



## **Background paper**



**Making Europe and Central Asia Fit for Children**

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# THE PROTECTION OF CHILDREN MOVING ACROSS BORDERS

## 1. Issues and responses

Legally or illegally, voluntarily or not, tens of thousands of children every year move, or are moved, across national borders of European and Central Asian countries for the purposes of:

- international foster care
- intercountry adoption
- international abduction by a parent
- family reunification
- Migration and asylum seeking
- Child trafficking

Whatever the reason and circumstances, the very fact that they find themselves in a country other than their own accentuates their vulnerability and brings to the fore clear and often major challenges regarding their protection.

From a children's rights standpoint, and over and above the need for repressing cross-border criminality involving children, meeting these challenges in the most effective ways possible requires the following minimum strategic components to be in place:

- An adequate and appropriate international legal framework setting out obligations and responsibilities, and where appropriate establishing multilateral cooperation systems to facilitate their implementation
- Agreed basic principles underlying all actions concerning the children involved
- Availability of data enabling credible monitoring and analysis of the phenomena
- Preventive efforts in countries of origin to curtail 'supply'
- Preventive efforts in countries of destination to curtail 'demand'
- Protective responses in countries of destination and on repatriation.

This paper first assesses the general international legal framework relevant to these spheres. It goes on to consider each of the cross-border phenomena bearing in mind the other necessary components listed above, and suggests a number of questions that would benefit greatly from discussion and recommendations in the context of this Conference.

## 2. The international legal framework

In itself, the overall international legal framework for the protection of children moving across borders is sound. In most of the spheres concerned – with exception of international foster care and migration – the Convention on the Rights of the Child (CRC) provides explicit obligations on the part of States Parties. The Convention general protection standards also apply in all these situations. Of major significance in the context of cross-border movement is the fact that the CRC, is applicable to every child under a State's jurisdiction, regardless of why the child is there and whether or not her or his presence is legal.

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\* Where country examples are used in this paper, they are intended purely to be illustrative of specific issues and realities. No inference whatsoever is thereby intended regarding a possibly positive or negative overall record of any given country as regards action in this sphere, and such examples should therefore not be interpreted in that manner.

An additional treaty of very special general significance is the 1996 Hague Convention on Protection of Children<sup>1</sup> which sets out the framework and criteria for determining the responsibilities of States Parties towards children who are outside their country of habitual residence. It has important ramifications for protective responses in almost all cases of children's cross-border movement, and its principles constitute an appropriate guide, framework and benchmark for necessary international cooperation in this field:

“The 1996 Convention has uniform rules determining which country's authorities are competent to take the necessary measures of protection [of children at risk in cross-frontier situations]. These rules, which avoid the possibility of conflicting decisions, give the primary responsibility to the authorities of the country where the child has his or her habitual residence, but also allow any country where the child is present to take necessary emergency or provisional measures of protection. [...] In addition, the cooperation provisions of the Convention provide the basic framework for the exchange of information and for the necessary degree of collaboration between administrative (child protection) authorities in the different Contracting States. [...] The cooperation procedures within the Convention can be helpful in the increasing number of circumstances in which minors cross borders and find themselves in vulnerable situations in which they may be subject to exploitation and other risks. [...] The Convention provides for cooperation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for example under fostering or other long-term arrangements falling short of adoption.”<sup>2</sup>

Although the treaty has entered into force, the ratification record in Europe and Central Asia is for the moment somewhat poor: only the three Baltic States, the Czech and Slovak Republics and Monaco are Contracting States. At the same time, all current EU Member States have now signed the treaty, thereby indicating their intention of ratifying and their commitment to abide by the basic principles of the treaty, as have Cyprus, Poland and Switzerland. Region-wide commitment to this treaty is an important pre-condition for States to effectively fulfil their protection responsibilities with regard to the rights of children crossing borders.

In addition, specific binding international instruments have been developed in relation to intercountry adoption, abduction by a parent, and child trafficking.<sup>3</sup> These and other relevant texts are considered under the appropriate topic heading below.

With the exception of international foster care, improving protection of children moving across borders is therefore not a question of inadequate legal standards as such. The problem lies more with securing greater commitment to international cooperation mechanisms, improving knowledge and information systems, ensuring effective monitoring and developing structures and strategies that comply with those standards and facilitate their implementation.

### **3. International foster care**

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The 'informal' placement of children abroad is reportedly a growing practice. It includes short-term respite care, care during and after medical treatment, longer-term fostering and *kafala*. Because such placements are 'informal', and not usually ordered or approved by an appropriate authority, it is also a notoriously unregulated practice. There are no explicit international standards governing informal placements of this nature. The absence of oversight and agreed guidelines means that hard data on their prevalence and the degree to which they comply with children's rights have so far been lacking.

