

Refugee and Migrant CRISIS in Europe

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ANALYSIS AND RECOMMENDATIONS

ON ISSUES RELATED TO RETURN OF CHILDREN AND BORDER CONTROL

The number of refugees and migrants arriving in Europe continues to remain high. Many of them are children. Between January and November 2015, out of 1.201.970 applications for asylum among European Union Member States, 433.203 of them were submitted by children¹. Unprecedented efforts have been undertaken to respond to the needs of the large number of children arriving and protect their rights. However the challenges remain high.

The drivers behind the current forced migration to Europe are complex, especially when children are involved. Many of the children arriving in Europe flee war and conflict back home. Others escape extreme poverty, devastating consequences of climate change, discrimination and violence back home and seek to access the most basic rights, including health and education. Against this background, States should ensure that these children effectively access their right to claim international protection.

As stated by the Committee on the Rights of the Child, State should make sure that there is an age and gender sensitive interpretation of the refugee' definition, as well as an age and gender –sensitive asylum procedure².

One dimension of States' response to the current refugee and migrant crisis has been a focus on more effective return policies and on a set of practices addressed at irregular migrants and people whose asylum application has been rejected. States consider return policies as an inherent part of their efforts to address irregular migration. These policies and practices are also considered necessary to alleviate pressure on resources and enable prioritisation of people in need of international protection. It is States'

prerogative to regulate the entry and residence of non-nationals on their territory and control their borders. This power is however not absolute, but regulated by rules of international law.

When children are concerned, the State on whose territory they find themselves, or which territory they attempt to reach, is obligated by Article 2 of the Convention on the Rights of the Child, to extend to these children all of the rights guaranteed by the convention, without discrimination.

This document follows a number of recent developments in States' response to refugees and migrants in Europe.

First, to respond to the needs of the large number of children continuing to arrive on their territory, many States are accelerating decisions on 'older' pending asylum cases and proceeding with removal of those whose asylum claim has been rejected and/or have found to be on the territory without legal basis. The list of so-called 'safe country nationalities' has also been extended, allowing for accelerated procedures of asylum cases, considered unfounded prima facie, for nationals of those countries

Secondly, the felt need to regain border control has led to specific situations of border closure and other practices around borders aimed at controlling the movement of populations concerned, children included. In all cases, there are serious concerns about child rights and respect for principles of international law, including respect for the obligation of non-refoulement. This analysis covers all these practices and provides UNICEF recommendations.

RETURN OF THE CHILD

In its General Comment no.6 on Treatment of unaccompanied and separated children outside their country of origin, the Committee on the Rights of the Child clearly stated that no return should take place if it violates the principle of non-refoulement. It also argued that based on the Convention of the Rights of the Child, regardless of the migration status of the child, return should not occur if it would result in violations of the fundamental human rights of the child³.

Asylum seekers and refugee children

Non-refoulement

As enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, no refugee or asylum seeking child should be expelled or returned ('refouler') in any manner whatsoever to territories where his/her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion. The principle of non-refoulement protects also against "real and substantiated" risk of torture or inhuman or degrading treatment or punishment. The Committee on the Rights of the Child extends the non-refoulement principle to protection of the child against harm, by referring among others to substantiated risk against life, survival and development, as well as deprivation of liberty.

Return to a transit country

The principle of non-refoulement protects the refugee and asylum seeking child also against return to a transit country, when in this country there are risks to expose the child to serious human rights violations, including subsequent return to the country of origin. Even within the European Union, the European Court of Justice has ruled against transfer of an asylum seeker to Member States which do not give sufficient assurance of appropriate accommodation and treatment of asylum seekers⁴.

Recommendations:

UNICEF calls upon States not to return asylum seeking and refugee children to any country unless there are sufficient guarantees that the child:

1. Will not face real risks of being subsequently removed to the country of origin.
2. Will not face any real risks of ending up in detention and/or being subjected to torture or inhuman and degrading treatment.
3. Will not face any real risks of being trafficked or exploited.
4. Will have access to a fair and child sensitive asylum procedure.
5. Will be provided with adequate accommodation, humanitarian assistance, protection, and have access to basic rights and services such as education and health.

