

## **Independent Children, Inconsistent Adults: Child Migration and the Legal Framework**

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: “... decision-making politicians appear sometimes to be confused about how to treat migrant children. On the one hand, they state their full support of the idea that children do have rights and also recognize that our aging continent will need migration, not least young migrants. On the other hand a number of them appear not to be able to draw the necessary conclusions [about the rights of migrant children].”<sup>1</sup>

### **OVERVIEW**

Like adults, children migrate across borders for different reasons and in varying circumstances; and they face legal consequences as a result of their migration. Two of these consequences are common to all child migrants and have far reaching implications: the child migrants become non citizens or aliens once they cross a border, and they face a new social environment once they leave home. The existing legal framework does not directly address either of these consequences. Domestic child protection law, which addresses the problems facing children without satisfactory homes, does not cover issues of alienage and citizenship, including the risk of deportation and lack of entitlement to social benefits that non citizen children can face. And migration law, which establishes the parameters of lawful status for recognized categories of migrant does not deal with the needs and circumstances of most children who travel independently of their families. To be sure, international law has long recognized the distinctive needs of some groups of child migrants. In the Declaration on the Rights of the Child, adopted by the League of Nations in 1924, the first ever international human rights declaration, two of the five principles articulated define rights relevant to child migrants: the primacy of the child’s right to relief in times of distress (a precursor to attention to the special needs of refugee children) and the imperative of protection for exploited children (prefiguring concern with child trafficking). More recent regional and domestic legislation regulating immigration has included provisions promoting family unity and by implication the migration of children with or to join their adult relatives. A broader engagement with the many other aspects of child migration however has been absent. There is no single piece of international or regional legislation that directly and comprehensively addresses the issue. As a result the body of relevant legislation, though quite extensive and diverse, has an impact on child migrants which is inconsistent and incomplete.

### **THE LEGAL FRAMEWORK**

International, regional and domestic law impinging on child migration includes three broad approaches, each of which covers only part of the relevant phenomena. One

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<sup>1</sup> Thomas Hammerberg, Commissioner for Human Rights, Council of Europe, presentation, March 2007.

approach is punitive and criminalizing, the oldest strain in migration legislation, dating back to prohibition of the so-called “white slave trade” in the nineteenth century. In its contemporary form, it includes conventions criminalizing trafficking in persons, including children, though not trafficked persons. It is based on a dichotomy between criminal traffickers and victim trafficked persons. This approach focuses on penalizing and preventing exploitative child migration. It is, by definition, inhibitory rather than facilitatory. In this body of legislation, crystallized by the Trafficking Protocol to the 2000 UN Transnational Organized Crime Convention<sup>2</sup>, victimhood is constitutive of the child migrant. As a matter of legal definition and unlike their adult counterparts, child migrants can never consent to exploitative migration facilitated by intermediaries<sup>3</sup>; where mediation and an intention to exploit exist, such migration therefore always constitutes the crime of trafficking. An adolescent looking for employment and a way out of a Kosovar refugee camp who agrees to accompany an agent to a west European capital to work in the sex trade counts as a trafficking victim just as an Indian child sold into domestic service by her parents. Insofar as this categorization results in the mobilization of protections and human rights entitlements for trafficked children, the results may be positive. In the US, for example, a “T Visa”<sup>4</sup> which provides lawful immigration status for 4 years and can lead to permanent residence, is available (though only very rarely granted) to child victims of trafficking. But often classification as a trafficking victim leads to additional migration obstacles for the child at the border or forced return of migrant child to his or her place of origin. This may hamper the long term realization of rights and opportunities for the child migrant, and frustrate plans actively chosen which the child considers his or her best available option. The process of criminalization of traffickers can also confront children with dangerous options: in some countries, access to protection is conditional on the agreement of the child to testify against the trafficker in court, a strategy which can backfire on relatives.

A second legal approach to child migration is regulatory, the primary thrust of most domestic and regional migration related law. It establishes the parameters for legal migration, including the migration of children. It is based on the notion that children are family dependents who lack autonomous agency. As has been pointed out in the context of the US, but the point applies more generally, “for purposes of immigration law, a “child” only exists in relation to a parent”<sup>5</sup>. Family reunion depends on proof of the parent/child relationship, and of the child’s dependence. It takes place around parents, not children. The European Union Council Directive on the Right to Family Reunification<sup>6</sup>, for example, only requires member states to admit children for family reunion without additional qualifications if they are below the age of 12. Beyond that age, states can impose additional requirements, such as proof that the child meets “a condition for

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<sup>2</sup> United Nations Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, A/RES/55/25 (2000) [hereafter “Trafficking Protocol”].

<sup>3</sup> Trafficking Protocol, Art. 3.

<sup>4</sup> Victims of Trafficking Protection Act 2000, 8 U.S.C. § 1101(a)(15)(T)

<sup>5</sup> David Thronson, “Choiceless Choices: Deportation and the Parent-Child Relationship”, 6(3) *Nevada Law Journal* 2006, 1181.