However, a recent study<sup>4</sup> financed by the European Commission's DAPHNE Programme sheds considerable, though not comprehensive, light on the matter. Noting that the practice began in earnest in the wake of the Chernobyl disaster, the study finds that in most EU countries voluntary associations have since been organizing so-called 'therapeutic holidays' for children from countries 'experiencing very serious economic conditions', particularly those of Eastern Europe. The great majority of children come from Belarus, Russian Federation and Ukraine; other countries mentioned are Bosnia and Herzegovina, Serbia and Montenegro (mainly to Greece) and UN Administered Province of Kosovo. Another source shows that children from Central Asia are also involved in 'summer holiday' schemes, though not with European host countries, e.g. Kazakhstan 'orphans' hosted in the USA.<sup>5</sup>

According to the DAPHNE study, tens of thousands of children are involved in such arrangements each year. In 2002, Italian families alone hosted almost 31,000 children and the other major host country – Germany – has taken in an annual average of 20,000 children since 1989. In most cases they are looked after by families, although public and private facilities are also used in Austria, Denmark, Finland (exclusively public structures), Germany and Sweden. However, only Italy has a designated body for monitoring this activity, the 'Committee for Foreign Minors' under the Ministry of Welfare. Three other countries – Spain, Sweden and the UK – now provide for certain supervisory functions to be carried out by public bodies. Efforts have also begun in Denmark, Germany, Ireland and the Netherlands to establish an 'umbrella organization' to set standards for care, draw up selection criteria, and promote exchange of information on good practice. Otherwise, associations organizing these 'informal' placements of children abroad have considerable – and sometimes virtually complete – freedom of operation.

The risks are clear, although there is only anecdotal evidence as to whether they in fact materialize. With no accepted criteria for assessing the fitness and ensuring the preparation of families to host children under these singular conditions, too much reliance may be placed on 'self-selection' and 'goodwill'. Instances of physical and sexual abuse as well as rejection on the part of host families have been reported, sometimes resulting in the child enduring the highly negative experience of being transferred to another family's care. Cases of aggressive non-adjustment and absconding by the children have also been recorded. A limited number of successful applications to adopt a hosted child have also been noted in the context of European schemes, but there are no indications of whether or not such applications have contravened international standards on intercountry adoption processes in any way.

A glaring knowledge gap stems from the almost complete absence of any valid assessment of the impact and ramifications of these 'holidays' on the children. In the past, serious concerns have been raised, for example, about children's reintegration into their habitual environment – whether family or institution – following a period of respite care, including negative attitudes towards their parents.<sup>6</sup> The DAPHNE study suggests that follow-up is not common.

The study contends that, although the original and specific aim of providing 'therapeutic care' for children from specific parts of the region has gradually been eroded, 'temporary holidays' are likely to continue as a significant phenomenon. Under these conditions it would be important to address the following questions:



#### Discussion points

- **To what extent do mandatory guidelines need to be developed, covering all aspects of the aims and organization of temporary care abroad, including the selection process of both the children and the carers as well as follow-up to the placement?**

- **Should a designated public body in both the country of origin and the host country oversee and/or coordinate such initiatives?**
- **What research programme could be envisaged to evaluate the short- and long-term impact of temporary care abroad on the child?**

#### **4. Intercountry adoption**

The pressure of demand – emanating in particular from several Western European nations and certain countries outside that sub-region – for adopting children from many countries of Central and Eastern Europe, the Baltic States and Central Asia (CEE/CIS Region) has increased in recent years, and has given rise to a number of disquieting developments. Illegal activities in a number of countries have been discovered. Suitable in-country care options are not always being systematically examined, as international standards require.

The highest-profile feature of the last two years in this sphere has been the prolongation of the 2001 moratorium on intercountry adoption decreed by Romania, pending preparation of a child protection legislative package, including a new adoption law. The European Commission and, notably, the USA have demonstrated diametrically opposed attitudes towards the ongoing ban and towards the future of intercountry adoption from the country. This has undoubtedly complicated the task of the Romanian Authorities in developing the new law. Similarly, conflicting views regarding the justification for several hundred 'exceptional case' adoptions – mostly to EU Member States – approved since the ban was introduced have not facilitated the reform process.

But there have been other significant developments in intercountry adoption in recent years. Adoptions from countries in the region (notably Russian Federation, Romania and Ukraine) by Spanish families rose from just 97 in 1997 to 1,569 in 2001. They constituted almost half of all intercountry adoptions to that country in 2000 and 2001 (47 per cent and 45.8 per cent respectively), dropping somewhat in 2002 (to 1,395, or 38.5 per cent) but solely because of the moratorium in Romania.<sup>7</sup> No less strikingly, from November 2000 to the end of 2003, well over 60 per cent of the 7,128 intercountry adoptions by Italians involved children from countries in the CEE/CIS Region (notably Ukraine, Russian Federation, Bulgaria and Belarus), with especially marked increases over that period from Belarus and Ukraine, as well as a rather surprising rise in the albeit relatively small numbers from Poland (the total of 62 adoptions to Italy for 2001 climbed to 154 in 2002 and remained almost at that level in 2003).<sup>8</sup>

Although few of its children reportedly go to European countries, Kazakhstan is so far unique as a significant 'country of origin' in Central Asia. It has seen adoption of its children to the USA rise massively: statistics for Kazakh adoptions by US citizens alone show a more than 30-fold increase between 1997 and 2003 (from just 26 to 825).<sup>9</sup> In a new development towards the end of 2003, at least five US agencies announced the opening of adoption programmes from Tajikistan, from where there have been almost no recorded adoptions to date.

