



**THE TUSSELE BETWEEN  
RESPONSIBILITY AND  
SOVEREIGNTY: IS INNOCENCE OF  
UNACCOMPANIED MIGRANT  
CHILDREN THE PRICE?**

By Ira Kumar  
From Symbiosis Law School, Pune

**ABSTRACT**

*Children in migration form one of the most vulnerable of groups. Unaccompanied child migrants are particularly the most vulnerable owing to the lack of any adult accompanying. This makes them the easiest targets for some of the most extreme forms of human rights violations.*

*This paper seeks to analyse the tussle between state's sovereignty and their legal obligations to protect the human rights of the unaccompanied child migrants. The paper first tries to define the term 'unaccompanied child migrants' in light of the Child Rights Convention and the UN Refugee Convention to determine the scope of the existing legal framework enforcing human rights. It further takes up a case study of US expulsion of child migrants to examine flouting of state responsibility by US. It tries to put forth certain durable solutions aimed towards a better child-centric approach to human rights protection of child migrants. It concludes that the tussle between states and international law is a long-standing and*

*never-ending one. However, this should not compromise on the innocence of children.*

**KEYWORDS:** Unaccompanied, child, Migrants, Human Rights

**I. INTRODUCTION**

A picture speaks a thousand words.  
*The lifeless body of a young Syrian boy, escaping to Greece, washed ashore near Turkey<sup>1</sup>...*

This was just one of the many gut-wrenching pictures which captured the world's attention and evoked in all a mutual feeling of outrage and compassion. From time to time many such indeleble stories surface, hold attention of the people for some time and are then conveniently forgotten. Just because such images are not making to the headlines anymore, does it mean that the dangers and challenges posed by crises like violent conflicts etc. are not forcing millions of families and children to be uprooted from their homes and embark on a perilous journey to a land that holds the promise of a better future?

The appalling statistics further highlight the compelling nature of the global issue of child migration. According to the UNICEF data, where the total number of globally recorded child migrants was 31 million, approximately 13 million of them were child refugees and 936,000 children were seeking asylum.<sup>2</sup> The phenomenon of child migration is in fact an ancient phenomenon which has gained relevance in the contemporary times owing to

<sup>1</sup> H. Smith, *Shocking images of drowned Syrian boy show tragic plight of refugees*, THE GUARDIAN, (September 22, 2020, 10:05 AM), <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees>

<sup>2</sup> *Child Displacement 2018*, UNICEF, (September 22, 2020, 10:05 AM), <https://data.unicef.org/topic/child-migration-anddisplacement/displacement/>



the challenges associated with unsafe international child migration.

The notion of international child migration is a subset of the broader notion of child migration and it pertains to both authorised and unauthorised migration of children across borders for reasons ranging from safety, security, access to better opportunities, climate change etc. Factors like whether the child is migrating accompanied, separated, or unaccompanied, whether his/her migration is a regular authorised migration, reasons behind migration especially that of escaping persecution of children etc. are of significance in determining the vulnerability and the distinctive needs of child migrants.<sup>3</sup> This lugubrious picture is further exacerbated owing to the vulnerability of the child migrants because of their age and circumstances. They face the perils of migration at all stages- the deplorable pre-migration life that forces them to uproot and move, the perilous journey they undertake often without adequate necessities like shelter, clothing and food, and finally the extreme barriers they face beyond their borders in the form of detention, separation from families and other exploitations. Their challenges do not just end here but the issue of resettlement into a new place overcoming the barriers of exclusion, poverty, culture, language, access to basic rights like education, healthcare facilities etc. further

adds on to the long list of deprivations of such child migrants.<sup>4</sup>

The plight of unaccompanied children migrants is only worsened as they are forced to face this journey alone. Factors like origin country, socio-cultural background together with family needs form the basis for migration for these children. Gross violation of human rights like violence, lack of security, opportunities, poverty, access to basic facilities like healthcare education, maltreatment at home, form the most common instigating factor that forces such children to embark on a journey away from their land of origin, unaccompanied. These human rights violations either forces them to the brink of desperation where they choose migration as a 'necessary risk' to escape the violence and persecution in pursuit of safety, seeking asylum in a land other than their own, or it pushes them to voluntarily migrate in search of a better quality of life.<sup>5</sup>

Threats from extreme forms of human rights violations like human trafficking, sexual exploitation, drugs trafficking, subdued participation in gang violence etc. coupled with the reception policies beyond the borders like detention, deportation, age determination etc. places unaccompanied migrant children among the most vulnerable of the groups, putting them at risk as one of the weakest victims to the extremist human rights violations.<sup>6</sup> Therefore, it becomes pertinent to examine the existing legal