<sup>6</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

integration”<sup>7</sup>. As a result, much contemporary independent child migration fits imperfectly into the template, leading to status illegality or irregularity for the migrant child. In the UK, for example, single parents who cannot demonstrate that they have had “sole responsibility” for children over 12 who are seeking to join them, will be disqualified from bringing them in<sup>8</sup>.

A third approach is protective, the most recent human rights related strain. It includes international law directed at the protection of specific groups, refugees, migrant workers and their families, children, victims of the worst forms of child labour. Over the past fifteen years or so, there has been a growing acknowledgement that child migration is a significant and increasingly important phenomenon that requires the development of a more effective, protective approach. As a result, despite the absence of comprehensive legislation, there is now a body of “soft law” which does directly address child migration. For example, several migration destination countries such as Canada, the US and the UK, have developed guidelines for child asylum seekers<sup>9</sup>; regional bodies including the EU have produced recommendations targeting child migrants<sup>10</sup>, and the UN Committee on the Rights of the Child has issued a detailed and comprehensive General Comment on the topic<sup>11</sup>. Regional groupings of NGOs, such as ECPAT in Asia, and the Separated Children in Europe Programme, have developed specific recommendations on particular categories of child migrants, such as sexually exploited and asylum seeking children<sup>12</sup>. Human rights groups have directed research and advocacy towards targeted issues such as child labourers in Italy (MSF<sup>13</sup>) and child workers and street children in Morocco and Spain (HRW)<sup>14</sup>. International migration organizations such as the United Nations High Commissioner for Refugees (UNHCR) now regularly track child migration statistics for refugee and internally displaced persons, and have issued a series of Executive Committee (or EXCOM) recommendations and guidelines about refugee children<sup>15</sup>.

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<sup>7</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L251, Art. 1(d)

<sup>8</sup> UK Statement of Changes in Immigration Rules HC 395 para 297 (i) e); 298 (i) (c); 301 (i) (b).

<sup>9</sup> UK Refugee Council Panel of Advisers for Unaccompanied Refugee Children established in 1994 ; Canadian Immigration and Refugee Board: “ Child Refugee Claimants: Procedural and Evidentiary Issues” 1996.; US Guidelines for Children’s Asylum Claims, 1998.

<sup>10</sup> See for example European Network of Experts on Fundamental Rights, *Thematic Comment on Children in the EU*, section on child migrants.

<sup>11</sup> Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their country of origin, CRC/GC/2005/6 (2005).

<sup>12</sup> See, for example: *ECPAT International, Distilling Elements of Good Practice: The Action Programme against Trafficking in Minors for Sexual Purposes* .2007; The Separated Children in Europe Programme and Save the Children: *Returns and Separated Children*, 2004.

<sup>13</sup> Personal Communication, MSF Representative, PICUM Conference, Brussels June 27 – 29, 2007.

<sup>14</sup> Human Rights Watch, United States – Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service, December 1998 vol. 10 No. 4 (G); Amnesty International , Most Vulnerable of All: The Treatment of Unaccompanied Children in the UK, 1999. Human Rights Watch, *Nowhere to Turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco*, Vol.14, No.4(D), May 2002.

<sup>15</sup> UNHCR, *Policy on Refugee Children*, 1993 , E/SCP/82.; UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (February 1997).

The emphasis of this body of work has been on child migrants' distinctive vulnerability, their triple burden of alienage, minority and family separation, and on the need for protective policies to ensure their safety and welfare. In this focus, the work has followed one of the two cardinal principles of the UN Convention on the Rights of the Child, the best interests principle:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, *the best interests of the child* shall be a primary consideration.'<sup>16</sup>

The other, complimentary, principle, equally central to the international child rights framework, but newer in its conception, has not featured as prominently. This is the principle of child agency or voice:

'State parties shall assure to the child who is capable of forming his or her own views *the right to express those views freely* in all matters affecting the child, *the views of the child being given due weight* in accordance with the age and maturity of the child'.<sup>17</sup>

When this principle is applied to the analysis of child migration, a different perspective emerges, with child migrants as agents, decision makers, initiators and social actors in their own right. From this vantage point, vulnerability and the need for protection are only one element of the social policy agenda; the other role is facilitation, non discrimination, inclusion, the promotion of opportunity and the acknowledgement of capacity for child participation in policy formation and for autonomous responsible action. This perspective has been virtually non-existent in the evolution of the legal framework governing child migration, where denial of the child migrant's capacity for autonomous agency has been the guiding principle. Even worse, independent child migrants have generally been regarded as suspect, either passive victims of exploitation (trafficked), or undeserving illegals (petty thieves, beggars, domestic workers pretending to need asylum) or adults masquerading as children<sup>18</sup>. In the words of an American juvenile immigration officer, they are "either runaways or throwaways"<sup>19</sup>.