Sudden substantial increases in intercountry adoptions from a given country are cause for concern. In addition to questions about the possible reasons behind such phenomena, it is unclear if the countries concerned – both the country of origin itself and the representatives there of the receiving countries – are always fully equipped to cope appropriately with such rapid expansions in the number of applications.

Hard information on intercountry adoptions remains far too difficult to access. Very few countries of origin and by no means all receiving countries in the region appear to make data

publicly and easily available. It is exceptional to find statistics that are both sufficiently disaggregated and up-to-date to allow for the kind of meaningful and on-going assessment and analysis necessary to adjust policies and combat problems in this sphere.<sup>10</sup>

The CRC requires that “[States Parties shall] promote, where appropriate, the objectives of the present article [on protection in intercountry adoption] by concluding bilateral or multilateral arrangements or agreements...”<sup>11</sup> The major agreement in this sphere is the 1993 Hague Convention.<sup>12</sup> In the past three years, there has been an encouraging increase in the number of the region’s countries ratifying or acceding to it. However, many intercountry adoptions within and from the region are still taking place outside the framework of this treaty. Belgium, Ireland, Russian Federation and Turkey have signed but are still not Contracting States. While serious consideration of accession seems to be under way in at least Azerbaijan and Ukraine, it would appear that Armenia, Hungary, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan have not yet indicated any official intentions in this regard. Commitment to becoming a party to this Convention would constitute an important step forward in securing compliance with international standards on intercountry adoption.

Several countries have placed important limitations on the possibility of their children being adopted abroad, feeling that appropriate in-country care can now be provided for all, or virtually all, children. Nonetheless, experience is showing that countries from where significant numbers of children have been adopted may find it difficult to shake off the perception of their being quasi-permanent ‘countries of origin’. The consequent ongoing exhortations from abroad to continue allowing such adoptions may compromise efforts to ensure that children are able to benefit from domestic solutions.



## Discussion points

- **Why are intercountry adoptions from many countries increasing – sometimes rapidly – despite improved economic conditions in those countries?**
- **What preventive initiatives are needed to enhance, increase availability of and access to recourse to in-country care options?**
- **Why is data essential to monitoring intercountry adoptions not readily available, and how might this be remedied?**
- **How can States that are traditionally receiving countries contribute to reducing pressure stemming from demand for adoptable children on the part of their citizens - particularly when intercountry adoption is no longer felt to correspond to children’s needs in the potential country of origin ?**

## 5. Abduction by a parent

The problem of taking or retaining the child abroad by one parent, and preventing that the child maintains contact with the other parent, is addressed in the CRC: “States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements [to combat the illicit transfer and non-return of children abroad.]”<sup>13</sup> And the CRC makes implicit reference to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the recognized cooperation framework for dealing with this issue. Indeed, the great majority of the countries in the region are already States Parties to this Convention. Those that are not<sup>14</sup> should be encouraged to accede to the Convention as soon as possible.

The 1980 Hague Convention has a preventive effect by virtue of its very existence, since parents contemplating such a move are aware that their child will in principle be returned to

his or her country of habitual residence before any reassessment of the situation is initiated. But prevention is also the subject of a special initiative now launched by the Permanent Bureau of the Hague Conference.<sup>15</sup>

No consolidated data are published regularly on abductions, but it is understood that the number of cases within the region has remained relatively stable in recent years. While most cases used to involve fathers without custody abducting their child, the majority of cases now involve mothers returning to their home country with their child. The Hague Conference is currently preparing a comparative study of cases dealt with under the 1980 Convention in 1999 and 2003, for publication later this year, and a Special Commission to review the operation of the 1980 Convention is scheduled for late 2005. Both should soon provide more insight into the realities of this issue in the region.

As geographical mobility within the region continues to increase, resulting in both a growing incidence of mixed marriages and the easier transfrontier removal of the child on-going attention to the protection of children abducted by a parent will clearly be required.



### Discussion point

- **What services and measures can be developed to reduce the likelihood that a parent will resort to the abduction of his or her child?**

## 6. Family reunification

The issue of a child's reunification with his or her family concerns all countries in the region. Over the past twenty years, it has become one of the main forms of legal immigration into Western Europe.

The CRC requires that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."<sup>16</sup> However, notably, this provision does not grant an absolute right to be reunited, and according to one source,<sup>17</sup> the only international legal text where that right has been unequivocally recognized as such is an EU Council Regulation<sup>18</sup> that confers the right to family members of EU workers, regardless of their nationality, to join the worker, provided the latter has appropriate accommodation. But family reunification for third-country nationals remains a politically charged issue. Neither the EU Charter of Fundamental Rights nor the 1951 Geneva Convention relating to the status of refugees deals with family reunification.

