Migration Policies and Children Rights

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Course on International Migration Law (UNITAR-IOM)
New York, 10-12 June 2009
Challenges, Gaps and Opportunities
Challenges

- Children Approach in Migration Law and Policies (origin, transit and destination)
  - Introducing Principles, Obligations and International HR Standards within public policies
  - Balance Migration Control and HR
  - Social integration of children migrants (rights-based approach)
  - HR of children affected by migration of relatives (e.g., children left behind)

- Long term: Migration as a choice, not necessity
Main Gaps on Children, Human Rights and Migration

- **Children perspective in Migration Law and Policies**
  - Childhood protection policies since 1989 → CRC standards and obligations within public policies
    - Lack of dialogues between gov. agencies (Childhood-Migration)
  - Children treated as adults: human rights abuses
  - Children First, Migrant Second (ILPA, UK, 2006)

- **Migrants in Childhood Policies**
  - Every Child Matters
  - Social Integration
  - Universality. Non Discrimination
Opportunities

- **Migration Policies Legitimacy**
  - Balance between States policies goals and universality of human rights
    - Legitimate Goals ↔ Legitimacy of policies
      - Human Rights, Democracy and Rule of Law in the core of democratic societies
  - Progressive active role of international human rights mechanisms and national courts on migration issues
  - International migration in the current global context: root causes of migration, communication and transportation, transnational social networks, multicultural societies → Rights in origin and destination

- **Discussions on Policy Coherence, Migration and Development (GFMD, IOM Dialogues, Regional Conferences)**
  - Human Rights as the key element
    - Sustainable Development: interdependence of human rights
    - Unsustainable development: increase of inequality and migration, including irregular migration
Migration Policies and Children Rights Principles
Principles of CRC and other Human Rights Treaties

- **Best Interest of the Child (CRC, art. 3)**
  - Every law, measure or decision which impact directly and indirectly in migrants children and others affected by migration

- **Non Discrimination (CRC, art. 2)**
  - Migration and Grounds of discrimination
    - Nationality (e.g. foreignness condition as a ground for recognizing human rights)
    - National Origin (e.g., nationality of parents)
    - Migration Status (e.g., access to ESCR)
    - Disability and Migration (e.g., regulation of entrance and access to legal residence)
CRC Principles (II)

- Participation of Children
  - In designing and implementing policies that may affect them
    - Children Left Behind
    - Children Migrants in destination countries
      - E.g., Integration Policies (Education, Intercultural Programs, Access to Health Care with cultural-sensitive approach)

- Protection approach
  → within migration policies
  - E.g., Unaccompanied Children (CRC, art. 20) without legal residence
    - Deportation?
    - Repatriation to country of origin
      - Grounds?
    - Granting Legal Residence
      - Family Reunification in Country of destination?
Other IHRL principles

- **Pro Homine** (*pro persona*)
  - In each case:
    - Applying the regulation most favourable for the child's rights
    - Law interpretation in his/her best interest

- Progressiveness
  - Migration Policies Approach?
    - Preventive and Punitive?
    - Comprehensive and Rights-Based Approach?

- Dynamism
  - Facing international migration challenges in the current context. Human Rights Treaties as “living instruments”

- Universality
  - Back to 1948? Human Beings in the centre

- Groups in a vulnerable situation (children, irregular migrants)
  - Additional protection duties
CRC Obligations

- Respect, Protect and Fulfil human rights of all children within State jurisdiction
- Adopt Measures (CRC, art. 3.1, 3.2)
  - Harmonize Legislation
  - Design public policies (participatory processes)
  - Produce data (distribution, access to information)
  - Monitoring enforcement
  - Access to Justice (+ due process)
  - Training on rights-based approach, children rights and gender perspective in public policies, including migration field
Migration Issues and Human Rights of Children
Migration Procedures, Children and Due Process of Law

- **Procedures:** entry (in country of origin and at borders); residence authorization (and renewal) based in different motives (e.g., family reunification); repatriation and deportation

- **CRC, art. 12 (right to be heard), art. 40 (basic guarantees of due process)**

- **Unaccompanied Children**
  - Guardian. Legal Representative. Free Legal Assistance.
  - Proceedings related to his/her migratory condition (entrance, permanence, forced or voluntary returning)
  - Effective Remedy. Access to Justice

- **Accompanied Children**
  - Participation in migration procedures which may affect their rights
  - Right to be heard
Deportation and Repatriation (I)

- Children Protection Approach in migration control policies, including readmission bilateral treaties

- Non deportation as punishment
  - Criminal Juvenile Justice: discussion on minimum age of capacity to infringe penal law. What about youth migrants and migration law breach?
  - Unaccompanied (protection of children in vulnerable situation)
  - Accompanied (responsibility for migration law breach?)

