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Child rights Bridging Paper – the 5 year action plan for collaboration from a child rights perspective

# Interaction of international mechanisms of migrants' rights protection:

## A child rights perspective

This paper is part of a series of bridging papers looking at different points of the 5-year Action Plan for Collaboration from a child rights perspective. The aim is to examine the specificities affecting children in the context of migration and inform more coherent approaches from a child rights standpoint. It has been prepared to provide input for the Civil Society Days of the Global Forum on Migration and Development (Istanbul, Turkey, 12 to 13 October 2015).



Photo from VR video « A day in the life of Amani » of Terre des Hommes Netherlands

## Recommendations

- 1 Advocate for States to remove reservations which limit the rights of children in the context of international migration, especially with regards to the CRC, CMW, ICCPR and ICESCR.
- 2 Coordinate civil society's advocacy and follow-up activities around the CRC, CMW and UPR, on children in the context of international migration (e.g. the joint general comment on the rights of children in the context of international migration).
- 3 Call for a greater commitment and resources from UNICEF, specifically on policy change regarding children in the context of international migration.
- 4 Translate the obligations of these treaties into national legislation and policies in a way that maximises the rights of migrant children.
- 5 Collate best practices of initiatives taken by states (i.e. in federal states), municipalities and cities in protecting migrant children's rights.

## Context

Children in the context of migration face a situation of double vulnerability, both as children and as migrants, putting them at risk of grave human rights violations. Whether they are travelling alone or with their families, they are born to migrant parents or left behind, they may be subjected to some of the following violations: discrimination based on theirs or their parents' status; trafficking; sale; worst forms of child labour; non-registration at birth; statelessness; arbitrary detention and deportation; violence, including sexual violence and torture; family separation; limited access to economic and social rights and disregard of their best interests and their right to life, survival and development.

Yet children in the context of migration are entitled to comprehensive protection through the large body of international law. While States have the power to control their borders and develop migration policies, they have the duty to respect these children's rights through a range of treaties under international human rights law, humanitarian law, refugee law, labour law, maritime law as well as regional treaties, regardless of their migratory status. Children should be at an advantage compared to adults, as the UN Convention on the Rights of the Child (CRC) not only provides them with specific rights, but its near universal ratification entitles them to protection in 195 States parties.<sup>[1]</sup>

In many countries, this legal framework has provided a basis to amend laws, develop policies or issue judgements with regards to the rights of migrant children. This has included laws or policies related to nationality and statelessness, access to healthcare and education, determining the best interests of the child in decisions regarding family reunification, providing alternatives to detention and granting more comprehensive protection to unaccompanied children. However, these measures are often fragmented and only cover specific areas of these children's rights. To maximise the impact of this legal framework, States need to address the frequent double deficit in legislation and policies which increase these children's vulnerability: child protection laws and policies do not sufficiently take into account the specific needs and vulnerabilities of migrant children nor do migration laws and policies have a child-perspective, often applying measures which are inappropriate for children.

Compliance with these treaties is monitored, reported on and supported by a range of mechanisms and stakeholders, including treaty bodies (e.g. the UN Committee on the Rights of the Child), independent experts (e.g. Special Procedures Mandate Holders), the Universal Periodic Review, international and regional courts, intergovernmental and non-governmental organisations and National Human Rights Institutions. The mechanisms and bodies, which are mandated to review States' compliance with their human rights obligations, issue a range of recommendations including on the rights of children in the context of international migration.

<sup>[1]</sup> The States which have not ratified the CRC are Somalia and the United States.

## Issues and challenges

### Invisibility of migrant children despite the comprehensive protection of treaties

In international human rights treaties, the rights of migrants (including children) are usually covered under general provision related to all human being or the specific groups relevant to the treaty, as well as the provision on non-discrimination being applied to anyone within « their jurisdiction ». This is the case for the CRC, where migrant children are covered under article 2: « *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.* » In addition to the CRC, the vast majority of human rights, humanitarian, refugee and certain labour treaties have specific provisions on children, which are relevant to migrant children, such as right to nationality, education, birth registration and not being exploited in labour.