Two particularly relevant initiatives taken on the European front during the past two years give rather conflicting indications of the directions in which thinking and policy on the issue are going at present. On the level of the Council of Europe, the Committee of Ministers in 2002 adopted a recommendation<sup>19</sup> regarding "aliens who have been authorized to reside on the territory of a member State for the purpose to re-create, to maintain or to form a family unit."<sup>20</sup> *Inter alia*, it deals with the status of family members and their protection from expulsion. The Explanatory Memorandum notes that with regard to "the decision on the duration of the residence permit of minor children, special attention should be given to the best interest of those children", while reiterating that no absolute reunification right exists.<sup>21</sup> The recommendation is not binding, and has no monitoring mechanism, but it does at least reaffirm that particular consideration needs to be given to the situation of children.

The second initiative came on 22 September 2003 when the European Union's Council of Ministers approved a Directive<sup>22</sup> that sets out a series of conditions under which family

reunification is to be granted.<sup>23</sup> Specific criteria would apply to refugees. Legally resident foreigners would be allowed to bring their spouse and the ‘legitimate, natural and adopted children’ of the couple, but Member States could require legal residence in the country for up to two years before authorizing family reunion, and could restrict family reunification rights for children applying after the age of 15 or for those over the age of 12 travelling separately from their family. The right to family reunification is also subject to mandatory respect for ‘public order and public security’.

This Directive is in abeyance, however, since several aspects have been contested on grounds that they infringe the fundamental rights of third country nationals to live with their families and, in particular, of children to live with their parents, as well as violating international and European standards. The UNHCR, for example, has stated that “[the rules] discriminate against certain categories of refugees and could lead to some refugees remaining unnecessarily separated from their children and spouses”, and has complained about the criterion of respect for “public policy, public security and public health”, qualifying ‘public policy’ in particular as “a very vague term that could easily be used to keep families apart without any real justification”.<sup>24</sup> Such concerns have led the President of the European Parliament to challenge the Directive in the European Court of Justice, following a recommendation by the European Parliament’s Committee on Citizens’ Freedoms and Rights, supported by its Committee on Legal Affairs.



### Discussion points

- **Although the CRC only strongly promotes, rather than requires, the right to family reunification, it also grants the child the right “as far as possible [...] to know and be cared for by his or her parents”<sup>25</sup> and only permits the child’s separation from a parent through a decision of the competent authorities on the grounds of the child’s best interests.<sup>26</sup> In this context, what restrictions on family reunification are compatible with such obligations, and what are the implications for policy and practice?**
- **How could more systematic and comprehensive data be secured in this sphere to enable better understanding of how many reunification applications fail, the reasons for failure, and the impact on the children concerned?**

## 7. Asylum-seekers and immigrants

The situation of children looking to enter a State as immigrants or asylum seekers, whether alone or as part of a family group, has been the subject of increasing concern in many countries in terms of both the circumstances that motivate and characterize their journey, and the treatment and solutions offered to them on and following arrival.

Basic figures in this sphere are not available for a number of countries, and the UNHCR notes that comparison of national data poses “a serious challenge due to the differences in definitions and recording practices”.<sup>27</sup> From those statistics available, moreover, no clear overall trends are apparent. Thus, while recorded numbers of unaccompanied minors seeking asylum in the Netherlands nearly doubled between 1998 and 2000,<sup>28</sup> they remained relatively stable in the UK in that period and fell by two-thirds in Switzerland.<sup>29</sup> But then the increase in the Netherlands was reversed – reportedly as a result of a new asylum policy adopted in 2001 – so that figures for 2002 were under half of those for 2000.<sup>30</sup>

This issue does not only concern Western European countries. In 2000, Hungary received well over 1,000 asylum applications from unaccompanied minors. High numbers of

applications are reported also in some Central Asian Republics, while smaller numbers were recorded for several Central and Eastern European countries in that year.<sup>31</sup> Other countries in the region not covered in the UNHCR report also face this phenomenon.

There are clear legal and other distinctions between the situations of asylum-seekers and immigrants – and the subsequent distinctions between children in these groups who are accompanied, unaccompanied and variously in situations of legality, illegality or victims of trafficking. Issues relating to their protection – the aims and forms of care, recovery, integration and decisions on repatriation, for example – are essentially common to all, however. In practice, moreover, the differences in purpose and status of these children are blurred. Restrictive immigration laws lead many of those looking for admission to a country – including in particular unaccompanied children – to resort to seeking asylum, and the conditions of their arrival are not always clear. It is therefore justifiable to take an essentially generic approach to these issues.

The CRC does not explicitly address immigrants, however, referring to child refugees it requires that: “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee [...] whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance...”<sup>32</sup>

The Separated Children in Europe Programme (SCEP)<sup>33</sup> defines separated children as children under 18 years of age who are outside their country of origin and separated from both parents or from their legal/customary primary caregiver. Some are totally alone while others may be living with extended family members. SCEP recognizes the entitlement of all such children to international protection under a broad range of international and regional instruments. These include, for example, the 1997 UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum and the June 1997 European Union Resolution on unaccompanied minors who are nationals of third countries.

