup>22</sup> The child may reside with a family member or trusted adult if that option is available; however, often parents must make the difficult decision to either keep their children in detention with them, or place them in foster care if they have no one in the country who can care for them. For further information with respect to the consequences for children in detention centres vs. family separation see *Experiences of Detention*, *supra* note 12.

19. This is because children in detention with their parents are not considered detainees themselves by the Immigration Division. They themselves get no “review” of their circumstance, and this leads them to then become invisible under the law.<sup>23</sup>
20. In a recent example, JFCY is seeking public interest standing in a case where a nine-year old girl has been residing with her mother in an immigration detention centre in Toronto since February 25, 2015.<sup>24</sup> The Immigration Division, responsible for the decision of release, has consistently determined that it cannot consider the child’s best interests at her mother’s detention reviews because she is not the subject of the detention. This is despite a psychiatrist’s report detailing the many harmful effects of detention on the child. In addition, the child’s access to education has been severely disrupted. For the first nine months she did not leave the detention centre and did not attend school until JFCY was able to get her enrolled in school a group of volunteers began driving her every day.
21. The case demonstrates that not all children affected by immigration detention are in receipt of the rights set out in the *Convention* to which they should be entitled. This child has become invisible under the law; she lacks any mechanism to have her interests considered. Yet, she is directly affected by the decisions of the Division. Her interests, and those of children in similar circumstances, should be considered.

### Recommendations with Respect to Children in Immigration Detention

22. We recommend continued emphasis on the BIOC and principles laid out in the General Comment No. 6. Our experience shows that migrant children continue to face unnecessary deprivations of liberty, and have their access to education and recreational activity severely limited, even in states that have written the BIOC into their immigration legislation.
23. We further draw attention to the use of “deterrence” as a rationale for increased or mandatory detention periods – a rationale that is also being applied to children. JFCY recommends that the General Comment dissuade deterrence-based policy as it affects children affected by immigration policy.

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<sup>23</sup> Rachel Kronick & Cecile Rousseau, “Rights, Compassion and Invisible Children: A Critical Discourse Analysis of the Parliamentary Debates on the Mandatory Detention of Migrant Children in Canada” (2015) 28 *Journal of Refugee Studies* at 12.

<sup>24</sup> *B.B. and Justice for Children and Youth v. M.C.I.* Court File No: IMM-5754-15.

24. We emphasize especially the rights of children who are accompanying their detained parents. The BIOC must be considered in *every* case where children are affected by a detention order, not simply the subject of the order. State parties should ideally aim for a full ban on detention of migrant children.

## B. FAMILY REUNIFICATION FOR UNACCOMPANIED MINOR ASYLUM SEEKERS

### Legislative Framework

25. Under the current immigration structure in Canada, minors who arrive in Canada unaccompanied and are granted asylum after an in-land refugee protection hearing do not have the right to then bring their immediate family members to Canada. This is in contrast to adult refugee claimants, who, once they receive a positive refugee protection decision, have the right to bring their spouses (marriage or common-law) and dependent children to Canada. These family members arrive in Canada as Permanent Residents. Unaccompanied children who wish to bring their parents or siblings must first reach the age of 18 and meet income requirements that are out of reach for most minors, in order to sponsor family members.

### Effect of Legislation

26. In this legislative scheme children do not have access to family reunification. Our position that this is discriminatory, in violation of children's rights under the *Convention*,<sup>25</sup> and runs contrary to the objectives set out in the IRPA.<sup>26</sup>
27. The Committee has previously expressed concerns that Canada has not addressed the issue of family reunification for refugee children.<sup>27</sup> Several cases raising constitutional challenges have also been brought before the Federal Court of Canada with respect to this provision. It was alleged that restricting family reunification from accompanied minor refugee claimants violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.<sup>28</sup> In the cases that JFCY is aware of, the matter was settled prior to trial and the parents of the child were issued Permanent Residence under Canada's "Humanitarian & Compassionate" grounds scheme.<sup>29</sup> In one matter, the Respondent Minister of Citizenship and Immigration filed an affidavit of the then Manager of the

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<sup>25</sup> *Convention*, *supra* note 1 at art 22(2).

<sup>26</sup> *IRPA*, *supra* note 13 at s 2(f).

<sup>27</sup> *Concluding Observations*, 2013, *supra* note 7.

<sup>28</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Section 7 of the Charter states: "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"; Section 15 of the Charter calls for equal treatment and protection under the law.

<sup>29</sup> *AOF et al v MCI* (18 April 2005) Toronto IMM-3458-04 (FCC); *DT et al v MCI* (3 August 2005) Ottawa IMM-2508-05 (FCC); *MAH et al v MCI* (9 June 2005) Toronto IMM-3530-05 (FCC).

Post Determination Procedures Unit in the Refugees Branch of Citizenship and Immigration Canada.<sup>30</sup> In that affidavit he stated that the rationale for restricting children from bringing their parents to Canada following a positive refugee determination decision was to “protect” children from risks their parents or other adults may expose them to – mainly, the risk of sending children overseas to then be used as anchors to help the family come to Canada.<sup>31</sup> This, they asserted, was a balancing of best interests considerations.<sup>32</sup> There was no evidentiary foundation for their position.<sup>33</sup>

28. This is another example of the detrimental policies that are made on the basis of deterrence that in effect punish children. Although applicants’ eventually were able to reunite with their parents, in the above-mentioned cases applications were initially denied before being settled at the Judicial Review stage. This represents an additional delay in the reunification process that may take years. Further, the process is a considerable hurdle for children who may not be able to access legal assistance.