- Non Refoulement (*Jus Cogens*)
  - Committee CRC, Gen. O. No. 6 → Social and Economic circumstances in country of origin
  - Not Geographical limitation
Deportation and Repatriation (II)

- **Voluntary Repatriation or Returning**
  - **Ground:** Best Interest of the Child
  - **Reasons**
    - Social Reintegration or Family Reunification (CRC Committee, General Observation No. 6, 2005)
      - **Country of Origin**
        - Not possible or not in his/her best interest → protection and integration in country of destination
  - **Due Process.**
    - Public Policies to ensure that repatriation is in his/her best interest
    - Policies to ensure effectiveness of the goal invoked for repatriation (e.g., family reunification)
      - Both countries of origin and destination
    - Legal Proceeding. Due Process, including right to be heard (see, inter alia, Spanish Courts Jurisprudence)
Children Due Process in Deportation Procedures against their parents

- CRC, art. 9.1: separation on his/her best interest
- Art. 9.2: right to participate

- Best Interest of the Child as Primary Consideration
- Right to Family Life
- Deportation of one parent (right of spouses to live in one particular country? See ECHR, cases *Omoregie v. Norway* and *Y v. Russia*, 2008) → Impact on Children
  - Family Separation or Family Unite and Poverty?
  - Third Alternative: regularization and family unit
- Reunification after deportation (CRC, art. 9.4, 10)
  - Prohibition of entry to the country of destination?
Children Rights and Migration-Related Detention

- CRC, art. 37.b (arbitrary detention), 37.c (detention conditions)

- Best Interest of the Child
  - Detention as the last resort
    - Legislation: non detention of migrants or exception clause related to children
    - Principle of Legality
  - Practices: monitoring policies to prevent children migrants detention

- Non criminalization of irregular migration
  - Migrants Workers Committee
  - Global Migration Group (2008, p. 43)
Children migration-related detention (II)

Non detention of children for migratory reasons
- CRC Committee (G.O. No. 6, p. 40, 61)
- Touzenis, IOM, 2008, p. 33
- Working Group on Arbitrary Detention (UK Visit, 1999)

- Unaccompanied
  - Protection approach (Committee CRC, G.O. No. 6).
    - Principle of non detention.

- Accompanied
  - Best Interest? Alternative Measures
    - UNICEF Australia, 2003;
    - European Network of Ombudspeople for Children, ENOC, Declaration on EU Directive on Return, 2008;
    - Steps Consulting Social, Report on Detention Centres in EU countries, 2008: detention of children and families “should be prohibited”
Children migration-related detention (III)

- Alternative Measures
  - Legislation.
  - Enforcement.
  - Duty of justify properly non application of alternative measures to detention

- Reasons for detention?
  - Criminal Law Standards. Grounds.
    - Absconding. Obstruction of Justice
    - Migration Procedures?
Children migration-related detention (IV)

- **Due Process (CRC, art. 37.d)**
  - Judicial Control and Effective Remedy
  - Free Legal Aid and Guardian
  - Consular Assistance (Vienna Convention on Consular Relations; ICHR, Advisory Opinion OC-16/99)

- **Length of Detention**
  - Shortest period of time, by law

- **Place of Detention**
  - Non prisons-like
  - Open Centers

- **Detention Conditions**
  - Separated from adults (ECHR, Case *Mubilanzila and Mitunga v. Belgium*, 2006)
  - ESCR (health care, education –outside the center-)
  - Recreation
  - Childhood Protection Officers in charge (Protection for Children, not Prevention from them)
Children Rights and Migration Control (borders and beyond)

