



**REFUGEE AND MIGRANT CHILDREN AND FAMILIES:
Preserving family life through hard challenges**

**UNACCOMPANIED, STATELESS, REFUGEE, TRAFFICKED CHILDREN:
HOW WELL ARE THEY PROTECTED?**

Sir Mathew Thorpe- Rome, 15 November 2019

My professional life has been primarily devoted to family justice, in England and Wales and, since the emergence of international family justice in response to human mobility (itself made possible by so much technological innovation), that has been my particular focus within the wider field. In all this experience the child at the centre of the litigation has been the heavily contested prize. The contestants are almost always members of the child's family. They may strive for or resist lawful or unlawful relocation, usually across international borders. They may contest how the child's life should be divided between them. They may seek protective measures. They may resist the intervention of the state of the child's habitual residence alleging that the child must be protected from abuse or neglect. I have particular experience of cases in which the state of which the child is a national seeks to avert the risk of a UK adoption order which would remove all the child's connections to the country of birth.

Commento [T1]:

All this my experience is in the family courts. I have no experience of the law and practice in the immigration and asylum tribunals. In the family courts the paramount consideration is the welfare of the child and it often seems that there are too many contestants advancing their own contentions as to the child's best interests.

How different is the justice that awaits the child the focus of this paper! He or she only comes to the attention of some arm of the State, usually a police officer, a social worker or a health professional, when in crisis or in peril. Questions soon flow fast as to his or her origins and right to reside. Swiftly engaged are Border Force and Home Office officials. Immigration and asylum law is invoked and applied. The focus is on the child's past rather than his future. The paramount consideration of the welfare of the child is pertinent to the child's future and not to his past.

My thoughts were first turned to the contrast between society's approach to the child of a family and the child cut off from family by discussions between Philippe Lortie, the widely admired private international lawyer at the Permanent Bureau of The Hague Conference, and Judge Erb-Klunemann, a specialist in International Family Justice and a Hague Network Judge for Germany.

She as a practicing judge had had experience of cases in which she had sought to achieve a principled welfare solution for an illegal immigrant child and he expounded the potential of the 1996 Hague Protection Convention to be applied to such cases.

There followed the 2017 Special Commission in The Hague in preparation for which Philippe Lortie had written Preliminary Document 7. The title of the Document was “The application of the 1996 Hague Protection Convention to unaccompanied and separated children”. This was the stated objective of the Document:

“To discuss the application of the 1996 Hague Child Protection Convention to unaccompanied and separated children, with a view to inviting the authorities responsible for international co-operation in child protection matters to closely collaborate - at both the domestic and international levels - with those responsible for immigration and asylum matters, in this area”.

The Document over 20 pages develops its objective. Within the Introduction is this acknowledgement: “Also, and most importantly, the Permanent Bureau is fully aware that the large-scale and delicate problems posed by unaccompanied and separated children can only be solved effectively on the basis of mutually agreed and coordinated actions amongst all States concerned, and that these actions require, first and foremost, political consensus. However, the 1996 Convention should be part of the overall solution as it will ensure a conducive legal environment with regard to unaccompanied and separated children in the context of the operation of existing and future bilateral, regional and international instruments. Furthermore it is important to note that a number of provisions of the 1996 Convention apply regardless of whether the children in need of protection are from a Contracting State to the Convention or a non-Contracting State. Finally, as for many Hague Conventions, a number of Hague Conference post-Convention services could be developed to support the operation of the 1996 Convention”.