## DEFINITIONS

Who are independent child migrants and why do they travel? What are some of the current legal provisions that govern their situation and how might they be improved? One can define independent child migrants as children who migrate across national borders separately (though not necessarily divorced) from their families, and include within this definition, four broad categories defined by the primary purpose of travel:

- (a) Children who travel in search of opportunities, whether educational or employment related

<sup>16</sup> Convention on the Rights of the Child [CRC], art. 3(1).

<sup>17</sup> CRC, art 12(1).

<sup>18</sup> According to a recent UK study, 45% of all those who claim asylum as children in the UK are age disputed by the Home Office and treated as adults, Heaven Crawley, *When is a Child not a Child?*, ILPA 2007.

<sup>19</sup> Jacqueline Bhabha, "Inconsistent State Intervention and Separated Child Asylum Seekers" 3 *European Journal of Migration and Law* (2001) 283-314.

- (b) Children who are trafficked for exploitation
- (c) Children who travel to survive - to escape persecution or war, family abuse, dire poverty
- (d) Children who travel for family reunion - to join documented or undocumented family members who have already migrated<sup>20</sup>

These groups are not mutually exclusive. Like adults, children travel independently for reasons which may overlap. The refugee may also be seeking family reunion and hoping for enhanced educational opportunities; the trafficked child may find him or herself in this situation because of dire poverty and may have no better alternatives than employment abroad. Much of the applicable general legal framework applies to all four categories of independent child migrant. The most important and fundamental human rights protections are comprehensive in their scope. As stated above, there are some additional measures which apply more specifically to trafficked and persecuted children, and there are immigration regulations governing access for families. Children who travel independently, in search of education and / or work opportunities are least catered to by specific child migration measures. A fortiori legislative provisions that apply to them apply to the other groups of child migrants too.

### **MIGRATING TO ADVANCE OPPORTUNITIES**

We do not know how many children migrate alone in search of better opportunities, for education and or employment, but the number is undoubtedly significant and probably growing. Generic factors such as global inequalities, increasingly available travel opportunities, social imaginaries which include the possibility of life elsewhere combine with situation specific circumstances to produce a very large and diverse population of children migrating to advance their opportunities. Here are two vignettes encompassing four continents:

The first describes the large migration of Moroccan children to Spain. As the Moroccan director of an NGO providing services to the children in Ceuta, the Spanish enclave on the northern coast of Morocco commented:

“They are not street children, but youth from poor neighborhoods who are the only support for their families. They have no job skills and leave school early because they have no hope that schools will improve their situation.... [The children] plan for a long time; sometimes they travel with the agreement of their families, who pay clandestine travel fees to the “smugglers”... They know not to bring papers, but for the last two years they also know that with documents they can get status and they know who to ask for in Cordoba or Marseille to get help with status. We have never met a youth who comes back who says he failed”.

Children also describe their journeys as motivated by poverty and lack of opportunities, but also by a more general desire to seek out a better life:

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<sup>20</sup> This category should also logically include the 30,000 transnational adoptees who migrate across borders each year for family reunion purposes. However I will not include them in this analysis.

A sixteen year old boy explained: "I want to go to Spain to work and to help my family. My family is very poor". A thirteen year old girl, who sold sundry food items on the streets, begged and collected leftover food from cafes said: "We come to eat... I had to leave school about a year ago". According to a fifteen year old who left his job in Tangier to travel to mainland Spain hidden under a large truck but was detected at the border and returned: "My heart told me to go to Spain so I went. My parents let me do what I want... I see my future in Spain. The next time I will go over and become a butcher. I will go to school there and learn."<sup>21</sup>

Not all journeys undertaken are between adjacent countries. Some children embark on transcontinental travel to pursue their dreams or those of their families. A well worn route transports thousands of children on their own from the Fujian province of South East China to Northern metropoli, including New York. The journeys are invariably dangerous and unpredictable, mediated by intermediaries who stand to gain financially from the transport. Children's reactions on arrival are complex and varied. Some indicate an elaborate plan, involving what one might call "mutually advantageous exploitation"; others evidence regret, fear, the obligation of filial obedience, disorientation. Here are two different responses to similar journeys, given by Chinese children we interviewed in New York in December 2000:

An eighteen year old girl told us: "My family used to live in a village by the ocean in Fuzhou province. My father owned a big business, a sock factory, but his business went bankrupt and then we moved back to my grandmother's house on an island in Fuzhou... I had a happy childhood there... My Dad started a new transport business. Now my Dad only comes back home once a month. My Mom has a home business. She wakes up early to get fresh fish and sell it in the market.... Most of my friends have left my village. Almost all the young people leave, about 90%....They are foolish people. They want to send their kids away to save face. They are proud. Families think that at least one of their children should go to live somewhere else. Some of them are too proud to really care about their children's future. I have two younger brothers. My oldest brother wants to come to the United States, but I don't think he should.... Today the passage costs about \$60,000 and it is very dangerous. I don't think I should have come. I miss China. I wish I had not come. I don't think life in Fuzhou is that difficult really. ... The latest trend is for people in the village to borrow money from their neighbours or relatives at a very high interest rate in order to send their kids away.... When my Mom talked to me about coming to the United States, I disagreed with her very strongly, but then she started to cry. She begged me. I didn't want to disappoint her, so eventually I agreed to go... They are my parents so I have to obey them."