Given the current EU enlargement context, this is an area to which special and increasing attention has been paid in recent years. While many steps have been taken at international, regional and national levels, several gaps remain. The UNHCR has pointed out, for example, that enlargement “could lead to an increase in the number of asylum-seekers needing to be processed in the new border States”, and that they risk being sent back from other EU countries to the first State they entered, which in practice may often be a border State.<sup>34</sup> This could overwhelm fragile and under-resourced systems in those new EU Member States, as the UNHCR contends in support of its proposal that a centralized processing and ‘burden-sharing system’ throughout the EU be instituted.

Little attention seems to have been paid so far to examining potential preventive efforts in the country of origin. While, by definition, this is not an issue in the case of children seeking asylum from conflict or repression, it is of considerable importance for children contemplating emigration for other reasons, given the realities of arrival in another State.

In terms of the treatment of child asylum-seekers and immigrants, the main concerns highlighted have revolved around expulsion, detention, protection from exploitation, and representation while consideration is given to their claim.

**Expulsion:** Practice varies in the region, but overall the legal bases on which expulsion are carried out are the subject of widespread concern. According to SCEP, “[...] separated children seeking protection should never be refused entry or returned at the point of entry [...] neither should they be subject to detailed interviews by immigration authorities at the point of entry.”<sup>35</sup> In January 2003, the Council of Europe’s Commissioner for Human Rights was requested by the Parliamentary Assembly to investigate the situation of separated

children in Europe, with particular emphasis on expulsion procedures. The Commissioner's report, currently in preparation, will examine the legal and material conditions under which these children are being received by and expelled from the Council's Member States, and, echoing the generic approach, "be they refugees, asylum-seekers, migrants or victims of trafficking".<sup>36</sup>

**Detention:** This is a key issue where national practice also seems to vary. In general, the principle needs to be strongly upheld that deprivation of liberty is an inappropriate response for children, all the more so when they have committed no crime, and that it is to be used "only as a measure of last resort and for the shortest appropriate period of time."<sup>37</sup> This holds whether or not they are in the company of parents, despite the frequent claim that parents have to be detained and that it is therefore in the child's best interests to be detained with them. SCEP contends that children should never be detained for immigration reasons.<sup>38</sup> Reports last year by the Chief Inspector of Prisons on the seven Immigration Removal Centres in the UK<sup>39</sup> note that families with children may be detained there for weeks or months (especially prior to expulsion), whereas "the detention of children [in such centres] should be avoided wherever possible, and only take place for the shortest possible time, in no case more than seven days." Reportedly,<sup>40</sup> however, the Home Office has announced – in relation to one of the Centres at least – that express ministerial authority will only be required for detaining a child longer than 28 days. In the Netherlands, whether or not the child is finally to be repatriated or accepted, he or she spends up to 9 months in "closed, medium-large relief centres".<sup>41</sup> In Sweden, on the other hand, "[c]hildren are never held in detention for more than 6 days [...] In all, but extreme cases, families are released into the community under supervision. If husbands are held in detention, with wives and children released into group homes outside detention centres and they are allowed visits during the day."<sup>42</sup> In an example cited by Maud de Boer-Buquicchio,<sup>43</sup> the Authorities of the Czech Republic 'immediately implemented' a recent recommendation by the Council of Europe's Commissioner for Human Rights that action be taken with a view to preventing foreign illegal immigrant children being kept in prison-like detention centres pending expulsion from the country. A recent European Council Directive<sup>44</sup> laying down minimum standards for the reception of asylum seekers includes a provision that unaccompanied minors be placed with adult relatives, a foster-family, in accommodation centres with special provisions for minors or other suitable accommodation. It does not specify whether or not the children concerned are to be free to come and go when housed in these facilities, however: where this is not the case, it constitutes deprivation of liberty. The provision also allows Member States to "place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers": if placement in such centres constitutes deprivation of liberty, non-separation from adults would in principle be in violation of the CRC.

**Protection from exploitation:** Some degree of deprivation of liberty is often defended on the grounds of ensuring protection, particularly just after arrival. It is true that a major concern expressed by the authorities of several host countries is the fact that a significant proportion (sometimes a majority<sup>45</sup>) of unaccompanied minors are said to abscond and/or 'disappear' into exploitative networks or other vulnerable situations very soon after arrival, even when placed in relatively secure facilities. The issue has been the subject of considerable discussion in several countries, and revolves in good part around respecting the desire or felt-need of the children themselves to be 'protected'. Whereas a child fleeing armed conflict will probably be seeking protection, for example, this is much less likely to be the case for those who have contacts, of whatever nature, in the host country and whose goal is quite simply to get in touch with them. In the debate surrounding the proposed closure, in Autumn 2003, of a 'safe house' for unaccompanied girls arriving in Britain, the authorities maintained that vulnerable girls would be adequately looked after by trained foster carers. Fears were expressed, however, that the high levels of monitoring and security provided by the safe house would not be possible in foster care. Safe house accommodation, it was contended, should include 24-hour supervision – including supervised telephone access so victims

cannot contact their trafficker – as well as, *inter alia*, legal support and awareness-raising about trafficking and social reintegration.<sup>46</sup> This exemplifies the difficulties in ascertaining the most appropriate form of protective action that needs to be taken, and in particular how ‘secure’ it can and should be.

