

Mainstreaming Children's Rights in the Field of Asylum and Migration

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I. Introduction

This presentation focuses on at an EU policy area – asylum and migration - and explores what mainstreaming children's rights should mean in this field.

Children are frequently at their most vulnerable in situations of migration and asylum. Whether travelling within families or separated from their parents or primary caregivers, they may be economic migrants, they may be seeking asylum or they may have been trafficked into the EU for exploitation. The journeys of migrant children are often prompted by tremendously difficult situations in their country of origin. They often take place under dangerous conditions. In some situations, they end in a hostile reception (and possibly detention) in countries of destination.

And many of you will be familiar with the very stark example of the 5 year old Congolese girl, Tabitha. Tabitha's mother, who was seeking asylum in Canada, had asked her brother, a Dutch resident, to fetch Tabitha from the Congo and take care of her until she could rejoin her mother in Canada. However, arriving in Belgium with her uncle, Tabitha was separated from him and held in a Belgian detention centre for adults for two months, alone amongst families and single men and women, then put on a plane back to Congo with an air stewardess designated to look after her, before landing in the country with no member of her family waiting for her.

The hazards to which 5 year old Tabitha was exposed demonstrate clearly why it is so important to get the mainstreaming exercise right in this field. In this brief overview, we will look at two essential questions:

1. How should the core child rights under the UN CRC inform EU action in the field?
2. What has been achieved to date and what needs to happen next?

A number of themes will emerge:

- A central problem is that Member States and the EU to date have usually designed their immigration systems first and then tried to build in child rights issues, whereas international law arguably requires them to do it the other way around (in particular,

when dealing with separated children) and to deal with child rights first and then to consider the immigration issues.

- Through the way in which it designs European regional law, thereby shaping national implementing rules, the EU must play a key role in changing this.
- Pursuing the best interests of migrant children - which is required by international law - may necessitate diverse forms of EU action, for example, incorporating child specific provisions into general asylum laws or potentially adopting distinct EU measures which address certain unique issues confronting children (such as the situation of separated migrant children generally).
- The EU must also take the lead in fostering solidarity between Member States in meeting their obligations under international law. This may, for example, take the form of putting in place regional funding to support certain Member States, which are bearing the biggest burden. It may also take the form of better modes of regional cooperation to support durable solutions for the child, for example, broader opportunities for a separated child in one Member State to be reunited with a family member in another Member State.

II. How should the core child rights under the UN CRC inform EU action?

The key concern of mainstreaming, or integrating child's rights into EU policy, is to ensure that, when taking any action, the EU appropriately takes into consideration the situation of children from a rights based perspective.

The core rights of the child, reflected in the UN Convention on the Rights of the Child ("CRC"), should be the drivers in this consideration. Thus, within the scope of its competence to act in a particular field, the EU must ensure that:

1. the principle of *non discrimination* is observed;
2. the *best interests* of the child are taken as a primary consideration in actions in their regard;
3. children are afforded the *right to be heard*; and that
4. children have the *right to life and development*.

In addition, the CRC also provides that a child separated from his or her family shall be entitled to special protection and assistance provided by the State.

In the field of asylum and migration generally, each of these rights has a very significant impact on the policy and law towards children from third countries.

In particular, the principle of non discrimination means that all children must benefit from their rights under the CRC without discrimination of any kind. The Committee on the Rights of the Child notes that this means that the rights must be available to all children who come within the State's jurisdiction, regardless of their nationality, immigration status or statelessness. This creates a differentiating factor between the rights of adult and child migrant and asylum seekers, which must be reflected in policy and law.

Some countries (including the UK), perhaps recognising the extent and significance of these obligations in these fields, have sought to exclude the application of the CRC in the context of the application of immigration law through general reservations to the CRC. However, the Committee on the Rights of the Child firmly expresses the interpretation that reservations made by States should not in any way limit the rights of unaccompanied and separated children and that such reservations be reviewed with the objective of their withdrawal.¹

All of this means that, when dealing with the situation of migrant children, Member States cannot simply say “but these are not our children”. Indeed, Member States must have regard to the *best interests* of the migrant child in *all actions* in their regard.²

Clearly this is a considerable responsibility and demands resources and due attention to the individual circumstances of each child. This duty undoubtedly can feel like an unwelcome burden, in particular, in those EU countries with external borders which may receive the greatest volume of migrant children. However, this duty stems from the recognition that the crucial moments in the development of a child must be safeguarded, whatever his or her status. When seen from this perspective, the benefits associated with the duty are clear - that the child now and in the future will positively contribute to the society in which he or she finds himself.