By contrast, this was the perspective of an eighteen year old boy from the same area: "My father used to work in the Communist government, but he was fired when I was born (one child policy). ... he became a corn farmer. My family became much poorer... Then five or six years ago my father died. My family's financial situation became much

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<sup>21</sup> Human Rights Watch, *Nowhere to Turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco*, Vol.14, No.4(D), May 2002.

more difficult... I was 16 years old when I left China. My mom didn't want me to go at first. I was the only son left... But I knew I had to go to help my family.<sup>22</sup>

A range of different legal instruments are relevant to independent child migrants in these situations; as previously stated, no single consolidated statute or convention, specifically addresses them. Though there is an authoritative international definition of a child – “every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier”<sup>23</sup> – there is no comparable definition of a migrant. Applicable law can be divided into two broad categories, international human rights law and labour law. Other areas of law, such as refugee law and criminal law may be relevant in some cases too. I will touch on them only briefly, both because they have received much scholarly and policy attention in the literature, and because they are relevant to only a subset of children who migrate to advance their opportunities, those migrating for survival and for exploitation, rather than as a result of an independent choice .

### 1. International Human Rights Law

The minimum floor of rights to which migrants, including child migrants, are entitled derives from two clusters of human rights law, namely the international bill of rights which sets out general human rights protections for all, and specific conventions which address the rights of particular groups.

#### (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), the so-called International Bill of Rights, set out a broad range of basic human rights which apply to all, including therefore child migrants, irrespective of nationality, legal status or age. By virtue of these provisions, child migrants, whatever their immigration status, have an unqualified right to the familiar basic human rights. The most fundamental principle is the non discrimination principle, which prohibits all distinctions between people which are arbitrary, disproportionate or unjustifiable<sup>24</sup>. Cultural, moral and religious arguments are often advanced to justify migration decisions imposed on children (eg it is in the child's best interests to be sent home to their family); and political and economic factors are also used to rebut criticisms of arbitrary exclusion of migrant children from services (eg from education grants, from free health care). Given the moral and legal imperative of treating all humans as of equal worth<sup>25</sup>, the onus of justifying these measures is on those who seek to bring themselves within an exception to the equality principle. In practice, discussions about what exclusionary policies are arbitrary, unjustifiable or disproportionate, are ongoing and

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<sup>22</sup> Interviews conducted by Celeste Froehlich in New York, December 2000, unpublished on file with the author.

<sup>23</sup> CRC Art. 1

<sup>24</sup> ICCPR Art. 13.

<sup>25</sup> UDHR Art. 1.

central to the evolution of any society, especially one experiencing rapid demographic changes. And access to legal services required to enforce the rights eventually agreed upon is as unevenly distributed as the rights themselves, rendering the letter of the law illusory in most practical situations.

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, full procedural protections in the event of arrest and detention associated with a criminal process, payment of a fair wage for work performed, police protection from physical or sexual abuse, protection from “arbitrary arrest, detention or exile”, publicly funded emergency health care when available within the state, shelter and other forms of social assistance necessary to preserve life. All persons also have a right to some less commonly cited protections including “recognition as a person before the law” and the right to a nationality. In addition they have a right to leave any country including their own, unless restrictions to this right are required as a matter of “national security, public order (order public), public health or morals or the rights and freedoms of others”<sup>26</sup>.

These human rights provisions impinge directly on some common aspects of the situation of independent child migrants. Generic human rights obligations to protect life (strengthened by maritime law and specific regulations about rescue at sea) implicate state responsibility for children stranded trying to cross a border through the desert, or injured as a result of dangerous transport arrangements (undercarriages of planes, boots of trucks, containers in lorries) or in distress at sea. Procedures which create insuperable hurdles for children seeking to leave their own countries and which do not fall within the exceptions listed above, or which subject them to summary removal and return at borders without individualized proceedings, also fall foul of these provisions, as do arbitrary or abusive detention practices or other deprivations of liberty to which migrant children are frequently subjected. Even where the detention of child migrants is lawful, it must conform with a range of procedural protections, including the right to be informed of the reasons for detention, the right to be brought before a court promptly, the right to challenge the legality of the detention and to seek compensation in the event of wrongful detention. Where child migrants are denied access to guardianship or to free legal representation, the effectiveness of their right to challenge detention can be called into question. According to UNHCR and the Committee on the Rights of the Child, the treaty body overseeing implementation of the Convention on the Rights of the Child, the detention of child asylum seekers is always against their best interests<sup>27</sup>. Justifications, such as the need to “protect” them from traffickers or snakeheads have the same validity as incarceration of child abuse victims would.

