



IRISH CENTRE  
FOR HUMAN RIGHTS

# A Child Rights Response to Child Migration and Migrant Children at Risk

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# Table of Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AEDH	European Association for the Defence of Human Rights
ASEAN	Association of Southeast Asian Nations
BIOC	Best Interests of the Child
CABA	Cuban American Bar Association
CAM	Central American Minors Program
CAT	Convention Against Torture
CBP	United States Customs and Border Protection
CEAS	Common European Asylum System
CEO	chief executive officer
CFREU	Charter of Fundamental Rights of the European Union
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
COE	Council of Europe
COMAR	Mexican Refugee Commission
CRC	Convention on the Rights of the Child
DHS	Department of Homeland Security (US)
DTM	Displacement Tracking Matrix
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECTHR	European Court of Human Rights
ECSR	European Committee of Social Rights
EU	European Union
EUROPOL	European Police Office
GCM	Global Compact for Migration
GCR	Global Compact for Refugees
GRETA	COE Group of Experts on Action against Trafficking in Human Beings
HHS	Department of Health and Human Services (US)
HOVCRS	Home Office's Vulnerable Children's Resettlement Scheme
HRC	Human Rights Council
HRW	Human Rights Watch
IAAAS	Immigration Advice and Application Assistance Scheme
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IGOC	Immigration Guardianship of Children (Australia)
ILO	International Labour Organization
INM	National Migration Institute
INTERPOL	International Criminal Police Organization
IOM	International Organization for Migration
NGO	non-governmental organisation
OAS	Organization of American States
ODI	Overseas Development Institute
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights

ORR	Office of Refugee Resettlement
OTP	Office of the Prosecutor
OAU	Organization of African Unity
RCD	Reception Conditions Directive (recast)
SBGC	sexual and gender-based crimes
SCEP	Separated Children in Europe Programme
SDG	Sustainable Development Goals
SOP	standard operation procedure
TPV	Temporary Protection Visa (Australia)
TVPA	Victims of Trafficking and Violence Protection Act
TVPRA	William Wilberforce Trafficking Victims Protection Reauthorization Act
UAC	Unaccompanied Alien Children
UHM	Unaccompanied Humanitarian Minor
UN-ACT	UN Action for Cooperation Against Trafficking in Persons
UNCRC	UN Committee on the Rights of the Child
UN DESA	UN Department of Economic and Social Affairs
UNESCO	UN Educational, Scientific and Cultural Organization
UNFPA	UN Population Fund
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNICEF	UN Children's Fund
UNODC	UN Office on Drugs and Crime
URM	Unaccompanied Refugee Minor Program
USCIS	US Citizenship and Immigration Services
WHO	World Health Organization

# Executive Summary

1. There continue to be significant gaps in available and reliable data relating to the numbers of migrant children globally. The United Nations Children's Fund (UNICEF) estimates that approximately 50 million children, including at least 300,000 unaccompanied and separated children, moved across international borders in 2015 and 2016.<sup>1</sup> The UN High Commissioner for Refugees (UNHCR) *Global Trends: Forced Displacement in 2018* report estimates that there are 70.8 million displaced people in the world today and among them 25.9 million refugees,<sup>2</sup> 50 per cent of whom are children.<sup>3</sup> Conservative estimates in the absence of concise data for 2018 indicate that upwards of 138,600 unaccompanied or separated children sought asylum or were granted refugee status that year.<sup>4</sup> In 2018, 53 per cent (58,600) of the known global population of unaccompanied and separated child refugees originated in South Sudan.<sup>5</sup> In the continent of Africa, one in four international migrants is a child, twice the global average.<sup>6</sup> Children are disproportionately represented within the refugee population of Africa, at 54 per cent (or four million children), with an additional seven million children internally displaced due to war, poverty and violence.<sup>7</sup> The Asia Pacific region is home to approximately 6.8 million forcibly displaced people, including approximately 3.5 million refugees and 1.4 million stateless people, the majority of whom originated in Afghanistan or Myanmar.<sup>8</sup> UNHCR has estimated these figures, and the number of migrant children in this region cannot be known due to the fact that many are not registered at birth, or later. Unaccompanied migrant children in the region often live on the periphery of refugee camps and many do not lodge a claim for asylum.<sup>9</sup>

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1 UNICEF, *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (May 2017) [https://data.unicef.org/wpcontent/uploads/2017/05/UNICEF\\_A\\_child\\_is\\_a\\_child\\_May\\_2017\\_EN.pdf](https://data.unicef.org/wpcontent/uploads/2017/05/UNICEF_A_child_is_a_child_May_2017_EN.pdf) accessed 26 July 2019.

2 UNHCR, *Global Trends: Forced Displacement in 2018* (June 2019) [www.unhcr.org/globaltrends2018](http://www.unhcr.org/globaltrends2018) accessed 26 July 2019.

3 *Ibid* 3.

4 See n 2 above p 7. 'These figures are underestimates due to the limited number of countries reporting data' on unaccompanied or separated children in mixed migration flows.

5 *Ibid* 49. The situation in South Sudan is now entering its sixth year and has been referred to as a 'children's crisis' as children make up at least 65 per cent of the four million displaced people, 2.2 million of whom are refugees, with 1.8 million internally displaced.

6 This figure represents 6.5 million child migrants in total; UNICEF, *Data Snapshot of Migrant Displaced Children in Africa* (February 2019) <https://data.unicef.org/resources/data-snapshot-of-migrant-and-displaced-children-in-africa> accessed 26 July 2019.

7 *Ibid*. While accurate figures on migrant children are not reported, it is worth noting that unaccompanied and separated children who are internally displaced face the same challenges and dangers as refugee children, see UNHCR Operational Portal <https://data2.unhcr.org/en/situations> accessed 26 July 2019; see also the UN Committee on the Rights of the Child, *General Comment No 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) CRC/GC/2005/6, at para 5.

8 UNICEF Office of Research – Innocenti [www.unicef-irc.org/article/1424-asias-child-migrants.html](http://www.unicef-irc.org/article/1424-asias-child-migrants.html) accessed 26 July 2019.

9 *Ibid*.

2. The UN Office on Drugs and Crime (UNODC) reported that in 2016–2017, 30 per cent of all detected trafficking victims worldwide were children, 23 per cent of detected victims of trafficking in persons were girls and seven per cent were boys.<sup>10</sup> Based on analysis of data from 54 countries, UNODC estimates that 72 per cent of detected girl victims are trafficked for the purpose of sexual exploitation, while boys are mainly trafficked for forced labour and other reasons, such as child soldiering or forced begging.<sup>11</sup> In Thailand, where many Rohingya children fled from violence and persecution in Myanmar, research has shown that thousands of male children have been trafficked through ‘trafficking camps’ for the purpose of child labour and exploitation, yet a total of only 455 victims of trafficking were formally identified in 2017.<sup>12</sup>
3. The reasons why children set out on journeys alone vary greatly and may overlap, with many fleeing to seek asylum from war or civil strife, persecution or situations of mass violence in their own country.<sup>13</sup> Some children leave their country of origin where there is endemic poverty to access education, training or work, or to unite with family and community members who have already reached another country.<sup>14</sup> The achievement of the targets set by the Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development is critical to addressing the root causes of forced migration and displacement, and violations of the rights of migrant children. As such, the full implementation of the agreed targets is a critical prevention measure.
4. Although the 1951 Refugee Convention, and the 1967 Protocol thereto, applies to *all* persons, children are not specifically mentioned therein. The UN Convention on the Rights of the Child (CRC) stipulates that States parties to the Convention ‘shall respect and ensure the rights set forth ... to each child within their jurisdiction’,<sup>15</sup> including the refugee, migrant or asylum-seeking

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10 UNODC, *Global Report on Trafficking in Persons* (Vienna, December 2018), 10. This report covers 142 countries and is based on data in questionnaires collected from these countries.

11 *Ibid* 28, Figure 17: Share of forms of exploitation among detected girl victims of trafficking in persons. Figure 18: Share of forms of exploitation among detected boy victims of trafficking in persons – 50 per cent are trafficked for forced labour, 27 per cent for sexual exploitation and 23 per cent for other purposes.

12 UN Action for Cooperation Against Trafficking in Persons (UN-ACT), *Thailand Migration Report* (2019), UN Thematic Working Group on Migration in Thailand, 159–64. Available at <http://un-act.org/wp-content/uploads/2019/01/Thailand-Report-2019.pdf> accessed 26 July 2019. The scarce data is disaggregated by gender, nationality and type of exploitation, not age.

13 Michelle May, *Unaccompanied Minors from Afghanistan: Problems and Protection in the European Union*, UNICEF Office of Research – Innocenti, Research Commentaries [www.unicef-irc.org/research-watch/Children-on-the-move](http://www.unicef-irc.org/research-watch/Children-on-the-move) accessed 26 July 2019. The majority of unaccompanied child asylum applications in the European Union 2015 were Afghan minors (51 per cent). Two-thirds of all refugees come from five countries: Afghanistan, Myanmar, South Somalia, Sudan and Syria – UNHCR, *Refugee Facts* [www.unrefugees.org/refugee-facts/what-is-a-refugee](http://www.unrefugees.org/refugee-facts/what-is-a-refugee) accessed 26 July 2019.

14 UNICEF Office of Research – Innocenti, *Push and Pull Factors Affecting Children in Migration* (YouTube clip, featuring Professor Jacqueline Bhabha, year unknown) [www.unicef-irc.org/article/1382-push-and-pull-factors-affecting-children-in-migration.html](http://www.unicef-irc.org/article/1382-push-and-pull-factors-affecting-children-in-migration.html) accessed 26 July 2019. Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (Princeton University Press 2014).

15 Art 2 of the CRC; this is known as the principle of non-discrimination.

child.<sup>16</sup> States parties to the CRC have been urged to create a ‘conducive legal environment’<sup>17</sup> to close gaps in the protection of unaccompanied and separated children on the move and to adopt a holistic approach to protection by ratifying the two optional protocols to the Convention.<sup>18</sup> UNCRC General Comment No 6 (2005) provides comprehensive and substantive guidance to states on the protection and care of migrant children, based on the application of the full set of rights enshrined in the CRC,<sup>19</sup> and recognition that states’ obligations under the CRC apply to each child on its territory, irrespective of the immigration status of the child.<sup>20</sup> Significant standard setting initiatives by the UNCRC and other UN bodies have already led to the progressive development of the legal framework on the rights of migrant children.

5. Strengthened action is needed to secure universal ratification of the CRC and its optional protocols, and recognition of the rights of child migrants in the work of all core UN human rights treaty bodies and UN Special Procedures. As required by the UN Committee on the Rights of the Child General Comment No 5,<sup>21</sup> states should ensure, by all appropriate means, that the provisions of the CRC are given legal effect within their domestic legal systems. UN Human Rights Treaty bodies and UN Special Procedures can play a role in ensuring the protection of the rights of child migrants, including through explicitly recognising trafficking of children for the purpose of exploitation as torture, in their monitoring and enforcement procedures and in all standard setting.
6. The effective implementation of the UNCRC General Comments – in particular, General Comment No 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin; General Comment No 20 (2016) on the implementation of the rights of the child during adolescence; Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); and No 23 (2017) of the UNCRC on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return – would significantly strengthen the domestic legal protection of migrant children. Joint General Comment No 3 of the CMW and No 22 of the UNCRC

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16 Art 22 of the CRC explicitly refers to refugee or asylum-seeking child, and UNCRC General Comment No 6 stipulates in para 12 that all rights in the CRC apply equally to the migrant child who is not seeking asylum.