#### Recommendations with Respect to Family Reunification for Unaccompanied Refugee Children

29. JFCY reiterates our recommendation that the General Comment should address what appears to be a growing trend of deterrence-based policy making with respect to asylum seekers. These policies work against the best interests of the child.
30. JFCY further recommends that states ensure that family reunification is accessible for unaccompanied refugee children at the time they are accepted as Convention Refugees. Forcing children to apply for an exemption to the rule, or to Judicially Review the denial of their family applications, is a barrier to children that causes unnecessary delay and has uncertain outcomes. Moreover, it is dependent on children who are able to access legal assistance. Not all will.

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<sup>30</sup> *MAH et al v MCI* (9 June 2005) Toronto IMM-3530-05 (FCC).

<sup>31</sup> *MAH et al v MCI* (affidavit of JB sworn 12 September 2005) Toronto IMM-3530-05 (FCC), filed with the FCC on September 14, 2005.

<sup>32</sup> *Ibid.*

<sup>33</sup> *ZSL and KCL v MCI* (affidavit of GS sworn 20 November 2014) Toronto IMM-7057-14 (FCC); refer also to *MAH et al v. MCI*, *supra* note 30 (cross-examination of JB) Toronto IMM-3530-05 (FCC), filed with the FCC on May 15, 2006.

## C. ACCESS TO CANADIAN CITIZENSHIP FOR UNACCOMPANIED MINORS

### Legislative Framework and Effects

31. Canadian legislation requires that Canadian Permanent Residents who wish to apply for citizenship must be at least age 18, or be included in a parent's or guardian's application.<sup>34</sup> An exemption is built into the *Citizenship Act* that allows for the Minister to waive the age requirement on compassionate grounds.<sup>35</sup> This exemption is discretionary and must be requested.
32. Through our work at JFCY we have witnessed many migrant children who are in Canada unaccompanied by their parents or guardians, or who have become estranged from their parents or guardians after migrating to the country. These children often have precarious immigration status and have not yet acquired Canadian citizenship. We have observed that children in these situations may end up living in shelters or on the street. Mental health issues among some migrant children are also present.
33. Sadly, we have continuously observed that unaccompanied migrant children who do not obtain their Canadian citizenship before they turn 18, find themselves at heightened risk of having removal orders issued against them once they are of age, due to their personal circumstances and increased marginalization. For example, some young people, may come into contact with the criminal justice system and once convicted of a crime lose their Permanent Residency or other status; others lose the benefit of BIOC considerations in H&C applications, or are removed before obtaining access to legal help.
34. We believe that had the right to citizenship been more accessible to them as minors, they would not be facing removal as adults. Requiring minors to request compassionate consideration from the Minister presents a barrier that puts citizenship out of reach for some. Children will likely require legal or other assistance seeking the compassionate exemption. This, in addition to the high application fees, makes citizenship near inaccessible to unaccompanied migrant children and thereby delays their full integration into the country.

### Recommendations with Respect to Access to Citizenship

35. State parties should exercise caution when placing age restrictions on children seeking citizenship and develop policy that is child-sensitive and accessible to children.
36. States should implement policy that makes the nationalization of eligible migrant children a priority, particularly refugee children. State actors, including state guardians, must be informed of the state's goal to nationalize migrant children at the earliest point in

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<sup>34</sup> *Citizenship Act*, RSC 1985, c C-29 s 5(1)(b).

<sup>35</sup> *Ibid* s 5(3)(b)(i).

time possible. All children-serving agencies that come into contact with migrant children should be instructed to inform children of the option of applying for citizenship and assist them in the process, thereby taking into account the special needs and the vulnerable situation of migrant children.

#### D. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

37. In summary, the Canadian example highlights the importance of implementing BIOC principles at *every* stage of immigration processes for *any* child affected by migration-related legislation, policies and practices.
38. The Canadian example is also demonstrative of the detrimental policies that are made on the basis of “deterrence”. This leads us to recommend that the General Comment denounce the practice of basing immigration policy on deterrence. Deterrence-based immigration policies too often lead to legislation that is in contravention of the Committee in that it punishes children for decisions made by adults in their lives, or for seeking to exercise rights to which they are entitled.
39. JFCY further emphasizes the need for laws and policies that are sensitive to the particular circumstances of migrant children. In particular, state-run child serving agencies (in particular child protection agencies) should be mandated to facilitate the full-integration of the child into the society of their host country, including nationalization, subject to their instructions and best interests.
40. We reiterate our recommendations as follows:
  - Consideration of the Best Interests of the Child should be considered in *every* case where children are affected by an immigration detention order. This is whether the child is the subject of the detention order or affected by their parents’ detention;
  - States should be cautioned against the use of “deterrence” as a policy rationale for immigration-related legislation;
  - States should ensure access to family reunification for unaccompanied migrant children who receive positive refugee determination decisions;
  - States should exercise caution when placing age restrictions on children seeking citizenship and remove barriers for these children that prevent them from obtaining citizenship in their country of landing.