



# GUATEMALA

Submission to the Committee on the Rights of the Child

90<sup>th</sup> Pre-Sessional Working Group, September 2021

NGO Report

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**TABLE OF CONTENTS**

**Introduction** .....1

**Summary of Findings and Recommendations**.....2

- 1. General Principles: Equality and Non-Discrimination (Article 2) .....2
- 2. Special Protection Measures: Child Marriage (Articles 19, 24, 28, 34, and General Comment No. 4) .....2
- 3. Special Protection Measures: Children in Situations of Emergency (Detention based on Immigration Status) (Articles 9, 24, 28, 37).....3

**Detail of Constitutional and Legislative Findings**.....4

- 1. General Principles: Equality and Non-Discrimination (Article 2) .....4
- 2. Special Protection Measures: Child Marriage (Articles 19, 24, 28, 34, and General Comment No. 4) .....5
- 3. Special Protection Measures: Children in Situations of Emergency (Detention based on Immigration Status) (Articles 9, 24, 28, 37).....6



## INTRODUCTION

The WORLD Policy Analysis Center, based at the University of California, Los Angeles, captures quantitative policy data on more than 2,000 indicators that matter to equality, health, and well-being. We strive to improve the quantity and quality of globally comparative data available to policymakers, citizens, national governments, intergovernmental organizations, civil society, and researchers for all 193 UN member states. We submit the following brief in advance of the 90<sup>th</sup> Pre-Sessional Working Group of the Committee on the Rights of the Child.

This brief will focus on the following three areas:

- General Principles: **Equality and Non-Discrimination**
- Special Protection Measures: **Child Marriage**
- Special Protection Measures: **Children in Situations of Emergency (Detention based on Immigration Status)**

We have collected and analyzed information on rights, laws, and policies in these areas for all 193 UN member states using a variety of sources, including primary national legal sources (e.g. original legislation and constitutions), national reports on policies and laws to the United Nations and official global and regional bodies, and secondary sources where clarification or corroboration of primary data is needed. Using a rigorous double-coding process, we create original databases which distill thousands of pages of text to highlight the essential features of each right, law, or policy. These original databases are the reference for the following brief. When drafting each brief, we perform a series of additional verifications to ensure the data provided reflects the current constitutional and legal landscape of a country.

In this report we first provide a summary of our constitutional and legislative findings, as well as suggested questions for the Committee to ask Guatemala, and topics we hope the Committee will address in its concluding observations. This summary is followed by detailed constitutional and legislative excerpts documenting our findings. We hope the Committee will recommend that Guatemala address any gaps in consultation and collaboration with relevant stakeholders, including civil society organizations. We also recognize that while having strong laws and policies in place are necessary first steps, implementation is also of paramount importance. In areas where we have commended Guatemala for having provisions in place, we hope the Committee will recommend that Guatemala work with stakeholders to overcome any obstacles in implementing these provisions.



## SUMMARY OF FINDINGS AND RECOMMENDATIONS

### 1. General Principles: Equality and Non-Discrimination (Article 2)

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Based on our review of full-text national constitutions, Article 50 of the constitution of Guatemala prohibits all forms of discrimination against children. Article 4 further guarantees equality regardless of sex. However, some groups guaranteed equality in the Convention are not explicitly covered by these constitutional provisions, including children facing discrimination based on race, color, language, religion, political opinion, national, ethnic, or social origin, property status, disability status or birth status.

**We hope the Committee will:**

- Recommend in its concluding observations that **Guatemala amend the constitution** to add explicit guarantees of equality and non-discrimination regardless of race, color, language, religion, political opinion, national, ethnic, or social origin, property status, disability status or birth status, consistent with CRC commitments.

### 2. Special Protection Measures: Child Marriage (Articles 19, 24, 28, 34, and General Comment No. 4)

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Based on our review, a 2017 amendment to the Guatemalan Civil Code prohibits all marriages of children under the age of 18 with no exceptions. We commend Guatemala for taking this critical step in protecting girls and boys from early marriage. Prior to the implementation of this 2017 amendment, data from the Demographic and Health Survey (DHS) indicated that child marriage was a significant concern in Guatemala; in 2015, 29.5% of women aged 20-24 years reported having been married or in union before the age of 18.

**We hope the Committee will:**

- In its list of issues, ask Guatemala: Can Guatemala provide statistics on current rates of child marriage to demonstrate the effectiveness of the implementation of the 2017 Civil Code amendments?
  - If Guatemala cannot provide updated child marriage statistics, recommend in its concluding observations that Guatemala take concrete steps towards collecting this critical data, and pursue additional methods of monitoring the implementation of this law.



### 3. Special Protection Measures: Children in Situations of Emergency (Detention based on Immigration Status) (Articles 9, 24, 28, 37)

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Based on our review of legislation, regulations, and decrees, we find that the Guatemala has taken important steps towards ensuring the safety and protection of unaccompanied migrant children who are separated from their families. For these children, the law prioritizes alternatives to detention and ensures family reunification. We commend Guatemala for making such distinct efforts to protect unaccompanied and separated migrant children.