17 UNCRC General Comment No 6, para 15.

18 The relevant optional protocols to the CRC are the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (2000) A/RES/54/263 (Optional Protocol I) and Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000) A/RES/54/263 (Optional Protocol II). There is now a third Optional Protocol to the CRC, Optional Protocol to the CRC on a Communications Procedure (2011) A/RES/66/138.

19 See n 17 above, para 1. This General Comment was recently cited by the European Court of Human Rights (ECtHR) in *Abdullahi Elmi and Aweys Abubakar v Malta* (App nos 25794/13 and 28151/13), 22 November 2016, paras 61 and 63, and more extensively by the Inter-American Court of Human Rights in its Advisory Opinion, OC-21/14 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, (19 August 2014), eg, paras 131–133.

20 See n 17 above, para 12; CMW/CRC, Joint General Comment No 3 (2017) and No 22 (2017), para 9.

21 UNCRC, General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (2003), CRC/GC/2003/5.



highlights the positive obligation on States Parties<sup>22</sup> to prevent and reduce migration-related risks for unaccompanied and separated children, as well as children with their families, where the child is without legal documentation.<sup>23</sup>

7. The Rome Statute of the International Criminal Court<sup>24</sup> (ICC) (the 'Rome Statute') defines war crimes and crimes against humanity, including the war crime of conscripting or enlisting children under the age of 15 to participate in hostilities,<sup>25</sup> and the crime against humanity of enslavement,<sup>26</sup> defined in Article 7(2)(c) as the 'exercise of any or all of the powers attached to the right of ownership over a person', as well as where these powers are exercised while trafficking in human beings, including children.<sup>27</sup> Holding perpetrators of such crimes to account under international criminal law could help to close an impunity gap. Reflective of the purposes of the Rome Statute in relation to children and of the 'special recognition and protection of children under international law', the Office of the Prosecutor (OTP) underlines the gravity of international crimes against children in its 2016 *Policy Paper on Children*.<sup>28</sup> The OTP of the ICC, in line with its Strategic Goal 4, could usefully refine and reinforce its support to victims, in particular, victims of sexual and gender-based crimes (SBGC) and crimes against or affecting children.<sup>29</sup> The OTP Policy on Children could be expanded to explicitly recognise the risks faced by migrant children and the rights of migrant children that arise in the context of international crimes and implementation of the Rome Statute, internationally and domestically. Such elaboration would also play a significant normative role in ensuring positive complementarity at domestic level by states and effective investigation and prosecution of international crimes against migrant children both internationally and domestically. It would also be useful to support continued and strengthened international cooperation between criminal justice professionals, ensuring more effective investigations and prosecutions of crimes against migrant children.

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22 This obligation arises under Art 6 of the CRC and Art 9 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) A/RES/45/158.

23 CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), para 42; also, CMW, *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23. Para 43 provides details of measures to be taken by states for migrant children for whom there are indicators of trafficking or abuse, or where they are at risk. Measures include early identification and the granting of the most protective migration status, in accordance with the best interests of the child.

24 UN General Assembly, Rome Statute of the International Criminal Court [the Rome Statute] (last amended 2010), (1998) 2187 UNTS 3.

25 The Rome Statute, Art 8(e)(vii).

26 The Rome Statute, Art 7(1)(c).

27 ICC, *Elements of Crimes of the International Criminal Court* (2011) ICC-ASP/1/3, 117; as specified in the *Elements*, Art 7(1)(c), this may include where a child is deprived of his or her liberty, including for the purpose of forced labour, 117 fn 11.

28 OTP, ICC, *Policy on Children* (November 2016), *Executive Summary*, 2 [www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](http://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF) accessed 26 July 2019.

29 OTP, ICC, *Strategic Plan 2019–2021* (May 2019) 23–24 [www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con....pdf](http://www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con....pdf) accessed 26 July 2019.

8. Migrant children are especially vulnerable to exploitation by human traffickers.<sup>30</sup> The majority of unaccompanied and separated migrant children are adolescent boys who are increasingly trafficked for the purpose of labour and sexual exploitation. The gender dimension of specific risks faced by boys and girls must be recognised by states in policies, action plans and measures adopted to combat child trafficking. Child-specific identification measures within National Referral Mechanisms are essential to ensure the timely detection, identification and protection of child victims and potential victims of trafficking. Recognising the positive obligations on states, arising from international and regional human rights law, 'the spectrum of safeguards set out in national legislation must be *adequate* to ensure the *practical and effective protection* of the rights of victims or potential victims of trafficking'.<sup>31</sup> Implementing states' positive legal obligations requires going beyond criminal laws to prosecute and punish traffickers. Positive obligations also require that 'a State's immigration rules ... address relevant concerns relating to encouragement, facilitation or tolerance of trafficking' so as to ensure 'the practical and effective protection of the rights of victims or potential victims of trafficking'.<sup>32</sup>
9. A new General Comment by the UN Committee on the Rights of the Child on child trafficking could strengthen enforcement of existing legal standards to ensure and fulfil the human rights of child victims, and to support criminal law enforcement practitioners. Engagement with the UN Committee on the Elimination of Discrimination against Women during its consultation process on a new General Recommendation on trafficking of women and girls in the context of international migration will be important in securing a strong child rights response, and specific recognition of the rights of the girl child.
10. Ensuring the effective implementation of the UN Guiding Principles on Business and Human Rights<sup>33</sup> through all appropriate measures, including legislation, policy and national action plans, is critical to the prevention of abuses of child migrants, including trafficking for the purpose of labour exploitation. As required by the Guiding Principles, states must ensure that business enterprises have an effective human rights due diligence process to identify, prevent, mitigate and account for how they address their impact on human rights and processes to enable the remediation of any adverse human rights impact they cause or to which they contribute.<sup>34</sup> These requirements apply also with regard to ensuring that the rights of migrant children are protected. They are particularly relevant in relation to risks of labour exploitation, including human trafficking, but also in relation to human rights violations of migrant children.

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30 See generally, CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), Section II (F), paras 39– 44.

31 *Rantsev v Cyprus and Russia* (App No 25965/04) 7 January 2010, para 284 [emphasis author's own].

32 *Ibid.*

33 The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Human Rights Council, (2011) A/HRC/17/31.

34 OHCHR, *Guiding Principles* (2011), paras 15 and 25.

11. The universal ratification and effective implementation of the International Labour Organization (ILO) Convention on the Worst Forms of Child Labour<sup>35</sup> and Protocol of 2014 to the ILO Convention on Forced Labour (1930)<sup>36</sup> will be important to securing the rights of migrant children, preventing abuse and ensuring effective enforcement.<sup>37</sup>
12. States should commit to the establishment of a special humanitarian visa programme designed for children, where their claim for international protection can be processed in their country of origin or in a country of transit. Qualification criteria for this visa scheme should be broad and each case should be assessed on an individual basis.
13. As a general response to expand safe and legal pathways to migration, states should increase their refugee resettlement quotas in response to a crisis or emergency in their region that could foreseeably lead to an increase in child migration. Recognising UNHCR guidance, the best interests of the child is a primary consideration in all decisions concerning children, including in resettlement. In the context of resettlement programmes, a child's current protection situation; prospects for family reunification with parents, other relatives or previous primary caregivers; possibilities for integration in the country of destination; and the child's own views are essential considerations.<sup>38</sup>
14. Family reunification can provide a safe and legal pathway to migration for children, reducing vulnerability to trafficking and exploitation. It is essential, therefore, that barriers to family reunification are removed, to avoid prolonged separation, reduced integration prospects and irregular onward movement, which heightens risks experienced by migrant children.<sup>39</sup> States should ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents and siblings, where this is in the best interest of the child.<sup>40</sup>
15. Realising their obligations under the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, together with the obligation to ensure a child's right to a nationality, states should adopt comprehensive measures to ensure the registration of all children at birth, including in situations of conflict and forced displacement, and legislative, policy and procedural measures to avoid statelessness and facilitate the acquisition of a nationality.

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35 The ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182) (1999). This is more widely referred to as the ILO Worst Forms of Child Labour Convention.

36 Protocol of 2014 to the Forced Labour Convention (1930).

37 CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), para 44.

38 *Ibid.*

39 UNHCR, *Position on Safe and Legal Pathways* (February 2019) [www.refworld.org/docid/5ce4f6d37.html](http://www.refworld.org/docid/5ce4f6d37.html) accessed 26 July 2019.

40 CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), Section II (E) (2), para 32.

16. The International Bar Association (IBA) is uniquely placed to contribute to the progressive development of international law and to international law reform. Drawing on the expertise, influence and collaborative networks of the global legal community, the IBA can provide assistance at this critical moment in the international legal protection of human rights and of the rights of migrant children in particular.
17. A declaration, statement or a pact by states elaborating on the rights of migrant children could usefully add to the content and scope of existing international law standards. The risks of delay and diminution of international legal standards, however, are significant. Any such international legal instrument should take as a minimum standard the guarantees stated in international human rights and refugee law, specifically in the CRC, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. This should reflect an international recognition of the rights of migrant children arriving at borders daily. A comprehensive declaration or framework document, commencing with the standards set out in the CRC and the 1951 Refugee Convention and its 1967 Protocol, could provide a useful starting point for strengthened implementation, action plans and timelines for states.

# Chapter 1: Background and Data on Children on the Move

- 1.1 Although the exact number of children on the move globally today cannot be known, the most recent figures indicate that 50 million children, including at least 300,000 unaccompanied and separated children, moved across international borders in 2015 and 2016.<sup>41</sup> The United Nations High Commissioner for Refugees (UNHCR) has estimated that there are 70.8 million displaced people in the world and among them 25.9 million refugees.<sup>42</sup> Half of these refugees are children.<sup>43</sup> Conservative estimates in the absence of concise data for 2018 indicate that upwards of 138,600 unaccompanied or separated children sought asylum or were granted refugee status that year.<sup>44</sup> In 2018, 53 per cent (58,600) of the known global population of unaccompanied and separated child refugees originated in South Sudan.<sup>45</sup> In the continent of Africa, one in four international migrants is a child, and this is twice the global average.<sup>46</sup> Children are disproportionately represented within the refugee population of Africa, at 54 per cent (or four million children), with an additional seven million children internally displaced due to war, poverty and violence.<sup>47</sup>
- 1.2 The reasons why children set out on journeys alone vary greatly and may overlap, with many fleeing to seek asylum from war or civil strife, persecution or situations of mass violence in their own country.<sup>48</sup> As the nature of war changes, civilians are now commonly targeted during internal armed conflicts, with children increasingly used by non-state armed groups in 'support' roles or

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41 United Nations Children's Fund (UNICEF), *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (May 2017) [https://data.unicef.org/wpcontent/uploads/2017/05/UNICEF\\_A\\_child\\_is\\_a\\_child\\_May\\_2017\\_EN.pdf](https://data.unicef.org/wpcontent/uploads/2017/05/UNICEF_A_child_is_a_child_May_2017_EN.pdf) accessed 26 July 2019.