<sup>3</sup>International Organisation for Migration, *World Migration Report, 2020*, (September 22, 2020, 10:05 AM), [https://www.un.org/sites/un2.un.org/files/wmr\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/wmr_2020.pdf)

<sup>4</sup> *Uprooted: The Growing Crisis for Refugee and Migrant Children*, UNICEF, (September 22, 2020, 10:05 AM),

[https://www.unicef.org/publications/files/Uprooted\\_growing\\_crisis\\_for\\_refugee\\_and\\_migrant\\_children.pdf](https://www.unicef.org/publications/files/Uprooted_growing_crisis_for_refugee_and_migrant_children.pdf)

<sup>5</sup> Report of the Human Rights Council Committee, *Global Issue of Unaccompanied Migrant Children and Adolescents and Human Rights*, U.N. Doc. A/HRC/33/53 (2016)

<sup>6</sup> *Ibid.*



framework ensuring human rights protection to this vulnerable group and to revisit issues that require improvement to alleviate the plight of unaccompanied migrant children.

## II. DEFINING ‘UNACCOMPANIED MIGRANT CHILDREN’ IN LIGHT OF THE EXISTING REGIME OF PROTECTION

It becomes pertinent to define and identify the class of people being afforded the protection to bridge all gaps between the intended beneficiaries and the legal framework affording them the protection. To understand the scope and the legal implications of the term ‘Unaccompanied migrant children’, the notions of ‘child’, ‘migrants’ and ‘unaccompanied’ must be individually examined in light of the existing legal framework.

### A. Convention on the Rights of the Child

This convention lays down the international standard of human rights protection to be guaranteed to all children in the form of general safeguards and legal protection owing to their physical and mental immaturity to enable them to live a life of ‘*peace, dignity, tolerance, freedom, equality and solidarity*’.<sup>7</sup>

It defines ‘child’ as ‘all human being below the age of eighteen years’. The wide scope of the definition reflects on the extensive protection that CRC seeks to guarantee all children. The Convention endorses the principle of ‘best interest of the child’ as the

central principle that the states are required to uphold which now has evolved into an international custom.<sup>8</sup>

Art. 22 of the Convention furthers the protection to child refugees, both unaccompanied and accompanied, as defined under relevant governing laws, guarantying them the same protection and rights prescribed under it and other international laws.

### B. The UN Convention Relating to the status of the Refugees, 1951

This Convention being the principle legal framework dealing with refugee protection, defines the scope of the term ‘refugees’ as any person outside the country of his nationality, with a ‘*well-founded fear of persecution*’ on grounds of ‘*race, religion, nationality, membership of a particular social group or political opinion*’, who is ‘*unwilling*’ to go back to his country due to this ‘*fear of persecution*’.

This Convention by defining the notion of ‘refugees’ through a subjective criterion of ‘well-founded fear of persecution’ limits the scope of this protection. Children migrating for reasons other than those to seek refugee status are left out of the scope of protection guaranteed by states after establishing the refugee status of such migrants.<sup>9</sup>

However, the broader protection of human rights guaranteed under the CRC makes up for the shortfall of the UN Refugee Convention. It obligates all states to ensure

<sup>7</sup> Preamble, Convention on the Rights of the Child Art. 1, Nov. 20, 1989, 1577 U.N.T.S. 44

<sup>8</sup> Dina Supaat, *Establishing the Best Interests of the Child Rule as an International Custom*, 5 INT’L J. BUS., ECON., & L. 109, 111 (2014)

<sup>9</sup> UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, (2011), (September 22, 2020, 10:30 AM), <https://www.unhcr.org/50a4c2b09.pdf>



all rights prescribed under the Convention to ‘all children within their jurisdiction’, irrespective of their status.<sup>10</sup> Thus, instead of using the status of the children as a prospective refugee or a migrant to grant them the protection of human rights, the focus is centred on ensuring the ‘best interest of all children’, thus giving the applicability of the Convention a more child-friendly flavour. This focal principle ensures a sustainable approach to tackling the issue of migrant children by providing that all interactions of such migrant children with the state authorities are conducted with due consideration to the age, experiences, vulnerabilities of such children to make the process as child centred as possible.<sup>11</sup>

It is the interpretation of the term ‘unaccompanied’ that brings out the scope of protection guaranteed to ‘unaccompanied child migrants’. UNHCR defines an unaccompanied child as a person below 18 years of age, who is ‘separated from both parents’ and is not under the care of any other adult, responsible for the child by law or custom.<sup>12</sup> Further, Art. 20 of CRC touches upon the notion of unaccompanied children by defining them as those ‘deprived of their family environment’, temporarily or permanently.<sup>13</sup>

The term ‘unaccompanied’ stresses on the vulnerability of the already vulnerable group of migrant children and requires the

application of all international legal frameworks of human rights law to ensure the best interests of ‘unaccompanied migrant children’, irrespective of their status as a refugee or any other illegal immigrant.