The right to equality before the law combined with the right to fair working conditions should enable child migrants to claim redress for abusive employment situations. And the

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<sup>26</sup> ICCPR Art 12(2) and (3).

<sup>27</sup> United Nations High Commissioner for Refugees, *1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Paras 7.6 – 7.8.; Committee on the Rights of the Child, *General Comment No.6: Treatment of Unaccompanied and Separated Children outside their country of origin*, CRC/GC/2005/6 (2005), Para V (c).

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. Conversely, however, human rights law also includes very general provisions regarding the right to work: the ICESCR notes that states “shall recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”<sup>28</sup>. States can limit this right to promote full employment and adequate rates of pay, provided adequate social assistance is afforded to those excluded from the labour market. And states can also limit the types and conditions of employment permissible for children, including providing for a minimum age for admission to employment<sup>29</sup>. European Union law, for example, prohibit the employment of children under 15<sup>30</sup>. Subject to these provisions, however, general non discrimination provisions apply and migrant children should not be arbitrarily excluded from employment available to domestic children.

Other social and economic rights relevant to child migrants, including housing, health care and education, are also protected by international human rights law. The ICESCR recognizes the ‘right of everyone to an adequate standard of living including adequate .... housing, and to the continuous improvement of living conditions’, a generic right which in the case of children is strengthened by more explicit 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 programs, particularly with regard to nutrition, clothing and housing”.<sup>31</sup> There is a serious question about whether the bed and breakfast accommodation provided by some states to adolescent child migrants without any additional support complies with this requirement.

Regarding health care, the ICESCR notes that ‘every person has the right to enjoy the highest attainable standard of physical and mental health’<sup>32</sup>. This encompasses the right to access health care, and not to face discrimination on the basis of nationality or other status. Whereas the scope of the obligation for undocumented adult migrants may be limited to provision of emergency health care, with other broader health care obligations residing with the country of origin<sup>33</sup>, in the case of child migrants the obligation is undoubtedly broader, encompassing “the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care”.<sup>34</sup> Many migration destination states have embraced these inclusive provisions providing emergency, necessary and in some cases comprehensive health care to child migrants irrespective of status. Within Europe, for example, there appears to be a broad spectrum of approaches. Spain and Italy provide free health care for all within the same

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<sup>28</sup> ICESCR Art 4.

<sup>29</sup> CRC Art. 32

<sup>30</sup> European Social Charter (ETS No. 163) of 3 May 1996 (revised) Art 7; European Council Directive 94/33/EC on the protection of young people at work.

<sup>31</sup> CRC Art. 27.

<sup>32</sup> ICESCR Art. 12

<sup>33</sup> CPRMW Art. 28.

<sup>34</sup> CRC Art. 24.

comprehensive health care system; France, Belgium and the Netherlands administer separate systems for migrants, but envisage free access for some types of health care needs; the UK and Portugal have more restrictive systems, and Hungary and Germany allow free health care only in limited cases, but require providers to inform on users with an irregular migration status. Poland only provides access to medical care to children who are asylum seekers, who are obliged to go through medical screening. IN practice however, even in countries where access to health care is permitted, child migrants encounter obstacles to medical treatment arising out of discrimination because they lack health insurance. In the Netherlands, restrictive interpretations of what constitutes “necessary care” have prevented access for some child migrants. IN France, child migrants need a regular address to access emergency medical care if they do not have documents. Some NGOs, including the Association Jeunes Errants provide their own address to overcome this hurdle; children not in touch with helpful NGOs however would find themselves excluded. In the US, by contrast, undocumented child migrants must be provided with emergency care but they are not otherwise eligible for publicly-funded health services. In the state of California alone, there are an estimated 136,000 undocumented children without health insurance. State policies which subject migrant children to prolonged and harsh incarceration, whether as a result of age determination procedures or delays in immigration processing, are inconsistent with the international health obligations just outlined.

The right to education is recognized as fundamental for children. The ICESCR requires states parties to “recognize the right of everyone to education” and in particular to ensure that primary education is free and available to all, that secondary education, including technical and vocational education, is “made generally available and accessible to all by every appropriate means”, and that “higher education is equally accessible to all, on the basis of capacity”<sup>35</sup>. These obligations are reinforced in identical terms by the CRC; the CPRMW prohibits refusal of access to schools on the basis of a child’s irregular status. In practice states have again broadly embraced these provisions. In the US, all children irrespective of immigration status have the right to primary and secondary education, while access to higher education varies by state. Some states have passed legislation permitting undocumented children who have graduated from US schools to enrol in state colleges at the same tuition rates as legal residents. The DREAM Act, which has been introduced in the last 3 Congresses but is still only a proposal, would provide legal status to a subset of undocumented children who complete their secondary education in the US. European countries vary in their approaches to the education of undocumented child migrants. In Italy, for example, school is compulsory for all children under 18 and undocumented children have the right to attend; human rights groups however report non attendance by significant numbers of migrant children working in agriculture<sup>36</sup>. In Poland by contrast, though the same compulsory education provisions apply, undocumented children have to pay to attend. In practice, there is considerable evidence that undocumented children encounter obstacles in attending school in Europe. In some cases school authorities require identification documents as a precondition to enrolment (because the schools only get reimbursed from the ministry if they include these details in

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<sup>35</sup> ICESCR Art. 13

<sup>36</sup> MSF Personal Communication

their financial reporting). In other cases, undocumented families withhold their children from school, for fear that this will lead to detection by immigration authorities.

