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

Migrants stranded in distress :

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).

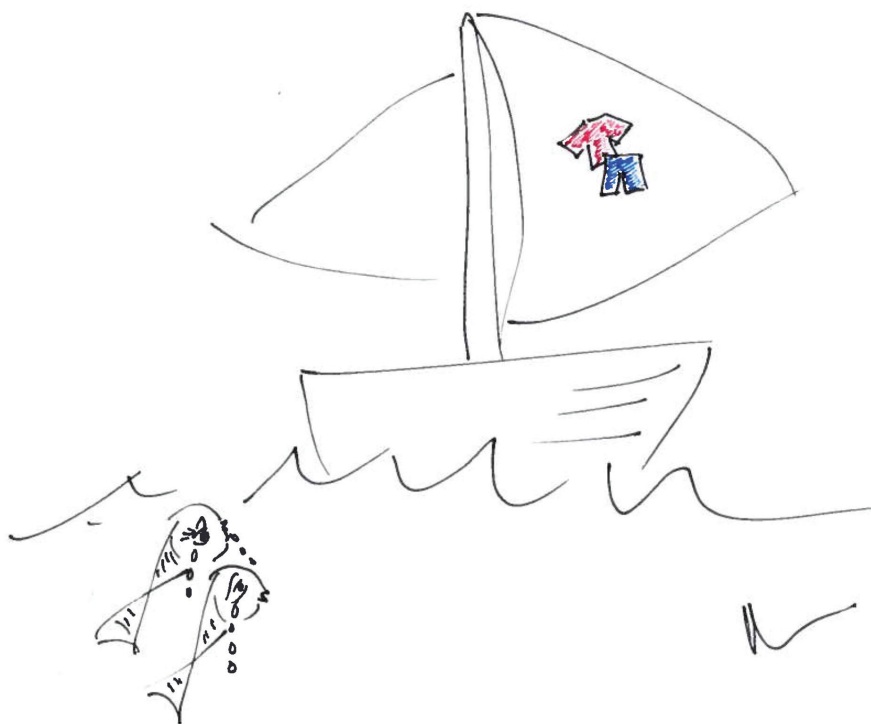


Illustration of Elena Sartorius

Recommendations

- 1 Apply the Convention on the Rights of the Child (CRC) together with humanitarian and national child protection policies and laws to maximise the respect of stranded children's rights.
- 2 Create or scale up the implementation of protection frameworks for migrant children in distress, in transit and at borders, which are consistent with the CRC.
- 3 End immigration detention of children and adopt alternatives that fulfil their best interests and allow them to remain with their family members in non-custodial community-based contexts.
- 4 Take children's views and best interests into account when processing their cases.
- 5 Collect and disseminate accurate disaggregated data on stranded children to develop policies and programmes that respond to their specific vulnerabilities and needs.
- 6 Create mechanisms to address the assistance and protection needs of migrants in all crises, including transit, and to close the egregious gaps in the protection of children.

Context

Migrants stranded in distress are making international headlines as their numbers and fatalities keep on rising. Yet there is no agreed definition of a 'stranded migrant' nor an adequate response to their plight. They can come from any country and be stranded at any point of the migratory movement. They may not be able to move due to a humanitarian situation (e.g. violence, civil unrest, war or natural disaster) or a state-driven situation (e.g. immigration policies, detention or discrimination). While any migrant can be stranded, including regular and documented ones, most of them have an irregular status and/or are undocumented, including many asylum-seekers and victims of trafficking or smuggling. Children are more vulnerable to being stranded in distress, be they accompanied or unaccompanied. This leads to grave violations of their rights, including increasingly the right to life and survival.

The unprecedented scale of the migration crises which have unfolded in 2015 have also been marked by a much higher proportion of children amongst the stranded migrants. Existing statistics, despite providing a fragmented and incomplete picture of the situation, are showing a significant increase in the number of children stranded in transit, at borders or in detention. The lack of accurate and disaggregated data on migrant children, including stranded children, reflects the overall absence of a child rights approach in migration policies.

At times of humanitarian crises, children's specific vulnerabilities and needs become less visible. The same measures are applied to them as to adults, including ones of deterrence, such as inadequate rescue efforts, mass deportation or punitive and arbitrary detention. Yet, in addition to issues faced by adults, children – especially unaccompanied or separated ones – are more likely to be abused, exploited, sold, be victims of violence or have limited or no access to the protection and services they should be entitled to according to the many treaties under international humanitarian, refugee, human rights and maritime law.