42 UNHCR, *Global Trends: Forced Displacement in 2018* (June 2019) [www.unhcr.org/globaltrends2018](http://www.unhcr.org/globaltrends2018) accessed 26 July 2019.

43 *Ibid* 3.

44 *Ibid* 7. 'These figures are underestimates due to the limited number of countries reporting data' on unaccompanied or separated children in mixed migration flows.

45 *Ibid* 49. The situation in South Sudan is now entering its sixth year and has been referred to as a 'children's crisis' as children make up at least 65 per cent of the four million displaced people, 2.2 million of whom are refugees, with 1.8 million internally displaced.

46 This figure represents 6.5 million child migrants in total. UNICEF, *Data Snapshot of Migrant Displaced Children in Africa* (February 2019) <https://data.unicef.org/resources/data-snapshot-of-migrant-and-displaced-children-in-africa> accessed 26 July 2019.

47 *Ibid*. While accurate figures on migrant children are not reported, it is worth noting that unaccompanied and separated children who are internally displaced face the same challenges and dangers as refugee children, see UNHCR Operational Portal <https://data2.unhcr.org/en/situations> accessed 26 July 2019. See also the UN Committee on the Rights of the Child (UNCRC), General Comment No 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005) CRC/GC/2005/6, para 5.

48 Michelle May, *Unaccompanied Minors from Afghanistan: Problems and Protection in the European Union* UNICEF Innocenti Research Commentaries [www.unicef-irc.org/research-watch/Children-on-the-move](http://www.unicef-irc.org/research-watch/Children-on-the-move) accessed 26 July 2019. The majority of unaccompanied child asylum applications in the EU 2015 were Afghan minors (51 per cent). Two-thirds of all refugees come from five countries: Afghanistan, Myanmar, South Somalia, Sudan and Syria – UNHCR, *Refugee Facts* [www.unrefugees.org/refugee-facts/what-is-a-refugee](http://www.unrefugees.org/refugee-facts/what-is-a-refugee) accessed 26 July 2019.

conscripted and forced to fight.<sup>49</sup> However, the agency of children on the move should not be ignored: some leave their country of origin where there is endemic poverty to access education or to unite with family members who have already reached another country.<sup>50</sup>

- 1.3 The UN Children’s Fund (UNICEF) and the International Organization for Migration (IOM) agree that ‘reliable, disaggregated and timely data’ is essential to understand and fulfil the specific needs of children on the move, but also to operationalise the goals and targets found in the Global Compact for Migration (GCM) and Global Compact for Refugees (GCR) processes,<sup>51</sup> among others.<sup>52</sup> The need for accurate data is in line with Target 17.8 of the UN 2030 Agenda for Sustainable Development,<sup>53</sup> which has been interpreted broadly in the context of migration<sup>54</sup> and specifically in relation to children on the move.<sup>55</sup> The UN Department of Economic and Social Affairs (UN DESA) notes that the availability of data varies greatly from region to region, with several countries in Africa and Asia either lacking data or providing inaccurate figures on international migration, despite experiencing a growth of 3.0 and 2.8 per cent per annum in the number of international migrants to each region, respectively.<sup>56</sup>
- 1.4 The almost universally ratified UN Convention on the Rights of the Child (CRC) defines a child in Article 1 as ‘every human being below the age of eighteen

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49 UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Child Recruitment and Use* <https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers> accessed 26 July 2019.

50 UNICEF/Innocenti Research, *Push and Pull Factors Affecting Children in Migration* (YouTube clip, featuring Professor Jacqueline Bhabha, year unknown) [www.unicef-irc.org/article/1382-push-and-pull-factors-affecting-children-in-migration.html](http://www.unicef-irc.org/article/1382-push-and-pull-factors-affecting-children-in-migration.html) accessed 26 July 2019. J Bhabha, *Child Migration and Human Rights in a Global Age* (Princeton University Press 2014).

51 These processes arose from the New York Declaration for Refugees and Migrants, which was adopted by the UN General Assembly (UNGA) on 19 September 2016 (A/RES/71/1) in recognition of an ‘unprecedented level of human mobility’, para 3. See UNGA, *Global Compact for Safe, Orderly and Regular Migration (GCM) (2018) A/RES/73/195* and UNGA, *Report of the United Nations High Commissioner for Refugees Part II: Global Compact on Refugees (2018), A/73/12 (Part II)*.

52 UNICEF/IOM, *Children on the Move: Building Migration Data Capacities* (Call for Papers March 2019). UNICEF, IOM, UNHCR, Eurostat, OECD, *A Call to Action: Protecting Children on the Move Starts with Better Data*; IOM Global Migration Data Analysis Centre, *Child Migrants: How Little We Know* (Geneva, 2017); UNHCR *Global Trends* (2019), p 49; GCM, para 17; and IOM, *Fatal Journeys Volume 4: Missing Migrant Children* (2019) ch 1.

53 UN 2030 Agenda for Sustainable Development, SDG Target 17.8: ‘By 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing states, to increase significantly the availability of disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts’ <https://sustainabledevelopment.un.org/?menu=1300> accessed 26 July 2019.

54 Overseas Development Institute (ODI), *Migration and the 2030 Agenda for Sustainable Development* (2018), Conclusion 5, p 7 [www.odi.org/publications/10913-migration-and-2030-agenda-sustainable-development](http://www.odi.org/publications/10913-migration-and-2030-agenda-sustainable-development) accessed 26 July 2019.

55 Migration Data Portal <https://migrationdataportal.org/themes/child-and-young-migrants> accessed 26 July 2019; Joint General Comment No 3 (2017) of the CMW and No 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, CMW/C/GC/3-CRC/C/GC/22, para 16. It is recommended here that a ‘systematic rights-based policy’ should guide the collection and use of such data by states.

56 UN DESA, *International Migration Report 2017 Highlights* (2017) ST/ESA/SER.A/404, 5–6. The Displacement Tracking Matrix (IOM) has started to monitor the number of unaccompanied and separated children on the move since 2015 [www.globaldtm.info](http://www.globaldtm.info) accessed 26 July 2019.

years'.<sup>57</sup> However, despite the setting down of a clear baseline in international law for the age of a child, historical distinctions made between children and 'youth' are still utilised today for statistical purposes both internationally and regionally, which causes an overlap in collected data, painting a capricious picture.<sup>58</sup> Authorities in different states and regions also use distinct definitions and categories when registering young people at their borders and this also contributes to fragmentation of data.<sup>59</sup> Accurate data is intrinsically important to the creation and implementation of policy in this area because it is essential to understand the experiences of migrant children, including their motivations, to ascertain what specific needs have to be addressed. Understanding the needs of migrant children should aid their integration into new communities and ensure that they have access to basic rights, such as education<sup>60</sup> and a guardian<sup>61</sup> where the child is unaccompanied. Ultimately, such an understanding is imperative to help law and policy-makers to create pathways to legal migration for children on the move.<sup>62</sup>

- 1.5 Gaps in protection persist for children on the move, particularly for unaccompanied children (often referred to as unaccompanied minors), who are defined by the UN Committee on the Rights of the Child (UNCRC) in its General Comment No 6 as children 'who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so'.<sup>63</sup> Separated children are also defined by UNCRC General Comment No 6 as children 'separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives'.<sup>64</sup> The Separated Children in Europe Programme (SCEP) broadens this definition in recognition of the fact that some children who appear to be 'accompanied' may

57 CRC, UN Doc A/RES/44/25 (20 November 1989). The CRC has been ratified by all UN Member States, with the exception of the US.

58 UN Youth, *Definition of Youth* (2013) 1: cites, inter alia, the UN Secretary-General's *Report to the General Assembly*, (1981) A/36/215, p 8 of the Annex: 'the United Nations, for statistical purposes, defines those persons between the ages of 15 and 24 as youth without prejudice to other definitions by Member States.' Although there are variations, many UN agencies use this definition, including UN Secretariat, UN Educational, Scientific and Cultural Organization (UNESCO), ILO, World Health Organization (WHO) and UN Population Fund (UNFPA), the agency that collects statistical information during emergencies and humanitarian crises. The OECD uses the 1982 Oxford English Dictionary definition of a child for statistical purposes, a '[y]oung human being, boy or girl; person who has not reached age of discretion; son or daughter at any age', rather than the international legal definition as found in the CRC. This was last updated in August 2004, see <https://stats.oecd.org/glossary/detail.asp?ID=6170> accessed 26 July 2019.

59 In some regions of the world, such as Africa and South America, where data on unaccompanied migrant children is unreliable or does not exist at all, local NGOs are relied upon to provide data which can be problematic. HRC, *Global Issue of Unaccompanied Migrant Children and Adolescents and Human Rights: Progress report of the Human Rights Council Advisory Committee* (August 2016) A/HRC/33/53, para 32.

60 CRC, Art 18(2).

61 CRC, Art 20(1).

62 Data may be used for less obvious purposes also, eg, data collected, which led to the delivery of emergency health checks along the route taken by the refugees from Myanmar to Cox's Bazar, revealed that few children had been vaccinated, leading to rapid vaccination of children as a result and the outbreak of disease in already squalid conditions was averted. IOM, *Fatal Journeys Volume 4: Missing Migrant Children* (2019), ch 3, p 78 <https://publications.iom.int/books/fatal-journeys-volume-4-missing-migrant-children> accessed 26 July 2019.

63 UNCRC, General Comment No 6, para 7; this relies on the definition of a child in Art 1 of the CRC.

64 *Ibid* para 8.

be with an adult who is either 'unable or unsuitable' to care for them.<sup>65</sup> The IOM defines 'migrant' in the absence of a universally accepted definition of the term in international law as: 'a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.'<sup>66</sup> This definition may refer to separated and unaccompanied children on the move and so the term 'migrant children' will often be used here generally, save where specific terms are required for legal accuracy or to reflect the language used in publications cited.<sup>67</sup>

- 1.6 Migrant children are a particularly vulnerable group and are often targeted by human traffickers. In 2016–2017, 30 per cent of all detected trafficking victims were children.<sup>68</sup> Based on the analysis of data from 54 countries, UN Office on Drugs and Crime (UNODC) estimates that 72 per cent of girls are trafficked for sexual exploitation, while boys are mainly trafficked for forced labour and other reasons, such as child soldiering or forced begging.<sup>69</sup> Since the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000)<sup>70</sup> (the 'Palermo Protocol'), entered into force in 2003, 168 of the 181 countries assessed by UNODC have passed legislation that criminalises trafficking in accordance with the first universal definition of this offence in international law that is legally binding.<sup>71</sup> Yet the problem persists.
- 1.7 Traffickers often target communities that are affected by armed conflict or displaced as a result of it, and are therefore in a precarious socio-economic position and perhaps more vulnerable to coercion.<sup>72</sup> Within these communities, unaccompanied children are particularly vulnerable due to their age, the fact that they are alone and because many rely on smugglers to transport them due to a lack of safe and regular migration pathways. UNODC reports that in 2016, 14 per cent of all smuggled arrivals along the Central Mediterranean route were unaccompanied children, which is an extremely sizeable proportion, in comparison

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65 SCEP, *Thematic Group on Age Assessment* (May 2011).