Undocumented migrant children and failed asylum claims

Children whose asylum claim has been rejected or who are qualified as undocumented migrants are not protected by the principle of non-refoulement. Nevertheless, as stated by the Committee on the Rights of the Child, the best interests of the child principle has to be followed when deciding upon their future, including eventually on return.

Moreover, in its Guidelines on the Protection of Child Victims of Trafficking, UNICEF calls upon States to develop and adopt effective procedures for the rapid identification of child victims of trafficking⁵. Regardless of their nationality, child victims of trafficking are entitled to protection and assistance and should be provided with a durable solution in line with their best interests.

Outside protection for child victims of trafficking, States apply different policies in deciding whether they should return or not a child to the country of origin. When the child is with his/her parents, the possibilities they have to regularise their status are very limited and increasingly States tend to favour the return of these families to the country of origin. In many such cases, the decision regarding the return of the parents automatically applies to the child and there is little consideration of whether or not such a return will be in the best interests of the child(ren) concerned, and the impact return will have on his/her rights and wellbeing.

When it comes to unaccompanied and separated children, some States (e. g. Italy) do not return them as a matter of policy. The children are issued a temporary permit until they become 18. Others decide on the return upon a number of guarantees. Minimum guarantees are recognised by the EU Return Directive, according to which, prior to the return of an unaccompanied and separated child, Member States shall make sure that he or she will be returned to a member of his or her family, a nominated guardian, or adequate reception facilities in the State of return.

In its General Comment No. 6, the Committee on the Rights of the Child lists the following elements to be considered among others when deciding on the best interests of an unaccompanied and separated child outside the country of origin:

- "a) safety, security and conditions, including socio-economic conditions awaiting for the child upon return;
- b) availability of care arrangements;
- c) views of the child and caretaker;
- d) the child's level of integration in the host country and duration of absence from home;
- e) the child's rights to preserve his/her identity, including nationality, name and family relations;
- f) the desirability of continuity in the child's upbringing, and to the child's ethnic, religious, cultural and linguistic background."⁶

Recommendations:

1. UNICEF calls upon States to always conduct and document a best interests' determination prior to a decision related to the return of a child. The decision should then be guided by the finding of such a best interests' determination.
2. A best interests' determination for the child should be conducted also in cases of children with their families and the decision on the possible return of the entire family should take into account the child's best interests.
3. UNICEF calls for an extensive child rights assessment in the country of origin as part of the best interests' determination procedure and decision. Such an assessment should be conducted by independent child protection professionals.
4. The child rights assessment in the country of origin should consider whether upon return the child will access a safe and protective environment, which will enable the child to fulfil his or her needs and rights and develop into adulthood. Gender specificities should be taken into account and all of the other elements regarding country of origin, as elaborated by the Committee on the Rights of the Child, in its General Comment No.6.
5. UNICEF considers institutionalised care as only a last resort and not an adequate long-term care for children. Children should not be returned if the only care arrangement immediately available upon that return is institutionalised care.
6. In line with the Committee on the Rights of the Child, UNICEF calls for other elements to be considered in best interests determinations, including the length of stay and level of integration of the child in the host country, his/her language skills, enrolment in school, vocational training, etc.
7. The views and opinions of the child should be heard throughout the process and properly taken into account in determining the child's best interests.
8. The best interests' determination should guide also decisions on return or not to the country of origin of child victims of trafficking. The provision of assistance to child victims of trafficking, including the possibility to remain in the host country, should not depend on the collaboration of the child with law enforcement authorities.
9. UNICEF calls for full implementation of article 13 of the EU Return Directive, which foresees the right to appeal a decision related to return in front of an independent body as well as the right to free legal counselling and representation in a language well-understood by the child.
10. States should ensure that free legal services are available to assist in reviewing return decisions, meet high quality standards, and that immigration authorities, lawyers and judges in charge of considering appeals by children receive specific training on child rights and child-friendly interviewing.
11. Every child and family subjected to a return decision should be given enough support to prepare him/herself for return. This includes accurate information in a language well-understood by all family members on options and legal consequences, as well as possibilities to receive psycho-social counselling and support.
12. UNICEF supports the provision of a period for voluntary departure as stated in article 7 of the EU Return Directive and calls upon States to effectively apply extension of such periods when required by the best interests of the child (e.g. child attending school, vocation training, medical concerns, etc.). Upon expiry of such a period, UNICEF calls for a mandatory separate administrative or judicial act ordering removal.
13. No child should be detained pending removal. Instead UNICEF recommends community-based alternatives such as supervision or obligation to report. Children pending removal should continue to access basic services such as education and health care.
14. UNICEF calls against use of force during enforcement of removal orders. Such use of force may affect disproportionately the fundamental rights of the child and may cause long-term physical and psychological harm. In line with the Committee of the Rights of the Child General Comment No 6, UNICEF calls for enforcement of removal orders in a child-appropriate and gender sensitive manner.



