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"Child first, migrant second?"

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Abstract

A large part of the migrants in the world today are children. Of those who are forcibly displaced, it is estimated that around 50 per cent are below 18 years of age. The UN Convention on the Rights of the Child establishes a comprehensive catalogue of rights for all children, including children on the move. In the context of migration, however, the child rights perspective of the Convention often is at risk of being overshadowed by the child's status as a migrant with all that this entails of rights limitations and restrictions. Put differently, instead of being treated first and foremost as a child, and as a migrant second, it is not uncommon for it to be the other way around. In this talk, I reflect upon the reasons and consequences of this for the idea of children as rights-holders.

Your Majesty, Vice Chancellor, distinguished guests,

I want to express my gratitude to the Stockholm Centre for the Rights of the Child for inviting me to present some thoughts at this prestigious event. I have for a long time been affiliated with or otherwise involved with the Centre, and it is truly a joy to see how it has developed over the years into the well-recognised hub for research on children's human rights that it is today. I am honoured to be here today.

The theme on which I was asked to reflect is “Children's rights in times of crises”. What we mean by crisis can be many things and have positive and negative connotations. Migration, at least forced migration – a term referring to a situation when people are forced to leave their homes and sometimes even their

countries due to fear of persecution or other serious harm of some kind – often is referred to as a result of a crisis, or as being a crisis in itself, due to the consequences it is presumed to have for states as well as migrants.

Now, this presentation is not the time to discuss whether migration is or is not a crisis. However, what is clear is that “crisis” often is seen and referred to as a kind of state of emergency, a situation where well-established rules may be challenged or derogated from more or less legitimately. Such well-established rules include human rights principles and standards, also those explicitly aimed at children. One example of many is the widespread use of detention of asylum seekers during the 2015 so-called refugee crisis in Europe, a practice highly questionable in many cases from a human rights point of view but motivated and necessary from the point of view of states seeking to control their borders at a time where the number of asylum seekers arriving in Europe was exceptionally high.

Against this background, in this presentation I will reflect on the importance of seeing children as rights holders, focusing on migrant children, and to what extent children in a migratory context are seen as children first and migrants second.

A few brief words on the background: The International Organisation of Migration, IOM; estimates that there are about 281 million migrants in the world today. A large part of these are children. Of the 100 million people the UNHCR describe as forcibly displaced, it is estimated that around 40-50 per cent are below the age of 18.

The Convention on the Rights of the Child (CRC) establishes a comprehensive catalogue of rights for children, including children in a migratory context. This rights catalogue includes articles on civil and political rights and economic, social and cultural rights. These rights are seen as interrelated and interdependent; no right is more or less important than another.

The principle of non-discrimination, expressed in Article 2 of the CRC, states that countries bound by the CRC shall respect and ensure the rights set forth in the Convention “without discrimination of any kind” including the child's or his or parent's status, something which has been interpreted as including legal statuses such as citizenship or residence permit.

In other words, as has also been emphasised by the Committee on the Rights of the Child, the CRC applies to migrant children to the same extent as it does to other children within the jurisdiction of a Convention state. This has the effect that the child rights perspective manifested and established by the CRC – that the child should be seen as a rights holder – is equally important in relation to migrant children as to children of other categories.

Seeing the child as a rights holder includes that children should first and foremost be treated as children, with all that that entails, including rights, and that any other category a child might belong to – for example, being a migrant – is secondary to that.

In the context of migration, however, the child rights perspective of the Convention often tends to be overshadowed by the child's parallel status as a migrant, with all that that entails of rights limitations and restrictions. In other

words, while children, in theory, are to be seen as children first and migrants second, in practice, there is not seldom a risk that it is the other way around. I will return to this shortly.

First, however, I will say a few words about the idea of children as rights-holders.

Put very simply, to see children as rights holders means to see children as individuals with agency, with the right to have rights, not merely objects of protection or parts of a unit such as the family.

Although this view of the child might be perceived as completely mainstream, seeing children as rights holders and acting accordingly continues to be easier said than done. Michael Freeman, the prominent child rights scholar, only a decade ago somewhat pessimistically held that “...the majority opinion is still...that the only right that children have is to autonomous parents”, which leaves us with a long way left to go to see children as rights holders on equal terms with adults.

In addition, the concept of “children as rights holders” may mean somewhat different things in different cultural contexts and be interpreted differently.

When talking about children as rights holders, an important distinction is between legal rights and moral rights, or the legal and moral or theoretical dimensions of rights.

That children have **legal rights** is not really an issue – there are legally binding instruments in international law as well as national law establishing that children have certain rights. From a legal perspective, children have rights because we have adopted laws that establish that they do. What might be debated is how these legal rights are to be interpreted and implemented, but not whether they exist.

The debate instead has concerned the moral and theoretical underpinnings of these rights – what can be referred to as the **moral dimension of the right**.

While it is perfectly possible to accept that children have legal rights without necessarily acknowledging that there is a corresponding moral right or just questioning the theoretical basis for children's rights, I think discussing the moral and theoretical underpinnings of the claim that children have rights can contribute to **establishing legitimacy** for such claims.