**Representation:** Concern continues to be expressed in many countries over the lack of counselling and representation that children receive while their status and future are being considered. The above-mentioned European Council Directive<sup>47</sup> requires Member States to “take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or [...] by any other appropriate representation”. The appointment of a guardian or adviser is also one of the Good Practice principles advocated by SCEP. Noting that children “can be overwhelmed by the practicalities of fleeing their homes” and “are often faced with complex asylum processes that they don’t understand”, Save the Children has called for “all children under 18 to be assisted by a guardian or adviser at all stages of the asylum process and in relation to durable solutions”.<sup>48</sup> Providing such guidance and representation is not always easy – for reasons of language or sheer numbers, for example – but is vital for the protection of children’s rights.



### Discussion points

- **How can data collection be more consistent and harmonized, in order to analyze trends and propose preventive and protection responses?**
- **What further measures are required to ensure that the special needs of children are met and that their rights are fully respected, in both the country of origin and the country of destination, when repatriation is decided?**
- **How can be children’s views about their need for protection in the country of destination systematically recorded and taken into consideration?**
- **What examples are there of providing adequate protection without recourse to deprivation of liberty?**
- **What are the practical and acceptable ways of avoiding deprivation of liberty for children in all these situations and how to promote them?**
- **How can children be granted a designated guardian or representative, even in problematic situations such as those involving large groups or a language barrier?**
- **How can children’s views be taken into account at all stages, and all aspects, of the asylum process?**

## 8. Child trafficking

As regards transfrontier movement of children in the region, most attention in recent years has been paid to child trafficking. It is connected in particular with exploitative labour (often including instrumental use in criminal activities) and sexual exploitation in all parts of the region:

“Trafficking into Western Europe is a variant of the push- and pull-driven pattern, with the demand for commercial sex creating a large market for children and young people following promises of income and economic independence. In Northern Europe, there is a clear pattern of trafficking between the poorer Baltic States and the affluent cities of Scandinavia, reflecting historical as well as geographical links, following sea trade and exchange routes and traditional patterns of movement. Children are trafficked into begging, street hawking, unskilled labour and commercial sex. Trafficking through and out of the countries of [Central Asia and the CIS] is characterized by the push of

dysfunctional societies in the wake of economic depression and societal dislocation, and the involvement of small-scale crime. Children and especially adolescents are trafficked into service industries and the entertainment sector, for the sex trade and for pornography and as mail-order brides. Trafficking from Eastern Europe combines a number of push- and pull-patterns. Dysfunctional societies, severe and increasing poverty and unemployment, conflict and expectations of greater opportunities, push children, young people and adults into the clutches of traffickers. Open borders and functioning criminal routes and networks come into play alongside regular migration. Children are trafficked for unskilled labour, work in the entertainment sector and for commercial sex. Some are used for petty crime.”<sup>49</sup>

While repression of trafficking clearly needs to be pursued and enhanced, from a children’s rights standpoint it is equally vital that simultaneous emphasis be placed both on the prevention of circumstances that spawn trafficking and on the protection of victims.

According to a recent report,<sup>50</sup> anti-trafficking activities in the region – such as legislative reform and concerted police actions – have increased, but there has been little progress on assisting the victims (mainly women and children). The report finds that victims who agree to testify against their traffickers lack protection and support, for example, so their ordeal in fact continues during the assistance and repatriation process. For this reason, many women and girls do not identify themselves as victims, aware that they are likely to be deported and stigmatized as a result. The report points to inadequate services during and immediately following the assistance process in countries of destination and origin alike. An earlier report<sup>51</sup> similarly noted that “[...] victims are still mainly treated as illegal migrants and potential witnesses...”

The ILO has stressed<sup>52</sup> that “the prevention component is key to addressing the root causes of trafficking in human beings” and has recommended that preventive action include:

- direct support to children at risk and their families through income generating activities, financial schemes and skills training to help the parents meet the basic needs of the family and to avoid children dropping out of school;
- educational and vocational training opportunities for victims (especially girls) who are often discriminated against in their societies and are the first to fall prey to traffickers;
- community mobilization and awareness raising in vulnerable areas in order to create a common sense of responsibility to protect potential victims from the traffickers.

Beyond these specific recommended actions, the legal and social protection measures that address the problem of exclusion and discrimination regarding access and delivery of basic services would also prove effective.

Responsibility for prevention does not only rest with countries of origin. Trafficking responds to a latent or effective demand in the countries of destination, and it is precisely ‘prevention’ of this exploitative demand that is required in those States. Despite of being an essential element of a strategy to combat child trafficking, this aspect has to date not received the necessary attention.

From the perspective of child protection, more systematic recognition is required of children’s rights not to be treated as criminals or offenders but to be provided with psychosocial, material or other practical and logistical support in the country where they are found and, where applicable, on return to their country of origin.