66 IOM, *Glossary on Migration, International Migration Law* (2nd edn, 2011) 130.

67 The term 'migrant children' may include refugee and asylum-seeking children; however, it will also include those children whose claims for asylum are ultimately rejected. Migrant children who are victims of human trafficking will always be referred to distinctly.

68 UNODC, *Global Report on Trafficking in Persons* (Vienna, December 2018) 10. This Report covers 142 countries and is based on data in questionnaires collected from these countries; most of the child victims are girls (23 per cent).

69 *Ibid* 28: 50 per cent of boys are trafficked for forced labour and 23 per cent for 'other purposes'.

70 The Palermo Protocol, 2237 UNTS 319: Arts 3(a)–(c) define trafficking in persons as 'the recruitment, transfer, or receipt of persons, by means of use of force or other forms of coercion, of abduction, of fraud, or of the abuse of power, for the purpose of exploitation' and children are defined in Art 3(d) as any person under the age of 18, in line with the CRC. Due to the vulnerability of children, there must simply be an act and a purpose under the definition in Art 3(c); the means are extraneous.

71 See n 68 above, 45.

72 UNHCR, *Unaccompanied Minors and Separated Children: Young, Alone, and Vulnerable* (December 2016) [www.unhcr.org/ceu/90-enwhat-we-docaring-for-the-vulnerableunaccompanied-minors-and-separated-children.html](http://www.unhcr.org/ceu/90-enwhat-we-docaring-for-the-vulnerableunaccompanied-minors-and-separated-children.html) accessed 26 July 2019.



to the two per cent of children who were smuggled with their parents.<sup>73</sup> Where smugglers are relied upon to transport them to Europe, unaccompanied and separated children are more likely to experience violence or exploitation or to fall into the hands of human traffickers on the way.<sup>74</sup> While migrant smuggling and human trafficking are distinct crimes that should not be conflated, it is important to note that there is a nexus between the two, particularly in relation to the movement of unaccompanied or separated children across international borders.<sup>75</sup> There are many differences between human smuggling and human trafficking, primarily that the former has a transnational element, while trafficking may take place within a jurisdiction. Smugglers facilitate illegal movement for profit, while human traffickers move people to exploit them.

- 1.8 Due to their relatively vast numbers, sea arrivals to Europe from Libya through the Central Mediterranean route have been the subject of extensive research and data collection by several non-governmental organisations (NGOs) and international organisations since 2014.<sup>76</sup> According to the IOM, approximately 13,000 unaccompanied minors, many of whom were smuggled from Sub-Saharan Africa, arrived in Italy from Libya in 2016, with girls as young as 13 years old identified as victims of human trafficking at the landing points.<sup>77</sup> This has led to fears as to the magnitude of the problem and calls for protection systems to be strengthened ‘throughout the migration process’ to guarantee the rights of the child and also to construct solutions for migrant children that are in their best interests.<sup>78</sup>
- 1.9 The land borders of North America are also closely monitored and provide a relatively detailed snapshot of data on what has been described as a human rights

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73 UNODC, *Global Study on Smuggling of Migrants 2018* (June 2018) [www.unodc.org/documents/data-and-analysis/glosom/GLOSOM\\_2018\\_web\\_small.pdf](http://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf) accessed 26 July 2019. During the same period, 94 per cent of all children arriving along this route were unaccompanied, see UNICEF, *Neither Safe nor Sound* (June 2016) [www.unicef.org/media/files/Unicef\\_NeitherSafeNorSound\(003\).pdf](http://www.unicef.org/media/files/Unicef_NeitherSafeNorSound(003).pdf) accessed 26 July 2019.

74 See n 1 above; UNICEF, *A Deadly Journey for Children: The Central Mediterranean Migration Route* (2017) [www.unicef.org/eca/media/941/file](http://www.unicef.org/eca/media/941/file) accessed 26 July 2019; and UNICEF, *Harrowing Journeys: Children and Youth on the Move across the Mediterranean Sea, at risk of Trafficking and Exploitation* (2017) [www.unicef.org/publications/index\\_100621.html](http://www.unicef.org/publications/index_100621.html) accessed 26 July 2019.

75 The smuggling of migrants is defined in Art 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (2000), 2241 UNTS 507, as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’. As with the Palermo Protocol, a child is defined in Art 3(d) in accordance with the CRC definition.

76 The Global Initiative Against Transnational Organised Crime, *Responding to the Human Trafficking–Migrant Smuggling Nexus with a Focus on the Situation in Libya, Policy Note* (July 2018) <https://globalinitiative.net/wp-content/uploads/2018/07/Reitano-McCormack-Trafficking-Smuggling-Nexus-in-Libya-July-2018.pdf> accessed 26 July 2019.

77 See IOM [www.iom.int/news/mediterranean-human-trafficking-and-exploitation-prevalence-survey-iom](http://www.iom.int/news/mediterranean-human-trafficking-and-exploitation-prevalence-survey-iom) accessed 26 July 2019. Children are underrepresented in this survey; however, ‘76 percent of [adult male] respondents answered positively to at least one of the trafficking and other exploitative practices indicators based on their own direct experience during their journey’.

78 *Ibid*, per Federico Soda, Director of the IOM Coordination Office for the Mediterranean in Rome.

crisis in this region, the arrival of tens of thousands of unaccompanied children<sup>79</sup> to the southern US border mainly from Mexico, and what are referred to as the Northern Triangle States: El Salvador, Honduras and Guatemala.<sup>80</sup> A study conducted by UNHCR in 2013<sup>81</sup> shows that these children are driven to migrate for various reasons, citing endemic poverty in their communities and violence as reasons for leaving home,<sup>82</sup> with the hope of family reunification, economic opportunities and education also given as reasons.<sup>83</sup> A total of 75–80 per cent of ‘unaccompanied alien minors’ were estimated by the Obama administration to have relied on smugglers to transport them,<sup>84</sup> with many children being sold on to human traffickers to ‘cover their costs’.<sup>85</sup> As will be shown, the situation for child migrants has not improved in any respect but has in fact worsened under the Trump administration.<sup>86</sup> Nevertheless, the US received the largest number of new individual applications for asylum in 2018,<sup>87</sup> with Peru receiving the second-largest number due to the situation in Venezuela.<sup>88</sup> Four million refugees and migrants, including half a million children, have left Venezuela since 2015 and are mainly hosted by Latin American and Caribbean states.<sup>89</sup> The Peruvian government has recently vowed to expel any Venezuelan individual who has ‘committed a crime’

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- 79 Referred to as ‘unaccompanied alien children’, as defined by statute in the Homeland Security Act, Public Law 107–296 (25 November 2002), 116 STAT 2135, s 462(g)(2) as ‘a child who has no lawful immigration status in the United States’ and who is below 18 years old, with no parent or legal guardian in the US, or where no legal parent or guardian in the US is ‘available to provide care and physical custody’. Problematically under this act, unaccompanied children may be placed in a detention facility or equivalent. The term ‘minor’ is frequently used interchangeably with ‘child’ in policy and practice in the US.
- 80 According to the US Border Patrol *Southwest Border Apprehensions by Sector Fiscal Year 2019*, the number of unaccompanied alien children apprehensions in the fiscal year May 2018 to May 2019 rose from 32,392 to 56,278, an increase of 74 per cent. This number had previously peaked at 70,000 in 2014, with the second-highest number of unaccompanied alien child apprehensions recorded as 60,000 in 2016 [www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions](http://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions) accessed 26 July 2019.
- 81 UNHCR, *Children on the Run: A Study Conducted by the United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean Washington, DC* (2014). This is a study based on a survey of 404 unaccompanied child migrant arrivals to the US from Central America [www.unhcr.org/en-us/children-on-the-run.html](http://www.unhcr.org/en-us/children-on-the-run.html) accessed 26 July 2019.
- 82 *Ibid.* Forty-eight per cent had experienced gang or state sponsored violence, while 16 per cent cited poverty as attributing to migration.
- 83 Twenty-one per cent cited family reunification with 51 per cent driven for economic reasons and 19 per cent hoping to further their education.
- 84 White House, Office of the Vice President, ‘Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala’, press release, 20 June 2014, cited in Congressional Research Service, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration* (July 2014), p 10 <https://fas.org/sgp/crs/homesec/R43628.pdf> accessed 26 July 2019.
- 85 *Ibid.*
- 86 For up-to-date examples of the Executive Orders issued by the present US President, see <https://pennstatelaw.psu.edu/immigration-time-of-trump> accessed 26 July 2019.
- 87 See n 2 above, 3. The US received 254,300 new claims for asylum in 2018.
- 88 *Ibid.* Peru received 192,500 individual new claims for asylum, representing a five-fold increase on the previous year, and Germany received 161,900 new applications.
- 89 UNICEF, *More than Half of the People who have Fled from Venezuela are being Hosted in Colombia and Peru*, [www.unicef.org/press-releases/venezuela-migrant-crisis-11-million-children-across-region-will-need-assistance-2019#\\_ftn1](http://www.unicef.org/press-releases/venezuela-migrant-crisis-11-million-children-across-region-will-need-assistance-2019#_ftn1); UN News, <https://news.un.org/en/story/2019/06/1040001> accessed 26 July 2019.

and to tighten controls at the border.<sup>90</sup> UNHCR has increased its presence at the Venezuelan border with Colombia and at the border between Peru and Ecuador in an effort to provide humanitarian aid and assist the authorities to register, identify and assist unaccompanied children and other groups who are particularly vulnerable to human trafficking.<sup>91</sup> UNICEF has called on host states in the region to assist and uphold the rights of unaccompanied children who may lack documentation and who may therefore experience discrimination, violence and difficulties in regularising their status.<sup>92</sup>

- 1.10 The Asia Pacific region is home to approximately 6.8 million forcibly displaced people, including approximately 3.5 million refugees and 1.4 million stateless people, the majority of whom originated in Afghanistan or Myanmar.<sup>93</sup> UNHCR has estimated these figures and the number of migrant children in this region cannot be known due to the fact that many are not registered at birth, or later. Unaccompanied migrant children in the region often live on the periphery of refugee camps and many do not lodge a claim for asylum.<sup>94</sup> In Thailand, where many Rohingya children fled from violence and persecution in Myanmar, research has shown that thousands of male children have been trafficked through ‘trafficking camps’, for the purpose of child labour and exploitation, yet a total of only 455 victims of trafficking were formally identified in 2017.<sup>95</sup> When Thailand permitted the entry of Rohingya refugees in 2013, unaccompanied children, together with children who could be identified as such by their parents or other adults, were detained with adults and denied their right to international protection.<sup>96</sup> The Thai government has underlined its commitment to the removal of children from immigration detention, but these policies must be finalised and implemented, with unaccompanied children released on an ad hoc basis in 2017 and 2018.<sup>97</sup>

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90 Reuters World News, ‘Peru president vows to keep deporting Venezuelans with criminal records’ (7 June 2019). Temporary residency permits, allowing Venezuelans access to healthcare and social services will no longer be issued; however, humanitarian visas will be available to those seeking international protection. According to the European Asylum Support Office (EASO), Venezuelans now represent the second-largest group of asylum seekers in Europe, after Syrians [www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends) accessed 26 July 2019.

