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SUBMISSION TO THE UN SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS

Response to the Questionnaire about immigration detention of children regarding the KINGDOM OF SPAIN by GENTIUM¹

I. INTRODUCTION

1. Gentium would like to thank the Special Rapporteur his intention to identify good practices and initiatives to avoid immigration detention of children and welcomes this opportunity to provide information about the Kingdom of Spain.
2. This submission presents the relevant Spanish legal framework and explains the circumstances under which immigration detention of children occurs in practice as a result of application of not human-rights compliant age-assessment procedures.

II. QUESTIONS 1-3: Legislation or policy that prohibits or restricts the use of immigration detention of children and their families, existing non-custodial alternatives and good practices in Spain

3. Spanish legislation prohibits immigration detention of children and, in particular, detention of children in CIEs (*Centros de Internamiento de Extranjeros*) – institutions where aliens are detained pending their expulsion from the Spanish territory.²
4. Although Spanish legislation provides for adults in CIEs to be accompanied by their underage children subject to the approval by the Attorney General,³ it does not seem that the Attorney General allows for such situation. The fact that families are not detained in CIEs is a good practice and should be praised.

¹ **About [Gentium](#):** Gentium is a Spanish non-profit association whose goal is to improve access to justice of victims of human rights violations belonging to vulnerable groups, notably through public interest and strategic litigation as well as capacity-building activities for lawyers. Gentium brings together lawyers, international human rights experts and researchers, all with experience in the human rights field.

² Article 62.4 of *Act 4/2000, 11 January, on rights and freedoms of aliens in Spain and their social integration* (thereafter LOEX) prohibits detaining minors in CIEs.

³ Article 62.bis.1.i) LOEX.

5. Nevertheless, unaccompanied migrant minors are in practice detained in CIEs by Spanish authorities. This, addressed below, happens as a result of flaws and bad practices in the age-determination system.

III. QUESTION 4: Challenges and obstacles

6. During 2018, professionals from the Jesuit Migrant Service observed **93 teenagers detained in CIEs who claimed to be minors**.⁴ The deficiencies of the age-determination proceeding – which result in minors mistakenly being considered adults – have been highlighted by the Committee on the Rights of the Child,⁵ the Spanish Ombudsman⁶ and civil society organisations working on the protection of children.⁷
7. This is essential because a human-rights compliant age-assessment system prevents migration detention of children at its beginning. The Committee on the Rights of the Child has declared in numerous occasions, both in the Final Observations to Spain in 2018 and in individual complaint proceedings,⁸ that the current age-determination system contravenes the Convention on the Rights of the Child and incurs in violations resulting in the exclusion of children from the protection system, and, in some cases, their detention in CIEs whilst awaiting their expulsion from the Spanish territory. The main challenges are:
 - (i) **The *Favor minoris* principle is not applied during the age assessment procedure in cases in which police officers consider that the age of the alleged unaccompanied minor is to be determined by the Public Prosecutor**
8. In Spain, when police forces identify an alien whose underage status is uncertain, they inform the Attorney General, which undertakes medical examinations to determine their age and issues a decision determining either their underage or adult status.⁹
9. During this process, no child-oriented practice is put in place.
 - (ii) **Age-determination proceedings are initiated in cases where official documents accredit underage status**

⁴ Servicio Jesuita a Migrantes “Informe CIE 2018” (2019), p. 9 <https://sjme.org/wp-content/uploads/2019/06/Informe-CIE-2018-SJM.pdf> [in Spanish].

⁵ CRC/C/ESP/CO/5-6, para. 44; and Views of the Committee of the Rights of the Child in the cases: *N.B.F. v. Spain*, Communication No. 11/2017, 27 September 2018; *M.T. v. Spain*, Communication No. 17/2017, 18 September 2019; *R.K. v. Spain*, Communication No. 27/2017, 18 September 2019; *A.L. v. Spain*, Communication No. 16/2017, 31 May 2019; *J.A.B. v. Spain*, Communication No. 22/2017, 31 May 2019.

⁶ Spanish Ombudsman, “¿Menores o adultos?: Procedimientos para la determinación de la edad” (2011) <<https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2011-09-Menores-o-Adultos-Procedimientos-para-la-determinaci%C3%B3n-de-la-edad1.pdf>> [in Spanish].

⁷ Fundación Raíces, “Informe alternativo al V y VI Informe de aplicación de la Convención sobre los Derechos del Niño de Naciones Unidas y sus Protocolos Facultativos presentado por España: Los Menores Extranjeros no Acompañados en España (2017), <http://www.fundacionraices.org/wp-content/uploads/2016/03/Informe-alternativo_Espana%CC%83a-febrero20171.pdf> [in Spanish].

⁸ Views of the Committee of the Rights of the Child (n. 5).

⁹ Article 35.3 LOEX.

