

Child Migration & Human Rights in a Global Age

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CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE



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For my Homi, Ishan, Maria Elisa, Satya, and Leah

Acknowledgments

Any book that spans a large part of one's working life reflects the impact of relationships extending far beyond work. This book is no exception. The concerns it describes have been with me since I was a graduate student at Oxford. They developed during my years as a practicing lawyer and activist in London. They still preoccupy me decades later at Harvard. Deciding whom to thank is thus a daunting task. Stray conversations, engaging arguments, nurturing distractions, generous collaborations, insightful suggestions, probing questions, frank testimonies, rigorous critiques, and loving relationships have all played a crucial role. To avoid an endless list, I only mention a few among the very many people I am grateful to.

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Introduction

Every year, tens of thousands of children cross borders alone. Some travel to join families that have already migrated. Others leave home to flee war, civil unrest, natural disaster, or persecution. Some migrate in search of work, education, opportunity, adventure. Others travel separated from their families but not actually alone, in the company of traffickers or smugglers, risking exploitation and abuse. The majority, perhaps, travel for a combination of reasons, part of the growing trend toward mixed migration. And yet, the complexity of child migration is a largely untold and unanalyzed story. This book is an effort to correct that omission.

Child migration is part of a contemporary phenomenon that changes and shapes the world we live in. Migration affects not just the 3 percent¹ of the global population who are migrants, but the vast majority who are not. As villages become depleted of young adults and the population in metropolitan centers changes beyond recognition within the space of a couple of decades, as schools, hospitals, workplaces, and shops cater to an increasingly diverse clientèle, so the cumulative impact of contemporary migration irrevocably seeps into the fabric of everyday life. Many stories have been told about this process, ranging from alarmist xenophobic accounts of invasion and cultural pollution to cautious academic analyses of the impact of migration flows on population stocks and domestic economic prospects. They are interspersed with a range of literary and cinematic depictions of the imaginative correlates of migration. Very few of these stories center on the experiences of child migrants, the push and pull factors affecting their movements, and the social and legal environments they populate. This deficit is nontrivial. It affects the perception of migration as a whole and the social investment it attracts. Migration is increasingly considered a voluntary adult phenomenon requiring management and control. The

claim to protective intervention or fiscally backed social engagement is ever-diminishing now that concerns about the Holocaust and the brutalities of the Cold War have given way to apprehensions about terrorists and welfare scroungers. Children do not feature in this large-scale picture, except as occasional appendages to adults. But they should. The failure to attend to child migration coincides with the diffusion of confused, unsatisfactory, and frequently oppressive policies that should not stand up to careful public scrutiny.

Migration to developed states has more than doubled in the last thirty-five years. A significant proportion of that migration, recently estimated at 11 percent,² consists of children and young people under twenty. There is every reason to expect this trend to continue, given global inequalities and shrinking geographies. But until the late 1990s, policy makers and advocates failed to ask themselves, let alone the children and adolescents in question, what the reasons for their migrations were, or who made (or should make) key decisions concerning their journeys, their well-being, their rights, and their future. With very few exceptions, no agency, department, or expert body considered itself primarily responsible for this group or competent to address the increasingly complex dilemmas that it presented. Though children outside family care have generally lacked the attention and support required to flourish—"the rhetoric of respect is contradicted by the reality of marginalization, rejection, abuse and neglect"³—there has at least been long-established and dedicated institutional provision for citizen children. Not so, until recently, for child migrants. Child welfare specialists have been absorbed by their domestic preoccupations with issues such as abuse and neglect, the relative role of foster care and adoption (including, increasingly, intercountry adoption),⁴ the scope of parental autonomy versus state responsibility, and the relationship between nurturing and punitive interventions for abandoned and troubled children. Immigration considerations did not feature as complicating, let alone central, issues for children in need of state protection. In many cases migrant children who did not have families to care for them became the responsibility of diasporic community organizations from their countries of origin—Ethiopia, Iran, Vietnam, Somalia, Sri Lanka, El Salvador, or Guatemala. Formal legal decisions were not taken on their behalf, and state entities did not take responsibility for their well-being.

