

Human Rights of Migrants : Migration and the Human Rights of the Child

Information with regard to the following issues raised by the OHCHR for the preparation of the study entitled “Human Rights of Migrants : Migration and the Human Rights of the Child” :

Issue No. 1

Challenges in the implementation of the international framework for the protection of the rights of the child in the context of migration, including in relation to:

- a) The situation of separated and unaccompanied migrant children;
- b) Access to social services (ensuring, inter alia, protection of the right to health, housing, education, water and access to sanitation), including for migrant children in an irregular situation;
- c) Legislative framework and practice in the context of detention and repatriation, including mechanisms to ensure protection from refoulement and to ensure family unity;
- d) Criminalization of irregular migration;
- e) Access to the right to identity, including birth registration;
- f) Protection of children left behind in countries of origin.

Children all over the world have been part of the migration process; both across and within countries, and have been affected by it in a variety of ways. As the focus of the OHCHR study is on international migration, children left behind by parents who migrate to another country for employment are affected by migration in countries of origin, both negatively and positively. Parental absence creates “displacement, disruptions and changes in care giving arrangements.” There is always an emotional aspect that goes along with parents leaving their children, especially for long periods of time. The fact that in few countries, including India, there still exists an extended family network to take care of children left behind is

certainly a relief along with the advent and widespread use of different kinds of technological mechanisms like cell phones, emails, videocams, etc. In spite of all this, it cannot negate the other fact that these children long for the love and affection of their biological parents. This is primarily because most of these children only see migration as a form of abandonment of their parents; while young adolescents may either be receptive or resentful. In cases, where only women migrate, it seems that families go through more adjustments as women's roles often have more implications for the family than changes in men's role. In a number of cases, children left behind may perhaps benefit from having migrant parents. Innocenti Social Monitor 2004¹ reported that remittances sent home by parents can increase consumption, finance schooling, buy health care and fund better housing. Whether children benefit depends on their access to those extra resources, which may depend partly on sex, age and the context of care left behind. The involvement of substitute care or the lack of care causes difficulties for some children's emotional well-being and psychological development. But, those children who accept the migration of their parents as an opportunity to have a better life, by and large, develop a materialistic attitude as they only see the "money equivalent" of migration, which in the long run may be detrimental to their overall growth and personality development.

Children, who migrate with their parents, either through regular or irregular channels, face different kinds of challenges. Some of these being marginalization and discrimination in the country of destination, barriers to accessing social services, problems relating to rights of citizenship and identity, economic insecurity of parents, and social and cultural dislocation may affect migrant children. This, in a way, makes them more vulnerable to abuse and exploitation. Several of them could also be affected at the pre-departure stage in countries of origin and in countries of transit and destination at the passage and arrival stages. Children may migrate independently also, in search of better opportunities, for survival (to escape persecution or war, family abuse, dire poverty) or for education or employment or to join family members in the destination country who have already migrated (whether legally or illegally). Many a times, children seek migration opportunities to move across borders all by themselves. These children who migrate on account of their own volition are in many ways similar to adult migrants in seeking new social and economic opportunities. But, very often, they are not recognized as migrants and are recognized by

¹ UNICEF Innocenti Research Centre, Florence.

terms like domestic workers, street children or children in difficult circumstances. Many of these children send remittances to their families, combine work with schooling or training and manage to save. These children are significantly affected by the absence of protection and support from their families, and by the challenges of their new situations after migration.

Other than this, there are children who are forced to travel in the context of exploitation, including trafficking. These children are particularly vulnerable to violence and abuse, and may fall victim to smuggling networks. Some children are return migrants or have been repatriated.

Socio-economic and gender inequalities render some child migrants even more vulnerable than others. Being young and naïve, the child migrants may not completely comprehend the risks involved in migration, thus leaving them unprepared to face the challenges they may confront at their destination, such as local hostility or coercion into criminal activities. Immigration authorities too may not distinguish between children and their parents or other adult migrants in their treatment of those who violate immigration regulations. The detention of children violates their rights and exposes them to undue harm. Children who are unaccompanied or separated by their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration process. Evidence suggests that unaccompanied children, especially the most vulnerable categories such as victims of sale of children or trafficking in persons, are often treated like adult irregular migrants. The lack of distinction between adult and child migrants thus poses to be a major challenge in many countries as well as in India irrespective of the fact that the Government of India ratified the Convention on the Rights of the Child (CRC) in 1992.