91 UNHCR, [www.unhcr.org/en-ie/venezuela-emergency.html](http://www.unhcr.org/en-ie/venezuela-emergency.html) accessed 26 July 2019 and UN News <https://news.un.org/en/story/2019/06/1040591> accessed 26 July 2019.

92 UN News <https://news.un.org/en/story/2019/04/1036181> accessed 26 July 2019.

93 UNICEF Office of Research - Innocenti [www.unicef-irc.org/article/1424-asias-child-migrants.html](http://www.unicef-irc.org/article/1424-asias-child-migrants.html) accessed 26 July 2019.

94 *Ibid.*

95 UN-ACT, *Thailand Migration Report* (2019), UN Thematic Working Group on Migration in Thailand, p 159 <http://un-act.org/wp-content/uploads/2019/01/Thailand-Report-2019.pdf> accessed 26 July 2019. The scarce data is disaggregated by gender, nationality and type of exploitation, not age (pp 159–164).

96 See n 93 above.

97 See n 95 above, 111.

# Chapter 2: Legal Frameworks

## International law

### 2.1 *1951 Convention Relating to the Status of Refugees*

Not all child migrants lodge a claim for international protection, although many have fled from persecution arising from war, violence or poverty<sup>98</sup> and may in fact fulfil the requirements of the 1951 Convention Relating to the Status of Refugees (the 'Refugee Convention')<sup>99</sup> definition.<sup>100</sup> The Refugee Convention and its 1967 Protocol enshrine in international law the human, civil, political and socio-economic rights of all persons granted refugee status under the Refugee Convention, in addition to those seeking asylum from persecution. Although the Refugee Convention applies to *all* persons, children are not specifically mentioned therein and there exists no universally endorsed definition of a refugee child as a result of this omission. This may have created many of the legal problems that separated and unaccompanied children face during the status determination process today, and has led to claims that the Refugee Convention is an inadequate source of protection for child refugees.

### 2.2 *UN Convention on the Rights of the Child*

Children on the move are not without rights, however, and the aforementioned CRC sets down a comprehensive set of child-specific rights in a legally binding international human rights law treaty. It stipulates that States parties to the Convention 'shall respect and ensure the rights set forth... to each child within their jurisdiction',<sup>101</sup> including the refugee, migrant or asylum-seeking child.<sup>102</sup> The key principle that effectively underpins all other provisions in the CRC is found in Article 3, which states that the best interests of the child should be a primary

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98 UNHCR, *Refugee Facts*, [www.unrefugees.org/refugee-facts/what-is-a-refugee](http://www.unrefugees.org/refugee-facts/what-is-a-refugee) accessed 26 July 2019.

99 UN General Assembly, Convention Relating to the Status of Refugees (1951) 189 UNTS 137, as completed by its Protocol of 1967; UN General Assembly, Protocol Relating to the Status of Refugees (1967) 606 UNTS 267.

100 Art 1(A)(2) of the Refugee Convention defines a refugee as anybody who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

101 Art 2 of the CRC; this is known as the principle of non-discrimination.

102 Art 22 of the CRC explicitly refers to refugee or asylum-seeking child and UNCRC General Comment No 6 stipulates in para 12 that all rights in the CRC apply equally to the migrant child who is not seeking asylum.

consideration in all actions concerning children.<sup>103</sup> This principle is reiterated in the binding Charter of Fundamental Rights of the European Union (CFREU) in Article 24<sup>104</sup> and in Article 20 of the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>105</sup> The Human Rights Council (HRC) urges states to protect the human rights of migrant children, and to have special regard for the particular vulnerability of unaccompanied children, by ensuring that the best interests of such children guide states' policies of integration, return and family reunification.<sup>106</sup>

This principle has been incorporated into the domestic law of several States Parties to the CRC and is also ubiquitous in policy documents relating to migrant children in a variety of spheres and regions, including in the US, where the Convention has not been ratified and where the best interests of the child principle is not considered a rule of customary international law.<sup>107</sup> The aforementioned Homeland Security Act<sup>108</sup> merely states that the *interests* of an unaccompanied (alien) child should 'be considered' in decisions relating to the care and custody of such children.<sup>109</sup> Article 7 of the CRC places an obligation on States Parties to safeguard the right of every child to be registered after birth and to acquire a nationality where they would otherwise be stateless, by providing for this in domestic legislation.<sup>110</sup> Action 2 of UNHCR Campaign to End Statelessness<sup>111</sup> draws on the Article 7 of the CRC and expands on it to include unaccompanied migrant or stateless children, drawing on the language of Article 2 of the 1961 Convention

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103 Art 3(1) of the CRC states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Art 3(2) specifies that States parties to the CRC have undertaken to provide any child in their jurisdiction with the requisite care and protection for the child's wellbeing: 'States Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.' Art 3(3) is especially relevant to Reception Conditions: 'States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.'

104 CFREU, 2000 (2012/C 326/02), Art 24 states that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. All actions and legislation of EU Member States when implementing EU law must be consistent with the CFREU.

105 ACRWC, Organization of African Unity (OAU) Doc CAB/LEG/24.9/49 (1990), Art 20 states that '[p]arents or other persons responsible for the child should always act in the best interest of the child'.

106 HRC, Resolution 9/5, *Human Rights of Migrants*, (2008) A/HRC/RES/9/5, paras 5(c) and 5(e); and generally HRC, Resolution 36/5, *Unaccompanied Migrant Children and Adolescents and Human Rights* (2017) A/HRC/RES/36/5.

107 This principle may not necessarily be regarded as a rule of customary international law, however, see *Flores-Nova and Castaño-Garduno (also known as Ariceli Flores Jesus Alberto Flores-Nova) v Attorney General*, Review of an order of the Board of Immigration Appeals, 652 F3d 488 (3d Cir 2011), ILDC 1795 (US 2011), 25 July 2011, Court of Appeals (3rd Circuit), para 15. See UNICEF, *Uprooted in Central America and Mexico* (August 2018) 1.

108 Ch 1, fn 37.

109 Homeland Security Act 2002, s 462(b)(1)(B) states that, inter alia, the functions of the Director of the Office of Refugee Resettlement (ORR) include 'ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child' [emphasis author's own].

110 Also, International Covenant on Civil and Political Rights (ICCPR) Art 24 (3) and UN Human Rights Committee (HRC), CCPR General Comment No 17: Art 24 (Rights of the Child), 7 April 1989, para 8.

111 UNHCR, *Global Action Plan to End Statelessness 2014–2024* (November 2014) [www.unhcr.org/en-ie/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html](http://www.unhcr.org/en-ie/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html) accessed 26 July 2019.

on the Reduction of Statelessness<sup>112</sup> and stipulating that states should grant nationality to 'children of unknown origin found on their territory'.<sup>113</sup>

### 2.3 UN Committee on the Rights of the Child, General Comment No 6

UNCRC drafted its General Comment No 6 in 2005, both in recognition of the particular vulnerability of separated and unaccompanied children who have crossed an international border and to provide comprehensive and substantive guidance to states on the protection and care of such children, based on the application of the full set of rights enshrined in the CRC.<sup>114</sup> UNCRC underlines that states' obligations under the CRC apply to each child on its territory, irrespective of the immigration status of the child.<sup>115</sup> Nevertheless, legal obstacles appear immediately for unaccompanied children at borders who cannot prove their age to the authorities of a receiving state due to lack of documentation or what has been described as a 'growing trend' of administrations to contest their minority by claiming that civil status documents are not authentic.<sup>116</sup> This may result in the refusal of entry to the territory of a state and denial by the authorities of the 'particular care'<sup>117</sup> that is to be extended to all children within the jurisdiction of that state. This practice is widespread across European states at present, with many unaccompanied children lacking the necessary documentation to prove their age for a variety of reasons, such as having not been registered at birth, fleeing without it, losing it or having it confiscated along the way.<sup>118</sup> Actions such as these by the competent authorities of a state violate the best interests of the child principle, where the child is unaccompanied or separated and on the move internationally.<sup>119</sup>

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112 UN General Assembly, Convention on the Reduction of Statelessness (1961) 989 UNTS 175, Art 2 states that '[a] foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State'. Stateless children are not expressly provided for in the 1954 Convention Relating to the Status of Stateless Persons (360 UNTS 117); however, the right to education is provided for in Art 22.

113 *Ibid* 2. *Goals* listed as follows: 'No reported cases of childhood statelessness; All States have a provision in their nationality laws to grant nationality to stateless children born in their territory; All States have a provision in their nationality laws to grant nationality to children of unknown origin found in their territory (foundlings); All States have a safeguard in their nationality laws to grant nationality to children born to nationals abroad and who are unable to acquire another nationality'. See also pp 9–11 on the operationalisation of this action.

114 UNCRC General Comment No 6, para 1. This General Comment was recently cited by the European Court of Human Rights (ECtHR) in *Abdullahi Elmi and Aweys Abubakar v Malta* (App no 25794/13 and 28151/13) (22 November 2016), paras 61 and 63, and more extensively by the Inter American Court of Human Rights (IACtHR) in its Advisory Opinion, *OC-21/14 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, (19 August 2014), eg, paras 131–133.

115 UNCRC General Comment No 6, para 12; CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), para 9.

116 European Association for the Defence of Human Rights (AEDH), *In Europe, Unaccompanied Minors are Not Protected* (2017) 2 [www.aedh.eu/en/in-europe-unaccompanied-minors-are-not-protected](http://www.aedh.eu/en/in-europe-unaccompanied-minors-are-not-protected) accessed 26 July 2019.

117 Preamble to the CRC.

118 House of Lords EU Committee, 2nd Report of Session, *Children in Crisis: Unaccompanied Migrant Children in the EU* (2016–17) HL Paper 34, para 40 <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/34/34.pdf> accessed 26 July 2019.

119 General Comment No 6, para 20, also CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), para 12.

The immigration laws and policies of a state often mean that entry to a territory does not guarantee that unaccompanied and separated children on the move may vindicate their rights under this Convention. Normative frameworks come into conflict in this context and the international human rights of a migrant child rarely triumph. Similarly, there is no assurance that states will adhere to their positive obligations to such children under the CRC, such as the earliest possible identification of a child as separated or unaccompanied, followed by tracing activities and family reunification, where this is in the best interests of the child.<sup>120</sup> These measures are among others listed in the non-binding GCM to ensure the protection of unaccompanied and separated children in the context of international migration;<sup>121</sup> however, this document also 'reaffirms the sovereign right of states to determine their national migration policy'<sup>122</sup> and, with the exception of the best interests of the child principle, the only explicit reference to the CRC appears in a footnote.<sup>123</sup>

#### 2.4 *CRC Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography*

Article 35 CRC stipulates: '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.'

