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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 the second edition of the child rights bridging papers commented at the Civil Society Days of the Global Forum on Migration and Development (Dhaka, Bangladesh, 8 to 10 December 2016) and an output of the Civil Society Days. It examines specificities affecting children on the move and other children affected by migration related to the 2030 Agenda for Sustainable Development.



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The bridging documents can be downloaded on www.terredeshommes.org,
www.destination-unknown.org and www.madenetwork.org/documents
Correspondence: info@terredeshommes.org

 Global Forum on
MIGRATION & DEVELOPMENT

Key SDGs, sections of the NY Declaration and Recommended Principals:¹

Sustainable Development Goals (SDGs)²

- 10.7 Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.
- 6.1 Significantly reduce all forms of violence and related death rates everywhere.
- 16.2 End abuse, exploitation, trafficking and all forms of violence against and torture of children.

NY Declaration for Refugees and Migrants³

- 16. (...) We said also that we would endeavour to reach the furthest behind first. We reaffirm today our commitments that relate to the specific needs of migrants or refugees. (...) The needs of refugees, internally displaced persons and migrants are explicitly recognized.
- 28. We express our profound concern at the large number of people who have lost their lives in transit. (...) We commit to intensifying international cooperation on the strengthening of search and rescue mechanisms. (...) we will strengthen support for rescue efforts over land along dangerous or isolated routes. (...)
- 29. We recognize and will take steps to address the particular vulnerabilities of women and children during the journey from country of origin to country of arrival. (...)
- 32. We will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child.(...)
- 33. (...) We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.
- 36. (...) We note regional initiatives (...). We welcome reinforced technical cooperation, on a regional and bilateral basis, between countries of origin, transit and destination on the prevention of human trafficking and migrant smuggling and the prosecution of traffickers and smugglers.
- 58. (...) Any type of return, whether voluntary or otherwise, must be consistent with our obligations under international human rights law and in compliance with the principle of non-refoulement. It should also respect the rules of international law and must in addition be conducted in keeping with the best interests of children and with due process. (...)
- 59. We reaffirm our commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychosocial services, ensuring that the best interests of the child is a primary consideration in all relevant policies.

Annex II

- 8 (e) The facilitation of safe, orderly, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies; this may include the creation and expansion of safe, regular pathways for migration;

Recommended principles to guide actions concerning children on the move and other children affected by migration⁴

1 These are directly relevant, but they do not preclude other ones (e.g. linked to root causes of migration).

2 http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

3 http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1

4 <http://destination-unknown.org/wp-content/uploads/recommended-principle-EN.pdf> and <http://principlesforcom.jimdo.com/>

Recommendations

- 1** Apply the Convention on the Rights of the Child (CRC) and other relevant treaties, together with humanitarian and national child protection policies and laws to maximise the respect of stranded children's rights.
- 2** Create an implementation plan and legal children, especially those stranded in distress, while the compacts are being developed
- 3** Collect and disseminate accurate disaggregated data on stranded children to develop policies and programmes that respond to their specific vulnerabilities and needs, as well as those who turn 18 while migrating.
- 4** Ensure the burden of proof to determine age and nationality of unregistered or undocumented children is not placed on them.
- 5** Fulfil the NY Declaration's commitment to work to end the practice of child immigration detention and adopt alternatives that fulfil their best interests.
- 6** Take children's views and best interests into account when processing their cases.
- 7** Take measures to provide education to stranded children within a few months of displacement.

Context

The plight of migrants stranded in distress is worsening in 2016. The Mediterranean continues to be the deadliest region of the world for migrants and refugees, with an estimated 75.8% of the global recorded deaths or disappearances. Despite the number of people crossing the Mediterranean nearly halving since last year, due to the agreement between the European Union and Turkey, there has been a 23% increase in the number of people who lost their lives or went missing compared to 2015.⁵ An estimated 31 million international migrants were children in 2015 and nearly 1 in every 200 children worldwide is a refugee.⁶ Amongst them, there are children stranded in distress, who are unable 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.

Despite providing a fragmented and incomplete picture of the situation, existing statistics show a significant increase in the number of children stranded in transit, at borders or in detention. Data collected by UNHCR and IOM's Global Migration Data Analysis Centre do not always use the same definitions and methodologies, which lead to some confusing or overlapping data. Disaggregated data on migrant children, including by age and gender, is essential to assess the situation, as risks and needs may differ accordingly. Data on those who have just turned 18 should also be considered, as their status can change from child to adult during the migratory process, especially when they are stranded.

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, stranded in transit (e.g. Calais jungle), mass deportation or punitive and arbitrary detention. Yet, in addition to issues faced by adults, children 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.