Use of temporary residence status

Some State grant temporary residence permits to children, which usually comes to an end when the persons reaches 18 years of age. Thus this Status does not promote the full integration of the child into the host society and might push the child towards absconding and related risks once he/she approaches the age of 18. In many States, there are increasing concerns about the limited investment made in unaccompanied and separated children of age 16-18 years old. The support they receive in accessing their rights and services is very limited.

Recommendations:

1. UNICEF calls upon States to adequately proceed any claim for international protection. Temporary protection should not be used as a replacement to refugee status determination but as an alternative on child protection grounds, when the child does not qualify for refugee protection.
2. UNICEF calls for long-term durable solutions for unaccompanied and separated children. Adequate investments should be made to ensure that children on territory have equal access to services and basic rights, including children who have been granted a temporary protection or residence status.
3. Once a person reaches 18 years old and his/her temporary residence title comes to an end, UNICEF calls upon States to consider continuing residence status for the continuation of education or employment purposes on protection grounds. States should take into account the length of stay and the level of integration in their decision to return.

UNICEF's role: monitoring and advocacy

1. Through its child rights monitoring and advocacy, UNICEF will aim to ensure that States provide refugee and migrant children in Europe with adequate information on their rights and that children access legal and psychosocial support as per need. It is not part of UNICEF's mandate to participate to interviews and procedures regarding determination of the status of the child (i.e. refugee, other forms of international protection etc.)
2. Whenever possible, UNICEF will monitor the entire process, from access to an effective procedure to claim international protection to a decision taken and follow up measures by the Government.
3. It is not part of UNICEF's mandate to determine if a country can be qualified as a safe country of origin. Based on its general mandate of child rights monitoring, and according to its capacity and priorities, UNICEF country offices do provide general information on child rights situation in a given country. Specific country reports can be produced which can be used as intelligence on the risks and opportunities children might face once returned to these countries.

However, under no circumstances, should such reports be interpreted as a UNICEF position to determine whether return to the country is safe for children or not. In fact UNICEF calls for a case per case decision, based on the best interests' determination of the child concerned (see above under c).

4. At the country level, children who are returned should be able to benefit from all protection and assistance programmes in the country. UNICEF is often engaged in Governments' supports to reinforce child protection systems' capacities to care and protect all children. UNICEF intervention contributes to social work development, including outreach and case management capacity, family tracing, risk assessments at family and community level and follow up. The development of specific programmes and activities to support returned children need to be given careful consideration, in particular regarding risk management, and expectations by stakeholders, including governments (both of destination and origin country), children and communities concerned.