To a large degree, in this sphere as in others, protection concerns are adequately covered in international texts. The linkage between trafficking, exploitation and the need for victim support makes two provisions of the CRC specifically relevant with regard to international

cooperation: “States Parties shall [...] take all appropriate national, bilateral and multilateral measures [to protect the child from all forms of sexual exploitation and sexual abuse]”<sup>53</sup>; “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”<sup>54</sup> In addition, obligations under CRC articles 32 (exploitation of child labour) and 39 (“measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse”) are key to efforts and approaches in this sphere.

The Palermo Trafficking Protocol<sup>55</sup> adds significantly to international legal standards relating to the protection and repatriation of victims. Currently approaching the final stages of drafting is the future European Convention on Action Against Trafficking in Human Beings, which is slated for submission to the Council of Europe’s Parliamentary Assembly in January 2005 and also has a chapter on “protection” including repatriation issues.

Special mention should be made of the non-binding Guidelines for Protection of Children Victims of Trafficking<sup>56</sup> produced in the framework of the Stability Pact for South Eastern Europe and signed off by its member States. Although the text concerns that sub-region only, it has far wider applicability and potential importance for the region as a whole and beyond. Its consideration, adoption and implementation by a broader range of States would constitute important progress on child protection.



### Discussion points

- **What are the obstacles to ensuring that children found to have been trafficked are systematically treated as victims and not as offenders? How can children themselves help to identify these obstacles?**
- **How can the identification and implementation of preventive efforts be better promoted and carried out, in countries of origin and countries of destination alike?**
- **What more needs to be done to ensure that, when repatriation of children is envisaged, the decision is based on a durable solution in the child’s best interests and taking into account his or her views, and the child’s return is properly coordinated and prepared with the country of origin?**

## 9. By way of conclusion: cross-cutting concerns

To improve the effectiveness and appropriateness of responses to the problems of children who cross borders, as this brief overview indicates, there are a number of cross-cutting concerns to be addressed in addition to specific initiatives targeting given phenomena. Among the main ones that can be highlighted here are:

- a) **Recognition that, whatever the circumstances, children moving across borders are particularly vulnerable and should never be viewed or treated as criminals.**
- b) **The establishment of procedures that enable children to voice their opinions regarding the most desirable response to their situation, and to have their opinion taken into account according to their age and maturity.**
- c) **The vital need for comprehensive, disaggregated and up-to-date data, collected systematically and on a harmonized basis that enables both comparative and cumulative analysis to be carried out region-wide.**

- d) Better understanding of the 'supply' and 'demand' factors and risk situations that underscore cross-border movement of all kinds, and of the way they interact, so that the most effective action possible can be taken in relation to each.**
- e) Adherence to international cooperation mechanisms allowing for inter-State consultation both on policies and practice as well as on the cases of individual children: these include the general protection mechanism established by the 1996 Hague Convention as well as those targeting specific manifestations of children's cross-border movement.**

## Endnotes

- <sup>1</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for Protection of Children. This Treaty does not cover abduction by a parent or intercountry adoption, which are dealt with in separate Hague Conventions (see below).
- <sup>2</sup> Duncan, William (Deputy Secretary General, Hague Conference on Private International Law) *in* The Judges' Newsletter, Vol. 6, Autumn 2003, pp. 69-70.
- <sup>3</sup> Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (The Palermo Protocol).
- <sup>4</sup> REMATCH Project (Risk Evaluation of Models of Assistance through Temporary Children's Holidays), *Indagine sulle forme di accoglienza temporanea di minori e in particolare sul c.d. soggiorno a scopo terapeutico. Documento di sintesi*, CENSIS, Camino, EPE Altea España, Rome, 10 November 2003.
- <sup>5</sup> Although it does not involve Europe so far, this case is particularly instructive on a general level. Since 1999, several hundred Kazakh and Russian children have been brought to the USA for a 6-week holiday under Kidsave's 'Summer Miracles' programme, and the organization indeed states that the vast majority were subsequently adopted ([www.kidsave.org/sum\\_acc.htm](http://www.kidsave.org/sum_acc.htm), accessed 16 February 2004). According to one report, the children "are told they are going to summer camp, although [Kidsave's] intent is to facilitate adoption" (Bozeman Daily Chronicle, 25 August 2002).
- <sup>6</sup> Particularly children who were experiencing conflict situations, such as Northern Ireland or Bosnia, but also those from economically deprived families. Furthermore, children from residential facilities in Romania, for example, have been found to require support on their return there after short stays outside the institution.
- <sup>7</sup> Ministerio de Trabajo y Asuntos Sociales, *Estadísticas de Adopciones internacionales en España, por continente y país de origen de los menores, 1997 a 2001 y 1998 a 2002*.
- <sup>8</sup> Commissione per le Adozioni internazionali, *Rapporto della commissione sui fascicoli pervenuti dal 16/11/2000 al 31/12/2003* ([www.commissioneadozioni.it/site/files/RAPP1203.pdf](http://www.commissioneadozioni.it/site/files/RAPP1203.pdf)).
- <sup>9</sup> US State Department web site. Figures given are for Fiscal Years (October-September).
- <sup>10</sup> Italy is a notable exception: the website of the Italian Central Authority (see footnote 8) contains statistics of adoptions by country of origin, sex, age and Italian Province of destination. Accessed on 29 February 2004, its data was valid to 31 December 2003. This combination of disaggregation and currency is probably unique in the region. In contrast, for example, the 'international adoption statistics' section on the website of the Central Authority for England (Department of Health) gives nothing more than an annual figure for the number of adoption applications (home study assessment reports) received by the Department from 1996 to 2003.
- <sup>11</sup> CRC article 21(e)
- <sup>12</sup> see footnote 3.
- <sup>13</sup> CRC article 11(2)
- <sup>14</sup> Albania, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan and Ukraine.
- <sup>15</sup> "The Hague Project on Preventive Measures under the Child Abduction Convention", a component of the Guide to Good Practice being developed by the Hague Conference to facilitate implementation of the treaty.
- <sup>16</sup> CRC article 10(1).
- <sup>17</sup> Attardo, Antonella C.: Family Reunion, at [www.legislationline.org/index.php?topic=183](http://www.legislationline.org/index.php?topic=183)
- <sup>18</sup> Council Regulation 1612/68/EEC, article 10.1
- <sup>19</sup> Recommendation Rec (2002) 4 on the legal status of persons admitted for family reunification.
- <sup>20</sup> Explanatory Memorandum to Recommendation Rec (2002) 4.
- <sup>21</sup> *ibid.* "The European Court of Human Rights does not deduce from the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 an unlimited right to join one's legally admitted, foreign family members in the member States, nor an absolute protection against expulsion of family members."
- <sup>22</sup> Directive on the Right to Family Reunification for third-country nationals legally established in a Member State. See: [www.europa.eu.int/comm/justice\\_home/fsj/immigration/family/printer/fsj\\_immigration\\_family\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/immigration/family/printer/fsj_immigration_family_en.htm)
- <sup>23</sup> The common EU immigration policy does not apply to Denmark, and the United Kingdom and Ireland chose not to be bound by this particular Directive.
- <sup>24</sup> "UN refugee agency criticises EU family reunification rules" EUBusiness, 23 September 2003.
- <sup>25</sup> CRC, article 7(1)
- <sup>26</sup> CRC, article 9(1)
- <sup>27</sup> Trends in Unaccompanied and Separated Children Seeking Asylum in Europe, 2000, UNHCR, Nov. 2001.