10. Contrary to the legislation¹⁰ and the Supreme Court's case-law¹¹, in practice the Public Prosecutor undertakes age-determination examinations also in case where documents accrediting underage status exist.
11. The Ombudsman and civil society organisations have raised concerns about the illegal automatic initiation of age-determination proceedings, as well as about the unjustified invalidation of official documents of minors from certain countries.¹²

(iii) Medical examinations used by the Attorney General in age-assessment are inaccurate and unreliable

12. The inaccuracy of the medical examinations' results practiced on alleged minors is a problem. In Spain, the most-widely used examination is the X-ray of the left wrist through the Greulich and Pyle method. The Ombudsman, in a monographic report published in 2012, underscored the great margin of error of such method, especially if practiced to groups of people with different origin from the reference group and held that the result of an X-ray cannot scientifically entail the determination of the age.¹³ The Committee of the Rights of the Child expressed concern over "the use of intrusive age-assessment methods, even in cases where the identification documents appear to be authentic".¹⁴
13. There have even reported cases where the Attorney General has concluded the majority of age of female minors based solely "on the size of their breasts".¹⁵

(iv) The Attorney General is the authority responsible for the proceeding and its age-determination decision cannot be appealed

14. The Committee on the Rights of the Child has shown concern over the fact that "the Attorney General is empowered to undertake age-determination procedures for foreign unaccompanied children".¹⁶
15. The difficulty to appeal and obtain judicial review of the age-determination decisions entails one of the main problems arising out of the competencies awarded to the Attorney General on the matter. The Supreme Court has held that such decisions are not subject to

¹⁰ Ibid; and Article 190.1 del *Royal Decree 557/2011, 20 April, whereby the LOEX Regulation is approved.*

¹¹ Case-law established by *Judgment of the Supreme Court (Civil Section) 453/2014.*

¹² Spanish Ombudsman (n. 6); Fundación Raíces: "Sólo por estar solo: Informe sobre la determinación de la en menores migrantes no acompañados" (2014) < <http://www.fundacionraices.org/wp-content/uploads/2014/05/SOLO-POR-ESTAR-SOLO.pdf> >, pp. 63 and following [in Spanish]; Andalucía Acoge, "Desprotección de la infancia en la frontera Sur" (2019) < <https://acoge.org/wp-content/uploads/2019/07/informe-completo-light-%C3%8DNDICE.pdf> >, pp. 32 and following [in Spanish].

¹³ Spanish Ombudsman (n. 6).

¹⁴ CRC/C/ESP/CO/5-6 (n. 5), para.44.

¹⁵ See declarations by *Fundación Raíces'* lawyer in *Diario Córdoba*, "Córdoba hace de altavoz de la situación de desprotección de los niños inmigrantes" (26 March 2019), < https://www.diariocordoba.com/noticias/cordobalocal/cordoba-hace-altavoz-situacion-desproteccion-ninos-inmigrantes_1290713.html > [in Spanish].

¹⁶ CRC/C/ESP/CO/5-6 (n. 5), para.44.

direct appeal before the courts¹⁷, affecting severely access to justice and the right to an effective remedy of migrant minors.

IV. QUESTION 5: Stakeholder's role in the development and/or implementation of non-custodial alternatives to immigration detention of children

16. It has been shown that the age-determination system for unaccompanied migrant minors in Spain suffers from serious deficiencies which can result in detention of migrant children in CIEs.
17. Gentium would like to stress that an age-determination mechanism in accordance with international children's human rights standards is an essential condition to avoid migrant detention of children.
18. Therefore, Gentium suggests the Special Rapporteur to recommend the Kingdom of Spain to undertake an amendment of the current legal framework applicable to the age-determination process in order to avoid children detention in CIEs, as civil society organisations such as *Fundación Raíces* have suggested in the past.¹⁸ In particular, measures should include the modification of the current legislation and administrative practices so that, following the criteria set by the Committee on the Rights of the Child:
 - (i) The *favor minoris* principle is observed from the very beginning of the age assessment procedure;
 - (ii) no unaccompanied migrant child with identification documents validly issued by the relevant authorities evidencing their underage status is detained in a CIE;
 - (iii) the age determination procedure is reformed in order to guarantee the rights of the child to be informed and be heard;
 - (iv) the age determination procedure is reformed so that the results of X-ray of the left wrist through the Greulich and Pyle method cannot be considered as the most prominent evidence backing a decision of adulthood of an alleged migrant minor;
 - (v) the possibility to appeal against the age-assessment decision is explicitly introduced in the Spanish legal framework; and
 - (vi) finally, the age-assessment procedure is undertaken following a holistic and multidisciplinary approach as specialized international bodies suggest.
19. If these recommendations are followed, no detention of migrant children should occur.
20. On addition, Gentium also suggests the Special Rapporteur recommends the Kingdom of Spain to adopt (i) a child centred protocol for the proactive and early identification of most vulnerable profiles at sea and land borders in order to guarantee the presence of child protection professionals, as well as (ii) specific bilateral agreements with the countries of

¹⁷ Judgment of the Supreme Court 31/2018, 31 January 2018.

¹⁸ *Fundación Raíces* (n. 7).



origin of unaccompanied children in order to have fast track procedures for the recognition of documentation carried by children or for their identification by consular authorities.

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