That theme is also apparent in the following section that sets out the law providing protective measures. The 1951 Refugee Convention provided general measures for the protection of refugees but none specific to children. It was not until 1989 that the United Nations Convention provided specific Rights of the Child. The importance of the 1989 Convention cannot be over stated. It has been almost universally ratified. But it does not itself provide litigation remedies. It has not been generally incorporated in the domestic laws of the ratifying States as it should have been. For example, until the coming into force of the Brussels II a Regulation many States in Europe had not implemented in their domestic laws the right of the child to be heard (Art. 12). The 1989 Convention sets principles and States’ obligations with regard to the rights of the child including his or her protection. The 1989 Convention is complemented by the 2009 UN General Assembly Alternative Care Guidelines which States are all invited to implement in their respective domestic laws to supplement their laws with regard to the care of children such as parental responsibility, rights of custody, contact rights, etc. The Hague 1996 Convention provides for rules of private international law telling competent authorities (*e.g.*, judicial and/or administrative authorities) which State has jurisdiction to take measures of protection with respect to a given child, the law of which State will be applied with regard to a given child and how to go about recognizing and enforcing decisions taken in conformity with the rules of the Convention with respect to a given child in other State Parties to the Convention. Decisions taken under the 1996 Convention in one State Party will be giving effect in any other State Party to the Convention hence ensuring the continuity of protection measures for a given child across international borders. The 1996 Convention also provides the mechanism for the essential inter State communication and collaboration for the cross-border protection of children. It is The Hague

Commento [PL2]:

The 1996 Convention does not deal with substantive law but only PIL. Articles 3 and 4 indicate in which area of the law the 1996 Convention applies and does not apply. I would suggest that you include what I have added in the text.

Conference that provides the mechanism for the essential international judicial collaboration and the gateway to a wide range of support services. The interlocking of the 1989 and 1996 Conventions is perfectly apparent.

Thus the 1989 Convention by Article 22 provides that a refugee child, whether alone or accompanied, is entitled to the same protection as any other child deprived of family environment. Such children must first and foremost be treated as children and provided with alternative care. They have rights both to non-discrimination and their best interests must be the primary consideration in any decisions affecting their lives. Many other specific rights to which refugee children are entitled derive from the Convention. To facilitate access to these rights, in 2005 the Committee on the Rights of the Child invited States to ratify or accede to the 1996 Convention. Similarly in 2010 the United Nations General Assembly encouraged ratification of the 1996 Convention to ensure international co-operation and protection for children outside their country of habitual residence.

The majority of the Preliminary Document that follows carefully explains the content and operation of the 1996 Convention, particularly emphasizing its application to refugee and unaccompanied children and the potential for States to make fuller use of the Convention to protect these particularly needy children.

In the concluding paragraph it is well stated: "The migration of unaccompanied and separated children presents global problems that require global solutions. Each child who is part of this group will require protective measures that respond to his or her individual circumstance, and that have force of law across borders. The 1996 Convention can cater to the need for such measures to address this global challenge".

The reception to the presentation of Preliminary Document 7 at the Special Commission in November 2017 was mixed and it was resolved that the Permanent Bureau would do further work on the Document. Subsequently the Document has been withdrawn to make way for a revised text. In an unprecedented move the Permanent Bureau has consulted with six States and the European Union in this process of refinement. Comments from the consultees were invited by the 18th October and it is to be hoped that this important sign post will soon be available to direct States and their authorities to act both nationally and internationally more creatively for the protection of these particularly vulnerable children.

So what is the size of the global refugee population? I am indebted to Judge Erb-Klunemann for the following statistics:

- 50 million children are in migration worldwide;
- one in two hundred children is a refugee;
- one in three children living outside the country of birth is a refugee;
- children constitute half the refugee population;
- one in eight migrants is a child.

Of course these are estimates but they are from UNICEF. They look at one tragic condition from a number of different viewpoints but all give a stark message.

The position is particularly grave in our European region:

- twenty two million living in the EU on 1st of January 2018 were not EU citizens;
- 2.4 million immigrants entered the EU from non-EU countries in 2017;
- 5.4 million child migrants in Europe;
- one in four asylum applicants in the EU in 2015 was a child.

The vulnerability of so many and their needs is fully recognized. A communication in April 2017 from the Commission to the Parliament and the Council emphasized the need to protect children in migration, particularly the most vulnerable unaccompanied minors, and declared that the principle of best interests must be the primary consideration in all actions or decisions.

This policy was fully endorsed by the Conclusions of the Council in June 2017 thus protecting all children in migration is a priority at all stages.