- 28 *ibid.* Numbers rose from 3,504 in 1998 to 6,705 in 2000.
- 29 *ibid.*
- 30 Fact Sheet, Ministry of Justice, Netherlands, January 2003.
- 31 UNHCR, 2001, Czech Republic (296), Poland (89), Romania (34), Slovakia (145), Slovenia (45), etc.
- 32 CRC article 22(1)
- 33 A joint operation of Save the Children and UNHCR.
- 34 UNHCR Press Release, Dublin, 22 January 2004.
- 35 SCEP Statement of Good Practice, second edition, October 2000.
- 36 Maud de Boer-Buquicchio, Deputy Secretary-General, Council of Europe, during her 6th Kilbrandon Lecture, "Justice For Europe's Children", Glasgow, 1 December 2003.
- 37 Convention on the Rights of the Child, Article 37(b); see also UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) which define deprivation of liberty as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority", and which therefore apply to offenders and non-offenders alike.
- 38 SCEP Statement of Good Practice, second edition, October 2000.
- 39 HM Inspectorate of Prisons, April 2003, August 2003, September 2003.
- 40 BBC News Scotland, 24 December 2003.
- 41 Fact Sheet, Ministry of Justice, Netherlands, January 2003.
- 42 Mitchell, Grant, "The impact of the Swedish model of detention" *in* Australian Children's Rights News, No. 28, p. 7, 2001.
- 43 *supra*, footnote 36.
- 44 Council Directive 2003/9/EC of 27 January 2003, article 19(2)
- 45 For France, see, for example, Plantet, Joël, «Que faire des enfants de la rue?» *in* Lien Social 634, Sept. 2002.
- 46 UNICEF UK, "West Sussex refuge for trafficking victims to shut", 3 August 2003.
- 47 cf. footnote 44.
- 48 Children's Rights in the EU – A Call for Action, Save the Children, September 2002.
- 49 Combating Human Trafficking: Broadening the Perspective, a Report by Gloria Moreno-Fontes Chammartin, International Migration Programme, ILO, Geneva, delivered at "Stop Child Trafficking Conference", Helsinki, Finland, 1-3 June 2003, Annex 1.
- 50 Trafficking in Human Beings in South Eastern Europe, a joint report by OSCE, UNICEF and UNHCHR, within the framework of the Stability Pact for South Eastern Europe, issued 11 December 2003, Vienna. The report, for the period November 2002 to April 2003, covers Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Serbia and Montenegro (including Kosovo), Moldova and Romania.
- 51 Trafficking and Sale of Children in South Eastern Europe: Situation Overview, prepared by UNICEF for the Stability Pact for South Eastern Europe, Task Force on Trafficking in Human Beings, November 2002.
- 52 *supra*, footnote 49.
- 53 CRC article 34.
- 54 CRC article 35.
- 55 *supra*, footnote 3.
- 56 UNICEF, May 2003.