Moreover, as a practical matter, the EU and Member States should bear in mind the best interests of the migrant child do not inevitably mean that the child would remain in the country of destination, it may also mean that a child should be repatriated to its country of origin or go to a third country, for example, for the purposes of family reunification. Appropriate health care and education before repatriation may contribute greatly to the opportunities of a child in its home country and indeed indirectly contribute to the EU’s development agenda. Equally, migrant children who remain in a Member State will best be able to participate in that society if he or she has been properly received from the outset and properly integrated into the community.

III. What the EU has Achieved to Date and What Needs to Happen Next?

It is critical that the EU take the lead in ensuring consensus and action at regional and national level to ensure this duty to migrant children is fulfilled.

To date, EU measures in this regard have largely been fragmented and patchy. Although they sometimes contain child specific provisions or indeed distinct chapters on the treatment of

¹ General Comment No 6 addressing the treatment of unaccompanied and separated children outside their country of origin.

² In certain situations, the child’s best interests can be balanced against other considerations but only exceptionally and not simply by having regard to migration concerns. It is worth noting that the CRC also notes in General Comment No 6 that “exceptionally, a return to the home country may be arranged, after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override the best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments, such as those relating to general migration control, cannot override best interests considerations.”

unaccompanied minors, they frequently lay down only minimum standards that are too general to provide meaningful protection of the rights of the children. Equally, Member States have the discretion to opt in or out of certain standards. Moreover, the starting point in all of these laws is the underlying migration or asylum policy, rather than the need to attend to the rights of children and in particular to find durable solutions for separated children.

For example, there are no standard obligations established in EU law to ensure proper access to the asylum system for children, inter alia, through the obligation to exempt children from special border or expedited procedures, or the obligation to provide children with adequate information, legal representation if necessary or the creation of concrete child-friendly procedures. Similarly, there is no clear treatment of whether and how the views of the child should be heard and taken into account. This is a particularly sensitive issue, given the issues which can arise: (a) in recognising child specific forms of persecutions and (b) in ensuring that children can communicate on what has happened to them or the risks that they might face on return. Family reunification possibilities typically are defined narrowly and have proved difficult to apply in practice given the evidentiary difficulties which often arise.³

The Human Rights Watch Report on the situation of separated children in emergency reception centres in the Canary Islands⁴ details practical examples of this. Staff members in the residential care centres often do not have a basic understanding of asylum entitlements. Many children are never interviewed about the circumstances that led them to Spain. Children who do seek asylum are sometimes at a disadvantage in securing a residence permit when compared with unaccompanied migrant children generally.

So what does the future hold?

The EU's Green Paper on the future of the Common European Asylum System expressly recognises the deficiencies in current EU law as to the treatment of children. Save the Children's Response to the Green Paper has detailed what changes might be needed under the asylum laws to secure child rights. But we have also raised the strategic issue as to how the design of the future European Asylum System should take into account the broader issues of how to address the situation of all separated children more broadly.

³ Other examples of deficiencies in EU action are as follows. In the context of trafficking, Council Directive 2004/81 defining the conditions for granting residence permits of limited duration to third country nationals who cooperate in the fight against trafficking and smuggling is not automatically applicable to children but may be applied to children at the discretion of Member States. In the context of migration, whilst unaccompanied minors are specifically addressed in the proposed Directive on returning illegally staying third-country nationals, their rights are raised in the context of deportation as illegal migrants, as opposed to in the context of a broader range of possible durable solutions, including remaining in the country of origin, transfer to a third State or repatriation.

⁴ Human Rights Watch "*Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands*".

For example, we have proposed that the EU should consider whether or not a distinct measure for separated children would be appropriate. The potential need for such a law addressing all separated children flows from a number of factors.

First, regardless of whether separated children are asylum seekers/beneficiaries of subsidiary protection, victims of trafficking or economic migrants, their general needs for, and rights relating to, assistance are broadly similar, by virtue of the fact that they are separated children.

Second, many of these needs arise before the appropriate protection route or durable solution options are known.

Third, if the best interests of separated children are to be pursued across all actions in their regard, it is important to take a holistic approach to their situation, from access to the territory to achieving durable solutions in their regard.

It is also important to consider whether regional EU funding to support Member States in their actions for separated children should be put in place as well as modes of regional cooperation which will better allow a durable solution for separated children to be found.

Engaging in this analysis is one example of how to consider fully child rights issues at the outset to ensure that laws are shaped properly.

III. Conclusion

In conclusion, mainstreaming children's rights in the field of migration and asylum is not just a question of remembering to deal with children in asylum and migration laws.

- It requires the EU to start from the perspective of child rights and to see what these rights mean for the application of migration and asylum laws to children.
- It requires the EU to show leadership, in promoting a vision of the opportunities associated with protecting the development of children.
- It requires the EU to be thorough and creative in how it designs European laws.
- It requires the EU to consider further modes of regional cooperation so that Member States can shoulder their duties together.

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