Despite their inherent vulnerability, there is no accurate statistical information on the number of children involved in the international migration process. As reported by the Special Rapporteur on the Human Rights of Migrants², age is not a common variable of disaggregated statistical data on international migration, which remains as the most difficult component of population change to measure. There is no data as to how many children migrate alone in search of better opportunities, for education and or employment, but the number is undoubtedly significant and

² A/HRC/11/7, 14 May 2009

probably growing. Another major obstacle is lack of information on types of violation inflicted on children, the places where they occur, and their characteristics. One reason for this is that in many situations, child migrants do not know what rights they are entitled to, and still less how to claim them.

The study proposed to be undertaken by the OHCHR should invariably focus on these aspects and accordingly make suitable suggestions and recommendations as well as suggest further areas of research.

International Human Rights Law

The basic rights pertaining to migrants, including child migrants, derive from two clusters of human rights law, namely, the International Bill of Rights which sets out general human rights protection for all, and specific conventions which address the rights of particular groups. Though all the principal human rights which are relevant to child migrants are codified in the CRC, which consolidates previous international legal commitments, the proposed OHCHR study should also throw light on the more generic human rights instruments as child migrants' right should be understood and defended within the context of general and universal human rights obligations as well as by reference to more specific and limited legal undertakings.

a) The International Bill of Rights

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) set out a broad range of basic human rights which apply to all, including the child migrants, irrespective of their nationality, legal status or age. By virtue of these provisions, child migrants, whatever their immigration status, have an overarching right to the basic human rights. The most fundamental principle is the non-discrimination principle, which prohibits all distinctions between people which are arbitrary, disproportionate or unjustifiable. More specific rights include 'life, liberty and security', freedom from torture, cruel or degrading treatment or punishment, full access to the court system, equality before the law, protection from 'arbitrary arrest, detention or exile', full procedural protection to them in case the child commits a crime or is associated with any kind of criminal process, payment of a fair wage for work performed, police protection from physical or sexual abuse,

health care, shelter and other forms of social assistance essential for living a life of dignity. Even where the detention of child migrants is lawful and envisaged as a measure of last resort and for the shortest period of time, it must conform to a range of procedural protections. Where child migrants are denied access to guardianship or to free legal representation, the effectiveness of their right to challenge can be called into question.

The right to equality before the law combined with the right to fair working conditions and to work that is not hazardous, does not interfere with the child's education and is not harmful to the child's health or development (CRC : Article 32) should enable child migrants to claim redress for abusive employment situations. Similarly, the right to liberty and security and to the enjoyment of just working conditions imposes a duty on States to protect migrant children from working conditions that are inhuman or degrading, and from third party threats to their safety, including from smugglers and employers. Other social and economic rights relevant to child migrants, including housing, health care and education, are also protected by human rights law. The ICESCR recognizes the 'right of everyone to an adequate standard of living including.....housing, and to the continuous improvement of living conditions', a generic right which in the case of children is strengthened by more explicit CRC obligations on States to 'assist parents and others responsible for the child to implement the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development and to provide where necessary material assistance and support programmes, particularly with regard to nutrition, clothing and housing' (CRC : Article 27).

The right to health care and the right to education have been recognized as fundamental for children by the ICESCR. These obligations are reinforced in identical terms by the CRC.

b) Conventions Addressing Specific Interest Groups

In addition to the protection derived from the Bill of Rights, child migrants enjoy the protection of several other instruments. They include the CRC, Convention Against Torture (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CPRMW). Many of the

protections afforded restate or reinforce rights set out in the two covenants, namely, the CRC and the CPRMW, amplifying thereby particular aspects of rights protection for the relevant constituency.

i) The Convention on the Rights of the Child

The CRC is “the most complete statement of child rights ever made”. It covers almost every aspect of a child’s life.³ It is indeed an innovative document in overall human rights theory and practice. It treats children as complete individuals and aims to create a balance between the rights of children and those of the parents or adults responsible for their survival, development and protection. This is achieved by according children the right to participate in decisions concerning them and their future. The rights defined in the convention are interdependent and all-encompassing. The Committee on the Rights on the Child is the treaty body established to oversee the functioning of the convention. The CRC establishes without ambiguity the imperative obligation on States Parties to consider children’s human rights in general, and their best interests in particular, more vigorously than they have. The CRC further enlarges the scope of children’s right by emphasizing the importance of child agency and participation in addition to the traditional concern of child protection and best interest. In other words, the CRC establishes a framework for thinking about children as rights bearing subjects and agents, as well as objects of adult protective attention. The Committee on the Rights of the Child has issued a General Comment No. 6, which specifically and holistically addresses the obligations of States Parties towards unaccompanied and separated children outside their country of origin.⁴ By drawing attention to the particularly vulnerable position of this population, the General Comment sets out the “multifaceted challenges faced by States and other actors in ensuring that such children are able to access and enjoy their rights”, “irrespective of the nationality, immigration status or statelessness”.