**However, the law permits the detention of unaccompanied and separated migrant children in exceptional cases for the shortest time possible. The law also permits the detention of adult migrants or migrant families with children upon entry into the country, and does not outline or prioritize alternatives to detention for these groups.**

#### **We hope the Committee will:**

- In its list of issues, ask Guatemala: Can Guatemala outline the specific circumstances under which the detention of accompanied and unaccompanied minor migrants continues to exist?
- In its list of issues, ask Guatemala: Can Guatemala provide details on the rates of detention among accompanied and unaccompanied minor migrants?
- In its list of issues, ask Guatemala: Can Guatemala provide details on the specific steps it is taking to protect migrant families with children from detention, including whether alternatives to detention are in place and if so, if they are prioritized?
  - If Guatemala cannot provide details on the specific steps it is taking to protect migrant families with children from detention, recommend in its concluding observations that Guatemala prioritize alternatives to detention for families.



## DETAIL OF CONSTITUTIONAL AND LEGISLATIVE FINDINGS

While the following review is systematic and rigorous, we recognize that there may be laws or policies governing these areas that we have not captured, including new legislation or policies that have not yet been published globally.

### 1. General Principles: Equality and Non-Discrimination (Article 2)

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Article 2.1 of the Convention states that:

*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

Constitutions state the values of a country, outlining the rights of people living within the country and profoundly influencing norms and practices. In nearly all countries, constitutions take precedence over other sources of law—making them critical tools for delineating and implementing equal rights. New constitutions and new rights guaranteed in constitutions can be used to overturn discriminatory laws, as well as to legislate non-discrimination guarantees. Moreover, constitutions can offer protection against policy and legal changes during periods of social and political shifts that may seek to undermine equal rights. For these reasons and others, as the foundational document setting out the rights of all human beings in a country, a constitution and the rights contained therein are essential to realizing equal rights.

We reviewed full text constitutions for all 193 UN member states available from official government sources to determine whether the constitution took any approach to equality across the grounds listed in article 2.1 of the CRC by prohibiting discrimination based on each specific status, guaranteeing equal rights, guaranteeing equality before the law, or guaranteeing overall equality or equal opportunities.

#### *GUATEMALA'S CONSTITUTIONAL PROVISIONS: NEED TO STRENGTHEN CONSTITUTIONAL GUARANTEES OF EQUALITY AND NON-DISCRIMINATION*

Based on our review of full-text national constitutions, Article 50 of the constitution of Guatemala prohibits all forms of discrimination against children.

*Artículo 50.- Igualdad de los hijos.*

*Todos los hijos son iguales ante la ley y tienen los mismos derechos. Toda discriminación es punible.*

The constitution further guarantees equality regardless of sex in Article 4.



*Artículo 4º.- Libertad e igualdad. En Guatemala todos los seres humanos son libres e iguales en dignidad y derechos. El hombre y la mujer, cualquiera que sea su estado civil, tienen iguales oportunidades y responsabilidades. Ninguna persona puede ser sometida a servidumbre ni a otra condición que menoscabe su dignidad. Los seres humanos deben guardar conducta fraternal entre sí.*

There are, however, **some groups guaranteed equality in the Convention that are not explicitly covered by these constitutional provisions**, including children facing discrimination based on race, color, language, religion, political opinion, national, ethnic, or social origin, property status, disability status or birth status.

## 2. Special Protection Measures: Child Marriage (Articles 19, 24, 28, 34, and General Comment No. 4)

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General Comment No. 4 (2003) states that:

*The Committee strongly recommends that States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.*

Child marriage has life-long health, educational, and economic consequences. For girls in particular, child brides are more likely to drop out of school, be victims of domestic abuse, and experience pregnancy and childbirth complications due to early childbearing, all of which affect core rights of the Convention, specifically the right to protection from violence (Article 19), the right to health (Article 24), the right to education (Article 28), and the right to protection from sexual exploitation and abuse (Article 34).

We systematically reviewed national civil codes and child-related legislation for all 193 UN member states to determine whether national legislation established a minimum age of marriage for both girls and boys generally, with parental consent, and under religious and customary law. We reviewed all legislation available through the Lexadin World Law Guide, Foreign Law Guide, International Labour Organization's NATLEX database, Pacific Islands Legal Information Institute, Asian Legal Information Institute, JaFBASE, and official country websites.

### *GUATEMALA'S LEGISLATIVE PROVISIONS: MONITORING IMPLEMENTATION OF MARRIAGEABLE AGE*

As of 2017, the Guatemalan Civil Code prohibits all marriages of children under the age of 18 with no exceptions. We commend Guatemala for taking this critical step towards protecting girls and boys from early marriage. The Civil Code now states:



*Artículo .83- Prohibición de contraer matrimonio. No podrán contraer matrimonio ni autorizarse de manera alguna, el matrimonio de menores de dieciocho (18) años de edad.*

**However, previous data from the Demographic and Health Survey (DHS) indicated that child marriage was a significant concern in Guatemala;** in 2015, 29.5% of women aged 20-24 years reported having been married or in-union before the age of 18.