Member States should give full recognition to children as rights holders and should ensure respect for the principle of the best interests of the child in all policies affecting children.

These statistics demonstrate how immense is the scale of the vulnerability. The responses from the EU institutions show full recognition of the crisis and all that is due to children in such extreme need. But the real question must be what is the reality? Do refugee children in fact experience the recognition of their rights or are the exhortations of Commission, Parliament and Council lost on the member states to whom they are addressed? Sadly these remain exhortations and the challenge is still to achieve the standards set by the UN and the EU.

Why is it so? The first contact that the unaccompanied child may have with any officer of the State of passage or refuge is often when the child is picked up by the police off the street, or from a drugs or brothel raid. Far ranging enquiries will follow as to identity, country of origin, family and rights of residence. All this "detective" work is done through the prism of Immigration and Asylum Law. Certainly in the UK this justice system is insulated from the family justice system. Whilst the family justice system is overwhelmingly concerned with children habitually resident in the jurisdiction it also deals with all international family law instruments, including of course the 1996 Convention. What does not happen, and what should happen, is that all the questions raised in the initial "detective" stage should be within a referral to the Family Court and within the wide-ranging powers exercised by the Court under the 1996 Convention. Only thus is it guaranteed that all the rights conferred on the refugee child by the 1989 UN Convention will be respected, recognized and conferred and the corresponding responsibilities imposed by the Convention on the State equally performed.

Of course these two separate justice systems are complementary and not conflicting. Neither should trump the other. But it is my strong contention that the Family Court should first establish the best interests outcome for the particular child in need using the wide powers conferred by the 1996 Convention. Perhaps the best interests outcome would be for the child to be in the custody of a parent or other family member in the State of origin, the new State or a third State: perhaps in the case of an orphan it would be a return to the State of origin in the custody of a member of the extended family; perhaps it would be local integration in the care of a foster family; perhaps it would be inter country adoption. Once that best interests future has been judicially established in accordance with the applicable law (in the majority of cases domestic law or, sometimes, a foreign law with closer connection to the child and the end solution) and judicial and administrative collaboration by application of the various Articles of the 1996 Convention then and only then should the Asylum and Immigration laws be applied. They will follow their proper course to their lawful outcome but having regard to the welfare conclusions of the Family Court.

Not only is there the risk that international family law will be overlooked but also that when it is invoked private international law rules that determine which is the applicable foreign law will be erroneously applied. The first step should be the appointment of a guardian. If the child is a refugee a best interest assessment must follow as the first priority. If the family of origin cannot be traced then an alternative family setting should be sought.

Policy makers may resist a shift that would magnify the workload of family court systems that in many European jurisdictions are already overburdened. But early intervention can often save what would otherwise be much heavier future costs to the State. More generally children given an opportunity in early life may be more motivated to succeed and so develop into the future stars of their generation. We in England should reflect on how we over the last fifty years have benefited from the achievements of many of the children we received on the Kinderstransport. Similarly Sweden may come to count the benefits from the 25,000 migrant children received within a year some four years ago.

So urgent action in the field is imperative. The work of The Hague Conference is vitally important. Hopefully Preliminary Document 7 will soon be finalized. Widely disseminated and supported by UNCHR and UNICEF, the EU and ISS the culture and practice of the many disciplines active in this field should follow. Of course the desired development will not be easy or without frustration. The nations of the world might be divided into three categories: those who send out, those who take in and those who do neither. In this last category are some of the most significant States Party to the 1996 Convention. They have yet to demonstrate much positive enthusiasm for the completion and dissemination of Preliminary Document 7. But there are clear signs of a growing awareness of the need for higher performance and standards. At the end of last month the European Commission issued a Policy Statement on its actions on the Rights of the Child. The 9 headings included:

- child Protection Systems;
- children in Migration;
- missing Children and Child Alert Mechanisms.

The Statement is more a reiteration of existing policy than the launch of new policy but nevertheless it can only work to the benefit of the marginalized and deprived children of our world.