### III. THE CASE OF USA- MIGRANTS CONTROL POLICIES OVERRIDING BASIC HUMAN RIGHTS: THE FARCE OF PANDEMIC TO JUSTIFY BLATANT DISREGARD FOR THE HUMAN RIGHTS OF UNACCOMPANIED MIGRANT CHILDREN?

Nearly 1000 unaccompanied migrant children have been expelled and denied protection in US owing to the suspension of humanitarian protections due to pandemic since mid-March.<sup>14</sup> Under the public health order issued by the Centres for Disease Control and Prevention rapid expulsions are being justified by placing public health law over the protection guaranteed to asylum-seekers, immigrants etc.

A secretive border hotel detention system has been adopted to detain the unaccompanied minors and other immigrants until the Immigration and Customs Enforcement officers arrange for their deportation. This detention system not only has inadequate safety standards for the detained minor migrants, but also robs them off the right to

<sup>10</sup> Art. 2, Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 44

<sup>11</sup> UNHCR & United Nations Children’s Fund [UNICEF], *Safe & Sound: What States Can Do To Ensure Respect For The Best Interests Of Unaccompanied And Separated Children In Europe*, (2014),

<sup>12</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking*

*Asylum*, (1997), (September 22, 2020, 10:30 AM), <https://www.unhcr.org/3d4f91cf4.pdf>

<sup>13</sup> Art. 20, Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 44

<sup>14</sup> Catherine E. Schoichet, *8,800 migrant kids were kicked out of the US under coronavirus border restrictions*, CNN, (September 22, 2020, 10:30 AM), <https://edition.cnn.com/2020/09/11/politics/migrant-children-expelled/index.html>



seek adequate legal representation to seek asylum.<sup>15</sup>

But this brings us to the question if the concern of public health and the risk of spread of COVID-19 is in fact the reason behind the rapid expulsions of migrants from US for the last few months. Even before the 2020 pandemic, Trump administration citing the overwhelming spike in asylum-seekers as a threat to national-security, implemented a set of policies to deter migrants.

One of the prime reasons for unaccompanied migration by minors in Central America is the rampant poverty and violence which is forcing the minors from Honduras, Guatemala, Salvador, who account for 85% of the total unaccompanied minors, to flee to US in pursuit of a better life. 12% influx is from Mexico where the children are forced by the never-ending wars against drug cartels, criminal gangs, domestic abuse etc. to flee seeking for themselves asylum protection in the US.<sup>16</sup>

When a child arrives at the US borders unaccompanied, they are apprehended and placed under US Customs and Border Protection facilities where they are

temporarily detained before being transferred to the Department of Health and Human Services (HHS). The Office of Refugee Resettlement looks for a long-term shelter for these children while their cases for determination of legal status continues before the courts. The US Citizenship and Immigration Services and the Justice Department rule on the asylum cases and other immigration cases respectively. The child can legally stay after being granted relief or be deported back to their country by the Immigration and Customs Enforcement.<sup>17</sup> However, 65% of asylum seekers were denied asylum protection in 2018<sup>18</sup> and 71% of unaccompanied minors were deported back in 2019.<sup>19</sup> Apart from the challenge of pendency of asylum cases and the appalling condition of the over-crowded detention facilities<sup>20</sup> with the increase in influx of immigrants, migrant's deterrence policies like increase in detention period, family separation etc. further add on to the challenges faced by the migrants, especially the unaccompanied minors, resulting in their human rights violation.