#### (b) Conventions Addressing Specific Interest Groups

In addition to the protections derived from the bill of rights, child migrants enjoy the implicit protection of several other instruments. They include the Convention against Torture, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child (CRC) 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 2 Covenants, amplifying particular aspects of rights protection for the relevant constituency. I will confine myself to highlighting aspects of the two most relevant conventions, the CRC and the CPRMW. I will switch the focus of my analysis from the protective to the enabling perspective and inquire whether and to what extent these two targeted international human rights conventions address the needs and promote the interests of independent child migrants.

##### (i) The CRC

The CRC, as is well known, is a very widely ratified, consolidating convention that draws together all the disparate human rights provisions relevant to children, synthesizing and deepening their impact by creating an implementation structure that includes reporting obligations to and scrutiny by the Committee on the Rights of the Child, the treaty body established to oversee the Convention's workings. Apart from the measures already discussed – the protection of rights to education, to health, to shelter, the prohibition on discrimination, arbitrary detention, inhuman treatment – one additional set of provisions is worth reviewing. It concerns family unity, and the very strong protection afforded to both its aspects, the right not to be separated, and the right to reunification, by the Convention. The CRC notes that states parties have a mandatory obligation not to separate a child from his or her parents against their will unless this is necessary for the child's best interests<sup>37</sup>. It goes on to require of states that they deal with family reunion applications by a child or his or her parents "in a positive, humane and expeditious manner"<sup>38</sup>. These broad stipulations do not specify which parties provide the base, and which reunify. They thus cover not only the common situation in which children join parents who migrated before them, usually a right qualified by the ability to support and accommodate the child at a certain level and earned by parents following law abiding residence in the destination state. The CRC right also includes the opposite possibility – reunion of parents travelling to join a child who migrated first. This is important. Most domestic laws exclude this possibility, and indeed there is considerable suspicion of so-called "anchor children" sent off as front runners to secure a foot hold before the rest of the family follows. Family reunion in immigration law is a unidirectional principle, that assumes the movement of child to parent, not parent to child. As a general rule, children with citizenship or legal immigration status have no right to bring their parents or other

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<sup>37</sup> CRC Art. 9.

<sup>38</sup> CRC. Art. 10(1)

relatives to join them, despite the mandatory phrasing of Art 9 CRC. In the US, for example, even children who are granted the “Special Immigrant Juvenile Status”, a visa created to provide a permanent legal status for children found to have been “abused, abandoned or neglected” can never exercise family reunion rights. The idea that a child could provide the base around which his or her family later gathers is considered as illegitimate as the migration of men to follow their wives or fiancées once was<sup>39</sup>. Yet the CRC clearly envisages the possibility of such situations, and ratifying states have an obligation to allow them as they arise. In practice, however, such opportunities for child centred family reunion do not exist. Children can only bring their parents to join them once they become adults themselves and establish the parents’ dependency on them. Independent child migrants are thus deprived of the nuclear family reunification entitlements that other migrant workers enjoy and that, as a matter of international law, are considered fundamental to their well being.

(ii) The Convention for the Protection of the Rights of Migrant Workers and their Families

This Convention, much less comprehensively ratified and therefore in practice much less significant as a policy instrument than the CRC, provides a comprehensive protective framework for migrant workers. It is a remarkably inclusive document, which encompasses undocumented and irregular workers as much as regular legal ones in most of its provisions. Migrant workers irrespective of their status have a right to fair and public court hearings, to protection from collective expulsion, and to equal treatment regarding employment terms and conditions. In particular : “States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from [the principle of equality] by reason of any irregularity in their stay or employment.<sup>40</sup>”. The Convention reinforces the inclusive rights to emergency health care (but not education) set out in other instruments.

Two aspects of the CPRMW are relevant for the present discussion. First, the Convention adopts an age neutral definition of migrant worker and establishes a comprehensive principle of equality regarding the group as a whole. Unlike the CRC which only addresses exploitative or abusive child labour, this Convention covers the rights of all child migrant workers on a par with adults (though the rights of trainees and students are excluded). It is left to states to determine the minimum age of employment and other matters regarding conditions of work, within the rights respecting parameters defined by the Convention.

Second, and by contrast, the Convention’s definition of family members reflects the traditional view of primary migrants as exclusively adults. As a result the enumerated relationships are the spouse and the children; not parents or siblings. The definition does include “other dependent persons who are recognized as members of the family” by

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<sup>39</sup> For a good example of this approach see the UK government’s argument in the European Court of Human Rights leading case, Abdulaziz, Cabales and Balkandali (1985)7 EHRR 471.