³ The CRC defines a child as ‘every human being below the age of 18 years’

⁴ CRC/GC/2005/6

The two Optional Protocols to the CRC -- on the Sale of Children, Child Prostitution and Child Pornography; and on the Involvement of Children in Armed Conflict are also an effective point of reference for all children affected by migration, regardless of their migration status.

ii) The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

This Convention calls for equal treatment and same working conditions for migrants in the host countries as well as non-discrimination of migrants and their families. It also ensures that the right of migrants to remain connected to their country of origin is guaranteed. It thus constitutes the standard which a States Party should apply to protect both regular and undocumented migrants, such as, protection against arbitrary arrest, rights to due process, privacy and equal treatment towards employment with regard to pay and conditions of work. But it has no 'specific provision' for children. One reason for this perhaps could be that an age-neutral definition of migrant worker seems to have been adopted which goes on to establish a comprehensive principle of equality regarding the group as a whole. The only explicit mention of child migrants' rights covers the situation where criminal charges are levelled against juveniles [Articles 17 (4) & 18 (4)]. In other words, in the light of international standards, the convention requires State Parties to separate juveniles from adult offenders so as to treat them according to their age and promote rehabilitation where ever possible. Unlike the CRC, which focuses on child labour and child work with the goal of preventing abuse, exploitation and the curtailment of other rights like right to education and right to health, this convention perhaps covers the rights of all child migrant workers at par with adults. It also lays emphasis on the right to emergency health care but not education as spelled out in other instruments. As on 20 May 2010, the convention had 42 States Parties and 31 signatories. It is ironical to note that no western migrant-receiving countries have ratified the convention, even though majority of the migrant workers live in Europe and North America. Other

important receiving countries, such as India, Japan, Australia and the Gulf States, have not ratified the convention either.

The OHCHR study should therefore review the said convention so that the inherent gaps are examined and amended from the point of view of strengthening its implementation.

Issue No. II

Examples of best practice in the implementation of the international framework for the protection of the rights of the child in the context of migration, with particular regard to:

- a) National legislation, policies and practice, including mechanisms to assess and address challenges in the implementation of the international framework for the protection of the rights of the child in the context of migration;
- b) Joint efforts and strategies available at the bi-lateral, regional and international levels to assess and address challenges in the implementation of the international framework for the protection of the rights of the child in the context of migration;
- c) The work of National Human Rights Institutions and other relevant stakeholders.

The Government of India, having acceded to the ICCPR and ICESCR in April 1979, and thereafter having ratified the CRC in the year 1992, CEDAW in the year 1993 and the two Optional Protocols to the CRC, viz. the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict in the year 2005, makes use of its essential Articles for providing relief and protection to child migrants.

The Government of India in the year 2002 also endorsed the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Besides, it has signed the Protocol to Prevent,

Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention Against Transnational Organized Crime, 2000. The definition of trafficking given in the aforementioned Trafficking Protocol was adopted for the purposes of conducting an Action Research on Trafficking in Women and Children in India in the year 2002 by NHRC-India in collaboration with UNIFEM and the Institute of Social Sciences, New Delhi. The study was completed in the year 2005.

The Action Research corroborated the fact that trafficking uses the process of migration. This usage occurs at the structural level as well at the process level of the two phenomena. At the structural level, the migration phenomenon involves a shift in physical space from a place of origin to a place of destination and its multiple associative aspects provide the basis and the context for trafficking. It is this population movement, moving for different durations (permanent, semi-permanent and temporary) that provides the backdrop for trafficking.

And that a large number of children are trafficked not only for sex 'trade' but also for other forms of non-sex based exploitation that includes servitude of various kinds, viz., domestic and industrial labour, begging, trading in human organs, entertainment purposes such as circus and sports like camel racing, drug peddling, fake marriages, illegal adoptions, etc.