States parties to the CRC have been urged to create a 'conducive legal environment'<sup>124</sup> to close gaps in the protection of unaccompanied and separated children on the move and to adopt a holistic approach to protection by ratifying the two optional protocols to the convention.<sup>125</sup> Optional Protocol II was drafted as a result of the grave concern arising from the 'significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography'<sup>126</sup> in the latter part of the past century. It was reflective of the recognition by the international community that such egregious practice could only act as a barrier to the 'the fulfilment of the vision' of the CRC and a determination to eradicate such egregious practice.<sup>127</sup>

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120 UNCRC General Comment No 6, para 14.

121 Global Compact for Safe, Orderly and Regular Migration (2018), Objective 7: *Address and reduce vulnerabilities in migration*, paras 23(b) and (f), also para 27(e).

122 *Ibid*, para 15(c).

123 *Ibid*, preamble, para 2, fn 4.

124 UNCRC General Comment No 6, para 15.

125 The relevant optional protocols to the CRC are the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (2000) A/RES/54/263 (Optional Protocol I) and Optional Protocol to the CRC on the on the Sale of Children, Child Prostitution and Child Pornography (2000) A/RES/54/263 (Optional Protocol II), respectively. There is now a third Optional Protocol to the CRC, Optional Protocol to the CRC on a Communications Procedure (2011) A/RES/66/138).

126 CRC Optional Protocol II, preamble.

127 UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *25 Years of Fighting the Sale and Sexual Exploitation of Children: Addressing New Challenges* (2016), Foreword. This mandate was created ten years prior to the drafting of CRC, Optional Protocol II. [www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf](http://www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf) accessed 26 July 2019.

## 2.5 *ILO Worst Forms of Child Labour Convention*

Article 3 of the International Labour Organization (ILO) Worst Forms of Child Labour Convention<sup>128</sup> includes the 'sale and trafficking of children' as a key component of the definition of 'worst forms of child labour'.<sup>129</sup> Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No 22 of the UNCRC highlights the positive obligation on States Parties<sup>130</sup> to prevent and reduce migration-related risks for unaccompanied and separated children, as well as children with their families, where the child is undocumented.<sup>131</sup> While this General Comment urges states to devote 'special attention' to the protection of such children, including victims of human trafficking, States Parties are simultaneously granted a margin of discretion when interpreting their obligation to prevent and reduce migration-related threats to the life and wellbeing of children with the insertion of the phrase 'to the maximum extent possible', which only serves to undermine the entire paragraph.<sup>132</sup>

## 2.6 *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')*

It is hardly surprising, therefore, that 25 years after the mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography was created, it was reported by the current mandate holder that a lack of political will has prevented the implementation of law and policy to prevent trafficking children for these purposes and that 'no significant change' had taken place.<sup>133</sup> Maud de Boer-Buquichio reminds us that there are significant commitments in the 2030 UN Agenda for Sustainable

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128 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) C182. This convention is binding upon ratification by members of the ILO.

129 *Ibid*, Art 3.

'For the purposes of this Convention, the term the worst forms of child labour comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.'

130 This obligation arises under Art 6 of the CRC and Art 9 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) A/RES/45/158.

131 CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), para 42; also, CMW, Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23; para 43 provides details of measures to be taken by states for migrant children for whom there are indicators of trafficking or abuse or where they are at risk. Measures include early identification and the granting of the most protective migration status, in accordance with the best interests of the child.

132 *Ibid*.

133 UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *25 Years of Fighting the Sale and Sexual Exploitation of Children: Addressing New Challenges* (2016), preface by Maud de Boer-Buquichio [www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf](http://www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf) accessed 26 July 2019.



Development to, inter alia, eradicate the abuse, exploitation, trafficking and torture of children, and all forms of violence against them,<sup>134</sup> and that this goal can only be achieved by greater respect for the human rights of children and the recognition that migrant child victims of trafficking are entitled to the protection offered by CRC Optional Protocol II, where it has been ratified.<sup>135</sup> The Palermo Protocol strengthens this protection for children, in states where both instruments have been ratified.<sup>136</sup>

## 2.7 *UN Sendai Framework for Disaster Risk Reduction 2015–2030*

The UN Sendai Framework for Disaster Risk Reduction 2015–2030 (the ‘Sendai Framework’) recognises that children are disproportionately affected by displacement due to disasters,<sup>137</sup> and the fourth Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M’jid, pointed out that the protection of orphaned or separated children who are displaced and may migrate as a result of disaster is undermined due to the lack of a comprehensive framework with clearly outlined roles for responders, leading to confusion and gaps in protection for vulnerable children.<sup>138</sup> In this context, children who are not registered following a disaster and set out on the move alone are often targeted by human traffickers.<sup>139</sup> Despite this, the Sendai Framework fails to outline a response to children who have been orphaned or separated and displaced due to disaster, or to provide a clear and unequivocal statement of commitment to protect the human rights of unaccompanied children who may then be forced to migrate.

## 2.8 *Rome Statute of the International Criminal Court*

The Rome Statute of the International Criminal Court (ICC) (the ‘Rome Statute’)<sup>140</sup> enumerates war crimes and crimes against humanity against children, including the war crime of conscripting or enlisting children under the age of 15 to participate in hostilities<sup>141</sup> and the crime against humanity of enslavement,<sup>142</sup> defined in Article 7(2) (c) as the ‘exercise of any or all of the powers attached to the right of ownership over a person’, as well as where these powers are exercised while trafficking in human beings,

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134 UN 2030 SDG, Target 16.2. See also Goals 5 and 8, on gender equality and decent work and economic growth, respectively.

135 CRC Optional Protocol II, Art 8(1).

136 Anti-Trafficking (Palermo) Protocol, Art 6. See ch 1, para 1.6 above for the definition of trafficking in persons under the protocol.

137 UN Sendai Framework for Disaster Risk Reduction 2015–2030, preamble, para 4. [www.preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](http://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf) accessed 26 July 2019.

138 UN General Assembly, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M’jid* (21 December 2011) A/HRC/19/63, paras 15–25 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/175/13/PDF/G1117513.pdf?OpenElement> accessed 26 July 2019.

139 *Ibid.*

140 UN General Assembly, Rome Statute of the International Criminal Court [the Rome Statute] (last amended 2010), (1998) 2187 UNTS 3.

141 *Ibid.*, Art 8(e)(vii).

142 *Ibid.*, Art 7(1)(c).

including children.<sup>143</sup> For such conduct to be considered a crime against humanity, it must be part of a widespread or systematic attack directed against a civilian population.<sup>144</sup> Holding human traffickers who prey on migrant children in the context of large numbers of people on the move to account under international criminal law should help to close an impunity gap and may serve as a deterrent to others.

Reflective of the purposes of the Rome Statute in relation to children and of the 'special recognition and protection of children under international law', the Office of the Prosecutor (OTP) underlines the gravity of international crimes against children in its 2016 *Policy Paper on Children*.<sup>145</sup> Guided, inter alia, by the provisions of the CRC and in accordance with the principle of complementarity, the OTP had committed to support national efforts to hold the perpetrators of crimes against children to account.<sup>146</sup> Since then, the OTP has prioritised international crimes against children in its Strategic Plan,<sup>147</sup> with a commitment in Strategic Goal 4 to refine and reinforce its approach to victims, in particular victims of sexual and gender-based crimes (SBGC)<sup>148</sup> and crimes against or affecting children, and to 'ensure a systematic application of its policies', including its policy on children.<sup>149</sup> The OTP will continue to monitor its practices and ensure that its interactions with children are child-friendly and sensitive.<sup>150</sup>

## Regional legal frameworks

### 2.9 American Convention on Human Rights and the Inter-American Convention on International Traffic in Minors

Almost a decade ago, several Member States of the Organization of American States (OAS) requested that the Inter-American Court of Human Rights (IACtHR) exercise its advisory jurisdiction in recognition of the fact that in this region there is 'a grave and pending situation of violation of the human rights of children and adolescents that migrate due to economic, social, cultural or political reasons'.<sup>151</sup> The IACtHR was asked to

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143 ICC, *Elements of Crimes of the International Criminal Court* (2011) ICC-ASP/1/3, p 117. As specified in the *Elements*, Art 7 (1)(c), this may include where a child is deprived of his or her liberty, including for the purpose of forced labour, 117, fn 11.

144 See n 140 above, Art 7 (1); *Elements of Crimes*, p 117, Art 7 (1)(c), *Element 2*. The perpetrator must know this, or intend this conduct to be part of the widespread or systematic attack against the civilian population (*Element 3*).

145 OTP, ICC, *Policy on Children* (November 2016), *Executive Summary*, p 2 [www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](http://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF) accessed 26 July 2019.

146 *Ibid* 4.

147 OTP, ICC, *Strategic Plan 2019–2021* (May 2019) [www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con...pdf](http://www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con...pdf) accessed 26 July 2019.

148 See n 140 above, Art 7(1)(g), and Arts 8(2)(b)(xxii) and 8(2)(e)(vi).

149 *Ibid*, p 5 and para 37.

150 OTP, ICC, *Policy on Children*, para 123.

151 Institute for Public Policy in Human Rights, *Request for Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights*, CABA (6 April 2011). The Court recognised in its advisory opinion that there is a significant increase in children migrating autonomously and unaccompanied and also that there is a variety of reasons that lead to such movement by children. *Inter-American Court of Human Rights Advisory Opinion OC-21/14 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, (19 August 2014), paras 34–35. Requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay.

examine the content and scope of the general provision established in Article 19 of the American Convention on Human Rights,<sup>152</sup> in relation to migrant children and in light of the CRC, and the General Comments of the UNCRC.<sup>153</sup> The request had issued, due to a lack of interrelation between migratory laws and policies, the ‘system of protection of the rights of the child’, which effectively hobbled the development of a comprehensive system of protection for migrant children arriving in the region irregularly.<sup>154</sup> The request had advocated, inter alia, that the laws, policies and practice of a state in relation to migrant children be guided by ‘the safeguarding of human rights and a transversal focus on age that takes into account the rights of children affected by migration’<sup>155</sup> and expressed concern that the absence of such ‘legal precepts’ means that needs of children in mixed migration flows are not identified correctly, and cannot be addressed.<sup>156</sup> Children who are in need of international protection or who may be victims of human trafficking slip through the cracks in this context and are frequently detained with adults, without access to social services, legal aid and the justice system, or a legal guardian where they are unaccompanied.<sup>157</sup> The response from the IACtHR drew heavily on the CRC and placed a strong emphasis on a human rights-based approach to all migrant children,<sup>158</sup> with an emphasis on the protection and development of such children, irrespective of the migratory status of the child.<sup>159</sup>

The Inter-American Convention on International Traffic in Minors (the ‘Inter-American Convention’)<sup>160</sup> also draws on the CRC<sup>161</sup> and reaffirms the importance of international cooperation to ensure that the best interests of minors are