<sup>40</sup> CPRMW Art 25 (3).

domestic legislation, but this breaks no new ground in advancing the family unity rights of independent child migrants or in facilitating their ability to migrate autonomously and eventually bring relatives to join them. The only explicit mention of child migrants' rights in the Convention covers the situation where criminal charges are brought against juveniles<sup>41</sup>. The Convention requires states parties to separate juvenile from adult offenders<sup>42</sup>, to treat them appropriately taking into account their age and promote rehabilitation where possible<sup>43</sup>.

## 2. Labour Law

Labour law provides a different legal framework for child migrants, based on their activity rather than their status. It takes as its starting point the reality of child labour. The International Labour Organization (ILO), which has been at the forefront of labour rights legislation and standard setting since the early twentieth century, operates quite differently in relation to its mandate from the Committee on the Rights of the Child. Its role is regulatory and its conventions do not have the force of law, though they may and frequently do provide the framework for subsequent legislation. The institutional and legislative separation between human rights and labour rights has not served migrant child workers particularly well; the implementation strategies for the labour provisions are underdeveloped and as a result many of the most relevant provisions lack effective practical impact.

Most of the general provisions promulgated by the organizations apply incidentally to child migrant workers as they do to the workforce as a whole. Like international human rights law discussed earlier, international labour law establishes the right of all migrant workers, including those in an irregular immigration status, to fair working conditions and pay. For example, the ILO 1975 Migrant Workers Convention requires states parties to ensure "equality of treatment" for irregular migrant workers who face expulsion "in respect of rights arising out of past employment as regards remuneration, social security and other benefits"<sup>44</sup>. If the migrant worker has been employed in an ostensibly regular context and has made contributions to the social security system, both the CPRMW and the ILO Migrant Workers Convention (and the ICESCR) protect his or her right to receive social security payments without discrimination. Of particular relevance to the situation of independent child migrants are ILO conventions on forced labour and on child labour.

The former include the Convention on Forced Labour<sup>45</sup> and the Abolition of Forced Labour Convention<sup>46</sup>. They call on all states to suppress forced or compulsory labour, which is defined as "all work or service which is exacted from any person under the

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<sup>41</sup> CPRMW Art. 17,18.

<sup>42</sup> Art. 17(4)

<sup>43</sup> Art. 18(4).

<sup>44</sup> Art 9(1).

<sup>45</sup> C 29, 1930.

<sup>46</sup> C 105, 1957.

menace of any penalty, and for which the said person has not offered himself voluntarily”. Many independent child migrants may fit this definition. For example, children such as the Chinese children quoted earlier who have to work to repay a smuggling debt are frequently threatened with severe sanctions against themselves or their families if they fall behind in their payments<sup>47</sup>. Establishing the voluntariness of their agreement to work may also be complicated: in the absence of good employment options or other means of livelihood, many child migrants “voluntarily” agree to highly exploitative working conditions<sup>48</sup>. The regulation and prohibition of these employment situations may work against the medium and long term interests of independent child migrants unless prohibiting states set in place alternatives for them other than expulsion or repatriation. Child rights, migrants rights and labour rights organizations need to establish common guidelines and standards as a basis for government policies.

The ILO has taken the lead internationally in formulating policy on child labour. The Minimum Age Convention<sup>49</sup> and the Convention on the Worst Forms of Child Labour<sup>50</sup> address the situation of all children, including migrant children. The Minimum age convention requires member states to “ensure the effective abolition of child labour” and to progressively raise the age for admission to employment<sup>51</sup>. The Convention establishes 15 as the minimum age for employment, except for potentially hazardous work where the minimum age is set at 18. Much of the work performed by independent child migrants falls within the categories envisaged. But implementation is weak and children’s alternatives are often non-existent. As a result the impact of labour law regulation on the working lives of child migrants is generally minimal.

## **MIGRATING FOR SURVIVAL**

UNHCR data suggests that between 4 and 5% of all asylum applications received by industrialized countries come from unaccompanied minors. Conversely, given the paucity of permanent legal immigration statuses available to independent child migrants, many of those fortunate enough to get some form of legal advice (a minority) are encouraged to apply for asylum. The refugee protection system, however, is anything but a panacea for independent child migrants. Though many child asylum applicants receive some form of protection during their minority – humanitarian leave, temporary permission to remain, discretionary status - long term permanent legal status however is far less common. Moreover, procedural problems undermine the efficacy of the rules in place. In general, securing a valid legal status is dependent on the child having access to effective mentorship and legal representation, which is frequently not the case. In the absence of this support, children regularly give up rights to challenge the refusal of status (eg many

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<sup>47</sup> Jacqueline Bhabha, “Out of the Frying Pan and into the Fire? Unaccompanied Child Asylum Seekers in the United States”, (1999) *Social Politics*, 263-270. Gao Yun, *Chinese Migrants and Forced Labour in Europe*, ILO Research Paper, July 2004.