Over the past year, two major frameworks have been adopted with the potential to address the situations of children stranded in distress, namely the SDGs (especially goal 10 and 16) and the NY Declaration. While the UN High-level Summit on Addressing Large Movements of Refugees and Migrants and its declaration (September 2016) did not go far enough in making concrete, effective and immediate commitments, it used strong human rights language when it came to children. In the NY Declaration, member states commit to "protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child." Yet, what is needed are immediate actions in parallel to developing the global compacts, as 2018 is in a long time, especially for children.

5 <http://missingmigrants.iom.int/>, Dangerous journeys – International migration increasingly unsafe in 2016

6 UNICEF, Uprooted, the growing crisis for refugee and migrant children, September 2016

Key challenges and issues

Definitions of 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 (CRC), which enjoys near universal ratification. Its 196 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.

While the Convention on the Rights of Migrant Workers and Members of their Families has only been ratified by 49 States, many of its provisions are applicable to non-State parties. These provisions are found in other UN human rights treaties, such as the two covenants,⁷ which have been widely ratified, including by many destination countries.

The deepening European crises have made the cracks in the system increasingly visible. At times of humanitarian crises, restrictive migration policies 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 children stranded in distress.

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 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 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.

⁷ The International Covenant on Civil and Political Rights (168 States parties) and the International Covenant on Economic, Social and Cultural Rights (164 States parties).

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 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. By being separated from their social network (and at times family members) and deported to countries they do not know, children face real and long lasting integration challenges.

Unregistered and stateless children

The lack of official records 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, be trafficked, smuggled or exploited. They also risk being stateless and in a legal vacuum, as no State has officially recognised them as citizens and there is no proof of their country of origin. Children born during their mother's migration are also at risk of being stateless, especially if the mother is unregistered, unable to transmit nationality due to her country's nationality laws or does not want to register with local authorities due to her migratory status.

Unregistered children, especially separated or unaccompanied adolescents, are more likely to be treated as adults. They may be detained, deported or subjected to inappropriate age determination techniques with the aim of sending them back with no consideration to reunite them with their families. They are also treated with suspicion, as illustrated during the recent dismantlement of the Calais Jungle. 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 are also the only group which can lose certain rights from one day to the next. This is especially problematic for children who are stranded, as they may become adults during that time, yet the change in status does not reflect their vulnerabilities and needs which have not changed overnight.

Children's right to be heard and best interests

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 immigration detention of refugee and migrant children

The Committee on the Rights of the Child has made clear that the detention of children for reasons of migration management is never in their best interests, represents a clear child rights violation and must be 'expeditiously and completely' ended. While the CRC allows for the detention of children in the narrow context of juvenile justice, this may only be as a last resort for the shortest period of time and when such detention is determined to be in the best interests of the child.

In the New York Declaration for Refugees and Migrants, States made a positive commitment to work to end the immigration detention of children and families. However, real steps must be taken to implement this commitment. In the meantime, 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. While there is no comprehensive data about the number of migrant children detained each year, anecdotal evidence shows that they are exposed to a number of serious human rights abuses in places of detention.

The absence of a child rights perspective in immigration detention policies leads to children being detained, 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.

The prohibition of child immigration detention extends to the entire family. Yet, 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. States should provide alternatives to detention for the entire family, which are based fundamentally on an ethos of care and protection, rather than enforcement. There are a wide range of alternative measures available to States, such as those set out in the International Detention Coalition's Community Assessment and Placement (CCAP) model. It represents a global best practice for States looking to implement rights-based alternatives.

Family reunification and unity

While family reunification should be dealt with by a State in a “positive, humane and expeditious manner”,⁸ 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 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.

The right to education in crisis situations

Despite being a right which is essential for a child’s future prospects, education is rarely considered a priority during crises such as the current migration ones. Less than 2% of humanitarian aid is allocated to education, leaving entire generations of children behind. Yet the impact of being outside education, even for as little as a month can have a lasting impact on children.

The Education Cannot Wait (ECW) fund estimates that over 75 million children and youth (aged 3-18) are out of school in 35 crisis-affected countries. This would include the many refugee and migrant children, especially those stranded. In addition to providing opportunities for decent lives and economic opportunities in future, education also reduces the exposure to grave violations of their rights which can occur during the migration process, such as trafficking, child labour as well as early and forced marriage.

Education is not only covered in the SDGs, but also in the NY Declaration, where it states that “We are determined to ensure that all children are receiving education within a few months of arrival, and we will prioritize budgetary provision to facilitate this, including support for host countries as required.” The main challenges ECW identified are: lack of prioritisation, despite being a priority for children; poor coordination between humanitarian and development agencies to provide education; insufficient funding; Inadequate capacity in relation to the needs and a lack of real-time data. Education needs to be part of the humanitarian aid for stranded children to protect them now and provide them with opportunities for the future.

8 Article 10(1) of the CRC

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