- Due Process. Guardian. Free Legal Aid
- Childhood Protection Officers at Borders
- Non prohibition of entry of unaccompanied children.
  - Protection approach
- Protection measures against abuses
  - Gender Perspective
- Children Protection under State's jurisdiction (beyond national territory)
  - Children Protection and Law of the Sea
  - Extraterritoriality of Human Rights Treaties
  - Right to asylum (CRC, art. 22)
  - Non Refoulement
  - Prohibition of Collective Expulsions (European Court, Interamerican Court, African Commission)
Economic, Social and Cultural Rights (CRC, art. 4, ICESCR)

- Non discrimination based in nationality, national origin and administrative status
  - Non discrimination based in parents status (CRC, art. 2.1, 2.2)

- Right to Education (CRC, art. 28)
  - Accessibility; Universality; Compulsory Education;
  - Discrimination in schools. Intercultural Education Programs (art. 29).

- Right to Health Care (CRC, art. 24)
  - ESCR Committee, General Observation No. 14: non discrimination against irregular migrants
  - European Council on Social Rights: Case FIDH v. France

However:
- Existence of legislation and practical cases of denial access to social rights of children migrants, based in their nationality or migration status (and their parents status)
- See recommendations to countries made by, inter alia, the CRC Committee, ESCR Committee, MWC Committee.
  - Deprivation of access to education, housing, health care, social security of migrant workers and their families
Economic, Social and Cultural Rights (II)

- Right to an Adequate Standard of Living (CRC, art. 27)

- ESCR of migrants parents as a child protection mechanism
  - Negative Obligations? e.g. restriction in access to an employment
  - Positive Obligations? Assist parents (art. 27.3). Regularization, access to legal residence: e.g., for family unit; job offer; social integration policy

- Protection against abuses and exploitation
  - Gender Perspective in Migration Law and Policies
  - Conventions and Principles on Child Labour (ILO)

- ESCR and Integration Policies
  - Equal rights and opportunities
  - Social Cohesion
  - Long-Term Policies

- Adolescents. Access to education, professional training, job
  - Gender Approach. Inequalities based on gender and national or ethnic origin → Revise migration laws and policies
Right to Family Life

- CRC
  - art. 9: not separation from parents (only in best interest of the child)
  - art. 10: facilitate family reunification (positive, human and expeditious manner)
  - art. 16: Protection of Family

- Family Reunification
  - Country of Origin
  - Country of Destination

- Regularization Policies
  - Extraordinary (Latin American Policies and Declarations)
  - Ordinary (permanent grounds for granting residence, based on family ties)

- Non Deportation
  - Due Process. Children Participation
  - Reasonableness (ECHR, ICHR and national jurisprudence)
Right to Birth Registration, to a Name and a Nationality (CRC, art. 7; MWC, art. 29)

- **Children born in destination countries**
  - Right to birth registration
  - Right to a name
  - Right to a nationality

- **Impact of migration control measures on children rights (ESCR and Birth Registration)**

- **Interamerican Court of Human Rights, Case Yeán and Bosico v. Dominican Republic (2005)**

- **Committee CRC (General Observation No. 7, 2006; MWC, Concluding Observations)**
Children Left Behind

- **Public Policies**
  - ESCR
  - Children Participation
  - Protection Measures
  - Gender Perspective

- **Reunification Policies in both countries of origin and destination**
  - Bilateral Agreements and International Discussions on Migration Policies
  - Prevention Irregular Adolescents Migration
  - Facilitate regular avenues for migration

- **Remittances**
  - Private Income
  - Co-development Initiatives (not replacing development and human rights obligations, neither international cooperation responsibilities)
Children Rights and Root Causes of Migration

- Fulfilment of CRC and other human rights treaties in countries of origin
  - Duty-bearers
    - Each State
    - International Community
    - Developed countries: cooperation and negative obligations
  - Childhood Policies
  - Adolescents Policies

- Universality of ESCR (Minimum Core, non discrimination)
  - ESCR Committee: Deprivation of ESCR
    - → Emigration, especially young and women
    - → Children Left Behind

- Non Discrimination against social groups
  - Women, Indigenous Peoples, Roma
Comprehensive and Coherent migration policies:
  → rights-based approach
  → child and gender perspective