<sup>48</sup> Jacqueline Bhabha, “Reforming Immigration Policy: Start by Protecting Rights, not Borders”, *Boston Review* (Summer 2005).

<sup>49</sup> C 138, 1973

<sup>50</sup> C 182, 1999

<sup>51</sup> C 138, Art.1.

child migrants in the US agree to sign “voluntary departure” forms when presented with the alternative of long term detention). Children are also beset with other problems which make the available remedies less accessible or effective than claimed<sup>52</sup>.

A pervasive climate of disbelief, reflected in the proliferation of age disputed cases, detention of children and rejection of children’s testimony affects child migrants in many sectors of the migration system. Ignorance by child welfare or social work officials of the intricacies of immigration law contributes to the absence of competent representation. As a result a substantial number of unaccompanied child migrants end up undocumented, in temporary and unsatisfactory statuses where their future rights cannot be assured.

Within the options available, asylum is perhaps the most familiar protection outcome for unaccompanied minors, not because it is easily secured, but because it corresponds to the protection required of all states parties to the 1951 Refugee Convention (as modified by the 1967 Protocol). However, many difficulties face children attempting to secure asylum over and above the access, guardianship and legal representation issues already raised. A central concern is the persistent failure of immigration officials and decision makers to effectively apply the refugee definition to children. This is the case both where children face similar harms to those faced by adults – such as political persecution or religious persecution – and where children face “child specific” forms of persecution. Whereas the US has promulgated specific guidelines concerning children’s asylum applications, it has not fostered the development of a consistent body of decision making which incorporates some of the recommendations in the guidelines. A comprehensive doctrine of child specific persecution which complements the broader, more generic concept, is necessary to correct the prevailing blindness towards the special problems facing children. At the same time, it is important to note that in the US there have been some significant improvements in the application of refugee law to children in some specific cases. For example, sexual violence inflicted on a girl by her father has counted as the basis for an asylum claim, as has female circumcision, persecution as a street child and child abuse. In this respect the US provides some laudable examples of good practice, which other countries could do well to emulate. Australia, by contrast, has not produced any child specific asylum guidelines and case law expanding the refugee concept to child specific situations is still in its infancy, despite the large number of Afghani child asylum seekers fleeing the Taliban that have been processed through the Australian system.

## **MIGRATING FOR EXPLOITATION**

States have developed other statuses for according protection to migrant children. Several states, among them the US and Australia, have instituted special anti-trafficking statutes for victims of trafficking including children. The main purpose of these measures is to criminalize the commercial networks involved in trafficking, but an important secondary goal is to provide protections for those who are trafficked and to

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<sup>52</sup> Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, The U.K. and the U.S.*, (Sydney: Themis Press. 2007) [hereafter *Seeking Asylum Alone*, Comparative Report].

establish they they are not prosecuted or penalized for their irregular entry. The US law has created a special “T Visa” which is available to victims of severe forms of trafficking in persons; children under 18 can benefit from this status and in theory they do not need to cooperate with law enforcement investigations by giving evidence against their traffickers. In practice, however, certification of a child as a victim of trafficking has come to depend on confirmation from law enforcement agencies of the child’s involvement, a practice which has deterred some children from applying for the visa for fear of retaliation. Moreover the burden of proof on the child is very high. As a result only a tiny number of children have received T visas (32 unaccompanied children between October 2001 and January 2005!)<sup>53</sup>.

In Australia, a special visa subclass for trafficked persons – Class UM and Class DH visas - has been created to provide protection for victims; initially limited to a temporary stay of two years, the visa can be extended to a permanent stay if the need for protection is ongoing. Children are eligible for this visa but they must cooperate in the prosecution of their trafficker, as a matter of law. This is an unfortunate requirement which places law enforcement above protection and acts as a deterrent for child victims. Numbers of child victim beneficiaries of these visas are negligible.

## CONCLUSION

As presently constituted, the legislative framework applicable to the situation of independent child migrants suffers from two significant defects. It is radically incomplete, because it fails to cover the circumstances of most independent child migrants; and it is dramatically ineffective, because even where binding obligations or legal requirements exist, their implementation is erratic, left to the vagaries of underfunded and ill equipped legal services. The real challenge is to generate political will to address a series of acute challenges facing a population that has no vote, no effective voice, and scanty political or economic clout. Employment pressures and demographic considerations, which rely on children’s energy and agency, may be the best allies for this constituency in the future. In the meantime, interested advocates, policy makers and civil society organizations would do well to focus on implementation strategies, including community mobilization and court litigation, on monitoring and training of front line officials, including submissions to treaty bodies, to domestic watchdogs and to socially responsibly electronic and other media outlets, and on increasing resource allocation to other avenues which protect the rights of independent child migrants. More normative standard setting, the preferred mode of international engagement with troublesome rights issues, is not a comparable priority.

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<sup>53</sup> Seeking Asylum Alone, Comparative Report, 185.