Key challenges and issues

Use of definitions that minimise States' obligations towards children

Migrant children should be at an advantage compared to adults, as they benefit from the additional protection of the Convention on the Rights of the Child, which enjoys near universal ratification. Under the CRC, the 195 States parties should treat each child under their jurisdiction without discrimination of any kind, including migrant children. Children stranded in distress are amongst the most vulnerable. In practice, however, these children are not being defined, and consequently treated, in a way that guarantees the maximum respect of their rights. They are, in fact, at a disadvantage due to gaps in migration and child protection laws and policies, where they are not adequately covered by either, affording them considerably less protection than they are entitled to and increasing the risk of further violations of their rights. This gap in protection is exacerbated for stranded migrant children.

As illustrated by the situation unfolding at European borders, States are increasingly reluctant even to apply the refugee or humanitarian conventions to children who are fleeing conflicts, pandemics, violence and other contexts in which their rights are violated. Amongst the children coming from Africa, the Middle East, Central Asia and Central America, many are fleeing conflicts (e.g. Syria, Iraq and Somalia), ongoing violence (e.g. Afghanistan, Honduras and Nigeria), discrimination based on ethnicity or religion (e.g. Myanmar), political repression (e.g. Eritrea) or poverty (e.g. Bangladesh). Regardless of whether they are recognised as refugees, asylum-seekers or migrants, these stranded children must be considered as persons in need of protection.

With the exception of certain States (e.g. Germany), many of them choose to recognise the narrowest definition of the 1951 Convention relating to the Status of Refugees, which focuses on « a well-founded fear of being persecuted. » Victims of general untargeted violence, conflicts and other disasters are not considered to be persecuted. The use of narrow definitions is a way of escaping responsibility and can be politically popular in destination countries. While the principle of non-refoulement can be applied to stranded children to avoid being sent back to their countries if their lives are at risk, they can end up in legal limbo and be denied legal protective status.

Meanwhile, the Convention on the Rights of Migrant Workers and Members of their Families, which has only been ratified by 48 States cannot be applied in many destination countries.^[1] Immigration remains politically unpopular in many States and national migration laws fail to offer adequate protection, even when the migrant is a child and in distress.

Regardless of how they are defined, at times of humanitarian crises, restrictive migration policies should not be scaled up. Instead, they should be replaced by measures used for humanitarian crises and the right to life and survival and the best interests of the child should be primary considerations in any decision regarding these children stranded in distress.

Measures that disregard children's right to life and survival

At any point during the migratory process, a child's right to life and survival may be at stake, including due to violence of criminal gangs, push-back or interception operations, excessive use of force of border authorities, refusal of vessels to rescue them and extreme conditions of travel. Yet the right to life is the cornerstone right of international human rights, humanitarian and refugee law. In the States parties^[2] to the CRC, every child has the inherent right to life and to the maximum extent possible to survival and development, irrespective of the child's status. In the case of migrants stranded at sea, the maritime treaties, namely the International Convention

^[1] This includes many destination countries in Europe, as only Albania and Bosnia Herzegovina have ratified the treaty in the region. ^[2] Although this is not the case in the USA and Somalia, as they are not States parties.

for the Safety of Life at Sea (SOLAS) and the United Nations Convention on the Law of the Sea (UNCLOS) should be applied to provide assistance swiftly to persons in distress. A protocol based on a needs-first principle to rescue at sea and reception centres to protect vulnerable migrants or refugees, such as children should be established to address their specific needs.

Despite States' legal obligations and knowledge of the crisis situations, migrant children are increasingly finding themselves stranded in distress. In the South-East Asian migrant boat crisis, children faced serious overcrowding, contaminated water, violent clashes for limited supplies of food and water, as well as death from disease. While in the Mediterranean crisis, the deterrent migration policies and limited support threaten their right to life, survival and development. Meanwhile, the tens of thousands of children entering the USA, including around 50'000 unaccompanied children in one year, often find themselves stranded in transit countries or in detention upon arrival.

Migrants stranded in distress, including children, often have no access to adequate nutrition, clean water, healthcare (including psychosocial support) and accommodation. Not only are States failing to provide access to services and protect these children's rights, but in many cases, State policies expose them to further violations of their rights. These include increased risks of physical and sexual violence, arbitrary detention and/or separation from their families. The negative impact of the absence of a child-rights perspective in migration laws and policies is also heightened in situations of deportation. Decisions to repatriate to the country of origin or a third country can lead to a real risk of irreparable harm to a child, including the risk of trafficking, exploitation, recruitment and participation in hostilities or economic destitution.

Undocumented children are more likely to be stranded in distress

The lack of official record of the existence of an estimated 51 million children born each year seriously limits the enjoyment of their rights in countries of origin, transit and destination. For the increasing number of migrant children in distress, documentation is essential to help process their cases faster and in a way that respects their rights.

