

# Transnational Child Protection Establishing and transferring jurisdiction over non-national children

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Health, Education, Equality, Protection  
ADVANCE HUMANITY



# Children on the move ....

- ▶ The latest data collected by the United Nations Department of Economic and Social Affairs (UN/DESA) and UNICEF show that there are nearly 35 million international migrants under the age of 20. They represent around 15 per cent of the total migrant population. If we disaggregate the data by age, we find that of these 35 million young migrants,
  - ▶ - 11 million are between 15-19 years of age;
  - ▶ - 9 million between 10-14;
  - ▶ - 8 million between 5-9; and
  - ▶ - 7 million between 0-4 years old.
- ▶ Girls migrate in almost the same numbers as boys. More than 60 per cent of those 35 million migrant children - 22 million - live in developing countries.

# Children and Migration

- ▶ **Child migrants with their parents**
  - ▶ **Regularly or Irregularly**
- ▶ **Unaccompanied and Separated Children**
  - ▶ **Education and Employment**
  - ▶ **Survival (conflict; poverty, environmental degradation)**
  - ▶ **Family Reunification**
  - ▶ **Victims of Exploitation (including trafficking)**
- ▶ **Children Left Behind in country of origin**
- ▶ **Children born in destination countries and denied nationality (Statelessness)**

# Challenges: Indicators and Data

- Data - especially from developing countries - often does not have sufficient disaggregation to allow for analysis of specific trends affecting children involved in migration flows.
- Data in developed countries often records unsuccessful claims for asylum and international protection of children, but offers little information on what happens to children afterwards.
- Very little data on ability of children to access education, healthcare and social protection in receiving states.
- UNICEF is moving towards indicators that contain a high level of disaggregation and focus on equity

# US - Mexico - Central America

- ▶ Upwards of 70,000 unaccompanied minors recorded arriving in the USA this year so far.
- ▶ Large numbers of Children from Central America (El Salvador, Guatemala, Honduras) also being identified and detained 'en-route' in Mexico. Estimated 50,000 in 2014.
- ▶ Limited capacity of authorities in the northern triangle to absorb large numbers of returned children.
- ▶ Migration motivated by a number of factors:
  - Fleeing violence and social instability
  - Family reunification
  - Economic opportunity

# Expanding the scope of the ‘Best Interests’ Principle to include Migrant Children

- ▶ Introducing CRC Standards into public policies which concern child migrants and their families.
- ▶ Balance between Migration Policy and children’s rights, including the child’s right to participate meaningfully in decisions affecting him/her.
- ▶ Rights of children left behind ?
- ▶ Coherent, long-term approach to increasing numbers of children embarking on independent migration.
- ▶ Re-framing migration in and of itself as neutral and act of agency and choice.
- ▶ ‘Guaranteeing’ safe return that is always in the child’s best interests .

# Protecting Migrant Children: The Convention on the Rights of the Child

- ▶ **Best Interest of the Child (CRC, art. 3)**
- ▶ Every law, measure or decision which impacts directly and indirectly on children affected by migration
- ▶ **Non Discrimination (CRC, art. 2)**
- ▶ Migration and Grounds of discrimination
- ▶ Nationality
- ▶ National Origin (e.g., nationality of parents)
- ▶ Migration Status (e.g., access to social benefits)
- ▶ **Participation of Children (CRC, art. 12)**
- ▶ In designing and implementing policies and individual decisions that may affect them

# Best Interests of migrant children in Practice

- ▶ Individual assessment of the child's situation on a case-by-case basis, guided at all times by child welfare authorities, not immigration authorities.
- ▶ Child-sensitive due process safeguards and child-rights impact assessments should be conducted in a manner appropriate to the age, gender and culture of the child and within a child-friendly environment.
- ▶ Immigration/asylum status interviews with children need to follow special protocols and be conducted by officials with the skills and experience to talk and listen to them.
- ▶ Children should have access to free legal counsel and, if unaccompanied, to a legal guardian. They must always be given the opportunity to be heard and express their views freely in all decisions that affect them or their parents.

# UNICEF - UNHCR Best Interests Determination Guidance

- ▶ *Safe and Sound: What States can do to ensure respect for the Best Interests of Unaccompanied and Separated Children in Europe.* October 2014.
- ▶ Aims to support States in the EU and EFTA in applying the best interests principle as a primary consideration when dealing with unaccompanied and separated children in their territory.
- ▶ No ‘perfect’ set of structures or procedures. It does, however, offer suggestions of elements that States may choose to include so as to meet international legal standards and obligations.
- ▶ Makes use of examples of practices by EU Member States and a few others.
- ▶ The document has been primarily designed for use by policy makers, public and private institutions in the EU and EFTA countries seeking to establish or improve arrangements for identifying unaccompanied and separated children, and according primary consideration to their best interests, including when identifying durable solutions for them.
- ▶ Whilst the document builds on the legal and policy framework in place regionally, the best interests principle in Article 3 of the CRC applies to any State that has ratified the CRC. Therefore *Safe and Sound* may offer inspiration to other countries that are developing or improving their child protection, international protection

## Why UNICEF is looking at issues around Establishing and Transferring jurisdiction

- ▶ Programme vs. Advocacy countries
- ▶ Changing profile of many countries
- ▶ Blurring between traditional divisions of ‘origin’, ‘transit’ and ‘destination’ countries.
- ▶ Increasing numbers of children migrating independently

# Unaccompanied Children

- ▶ In the vast majority of cases, no attempt by receiving states to establish jurisdiction
- ▶ Temporary guardianship assumed by migration or child protection authorities awaiting asylum status determination
- ▶ State-to-State communications a consular matter
- ▶ Quality of guardianship varies greatly from country to country
- ▶ Often results in detention / deprivation or restriction of liberty - which is a violation of the child's rights
- ▶ Upon a denial of asylum / humanitarian leave to remain, generally an automatic assumption of transfer of jurisdiction to the state of origin , followed by removal

# Problems ....

- ▶ CRC Article 2: Non Discrimination. In the case of unaccompanied children, are states really meeting their obligation to provide these children with the protection they would afford to national children deprived of parental care ?
- ▶ Does the lack of a (judicial) process to establish jurisdiction allow states to *de facto* provide a lesser duty of care ?
- ▶ Migration authorities are asked to perform two competing roles; to ensure the best interests of the child at the same time as enforcing migration control
- ▶ Consular communication mandated but insufficient
- ▶ ‘Aging Out’ used as the easiest solution in many cases

# Reality check

- ▶ Establishing jurisdiction for upwards of 20,000 children (EU) a year in a manner identical to that undertaken in Hague 1980 /1996 cases would be a logistical challenge
- ▶ Receiving and verifying information on the child's situation and other evidential factors is, in many cases, simply not possible (examples - Afghanistan, Honduras, Iraq etc.)
- ▶ Even verification of identity and age almost impossible for many of these children; Afghanistan BR rate less than 30%
- ▶ No 'ideal solution' for many of these children; the choices often come down to institutional care in a foreign country whilst 'aging out' or return to sub-standard institutional care in country of origin

# Moving forward ....

- ▶ Mechanism to manage the exchange of information regarding these children in a manner similar to that in Hague 1980/1996 cases needs to be established
- ▶ Needs however to have a public law framework as essentially a matter between two states, as opposed to private parties
- ▶ Needs to balance rights of children concerned with migration policy and states concerns over sovereign integrity
- ▶ Central authorities - potential increase in responsibility (and budget and power?)
- ▶ Ultimate decision on 'best interests' should remain with child protection, as opposed to migration, officials