

# Refugee and Migrant CRISIS in Europe

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## ANALYSIS AND RECOMMENDATIONS

### DUBLIN REFORM: EFFECTIVE ACCESS TO AN ASYLUM PROCEDURE WITHIN EUROPE

Thirty two countries in Europe<sup>1</sup> have agreed on a set of rules to determine the State responsible for considering an application for international protection submitted in one of them. The regulation<sup>2</sup>, known also under the name of Dublin III, aims at determining as quickly as possible the responsible Member State, preventing thereby multiple claims. This regulation recognises that the best interests of the child seeking international protection, whether accompanied or not, should be a primary consideration in its implementation.

However, in practice, due to a number of reasons, the objectives behind Dublin III are not being accomplished. States find it difficult to apply the primacy of the best interests of the child and too often child asylum seekers are denied their right to effectively access an asylum procedure. Given that children constitute a substantial proportion of asylum seekers in EU Member States, this situation is of serious concern to UNICEF<sup>3</sup>.

The following issues have been identified by UNICEF as challenges to Dublin III implementation that negatively impact the rights of children seeking international protection in 32 European countries.

#### Challenges

##### Too lengthy procedures

Under the Dublin III regulation a State has 3 months to send a 'take in charge'<sup>4</sup> request. The State that receives it should reply within 2 months, and upon receiving such a reply, the sending State should carry out the transfer within a period of 6 months. Respecting such deadlines means that the child might have to wait up to 11 months before being transferred to the State that will consider his/her application. Eleven months is too

long a period, during which the child might be exposed to various risks and hindered from being reunited with family, if the family resides in the other State.

A significant number of unaccompanied and separated children leave care centres, discouraged by the long delays and/or enticed by the promises of smuggling and trafficking networks to take them to their destination within a few days or weeks. Furthermore, children waiting for a Dublin transfer may lack access to basic entitlements, which negatively impact the well-being and social development of the child. Though little consolidated information exists, various studies confirm that in some States children are placed in detention for some time during Dublin procedures<sup>5</sup>.

##### Information on rules applicable

According to the current Dublin regulation, as soon as the application for international protection is lodged, the applicant has the right to be informed about Dublin rules and an interview is to be organised with the applicant. In practice, however, there are delays, and frontline workers report that unaccompanied and separated children leave centres without receiving information on Dublin and being interviewed.

##### Application of the primacy of family unity

There is also a need to know the number of cases of children who have been transferred for family reunification purposes under the Dublin III regulation. Previous studies conducted on Dublin II showed in general a low rate of transfers for family reunification purposes, as well as a poor understanding of the primacy of family unity by officers in charge of asylum procedures<sup>6</sup>.

## Definition of family

Applications by unaccompanied and separated children should be considered by the State where the child has his/her nuclear family (mother/father), but also a sibling, a grandparent or an adult aunt/uncle. However, this circle of people remains restrictive and does not correspond to the broad understanding of family, family relations, and ties in the cultures and traditions of many countries and communities where children come from. Because of these cultural differences, the European Court of Human Rights does not strictly define who falls under 'family', but takes a case-by-case decision, based on the personal ties between the persons concerned<sup>7</sup>. Further, the Dublin regulation restricts the concept of family to relations already existing in the country of origin. Today, many people might create family ties while on the move, and it is not unusual that children are born to parents on the move.

## Application of the best interests principle

For an unaccompanied and separated child, who does not have a family member in another State, the State responsible is the State where the application is submitted, unless this is not in the child's best interests. Article 6 of the Dublin III regulation recognises the best interests of the child as a primary consideration and provides some guidance on elements to look at when deciding on the child's best interests, including, but not limited to:

- Family reunification possibilities,
- The child's well-being and social development,
- Safety and security, including trafficking risks,
- Views of the child in accordance with the age and maturity of the child.

According to the Dublin regulation, States should appoint as soon as possible a representative to represent and assist the child, and take appropriate measures to identify family members, siblings, and relatives.

Despite this guidance provided, rules on unaccompanied and separated children and the best interests principle are interpreted in different ways in different States. This affects decisions on transfer of children under Dublin system and the child's right to an effective procedure.

## Application of the discretionary clause

A State has always the possibility of considering an application lodged without looking for responsibility among other States. This discretionary clause (art. 17), which could be used by any State to consider an application lodged by a child when it is in the child's best interests, remains also poorly implemented<sup>8</sup>.

## Protection regimes and legal entitlements differ across States

The Dublin regulation determines the State responsible for considering the asylum's application. However, reception conditions, criteria for granting international protection and entitlements under international protection titles, differ substantially across Dublin States. Children might thus prefer to apply in a country where they know the system works well or is more beneficial to them. They might also prefer to apply in a State whose language they know, where they have family networks and cultural ties, and / or where they perceive opportunities for integration, especially into the labour market, as more favourable.

There is an agreement on Dublin as a tool to prevent multiple claims and asylum-shopping. On the other hand, national court decisions, as well as rulings by the European Court of Human Rights and the European Court of Justice have decided against transfers to States which do not give sufficient assurance of appropriate accommodation and appropriate treatment of asylum - seekers.