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- 152 OAS *American Convention on Human Rights, ‘Pact of San Jose’ Costa Rica* (1969), Art 19 states that ‘[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’. The US has signed but never ratified this convention.
- 153 The Court also interpreted the following provisions to inform its comprehensive Advisory Opinion; Arts 1(1), 2, 4(1), 5, 7, 8, 11, 17, 19, 22(7), 22(8), 25 and 29 of the American Convention on Human Rights, Arts I, VI, VII, VIII, XXV and XXVII of the American Declaration of the Rights and Duties of Man, and Art 13 of the Inter-American Convention to Prevent and Punish Torture.
- 154 Institute for Public Policy in Human Rights, *Request for Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights*, CABA (2011), 2 [www.corteidh.or.cr/solicitudoc/solicitud\\_eng.pdf](http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf) accessed 26 July 2019.
- 155 *Ibid* 5.
- 156 *Ibid* 14. ‘Mixed flows have been defined as complex population movements including refugees, asylum seekers, economic migrants and other migrants’. Also, UNHCR/IOM/OAS, *Summary Report of the Regional Conference on Refugee Protection and International Migration in the Americas – Protection Considerations in the Context of Mixed Migration* (San José, Costa Rica, November 2009) 4–5 [www.acnur.org/fileadmin/Documentos/BDL/2010/7702.pdf](http://www.acnur.org/fileadmin/Documentos/BDL/2010/7702.pdf) accessed 26 July 2019.
- 157 Institute for Public Policy in Human Rights, *Request for Advisory Opinion on Migrant Children* (2011) 8–9.
- 158 UNCRC General Comment No 13: The Right of the Child to Freedom from all Forms of Violence (2011) CRC/C/GC/13, para 59, which defines a child rights approach under the CRC as:  
‘one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights, guided at all times by the rights to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), life, survival and development (art. 6), and respect for the views of the child (art. 12). Children also have the right to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children’s evolving capacities (art. 5). This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.’
- 159 IACtHR, *Advisory Opinion OC-21/14* (2014), XVI OPINION, para 2.
- 160 OAS, *The Inter-American Convention on International Traffic in Minors* (1994) OAS, Treaty Series, No 79; Adopted at Mexico, DF, Mexico, on 18 March 1994, at the Fifth Inter-American Specialised Conference on Private International Law (CIDIP-V).
- 161 CRC Arts 11 and 35. Art 2(a) defines a ‘minor’ as ‘any human being below the age of eighteen’ in line with the CRC definition.

protected.<sup>162</sup> It provides a broader definition of trafficking and strengthens protection for children in this region as, unlike the Palermo Protocol, it does not require that the act of trafficking in children, defined as the ‘abduction, removal or retention, or attempted abduction, removal or retention, of a minor’<sup>163</sup> be for the ‘purpose of exploitation’.<sup>164</sup> Rather, The Inter-American Convention requires that such removal or retention, whether actual or attempted, be committed either by ‘unlawful means’ or for ‘unlawful purposes’.<sup>165</sup>

## 2.10 Europe: the European Union

The spotlight has been on the EU since late 2014, when the number of irregular migrant arrivals increased considerably. Most migrants sought asylum there, having fled from war, persecution and human rights violations in their countries of origin. Although there has been an overall drop in arrivals since then, there has nevertheless been a rise in unaccompanied and separated migrant children arriving at European borders, who have been addressed collectively for the first time as ‘unaccompanied minors’ in the recast instruments of the Common European Asylum System (CEAS).<sup>166</sup> This asylum *acquis* was created to harmonise asylum procedures and standards and the application of the Refugee Convention and its 1967 Protocol within the EU, with the principles of responsibility sharing and solidarity in mind. Care of unaccompanied minors in the EU is regulated by the recast Asylum Procedures Directive,<sup>167</sup> the Reception Conditions Directive (recast) (RCD)<sup>168</sup> and the recast Qualification Directive.<sup>169</sup> Protection measures for those who have been trafficked are set down in the EU Anti-Trafficking Directive,<sup>170</sup> which also notes the good work undertaken by the monitoring bodies established under the Council of Europe (COE) Anti-Trafficking Convention, advocating for regional cooperation and cohesion when implementing law and policies developed to provide for specific measures of the assistance, support and protection for unaccompanied child victims of trafficking.<sup>171</sup> The CFREU, which is legally binding

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162 The Inter-American Convention, Preamble.

163 *Ibid*, Art 2(b).

164 See n 70 above, Art 3(c).

165 See n 163 above, Art 2(b). Arts 2(c) and (d) are lists of non-exhaustive examples of unlawful purposes and unlawful means, respectively.

166 Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ L337/9-337/26, 20.12.2011); Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (L 180/96, 26.6.2013); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L180; and Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ L180/31 26.6.2013).

167 Directive 2013/32/EU.

168 Directive 2013/33/EU.

169 Directive 2011/95/EU.

170 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

171 Directive 2011/36/EU, Art 16. Such measures include finding a durable solution that is in the best interests of the child (Art 16(2)), appointment of a guardian, where appropriate (Art 16(3)), and the appointment of a legal representative by the competent authorities of a state (Art 16(4)).

on all EU Member States, recognises the right to asylum<sup>172</sup> and enshrines, inter alia, the best interests of the child principle, the child's right to protection and care, and the right of children to express their views in Article 24.<sup>173</sup>

## 2.11 Europe: Council of Europe (COE)

As all EU Member States have ratified the CRC, they are bound to comply with its provisions and these states are also legally bound by the European Convention on Human Rights (ECHR).<sup>174</sup> While the human rights set down therein are comprehensive and justiciable, there is no express provision for the right to asylum, nor is there any explicit reference to children.<sup>175</sup> The COE has, however, recently developed the comprehensive *Action Plan on Protecting Refugee and Migrant Children in Europe*,<sup>176</sup> which contains proposed actions for states in an attempt to ensure that refugee and migrant children are protected in Europe, are not discriminated against, and are treated as children first, with access to their rights under existing norms.<sup>177</sup> The COE Convention on Action against Trafficking in Human Beings was adopted in 2005<sup>178</sup> and sets down special protection measures to be taken in the case of the identification of unaccompanied child victims of trafficking.<sup>179</sup> The COE Group of Experts on Action against Trafficking in Human Beings (GRETA) oversees and monitors the implementation of the COE Anti-Trafficking Convention by conducting visits to COE Member States and by publishing country reports. It has been cited as the 'most important monitoring mechanism available'.<sup>180</sup>

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172 CFREU, Art 18. Art 19(1) prohibits collective expulsions, while Art 19(2) states that an individual may not be 'removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

173 CFREU, Art 24, The rights of the child.

174 Member States of the COE also include states outside the territory of the EU. COE, The European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5 213. Since 1998, all members of the COE must accept the jurisdiction of the ECtHR (11th Protocol to the ECHR), to which individual complaints may be made by any person on the territory of a State Party, irrespective of their age or migratory status (Art 1 of the ECHR).

175 The good practice of the ECtHR in relation to migrant children will be examined in ch 3, *infra*.

176 COE, *Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019)* (2017) <https://edoc.coe.int/en/children-s-rights/7362-council-of-europe-action-plan-on-protecting-refugee-and-migrant-children-in-europe-2017-2019.html> accessed 26 July 2019.

177 *Ibid*, 9.

178 COE Convention on Action against Trafficking in Human Beings, COE Treaty Series – No 197 (16.V.2005). The two bodies that monitor the implementation of this convention are the GRETA and the Committee of the Parties which is 'composed of the representatives on the Committee of Ministers of the COE of the member States Parties to the Convention and representatives of the Parties to the Convention, which are not members of the COE' [www.coe.int/en/web/anti-human-trafficking/committee-of-the-parties](http://www.coe.int/en/web/anti-human-trafficking/committee-of-the-parties) accessed 26 July 2019.

179 A child is defined here as any person under 18 years old (Art 4(d)). Art 10(3) instructs states to presume that a child victim is under 18 for the purpose of benefitting from special protection measures, where their age is in doubt. Art 10(4) states that '[a]s soon as an unaccompanied child is identified as a victim, each Party shall: (a) provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child; (b) take the necessary steps to establish his/her identity and nationality; (c) make every effort to locate his/her family when this is in the best interests of the child'.

180 Marija Jovanovic, *Comparison of Anti-Trafficking Legal Regimes and Actions in the Council of Europe and ASEAN: Realities, Frameworks and Possibilities for Collaboration* (2018) 11, citing Jan van Dijk and Fanny Klerx-van Mierlo, 'Quantitative indices for anti-human trafficking policies: based on reports of the US State Department and the Council of Europe' (2014) 61 *Crime, Law and Social Change* 229–250. These authors recognise both the GRETA reports and the US State Department Trafficking in Persons annual reports as of equal importance in the effort to combat human trafficking effectively.

## 2.12 Association of Southeast Asian Nations

Although the Association of Southeast Asian Nations (ASEAN) states<sup>181</sup> are party to the CRC, many have not ratified any of the optional protocols or implemented the provisions of this convention. The legally binding ASEAN Convention Against Trafficking in Persons, Especially Women and Children<sup>182</sup> provides only the second example of a legally binding regional convention to combat human trafficking.<sup>183</sup> Although this represents a shift towards protecting the human rights of child victims of trafficking in the region, the lack of data on both migration and trafficking flows would imply that the impact of this convention in relation to guaranteeing the rights of migrant children in this context is low, due to the fact that such children are not identified as victims of trafficking in the first place and where they are there is a lack of a holistic approach to the rights of the migrant child generally, as is evidenced by the lack of enthusiasm for the CRC and its related General Comments and protocols in the region.

## 2.13 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>184</sup> underlines the norms set down in the CRC, which has been ratified by all African states (recognised by the UN). The ACRWC has been ratified by 48 African states and reiterates the CRC principles of non-discrimination<sup>185</sup> and the best interests of the child,<sup>186</sup> in principle strengthening the legal protection available to children in the region. However, in many African states, neither instrument is implemented at a domestic level. The drafters of the ACRWC attempted to close protection gaps in the CRC by addressing the African child directly, and the charter includes detailed provisions on the rights of children who are affected by armed conflict (Article 22) and the treatment of children who are internally displaced (Article 23).

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181 These are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam and one observer – Papua New Guinea; NTI [www.nti.org/learn/treaties-and-regimes/association-southeast-asian-nations-asean](http://www.nti.org/learn/treaties-and-regimes/association-southeast-asian-nations-asean) accessed 26 July 2019.

182 ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015).

183 Brunei Darussalam has not yet acceded to this Convention or to the Palermo Protocol. See, US Department of State, Trafficking in Persons Report (June 2019), Tier 2 Watch List: Brunei [www.state.gov/reports/2019-trafficking-in-persons-report-2/brunei](http://www.state.gov/reports/2019-trafficking-in-persons-report-2/brunei) accessed 26 July 2019.

184 OAU, ACRWC, (1990) CAB/LEG/24.9/49.

185 *Ibid*, Art 3.

186 *Ibid*, Art 4.