Similarly, immigration advocates have been increasingly engaged in defending humanitarian immigration access—refugee protection—in the face

of a changing refugee demographic (what David Martin usefully referred to as the “new asylum-seekers”⁵) and in challenging a growing state propensity to detain, exclude, and criminalize immigrant populations. As subsequent chapters in this book will show, children did not feature in this equation as individual subjects of immigration concern. Rather (as women before them) they were considered appendages and possessions of others—parents, families, lone mothers. Immigration specialists lacked child-specific competence, both substantively in terms of child welfare law and policy, and procedurally in terms of child-friendly operational guidelines. Where they were not entirely overlooked, decisions about migrant children’s immigration status and rights were generally linked to and driven by adult entitlements and concerns. This state of affairs began to change in the late 1990s. Two factors were key to the transformation. One was population driven. It concerned the growing presence of unaccompanied child migrants manifestly requiring some form of state attention in developed destination states. There were two aspects to this newly pressing issue. On the one hand child migrants appeared to require *protective attention* because they had or were at risk of having no adults caring for them. On the other hand, child migrants seemed to some key policy makers to need *punitive attention* because their presence as suspected gang members or otherwise threatening outsiders was disruptive and posed challenges to existing state structures.

The other factor central to the changing approach to child migrants at the end of the 1990s was law driven: the increasing importance given to children in international law, thanks to the growing influence of the widely and rapidly ratified 1989 Convention on the Rights of the Child, and the foundational impact of the 1996 Graça Machel report on children and armed conflict. The public law acknowledgment that children featured as rights bearers and as subjects of concern in international law, and that noncitizen children deserved attention and state protection as much as domestic children, provided ammunition to child migrant advocates. As a result of these two developments, conceptions of migrant children began to change, to assume more importance and definition and to have a greater impact on child welfare and immigration decisions. By the beginning of the twenty-first century, the chasm between child welfare and immigration experts was starting to close, with a small group of immigration advocates, juvenile justice experts, child welfare specialists, and humanitarian activists directing attention to issues specific to different groups of child migrants.

Clear evidence of this gradual transformation in the conception of migrant children and the legitimacy of their claims to attention is the evolution of terminology dealing with child migrants, an evolution that reflects a growing sophistication in categorization and understanding. As already noted, until the 1990s⁶ the vast majority of child migrants were subsumed within family immigration where they were simply “dependents.” This was true both of national immigration statistics regarding family reunification claims, and of international demographic data regarding refugee processing. Insofar as any attention was paid to other child migrants, it was simply because they arrived alone. They were at first referred to as “unaccompanied children,” and were generally assumed to be asylum seekers. The February 1997 Office of the United Nations High Commissioner for Refugees (UNHCR) *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*⁷ was among the first of official documents to address this population.⁸ The *Guidelines* targeted children under eighteen who were “separated from both parents and [were] not being cared for by an adult who by law or custom had responsibility to do so.”⁹ Within four months, the European Union followed suit. It passed a “Resolution on Unaccompanied Minors who are nationals of Third Countries,”¹⁰ its only one to date focused on this issue. The assumption here too was that all these children needed to be dealt with within the asylum-determination framework. National guidelines eventually followed in the United States and the United Kingdom¹¹ targeting unaccompanied child asylum seekers as the only category of concern.

The inadequacy of this terminology gradually became apparent. As the UNHCR definition itself noted, children requiring attention were not just those who were unaccompanied by parents but those not cared for by a responsible adult. In other words, lack of care rather than unaccompanied status was the factor precipitating the need for public attention. The terminology changed to reflect this new conception—“unaccompanied and separated child asylum-seekers” were the new target, so that children separated from their customary caregivers but in others’ company were also included. Indeed it became apparent that accompanied migrant children might be highly vulnerable, if for example they were with traffickers, military recruiters, or other exploitative individuals. What unaccompanied and separated children had in common was a protection deficit, one that the state in its role as *parens patriae* was obliged to address.

Toward the middle of the new century's first decade, around 2005 to 2006, a third development regarding child migrants appeared that coincided with the growing constriction of access to asylum after the mushrooming of applications following the Balkan War, and the expansion of independent child migration from North Africa, West Africa, and Latin America. It became apparent that many unaccompanied or separated children were not asylum seekers at all, but young migrants driven to cross borders because of a complex, mixed set of factors unrelated to fear of persecution. Fitting all these diversely driven young migrants into the asylum-determination process and the refugee definition for the purposes of securing a legal immigration status became increasingly unworkable. Most undocumented migrant children living in irregular situations who are not asylum seekers continue to fall outside domestic legislation and institutional protection in the destination states where they reside.¹²