Unregistered children do not have a legal identity and protection of their rights, including a nationality, access to services and other safeguards. As a result, they will have fewer opportunities, be more likely to be marginalised in their country of origin and if they decide to migrate, they would be more exposed to risks. Without birth registration and identity documents, any international migration will be irregular, increasing the risk of ending up stranded. For instance, they are more likely to be trafficked, smuggled or exploited. They also risk being stateless and in a legal vacuum, as no State has officially recognised them as citizens. Children born during their mother's migration are also at risk of being stateless.

Undocumented children, especially separated or unaccompanied adolescents, are more likely to be criminalised for illegal immigration. They may be detained, deported or subjected to inappropriate age determination technics with the aim of sending them back with no consideration to reunite them with their families. Some transit countries are also registering these children as adults in order to avoid any responsibility they may have towards them as children. In emergency situations, these children are less likely to be covered by existing child protection systems, despite their need for additional protection measures.

Children's views and best interests are rarely taken into account

Children have the right to have their best interests assessed and taken into account as a primary consideration in all actions or decisions concerning them. This fundamental right of the CRC, which should be used to interpret all other rights, is largely violated by States when it comes to migrant children, especially those stranded. Even when children apply for asylum, and despite the work done by UNHCR and NGOs on the Best Interests Determination (BID) process, this right is far from guaranteed. Even in countries where legislation allows for case-by case assessment based on the best interests of the child, an insufficient number of professionals in charge know what it means and how to do it.

The registration process of foreign unaccompanied children should enable these children to provide information on what happened to them and assess their vulnerabilities and protection needs. However, when interviewed, children often lack the necessary information on their entitlements, services available, asylum process and family tracing. This information should be appropriate to their maturity and level of understanding and take into account any trauma they may have endured. The exchange should occur in a language that is well understood and spoken by the child. When being heard, they should be entitled to advice by a guardian/legal representative to ensure that the best solution will be found for them. However, this advice is often absent, increasing the likelihood of repatriation, even if these children would in principle be entitled to seek asylum or receive other assistance. Thus for many of these unaccompanied children, especially adolescents, States apply general policies which prioritise border and migration control rather than child rights.

Children travelling with adults are less likely to have their views heard in judicial or administrative settings (e.g. immigration or asylum proceedings), as they are considered part of the same family. They remain invisible, despite the fact that the decisions regarding adults are often inappropriate for children. All decisions, such as at border control, return decisions or the delivery of social services, should be made after consultation with the children in question. However, for these many stranded migrant children, the States' priorities are rarely to find durable and long term solutions for them, but to find ways to get them off their territory.

The arbitrary use of detention for children who have committed no crime

Detention of children on the basis of their migratory status is never in their best interests and should be avoided. The CRC allows for the detention of children in the narrow context of juvenile justice, only as a last resort and for the shortest period of time. However, with the rise in the criminalisation of irregular entry or stay, children in irregular situations are being systematically detained in some countries. Thus, children who were stranded during the migratory process and should be entitled to care arrangements, may be stranded in detention after crossing an international border.

The absence of a child rights perspective in immigration detention policies leads to children being detained as adults, including in punitive detention. These children are exposed to deplorable living conditions, overcrowding, lack of healthcare (including psychological), physical and sexual violence, inadequate nutrition and in some cases torture. They can be detained with unrelated adults, including in certain cases with convicted criminals.


Unaccompanied or separated children often end up being detained as a general rule, which is a punitive rather than a protection measure. Mandatory or automatic detention should be considered arbitrary and should cease. It should be replaced with alternative forms of accommodation. In cases of migrant children stranded with their families, States often justify their detention by claiming to be doing it to preserve family unity despite the long term negative impact of detention on children. To uphold the principle of family unity, States should provide alternatives to detention for the family, which are not punitive or disciplinary in nature. The wide range of existing alternative measures should replace detention, such as those set out in the Child-Sensitive Community Assessment and Placement (CCAP) model.

Using family reunification and unity as a punitive measure

While family reunification should be dealt with by a State in a « positive, humane and expeditious manner»,^[3] it is for the most part being dealt with in the opposite way, especially during migration and refugee crises.

In addition to using the 'preservation of family unity' to detain children with their families, many destination countries are increasingly interpreting family reunification as taking place in the country of origin. This decision is often taken without considering their best interests

^[3] Article 10(1) of the CRC



and assessing the situation if they were to return to their country of origin, thus disregarding these children's rights. Unaccompanied children are often sent back either to their country of origin or the nearest transit country, including as part of collective expulsions and without assessing the risks or attempting to trace or reunite them with their families. In some cases, they are sent to third countries, which may further reduce the possibility of being reunited with their families.

Family reunification in destination countries has become harder due to tougher new restrictions, including for regular migrants. As a result, children have to go through irregular channels to join their parents, putting them more at risk of travelling unaccompanied, having their rights violated and ending up stranded in distress.

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