For the children who are returned, UNICEF will continue to monitor their situation in the country of origin and use the findings of such monitoring for advocacy purposes both with the government in countries of origin and the governments responsible for the return. Agencies in charge of decisions on return in host countries are also encouraged to collaborate with child protection agencies in the country of origin and ensure monitoring of the situation of the child for a given period.



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WHAT PRACTICES HAVE BEEN OBSERVED AROUND BORDERS AND WHAT DOES UNICEF SAY ABOUT IT?

Closure of borders and denial of access to territory

If a child is denied access to territory, this child is deprived of the right to claim international protection. According to international law, every child who fears being persecuted has the right to claim international protection and this right should not be dependent on the nationality of the child. Children experience particular forms and manifestations of persecution, including under/age recruitment, subjection to early marriage and female genital mutilation, trafficking, etc., which occurs even in so-called 'safe countries'. Closing the border to children and their families exposes them further to smugglers and traffickers.

UNICEF recommends:

1. Border management processes which enable children to access their right to claim international protection.
2. Child-friendly information in different languages should be available on the right to claim international protection and how it can be accessed, including at border points.
3. Any asylum application by a child should be considered on its own merits, in an age- and gender-sensitive manner, in a timely fashion, and respecting all procedural safeguards.
4. More trained professionals should be engaged by States to consider child asylum applications, including at border points.

Children and group expulsion

Collective expulsion of foreigners is banned under international law. Article 4 of the Protocol No 4 to the European Convention of Human Rights bans any measure compelling foreigners, as a group, to leave, except when this measure is taken on the basis of a reasonable and objective examination of the particular case of each individual foreigner of the group.

1. UNICEF recommends:
2. No child should be expelled without an individual interview and assessment.
3. Interviews should be conducted by officers trained in child rights and child protection. The presence of a guardian should be guaranteed for any unaccompanied and separated child. When

presence of such a guardian is not possible, the child should be provided with adequate legal assistance.

4. The interview should also consider child-specific reasons for international protection and gender sensitivities.
5. The order of return should be individual for each child and consider specifically the objective criteria of the decision for the child and the best interests of the child.

Push-back practices, including of children

Children are being pushed back to the country they were trying to leave shortly after they cross the border. UNICEF expresses its concern about such practices as they occur too shortly / immediately after the child has crossed the border.

As such, they offer insufficient guarantees on the right to effective access international protection, protection against refoulement, and the right to legal review of a return decision.

The European Court of Human Rights has spoken against push-back practices, as they might also expose people to real risks of serious human rights violations in the country they are pushed back to.

In the ongoing refugee and migrant crisis in Europe, UNICEF observes two main risks facing children as a result of push-back practices: they become highly exposed to smugglers and traffickers, or they end up in detention in the State they are pushed back to⁷.

Both of them lead to serious child rights violations. UNICEF also reminds States that when a push-back practice concerns a group of foreigners and is not taken on the basis of a reasonable and objective examination of the particular case of each individual foreigner of the group, it qualifies as collective expulsion and it is banned under international law.

UNICEF advocates against push-back practices. Instead children should be given effective access to their right to claim international protection.

Endnotes

¹ EUROSTAT as per data updated on 4 February 2016

² Committee on the Rights of the Child, General Comment No. 6, para 27. available at: <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

³ Ibid, CRC GC No.6

⁴ For relevant case law, see i.a. ECHR, *M.S.S. v. Belgium and Greece*, available at: https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/case-mss-v-belgium-and-greece-application-no-3069609_en, ECJ, *Joined Cases C-411/10 and C-493/10*, available at: <http://curia.europa.eu/juris/celex.jsf?cel-ex=62010CJ0411&lang1=en&type=NOT&ancre=>

⁵ UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, 2006, available at: http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf

⁶ CRC, GC No. 6, supra note 2.

⁷ *Hirsi Jamaa and others v Italy*, http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/grandchamberjudgmenthirsijamaaandothersvitaly2302121_en.pdf