

Interaction of international mechanisms of migrants' rights protection:

A child rights perspective

This paper is part of the second edition of the child rights bridging papers for the Civil Society Days of the Global Forum on Migration and Development (Dhaka, Bangladesh, 8 to 10 December 2016). It examines specificities affecting children on the move and other children affected by migration related to the interaction of international mechanisms of migrants' rights protection.



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

Sustainable Development Goals (SDGs)

- 1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable
- 10.7 Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies
- 16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all
- 17.18 By 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts

NY Declaration for Refugees and Migrants

- 23. We recognize and will address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.
- 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. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant authorities. We will comply with our obligations under the Convention on the Rights of the Child. (...)
- 52. We will consider developing non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance. The guiding principles and guidelines will be developed using a State-led process with the involvement of all relevant stakeholders (...).
- 54. We will build on existing bilateral, regional and global cooperation and partnership mechanisms, in accordance with international law, for facilitating migration in line with the 2030 Agenda. We will strengthen cooperation to this end among countries of origin, transit and destination, including through regional consultative processes, international organizations, the International Red Cross and Red Crescent Movement, regional economic organizations and local government authorities, as well as with relevant private sector recruiters and employers, labour unions, civil society and migrant and diaspora groups. We recognize the particular needs of local authorities, who are the first receivers of migrants.

Annex I

- 2. (...) A comprehensive refugee response should involve a multi-stakeholder approach, including national and local authorities, international organizations, international financial institutions, regional organizations, regional coordination and partnership mechanisms, civil society partners, including faith-based organizations and academia, the private sector, media and the refugees themselves.

Annex II

- 14. Regional consultations in support of the negotiations would be desirable, including through existing consultative processes and mechanisms, where appropriate.
- 15. Civil society, the private sector, diaspora communities and migrant organizations would be invited to contribute to the process for the preparation of the global compact.

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

All of these are relevant, as they are based on international law.

¹ This list only covers some of the most relevant ones.

Recommendations

- 1 Advocate for States to ratify treaties or remove reservations which limit the rights of children in the context of international and national migration.
- 2 Use the provisions of the CRC and other treaties to address current violations (e.g. the return and refoulement of children and their detention) as well as to improve access to services and justice.
- 3 Using a child rights-based approach, coordinate civil society's advocacy to feed into relevant initiatives, including the joint general comment, monitoring processes (e.g. CRC, CMW and CEDAW) and non-binding guiding principles.
- 4 Advocate for thematic, regional and national consultations on children on the move and other children affected by migration in the development of the two Global Compacts.
- 5 Take the views of children into account in developing the two Global Compacts.
- 6 Collate best practices of initiatives taken by states (i.e. in federal states), municipalities and cities in protecting migrant children's rights and use them to develop the Global Compacts and other initiatives.

Context²

Children have become highly visible in the large movements of refugees and migrants. This highlights two particularly concerning trends: the unprecedented number of children on the move and the range and extent of human rights violations they are subjected to. Globally, an estimated 50 million children have migrated across borders (around 20 million children) or been forcibly displaced (around 28 million children).³ This conservative estimate does not account for the millions of children who have been left behind.⁴

Children in the context of migration face a situation of double vulnerability, both as children and as migrants. The violations they may be subjected to include: discrimination based on theirs or their parents' status or ethnic origin; 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. However, violations of their rights do not begin with the migratory process; they are often the root causes of migration.

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 which they have ratified under international human rights law, humanitarian law, refugee law, labour law, maritime law as well as regional treaties. 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 196 States parties.⁵ These treaties are not non-binding commitments, they are obligations for all States which have ratified or acceded them.

2 Reference is made to "children in the context of migration" as equivalent to "children on the move and other children affected by migration".

3 UNICEF, *Uprooted: the growing crisis for refugees and migrant children*, September 2016

4 The term "children left behind" is used to refer to its usage in policy terms and quotation marks are used to highlight that other terminology is preferred by civil society actors alike such as "children remaining in countries of origin".

5 The United States has not ratified the CRC.

2016 has seen a number of new frameworks, initiatives or events focusing on large movements of refugees, migrants and other displaced persons. In many of them, the human rights of migrants and refugees have been reasserted. The New York Declaration for Refugees and Migrants states that “We reaffirm also the Universal Declaration of Human Rights, and recall the core international human rights treaties. We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders.” It adds that “though their treatments is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms.”⁶ Human rights are referred to throughout the 2030 Agenda for Sustainable Development, including with regards to migrants and refugees when it states “We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons.” While the ‘Recommended principles to guide actions concerning children on the move and other children affected by migration’ are all derived from human rights, humanitarian and refugee law. The rights, including of children in the context of migration, have also been raised in the following events: the Supporting Syria and the Region conference, the World Humanitarian Summit; events around the Human Rights Council; the United Nations General Assembly summit on addressing large movements of refugees and migrants; the UNHCR Global Dialogue on Protection Challenges on Children on the Move and the Global Forum on Migration and Development.

Yet there is a dichotomy between all these pledges, commitments and obligations to protect, respect and fulfil these children’s rights and the reality in which they are living. While international law has provided a basis to amend laws, develop policies or issue judgements with regards to the rights of children in the context of migration, the gaps have become increasingly apparent as States try to address large movements of refugees and migrants. The laws or policies, such as those related to nationality and statelessness, refugee status, 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 are often fragmented, only covering specific areas children’s rights and not consistently implemented. They are symptomatic of 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 are migration laws and policies child-sensitive, often applying measures which are inappropriate for children.