While these provisions ensure that the children in the context of international migration have human rights, they require States to interpret them in a way that includes any child within their jurisdiction, including children with irregular migratory status. In certain cases, States have made reservations which limit the rights of migrant children (e.g. right to nationality), therefore explicitly limiting the scope of the treaties. In other cases, States' policies, such as push-back policies, are used to ensure that these children are never under their jurisdiction, thus removing any obligation towards them.

While the Convention on the Rights of All Migrant Workers and Their Families (CMW) has specific provisions relevant to children in the context of international migration, its low ratification rate<sup>[2]</sup> limits its impact on migrant children or children of migrant workers, including amongst the many destination countries which have not ratified it.

### Interpreting the CRC in the context of international migration

While it is incumbent upon the State to interpret the CRC with regards to migrant children into national laws or policies, States are often reluctant to grant them full protection, as it can be an unpopular political position. Even States with comprehensive child protection systems rarely provide the same protection to all children within their jurisdiction, especially those with an irregular status. Migrant children, therefore, often end up facing a double deficit in legislation and policies, which considerably limits the respect of their rights. For instance, States may use family unit as an excuse to justify the detention of migrant children with their parents or foresee family reunification taking place in the country of origin, regardless of the impact on the children's other rights. These child protection and migration policies may be contradictory, making it difficult for professionals working with migrant children to find the right balance.

To assist States in interpreting their obligations under the CRC, the UN Committee on the Rights of the Child has explicitly referred to children in the context of international migration in different ways. Following its periodic reviews of States, the Committee makes country-specific recommendations in its Concluding Observations on measures they should take to respect these children's rights. In 2005, the Committee drafted an interpretation of the CRC, called a General Comment, on the « treatment of unaccompanied and separated children outside their country of origin. » They also organised a Day of General Discussion in 2012 on « the rights of all children in the context of international migration, » issuing recommendations to States and other stakeholders. More recently, to further guide States parties' compliance with international human rights norms relevant to these children, the Committee on the Rights of the Child and the Committee on Migrant Workers began a process to draft a joint General Comment on the « rights of children in the context of international migration. » Finally, the third Optional Protocol to the CRC on a Communications Procedure, which entered into force in 2014,<sup>[3]</sup> could also be used to address alleged violations of migrant children's rights. Not only would this provide remedies for specific cases, but it would also develop relevant jurisprudence. These interpretations and recommendations have the potential to reduce the deficit in legislation and policies with regards to these children, if they are used.

<sup>[2]</sup> CMW has been ratified by 48 States. <sup>[3]</sup> Children have to exhaust domestic remedies first and the treaty has only been ratified by 17 States.

## **Underuse of the recommendations of human rights mechanisms to advance the rights of children in the context of international migration**

In addition to all the recommendations issued by the treaty bodies, issues relevant to children in the context of international migration have also been raised by mechanisms related to the UN Human Rights Council, including through resolutions, visits and reports by the Special Procedures (e.g. the Rapporteur on the Human Rights of Migrants) or under the Universal Periodic Review (UPR) process. UPR is a UN review mechanism of the overall human rights situation (including the rights of children in the context of international migration) of all UN Member States, by all UN Member States. Many recommendations relevant to children in the context of international migration have not only been made through UPR, but a large proportion of them have been accepted by the States under review. These have covered issues related to access to services; allocation of resources; birth registration; programme for children who have been returned to their country of origin or deported to a third country; better conditions, alternative measures and an end to detention; facilitation or preservation of family unity; protection from trafficking and child labour (including for domestic workers); as well as legislative frameworks or policies which are in line with the CRC. The States which have accepted these recommendations have the duty to implement them before their next review 4.5 years later.