A comparison of US approach towards protection of human rights of unaccompanied child migrants pre-pandemic and during-

<sup>15</sup> Camilo Montoya Galvez, *Nearly 9,000 migrant children have been expelled under pandemic border policy, court documents say*, CBS NEWS, (September 22, 2020, 10:30 AM), <https://www.cbsnews.com/news/8800-migrant-children-have-been-expelled-under-pandemic-border-policy-per-court-documents/>

<sup>16</sup> Amelia Cheatham, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS, (September 22, 2020, 10:30 AM), <https://www.cfr.org/backgrounders/us-detention-child-migrants>

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*; TRAC Immigration, *Asylum Decisions and Denials Jump in 2018*, *trac*, (September 22, 2020,

10:30 AM), <https://trac.syr.edu/immigration/reports/539/>

<sup>19</sup> Executive Office for Immigration Review, *Adjudication Statistics*, (September 22, 2020, 10:30 AM), <https://www.justice.gov/eoir/page/file/1083086/download>

<sup>20</sup> Simon Romero, Zolan Kanno-Youngs, Manny Fernandez, Daniel Borunda, Aaron Montes & Caitlin Dickerson, *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, THE NEW YORK TIMES, (September 22, 2020, 10:30 AM), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html>



pandemic doesn't portray a picture too different. It was the defence of threat to national security then and it is the threat of public health now. Despite there being legal frameworks in place, the US approach towards the unaccompanied minor migrants has not been a child-centred one, as is envisioned by the international legal instruments. US further evades its obligation by being one of the few nations who have not ratified the most widely ratified human rights treaty. The US case is a classic example of the tussle between a state imposing its sovereignty by letting the migrant control policies override its international obligations.

#### IV. TOWARDS A BETTER CHILD-CENTRIC APPROACH: LOOKING BEYOND THE RESPONSIBILITY v. SOVEREIGNTY DEBATE

Examples like that of US bring before us the long-standing tussle between state interests and their international obligations. States resort to their sovereign powers to escape their international legal obligations by adopting restrictive and deterrent migration policies, aimed at tackling the growing number of immigrants from seeking asylum or other legal protection.

In 2015, European Commission adopted a 'European Agenda on Migration' that aimed at 'creating a new policy on legal migration', strengthening the existing asylum system and establishing deterrence by 'reducing incentives for irregular migration'.<sup>21</sup>

<sup>21</sup> John R. Campbell, *Asylum v. sovereignty in the 21st century: how nation-states breach international law to block access to asylum*, 2 INT. J. MIGRATION AND BORDER STUDIES, (2016)

<sup>22</sup> *3,121 desperate journeys: Exposing a week of chaos under Trump's zero tolerance*, THE GUARDIAN, (September 22, 2020, 10:30 AM),

Another such example is that of the 'zero tolerance policy' adopted by US in 2018 to persecute all illegal immigration along the US-Mexico border. It incites much public outrage globally over the 'family separation' policy which left the children unaccompanied while their parents were tried and deported back to their countries of origin.<sup>22</sup>

The tussle between state sovereignty and international law is a long-standing one and it will continue to be an area of conflict as far as the protection of human rights of unaccompanied child migrants are concerned. *However, sustainable solutions may be identified to create a more comprehensive framework for the unaccompanied child migrants, aimed at addressing their addressing all their protection needs in a child-centric way.*

#### A. Family Reunification

States are obligated under the CRC to reunify the unaccompanied and separated children with their parents if it is in the 'best interests of the child' after considering the opinion of the child<sup>23</sup>. However, if the reunification with families at the country of origin pose a 'reasonable risk' of further violation of human rights of the child on return to the origin country, the non-refoulement obligation of the state may be invoked to grant the child a refugee status, thus taking a rights-centric approach to ensure the continued safety of the unaccompanied child migrant.<sup>24</sup>

<https://www.theguardian.com/us-news/ng-interactive/2018/oct/14/donald-trump-zero-tolerance-policy-special-investigation-immigrant-journeys>

<sup>23</sup> Art. 9,10, 20, 22, Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 44

<sup>24</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and*



Family tracing and reunification form an intrinsic part of the sustainable solutions and should be started right upon the arrival of the unaccompanied child migrant. However, the assessment should be keeping the child's interest at the forefront and any form of family reunification should be adopted that suits the best to the needs of the minor.