The human rights of children in the context of migration not only need to be monitored, reported on and supported by the range of human rights mechanisms, bodies and stakeholders;⁷ they need to be part of the new compacts on refugees and migrants, the implementation of the relevant SDGs and the measures which States and other stakeholders are taking at national level to fulfil their rights.

6 UN General Assembly, New York Declaration for Refugees and Migrants, paragraphs 5 and 6.

7 These include: 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.

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, healthcare, birth registration and not being exploited, trafficked or the victims of violence. Meanwhile, 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. However, its low ratification rate⁸ limits its impact on migrant children or children of migrant workers, including amongst the many destination countries which have not ratified it. Yet, most of the rights enshrined in CMW are also part of a number of other human rights treaties, including ones which have been ratified by a high proportion of countries of destination.

While the provisions of these treaties ensure that 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 these treaties. While in other cases, States which are trying to limit the flow of irregular migration resort to policies, such as push-back policies, to claim that children are not in their jurisdiction as they have not reached their territory. However, the act of pushing them back is an act which brings these children under their jurisdiction.

Many of these human rights obligations towards children in the context of migration are part of the NY Declaration, including ones concerning best interests of the child being a primary consideration (e.g. in paragraphs 32, 33, 58 and 59); access to basic health, education and psychosocial services (e.g. paragraphs 32, 59, 81 and 82); prevent criminalisation (paragraph 56), child immigration detention (paragraph 33) and birth registration and documentation (annex 1 5(f)). These and other rights enshrined in international law should be at the heart of the Global Compact for Refugees and the Global Compact for Safe, Orderly and Regular Migration.

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. 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.

8 CMW has been ratified by 48 States.

To assist States and others in interpreting State obligations under the CRC and CMW, the UN Committee on the Rights of the Child together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families are drafting a joint General Comment on the “rights of children in the context of international migration.” The General Comment will build on previous initiatives of these two Committees, other human rights mechanisms and bodies and civil society initiatives with regards to children and migration. Its objectives include to elaborate guidelines for developing migration, childhood and related policies to realise the rights of children in the context of migration; facilitate the Committees’ role in monitoring their treaties; providing interpretations of their provisions for use at national level and emphasising a rights-based approach. As they draft the General Comment, the Committees’ will continue making country-specific recommendations each time they review a State’s compliance with its treaty obligations, including with regards to the root causes of migration. They will also feed into the development of the Global Compacts to strengthen the rights-based approach.

Stepping up the implementation of obligations, commitments and recommendations

The problem is not the lack of international or regional standards, obligations, goals, targets, commitments, resolutions and recommendations relevant to children in the context of migration: it is the lack of implementation. The UN human rights bodies and mechanisms, for instance, do not have the mandate to provide human or financial resources to implement their recommendations, nor can they issue sanctions to States. They therefore rely on States, international organisations, CSOs and others to ensure the implementation of these human rights standards. While the latter often mention human rights in general terms in their visions, missions, goals or principles, their activities are linked to their thematic mandates rather than the implementation of human rights standards per say.

The implementation of the SDGs starting in 2016 and the development of the Global Compacts, provide opportunities to ensure that the rights of children in the context of migration are incorporated and increasingly implemented. In the case of the SDGs, the periodic reviews of treaty bodies, such as the Committee on the Rights of the Child, can feed into the monitoring of the SDGs, while the implementation of the SDGs can help advance the realisation of certain rights enshrined in the CRC. This is particularly valuable given the considerable overlap between some of the SDGs and the CRC’s thematic clusters,⁹ such as those on health, education, violence and special protection measures.

Despite some of the shortcomings of the NY Declaration, the human rights language included in the text should be used to advocate for a strong human rights perspective. The human rights mechanisms and bodies should feed into the drafting of these Global Compacts. For instance, the Human Rights Council should be used to discuss the link between human rights and large movements of migrants and refugees. To ensure that the specific issues affecting children are clearly addressed, taking into account their age and gender, the two Committees drafting the General Comment should feed their views into these negotiations. As for the SDGs, the Global Compacts could be key to implement relevant provisions of the CRC and CMW, while the Committees could be part of the monitoring mechanisms.

Ensuring coordination of civil society in these different initiatives

The myriad of initiatives, frameworks and events relevant to children in the context of migration can leave civil society organisations (CSOs) feeling overstretched, resulting in them having to choose a limited number of processes to follow. The SDGs, the NY Declaration as well as the future Compacts are high profile and strategic priorities. However, they will be reinforced if they are linked to binding treaties which States have ratified. Some of the CSOs are already reporting on the implementation of these treaties, but often only focusing on issues specific to their mandates.

To maximise the impact of the CSOs, a coordinated approach is essential, not only to raising a broad range of issues in different forums, but also in advocating or supporting States in fulfilling their obligations towards children in the context of migration.

⁹ The CRC has been organised into 9 clusters regrouping the articles of the treaty.

The perspective of children in the context of 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 lives. In the NY Declaration, the participation of women and sometimes youth is mentioned, but never children. Given the millions of children who are affected by migration and their specific vulnerabilities, their views should be heard and taken into account in the development of the Global Compacts and the implementation of the SDGs. If they are old enough to migrate, to take decisions throughout the migratory process, to put up with all the risks, challenges and violations of their rights, they are capable of discussing what they need to fulfil their rights. Their ability to take decisions and to be politically engaged should not be underestimated. For instance, undocumented youth in the USA lobbied for the passage of the DREAM Act.

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 and fulfil their rights.

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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