### 3. Special Protection Measures: Children in Situations of Emergency (Detention based on Immigration Status) (Articles 9, 24, 28, 37)

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The detention of children based on immigration status violates the principle of the best interests of the child and infringes on core values outlined in the Convention, including the right to liberty (Article 37) and the right to not be separated from their family (Article 9).

Moreover, as noted in the Committee’s 2002 Report on the Rights of All Children in the Context of International Migration, migrant and asylum-seeking children may experience heightened vulnerabilities. For example, migrant children held in detention may face barriers to accessing fundamental services such as education (Article 28) and health services (Article 24).

Articles 9.1 and 37.b. specifically state:

*9.1 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. [...]*

*37 States Parties shall ensure that:*

*(b) 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;*

In General Comment No. 6, the Committee has specifically ruled that detention of minor migrants is not in accordance with the Convention.

*61. In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.*

For 150 UN member states, we systematically reviewed national-level immigration laws, regulations, ministerial decrees, and executive decrees related to asylum-seekers, refugees, and migrants. We





identified and located relevant laws through the United Nations High Commissioner for Refugees (UNHCR) RefWorld catalog, the International Labour Organization's (ILO) NATLEX legislation database, and the Global Detention Project. For each country, we reviewed all identified legislation to determine whether countries prohibited or allowed the detention of accompanied and unaccompanied minors, and under what circumstances.

#### *GUATEMALA'S LEGISLATIVE PROVISIONS: MONITOR LAWS PROTECTING MINOR MIGRANTS*

Based on our review of legislation, regulations, and decrees, we find that the Migration Code of Guatemala takes important steps towards ensuring the safety of unaccompanied migrant children who are separated from their families, including **prioritizing alternatives to detention for this population (Article 173) and ensuring family reunification (Article 170.3)**. We commend Guatemala for making such distinct efforts to protect unaccompanied migrant children. **However, the law permits the detention of unaccompanied and separated migrant children in exceptional cases for the shortest time possible (Article 173.c).**

#### ***Código de Migración, 2016***

*Artículo 169. Niñez migrante no acompañada y separada de sus familias. Se considera niñez migrante no acompañada y separada de sus familias a los niños, niñas y adolescentes que están separados de su mamá, papá o ambos, o de otros parientes y no están al cuidado de una persona mayor de edad que, por ley o costumbre asuma esa responsabilidad.*

*Artículo 170. Principios. El procedimiento para la atención y protección de los niños, niñas y adolescentes no acompañados se rige por los principios de:*

*[...]*

*3. Unidad familiar y derecho a la reunificación familiar. Las autoridades deben procurar por todos los medios que el niño, niña o adolescente migrante no acompañado o separado de su familia se reúna con su mamá o papá, ambos padres, o tutor o quien ejerce la guarda y custodia, ya sea en el país receptor, el de origen o procedencia, salvo cuando el interés superior requiera prolongar la separación. Por este principio se favorece la no separación de hermanos o parientes.*

*Artículo 173.*

*[...]*

*No deberá privarse de libertad, por regla general, a las niñas, niños y adolescentes no acompañados o separados de su familia.*



*La Secretaría de Bienestar Social de la Presidencia de la República durante el procedimiento migratorio implementará los programas de protección del niño, niña o adolescentes, priorizando:*

*a) Acogimiento con un pariente que se encuentre en el país, sin considerar su situación migratoria, que garantice su cuidado;*

*b) El acogimiento familiar temporal; y,*

*c) Otras formas de alojamiento de carácter abierto, orientadas a la protección de la niñez y la familia, estas medidas podrá adoptarlas conforme al procedimiento administrativo que se desarrollará en el reglamento respectivo. En forma excepcional, y por el menor tiempo posible, podrá ser alojado bajo la modalidad de abrigo residencial.*

The Migration Code also generally **permits the detention of migrants, including migrant families with children upon entry into Guatemala, and does not outline or prioritize alternatives to detention for these groups.** In the case of migrant families, family unity and reunification are prioritized.

*Artículo 71. Situaciones no previstas. Cuando en las instalaciones del Instituto Guatemalteco de Migración o sus sedes, se presente una persona solicitando et ingreso oficial a Guatemala sin estar previsto en las regulaciones del presente Código o en las demás disposiciones legales que se emitan, deberá ser enviada a las instituciones previamente autorizadas por el Instituto que presten abrigo temporal y el funcionario o empleado deberá observar los siguientes criterios.*

*[...]*

*d) Si es una familia, se estará a lo dispuesto del presente Código y será el Subdirector de Atención y Protección de Derechos Fundamentales de los Migrantes quien debe brindar la atención y seguimiento al caso para la reunificación familiar, protección y asistencia de niños, niñas o adolescentes de conformidad con su interés superior, o conforme los principios que rigen la actuación según sea el caso.*