An example of a good practice towards family reunification is the EU Family Reunification Directive which allows the parents or the legal guardians of the unaccompanied child migrant to enter and seek residence in the states.<sup>25</sup>

### **B. Durable and Adequate accommodation and assistance**

After the unaccompanied child migrants are intercepted at the borders by the state authorities, adequate assistance mechanism adhering to the existing human rights standards and those best-suited for the child should be provided to the child migrants. For this, the states shall establish their services in a child-centric manner, prior to the child's arrival.<sup>26</sup>

All the assistance services should be designed in a child-friendly way keeping the best interest of the child at the centre. All procedures to identify the needs of the child must be conducted in a child-friendly environment. A safe and scientific Age determination procedure must be conducted,

best suited to the child's physical, mental, social situation. The other formalities like interviews, data collection must be done by professionals in an environment which is conducive to the best interests of the child. In cases where the unaccompanied child migrant is exposed to imminent threats from human rights violations by human traffickers etc. the first step should be ensuring his safety against exploitation and violence.<sup>27</sup>

Community-based solutions, specialised assistance in foster homes and other child-friendly reception centres with constant professional supervision ensuring the well-being of the child should be established to create an environment conducive to the physical and mental development of the unaccompanied child migrants.<sup>28</sup>

### **C. Education and Healthcare**

Apart from a child-friendly accommodation and assistance mechanism, access to education and healthcare facilities forms a core aspect while guarantying the best to the unaccompanied child migrants.

Education both formal and informal should be provided to the child migrants at the facilities by professional trained in childcare. All level of education, recreational activities etc. are important to ensure the growth of the child is not stunted while the immigration proceedings continue.

*separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6 (2005), (September 22, 2020, 10:30 AM), <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

<sup>25</sup> Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, art. 10, 2003 O.J. (L 251) 16.

<sup>26</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and*

*separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6 (2005), (September 22, 2020, 10:30 AM), <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

<sup>27</sup> *Ibid.*

<sup>28</sup> *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997)*, UNHCR, (September 22, 2020, 10:30 AM), <https://www.unhcr.org/3d4f91cf4.pdf>.



Access to adequate health facilities forms an integral part of ensuring the unaccompanied child migrants an effective remedy against the physical and mental trauma caused by family deprivations. The health services must be gender and age sensitive<sup>29</sup>.

Where certain states are unable to provide adequate basic healthcare and educational services to such minors owing to inadequate socio-economic means, involvement from civil society and other stakeholders may be sought to ensure there exists no obstacles in assuring the highest standards of care to unaccompanied child migrants. There is an urgent need to address the appalling conditions at over-crowded, inadequately furnished facility centres to ensure the above standards of protection to the child migrants.

#### D. Assignment of a Guardian

The major issue that makes the unaccompanied child migrants most vulnerable is that they are without the care of an adult, be it parents or legal guardian. To help the navigate through the whole process of immigration, a guardian may be appointed for them at the first instance itself. Special officials with training in childcare services may be appointed as guardians to the child migrants, to guide any legal decisions in the best interest of the child. A guardian is responsible for safeguarding the rights of the unaccompanied child migrant, ensuring a physical and mental environment best suited for the child migrant. By acting as a link between the system and the child migrant, guardian ensures the protection of the human rights of the child migrant.<sup>30</sup>

<sup>29</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,

#### V. CONCLUSION

With migration being one of the biggest contemporary challenges before the world, there is an urgent need to revisit the existing legal frameworks both international and domestic to address the lacunas in them to ensure the highest standard of human rights protection to all categories of migrants.

However, the child migrants, and unaccompanied child migrants in particular, are often the worst hit by poverty, conflicts, conflicts etc. It is their vulnerability that makes them an easy target for different kinds of human rights violations and exploitations. It should not be forgotten that before being a migrant or a refugee, **they are children first**, humans who owing to their immaturity are often the easiest victims of the most abhor human rights violations.

While there is no one possible outcome of the constant face-off between international responsibility of states and their sovereignty, what is compromised in this constant battle is the innocent childhood of the children. *Ensuring the protection of human rights of child migrants is more of a moral responsibility than a formal legal one.*

To protect the child migrants, especially the unaccompanied child migrants, it is important to **strengthen the protection mechanism** by establishing adequate care and assistance system, allotting them guardians who are experts trained to deal with child rights issues and involving NGOs and other stakeholders in this process.

**Alternatives to detention methods** like foster care shelters, other child-friendly facilities

Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, (Aug. 19, 2014).

<sup>30</sup> *supra* note 26.



should be developed to establish an environment conducive to the best interest of the child migrant. *Access to basic necessities* like nutrition, sanitation, healthcare, education etc. should be provided as a collective responsibility of all stakeholders.

*Sensitisation of the people towards the plight of such vulnerable groups is important to prevent any discrimination and exploitation.* Efforts for the *local integration of such vulnerable groups* after they are authorised asylum is equally important to prevent any future violations of their human rights and help them resettle peacefully among new people, in a new culture, in a different land.

\*\*\*\*\*