Gradually, however, in specialist circles at least, some acknowledgment of the complexity of child migration developed, reflected in a more differentiated categorical lexicon and more thoughtful policy articulation. In France, where large numbers of North African and East European adolescents arrived during the first decade of the new century, the terminology of "unaccompanied" or "separated" was replaced by the notion of *jeunes errants*, a term that means "young wanderers" but became translated into the less pejorative "children on the move." This terminological shift reflected a new conception: child and adolescent migrants were moving in search of various key elements of a rights-respecting life absent in the home countries—safety, nurture, educational opportunity, economic prospects, and perhaps family life. The dichotomy between forced and economic migration was giving way to an acknowledgment, for children too, of the reality of mixed migration. Migration was prompted not just by persecution or by family migration but by the spread of a global social imaginary, the fall of the Berlin Wall, the dramatic curtailment of legal status for Latino populations in the United States (rendered "impossible subjects" in Mae Ngai's evocative terminology¹³), the growth of immigrant diasporas, and the proliferation of social networking through omnipresent portable and affordable personal technology. Border crossing, therefore, was no longer simply an adult or family life strategy, but one adopted by children and adolescents—-independent child migrants making choices (whether experts considered them in their best interests or not) that expressed their views about their future preferences.

Greater attention to child migration is gradually bringing more sophistication to the related policy and decision-making process. As acknowledgment of the variety of the migration projects undertaken by young people has expanded, so has a more differentiated conception of the category “child.” In international law, the term spans a huge capability range, from zero to eighteen.¹⁴ It covers infants entirely dependent on adult provision, who should have a positive right to protection,¹⁵ as well as late teens considered independent family members back home, whose capacity to make best-interest judgments for themselves should be respected. In the migration context this more nuanced understanding of the evolving capacities of the child complicates decision making about the meaning of “the best interests of the child” as applied to the child’s future plans. Protective policies rub up against autonomous desires and plans that reflect an increasing capability for self-reflection and decision making. There is a growing recognition that unaccompanied child migrants are, in most cases, teenagers with complex life stories and agendas that challenge previous orthodoxies. Some advocates now insist that family unity traditionally conceived is not synonymous with the best interests of the child, and that other human rights—to education, to a reasonable standard of living, to freedom from exploitation—should complicate a simple-minded “return home” policy.

Consider the differences between the following common child-migrant situations explored in subsequent chapters. Some children who are unaccompanied or separated or in situations of “errance” are trapped by traffickers or exploitative employers unbeknown to their families, or held by smugglers refusing to hand them over to parents waiting to reunify their family: these children need positive protection by the state, including legal support, social and emotional care as a prelude to family reunification. Other children who have left home exercising their own initiative, leaving behind situations of abuse or exploitation, need to be protected from families and spared rather than forced into family unity. Policies that return these children “home” without scrutinizing the homes to which return is being effected may contribute to retrafficking or forced conscription. Even migrant children joining or living with loving families may nonetheless risk human rights violations requiring state intervention. Paradoxically, some accompanied children may face greater risks than their unaccompanied or separated counterparts. Whereas many unaccompanied children within state custody get access to education, necessary medical attention, and

sometimes even regularization of their immigration status, accompanied children living in families with an irregular immigration status rarely do. As chapter 2 discusses, children living with parents frightened of being arrested and deported, as millions of US resident children are, risk being kept away from necessary medical services and other public situations to avoid potentially devastating encounters with law enforcement and immigration agents. And, as chapter 7 points out, children living with stateless parents or parents in irregular settlements, including European Roma children, are regularly denied access to necessary state services for similar reasons. Unprotected rather than unaccompanied child migrants are a new and urgent focus of concern.

Finally some advocates have adopted the terminology of “lone” or “independent” child migrants, which suggests a more recent set of issues: that child migrant advocates need to take on board the autonomy and adolescent aspirations of many child migrants who are not looking to be “rescued” into state-run facilities where their opportunities to earn are blocked, or inducted into migration itineraries where their aspirations for agency and empowerment are erased. The large-scale absconding from state shelters by children “rescued” from traffickers (discussed in chapter 4) or from a life on the streets is evidence of this dynamic. This population of child migrants requires nonpaternalistic support and advice to enable them to realize the rights guaranteed to them by international law, including the rights to freedom from inhumane or degrading treatment; to basic education; to adequate health care, welfare support, and shelter. Above all, young migrants need to be listened to, and given a voice with which to articulate their concerns and hopes. Legal protections related to migration status need to be coupled with child welfare investments related to social and economic rights. Work with these independent migrant adolescents is in its infancy in Europe, and hardly in evidence at all in the United States. These terminological journeys illustrate the complex ecology of interrelated rights and needs that child migrants present and the unfinished business of legal implementation and policy refinement that lies ahead.

At the same time as conceptions of child migrants evolved, indeed in dialogue with and response to them, domestic proceedings linked to international law began to change. The first two chapters record the process by which child migrants appeared as plaintiffs or co-plaintiffs in challenges to family deportations citing the right to respect for their family life. Chapter 6