As has been argued by legal philosophers, it is not only a question of believing in the existence of children's rights but having a solid basis for this claim. The risk is that if there is not such a basis, **belief in the power and existence in children's rights – and the importance of implementing these rights in practice – can be countered by someone else's belief** in, for example, the superiority of the family, the subordinate status of children, or in that certain interests – such as those of the state to govern, control and reduce migration – always should take precedence.

A second division is that between legal rights in theory – on paper – and in practice – implementation of rights and access to rights.

As I have already mentioned, the CRC applies to migrant children as well as other children, with general principles of the Convention, such as the best interests principle and the right to be heard, being hugely important, not least for children in the asylum process.

In addition to the Convention, a large body of legal and soft law instruments have developed, acknowledging the child as a rights holder, including in the field of migration and refugee law.

It could thus be argued that on the normative level, a child first, migrant second approach, promoting the idea of children in a migratory context to be treated first and foremost as children, is well established.

The problem is, however, what happens in practice when these instruments, policies etc. are to be implemented, especially in times of real or perceived crisis.

As many research studies have shown over the years, it is not uncommon for laws and policies stating the importance of safeguarding the rights of migrant children because they are children to be poorly implemented, misinterpreted or ignored.

This may take the form of children being treated according to the same standards as adult migrants, even though there are rules requiring special attention to be given to their special status as children in such situations.

It may also be that being a child means being, in fact, treated less favourably than if the person had been an adult.

One example of the first situation is when families with children, including young children, are kept in detention for extended periods of time – following the rules applicable to adults – regardless of the fact that putting children in detention should, according to binding legal instruments, only be an option under particular circumstances. Examples of such practices were found in several EU countries during the so-called refugee crisis.

Another example is when the child's right to family life and the right to live with his or her parents is considered less important than the state's interest in controlling migration and upholding strict rules on family reunification, not taking into account the fact that for a child to be separated from his or her parent for a long period of time might have more severe effects on a child than the same situation would have for an adult, given that a period of time that may be judged relatively short in an adult's life may be perceived as considerably longer in the life of a child.

Being a child may also play to a migrant's **disadvantage** in the sense that children's claims for international protection are not always heard when they seek asylum together with their families – the fact that children may have separate, individual claims for protection remains to be overlooked or forgotten in far too many cases. The risks they may be exposed to are only evaluated as part of the risks for the family as a whole.

It is also common for children's asylum claims in practice to be assessed not according to what would be persecution or serious harm for a child but according to adult standards. This may lead to, for example, being denied basic education is not considered discrimination serious enough to amount to persecution, although denying a child the right to education seriously affects his or her possibilities later in life in a way that is not the same for an adult. A current example is girls in Afghanistan.

A conclusion to be drawn from these and many other examples identified in research studies is that even when migrant children on the normative level may be seen as children first, migrants second – legislation may well be in place - in practice, their position as rights holders, and as rights holders being in a particularly vulnerable situation, is at risk of being overshadowed by them also being migrants. This, more often than not, holds negative consequences for migrant children, as the rights of migrants, not least in recent years, have been severely restricted, challenged and even ignored, often with reference to the migrant situation being that of a crisis requiring exceptional measures to be taken to safeguard the interests of the state.

Please note: I am not suggesting here that applying a rights-based perspective and taking the vulnerable situation of migrant children into account means that the rights of the child should always trump other interests, or that being a child in itself constitutes a protection ground, or that being a child should be enough to be granted a residence permit in all situations. There still has to be an assessment of protection claims or other claims on which an application for a residence permit is based, and when such is allowed, a balancing of interests (the

state vs the child) can indeed be carried out. The point is how you do it and what weight is accorded to these competing interests.

So is there a way forward? How can the rights of migrant children, not only in theory but also in practice, be better protected and respected, including in times of crisis?

There is, of course, not one single answer to that question. Better legislation and policies is one response; educating decision-makers is another. I would, however, argue that one additional part of this puzzle is to focus on the very idea of the child as a rights holder. By this I mean that in order to **be able** to implement the legal rights of children properly, it is necessary to not only know the law but also to reflect upon the theoretical, moral underpinnings of children's rights. The basis of the claim, in other words.

The reason for this is that, in my view, understanding not only that there are certain rights to be respected but the basis for doing so, leads to rights gaining more weight and legitimacy, even in times of crisis. It is well known that in times of crisis, the rights of vulnerable groups and minorities are often among the first to be challenged. However, this may be counteracted, at least on the level of implementation, if those set to apply a rights-based perspective understand not only that they are required to do so but also WHY this is the case, which values they are set to protect, and how applying a child-rights perspective may affect society in a long-term perspective.

So to conclude, understanding not only that migrant children *have* rights but also why may contribute to making the idea of children as rights holders less of a

slogan and more of a necessity, and for migrant children, at least to a lesser extent than today, be treated according to standards set for adults, or as adults. In other words, for children, not only in theory but also in practice, to be seen as children first and migrants second.

Thank you very much for your attention.