## UNICEF RECOMMENDATIONS:

### 1. Timely decisions to avoid exposure of children to risks

Transfers under Dublin procedures should occur in a timely fashion to guarantee the right to family reunification and limit the exposure of the child to various risks and vulnerabilities. The best interests of the child means both procedural guarantees and timely decisions. When transfer is considered in the best interests of the child, UNICEF recommends a deadline of maximum 3 months: 1 month to present the 'take in charge' request, 1 month to respond, and 1 month to implement the transfer

### 2. Swift information sharing

States should make sure that every child, regardless of whether (s)he arrives in a State accompanied or unaccompanied and separated, receives, within 72 hours, adequate information on the right to claim international protection and how to access it (including on Dublin transfer rules).

### 3. More guardians for children

More resources and professionals should be made available to consider claims made by children adequately, including in initiating and responding to transfer requests. States should ensure that qualified guardians are available and appointed to represent any unaccompanied and separated child, take appropriate measures to identify family members and relatives, and ensure that the best interests of the child is respected.

### 4. Views of the child

Children should be informed throughout the procedure on the progress and further steps to be undertaken. The views and opinions of the child should be heard and taken into account when determining the child's best interests.

### 5. Better trained professionals

Further training should be given to officers in charge of considering international protection claims and interviewing child applicants, so that the best interests' principle and the primacy of family unity is fully respected and implemented. Training should cover child-friendly interview techniques, individual assessment of every child (including those accompanied), age- and gender-specific criteria for granting international protection, etc.

### 6. Community alternatives to detention

No child should be detained pending transfer to another State under Dublin regulation. UNICEF calls for use of non-custodial, community-based alternatives for children and their families claiming international protection.

### 7. Individual assessment of family ties

In line with European Court of Human Rights jurisprudence, the definition of family should go beyond nuclear family and recognise the importance of personal ties, as interpreted by the child concerned, when it is in the best interests of the child.

### 8. Harmonised application of the best interests principle

States should apply the best interests' principle in a harmonised manner, in line with current article 8 of the Dublin regulation. The European Asylum Support Office, in collaboration with child rights stakeholders, should provide Member States with a practical guide on the implementation of the best interests' principle.

### 9. Use of the discretionary clause

When it is considered in the best interests of the child, States should make use of the discretionary clause and consider promptly an application lodged by a child, without looking for responsibility in other States. UNICEF recommends using the discretionary clause to avoid transfer to another State when the child would benefit from a network and other elements supporting his/her potential integration, in line with the child's best interests.

### 10. Harmonised and improved protection and reception

The EU and all States bound by Dublin regulation, should undertake all necessary measures to harmonise reception condition, protection regimes and legal entitlements offered to children seeking international protection. Such harmonisation should be guided by existing good practices, and guarantee, at a minimum, appropriate accommodation and treatment of child asylum-seekers.

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Dublin III sets the legal basis for establishing the criteria and mechanisms for determining the State responsible for examining an asylum application lodged in one of 32 European States by a third-country national or a stateless person. It also applies to subsidiary protection applications.

The Dublin III hierarchy of criteria to determine the responsible State is presented below:

#### *For an unaccompanied and separated child*

- Family unity: When an unaccompanied child has family residing regularly in another State, the application of the child will be considered by the State where the family member resides, unless this is not in the best interests of the child.
- In the absence of a family member, the State responsible shall be the one, where the unaccompanied child has submitted his/her application for international protection, provided that it is in the best interests of the child.

#### *For an adult*

- Family unity: Applicants who have family members with recognised refugee status or who are in the process of applying for international protection will have their claim considered by the State where the family member is located.
- Legal residence: In cases where no family is present, applicants with a valid residence permit or visa (or one that has recently expired) should have the application considered by the State that has issued the document.
- Irregular entry: If none of the above criteria applies, applicants who have transited irregularly, should have their application considered by the first-entry State.
- Place of application: If none of the above criteria applies, the application is considered by the State where the person applies.

In practice, once an application is submitted (lodged), the State that receives the application has two options;

a) Use the discretionary clause and process the application without looking for responsibility among other States

or

b) Clarify first which State is responsible. If it considers another State as responsible, it sends to this State a request, the so-called 'take in charge' request.

Only upon positive answer by this State, the person seeking international protection can be physically

transferred to the other State. However, in line with courts of laws' rulings, the transfer should be suspended if there are risks to human rights violations in the responsible State.

The Dublin regulation does not look at substantive matters. It is up to the responsible State to examine the application in order to decide whether the criteria for granting international protection are met. The transfer of the application is a State-led process.

## Endnotes

1. The EU Member States, Iceland, Norway, Liechtenstein and Switzerland
2. Regulation (EU) No.604/2013 of the European Parliament and the Council, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0604>
3. Between January and November 2015, out of 1.201.970 application for asylum in the EU MS, 433.203 were lodged by children (EUROSTAT as per data updated on 4 February 2016)
4. The request send by the State where the claim has been submitted to another State, asking the later to consider the application as the State Responsible.
5. Dublin Transnational Project, Transnational Advisory and Assistance Network, available at: <http://www.dublin-project.eu/dublin/Transnational-Dublin-Project-Final-Report-May-2011>
6. Amaral, Protection Interrupted, available at: <http://www.refworld.org/pdfid/51d153f46.pdf>
7. Dublin II regulation Lives on Hold, European Comperative Report, 2013, available at: <http://ecre.org/component/downloads/downloads/701.html>
8. See for ECHR case law, The Right to respect for private and family life, human rights handbooks no. available at: [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf)
8. See supra Lives on hold