The regional bodies have also issued a range of interpretations and recommendations of the treaties they cover with regards to the rights of migrant children. For instance, the African Committee of Experts on the Rights and Welfare of the Child has made recommendations to States parties in its concluding observations; the Inter-American Court of Human Rights has released an advisory opinion on the rights of migrant children and the European Court of Human Rights has issued judgements on migrant children (e.g. arbitrary detention, right to education and family reunification). There is, therefore, no shortage of recommendations and interpretations by all these and other mechanisms with regards to States' obligations towards children in the context of international migration. The problem lies in their implementation.

## **Insufficient coordination and use of these mechanisms by civil society**

While civil society organisations have advocated and influenced recommendations on children in the context of international migration, this has often not been done in a coordinated manner across the different thematic groups. This may be due to limited resources, but also due to a lack of awareness or capacity to cover other mechanisms. For instance, child rights NGOs often focus on the CRC, women's rights on CEDAW and migrants rights on CMW. However, if they are advocating for the rights of migrant girls, they should be targeting all three to maximise their impact as well as any other relevant treaties which the State might be a party to. Meanwhile, organisations with a narrow thematic focus (e.g. detention of children) might successfully advocate for their issue with a range of mechanisms, but do it in isolation. Thus, this sometimes fragmented approach does not always cover the issues relevant to children in the context of international migration in a comprehensive way.

Coordination amongst civil society, but also with intergovernmental organisations is key, not only to raising these issues in different forums, but also in advocating or supporting States in fulfilling their obligations towards these children. The Inter-Agency Working Group on Children on the Move is a good example of this. It brings together agencies working for the protection and support of children involved in or affected by migratory situations and includes Save the Children, UNICEF, ILO, IOM, UNHCR, Terre des Hommes, Plan International, the African Movement of Working Children and Youths, Environmental Development Action in the Third World and the Oak Foundation. The Group focuses its joint efforts in research and evidence building and regional and global advocacy.

Having influenced the recommendations of these mechanisms and bodies, advocacy needs to be scaled up and indicators or benchmarks developed to increase the implementation of these recommendations at national level, as this is what will have a real impact on the children concerned.

## The perspective of children in the context of international migration is often absent

**There is considerable focus on institutionalising the participation of civil society in these mechanisms, but rarely is it extended to children.**

Children affected by migration have seldom had their views heard in discussions relevant to their issues. There are, however, some exceptions which have brought an understanding as to why certain children migrated and the situations in which they live either in transit or destination countries. For instance, at the Day of General Discussion in 2012, a film, presentations and written submissions by children presented their views on the issue of discussion. Migrant children have also given their perspectives to the Committee on the Rights of the Child when it has reviewed certain States to influence recommendations to the destination States in which they live.

By listening to their views, it is not only respecting their right to be heard, but it is also essential to understand their decisions, needs and aspirations. Only by understanding what has driven them to end up in different contexts of migration, can policies and programmes be developed to address their needs. Children are often portrayed as victims and vulnerable in the context of international migration, for instance being trafficked, victims of violence, fleeing a conflict, being detained and so on. While these issues all illustrate some of the gravest violations, it is also important to consider children who have decided to migrate to find better opportunities for the future. All these children, should be given the opportunity to give their views, should they want to.

## Conventions and international instruments relevant to migrant children

### International Human rights instruments

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984)
- Convention on the Rights of the Child and its three Optional Protocols (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
- United Nations Convention against Transnational Organized Crime, and in particular its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and its Protocol against the Smuggling of Migrants by Land, Sea and Air (2000) and two of its three Optional Protocols.

### ILO Conventions

- Migration for Employment Convention (Revised), 1949 (No.97)
- Minimum Age Convention, 1973 (No. 138)
- Migrant Workers Convention, 1975 (No.143)
- Workers with Family Responsibilities Convention, 1981 (No.156)
- Worst Forms of Child Labor Convention, 1999 (No. 182)
- Convention on Decent Work for Domestic Workers, 2011 (No. 189)

### Regional human rights instruments

- European Convention on Human Rights and its Optional Protocols (1950)
- American Convention on Human Rights and its Optional Protocols (1969)
- African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)

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