# Chapter 3: Selected Examples of Good and Weak Practice

3.1 It has been shown here that there is a wealth of international and regional law and policy relating to and designed to protect children on the move, yet gaps in protection persist due to a lack of political will to enforce these norms by incorporating and implementing them at domestic level. Moreover, the immigration control concerns of states often lead to the flagrant denial of the migrant child's rights, particularly in the context of large movements of people. Perhaps, as a submission by the Inter-American Commission on Human Rights (IACHR) to the IACtHR suggested, this is due to the fact that states fail or refuse to see the migrant child as a true legal person, as a subject of rights and not merely as an object of protection.<sup>187</sup> International organisations, NGOs, child's rights scholars and advocates continuously argue that migrant children should be treated as children first and then as migrants, and that comprehensive, cohesive policies should be put in place immediately to guarantee systems of protection that enable the authorities of a state to act in the best interests of the child, while simultaneously ensuring that such children may access their substantive and procedural rights under international human rights law. Examples of such practice on the part of states is regrettably scarce, as will be seen below.

3.2 *Weak practice in Europe: implementation of EU asylum law and human rights violations in Greece*

The EU is a notable example of a region where the wide discretion afforded to states when implementing what is supposed to be a harmonised system of asylum law and policy gives rise to gaps in the protection of unaccompanied migrant minors. Legal obstacles appear immediately for unaccompanied children who cannot prove their age to the authorities of a receiving state due to lack of documentation or what has been described as a 'growing trend' of administrations to contest their minority by claiming that civil status documents are not authentic.<sup>188</sup> This may result in refusal of entry to the territory of a state and denial by the authorities of the 'particular care'<sup>189</sup> that is to be extended to all children within the jurisdiction of that state. As mentioned, the Committee on the Rights of the Child has stipulated in its General Comment No 6 that states must adhere to the principles contained in the CRC when making decisions in relation to the unaccompanied or separated child arrivals to their jurisdiction, including the

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187 *Advisory Opinion on Juridical Condition and Human Rights of the Child*, OC-17/02, IACtHR, 28 August 2002, citing the submissions to the court by the IACHR, 18.

188 AEDH, *In Europe, Unaccompanied Minors are Not Protected* (2017) p2 [www.aedh.eu/en/in-europe-unaccompanied-minors-are-not-protected](http://www.aedh.eu/en/in-europe-unaccompanied-minors-are-not-protected) accessed 26 July 2019.

189 CRC, Preamble.

best interests of the child principle<sup>190</sup> and the principle of non-discrimination.<sup>191</sup> The positive and negative obligations of States Parties to migrant children under the provisions of the convention are underlined, including an obligation to respect the fundamental principle of *non-refoulement*.<sup>192</sup> For states attempting to reject unaccompanied children at their border, the Committee on the Rights of the Child has made clear that obligations also ‘apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory’.<sup>193</sup>

- 3.3 In the EU, the RCD<sup>194</sup> stipulates that in implementing the directive, Member States should ‘seek to ensure full compliance with the principles of the best interest of the child and of family unity’ in accordance with the provisions of the CFREU, the CRC and ECHR, respectively.<sup>195</sup> The language used in this directive and in other instruments of the CEAS is, however, problematic and stops short of guaranteeing rights for unaccompanied minors. For example, rather than an explicit ban on the detention of asylum-seeking children, Member States ‘should ensure’ that Article 37 of the CRC is applied.<sup>196</sup> Furthermore, the RCD qualifies the right of Member States to deviate from certain reception ‘guarantees’ in detention, where it is ‘not possible in practice’ to ensure them, and states that any derogation should be temporary, duly justified and ‘only applied in exceptional circumstances’.<sup>197</sup> As a result, rather than an expedited ‘special reception needs assessment’,<sup>198</sup> for this category of ‘vulnerable persons’<sup>199</sup> in EU asylum law, and placement thereafter with adult relatives, a foster family or at least in accommodation suitable for minors, unaccompanied adolescent children are frequently placed in accommodation centres for adults or systematically detained, contrary to their best interests.<sup>200</sup> Unaccompanied children in adult accommodation centres have

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190 Art 3 of the CRC and UNCRC General Comment No 6, paras 19–22.

191 Art 2 of the CRC and UNCRC General Comment No 6, para 18.

192 UNCRC General Comment No 6, para 5. This general comment only applies to unaccompanied or separated children who have crossed an international border. The principle of *non-refoulement* is prohibition on the expulsion or return by any other means of an individual to a country where they face a real risk of persecution and human rights violations, and is codified, inter alia, in Art 33 of the Refugee Convention and Art 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85, and is now recognised as a rule of customary international law. UNHCR, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, Ministerial Meeting of States Parties, Geneva, Switzerland, 12–13 December 2001, UN Doc HCR/MMSP/2001/09, 16 January 2002, para 4. As endorsed by the UN General Assembly in Resolution A/RES/57/187. This principle is also set down in Art 19 of the CFREU.

193 CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), para 12.

194 Directive 2013/33/EU.

195 Directive 2013/33/EU (RCD), Recital 9.

196 *Ibid* Recital 18 (see RCD Arts 11(2) and (3) for specific provisions on the detention of minors and unaccompanied minors, respectively). Art 37 of the CRC is concerned with the deprivation of a child’s liberty, see Joint General Comment No 4 (2017) of the CMW and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return CMW/C/GC/4-CRC/C/GC/23, paras 5–13.

197 See n 195 above, Recital 19, also Art 11(6).

198 See n 195 above, Art 22.

199 See n 195 above, Art 21, ‘vulnerable persons’ include unaccompanied minors and victims of human trafficking for the purpose of this directive.

200 ECRE, *Access to asylum and detention at France’s borders* (2018) 23–25.



reported that they have experienced bullying, fear and violence, and they have not been allowed to have access to education or to play.<sup>201</sup> In a submission to the UNCRC in 2012, the Greek Council for Refugees identified age as a specific barrier to rights, and one that is utilised by the authorities that arrest and detain unaccompanied children systematically as ‘irregular migrants’.<sup>202</sup>

- 3.4 Age assessment procedures will be carried out in reception centres in cases where a child’s age is in dispute, and although there are comprehensive guidelines available to enhance states’ practice in this area, it remains fragmented. The outcome of these procedures, even where they are in line with good practice, will have a significant impact on the reception conditions provided to an unaccompanied child whose age is in dispute, as well as on the validity of the child’s claim for international protection and the child’s interrelated right not to be returned. Although it essential to determine the age of the child to first establish and then address their needs, the widespread practice in Greece and other European states of incorrectly identifying a child or adolescent as one or two years older means that unaccompanied children are often barred from guardianship and legal representation, leading to many being registered as adults without their knowledge, a decision that may then lead to detention or deportation orders being issued. Despite the passing of new domestic legislation in Greece<sup>203</sup> to establish a Reception and Integration Service, aimed at providing enhanced protection to particularly vulnerable individuals, including unaccompanied minors seeking asylum, there is a ‘prevailing culture of disbelief as minors’ age and right to protection are continuously doubted and denied by the responsible authorities’.<sup>204</sup> It has been observed that this practice equals invisibility for unaccompanied minors and leads to a denial of rights and human rights violations that may then go without notice.<sup>205</sup>
- 3.5 Poor reception conditions for unaccompanied minors in Greece are well documented in a plethora of reports, in the case law of the ECtHR and more recently in a joint complaint<sup>206</sup> to the European Committee of Social Rights

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201 See Hungary Helsinki Committee, *Monitoring the Situation of Unaccompanied Asylum Seeking Children in Hungary* (2016), 6 [www.helsinki.hu/wp-content/uploads/HHC\\_Situation-of-UA\\_Dec2016.pdf](http://www.helsinki.hu/wp-content/uploads/HHC_Situation-of-UA_Dec2016.pdf) accessed 26 July 2019 and *Abdullahi Elmi and Aweys Abubakar v Malta*, para 22.

202 Greek Council for Refugees, *Submission to the General Discussion (DGD) on the Rights of Migrant Children 28th September 2012: Immigration Detention of Children* (2012); *Submission to the Secretariat of the Committee on the Rights of the Child* [www2.ohchr.org/english/bodies/crc/docs/discussion2012/SubmissionsDGDMigration/GreekCouncilRefugees.doc](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/SubmissionsDGDMigration/GreekCouncilRefugees.doc) accessed 26 July 2019.

203 Greece: Law 4375/2016.

204 Andriani Fili and Virginia Xythali, ‘The Continuum of Neglect: Unaccompanied Minors in Greece’ (2017) *Social Work and Society International Online Journal* 15(2), 4.

205 *Ibid* 5.

206 *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece* (Complaint No 173/2018), 21 December 2018.

(ECSR),<sup>207</sup> which highlighted the endemic problems in reception centres, such as overpopulated or unsuitable facilities (including detention) for unaccompanied minors, in conditions so deplorable that protective measures are rendered meaningless.<sup>208</sup> Guardianship systems are described as essentially defunct and unaccompanied children do not have access to education or legal representation. The impact of overcrowding means that unaccompanied children do not have basic needs met, such as food, sanitation and medical care. Child victims of trafficking cannot be identified in this environment, with cuts to funding ensuring that there are fewer trained medical and other professionals now working in reception centres. This has had serious implications for the physical and mental health of the children, with some self-harming and attempting suicide.<sup>209</sup> ECSR has said that ‘immediate measures’ should be taken by Greece to protect the rights of migrant children as required under the European Social Charter.<sup>210</sup> While decisions such as these offer a modicum of hope, they simultaneously raise exigent questions around why migrant children must resort to litigation in order to vindicate their basic rights.

### 3.6 Good practice in Europe: COE and the European Court of Human Rights

As aforementioned, all EU Member States are legally bound by the ECHR and to accept the jurisdiction of the European Court of Human Rights (ECtHR).<sup>211</sup> Asylum seekers have successfully vindicated their rights before this court, by virtue of Article 1 of the ECHR.<sup>212</sup> Generally speaking, a wide margin of appreciation has been granted to states implementing asylum law that may conflict with national immigration control laws.<sup>213</sup> Significantly, although neither the right to asylum nor the prohibition on *refoulement*<sup>214</sup> are explicitly contained in the ECHR, the ECtHR has consistently interpreted Article 3 of the ECHR as amounting to a ban on returning an individual to a state where there is a real risk that he or she will be subjected to ‘inhuman or degrading

207 The ECSR is the COE body charged with overseeing the implementation of the revised European Social Charter (1996) ETS 163. The complaint cited violations of Art 31(1) and 31(2) (the right to housing); Art 17(1) (the right of children and young persons to social, legal and economic protection); Art 16 (the right of the family to social, legal and economic protection); Art 7(10) (the right of children and young persons to protection); Art 11(1) and 11(3) (the right to protection of health); Art 13 (the right to social and medical assistance); and Art 17(2) (the right to education).

208 *ICJ and ECRE v Greece* (2018), s II.2.2; *The Reception and Provision of Care to Migrant Children*.

209 *Ibid*, s II.2.3; *Living Conditions for Migrant Children*.

210 Reliefweb, ‘Greece: European Committee on Social Rights Decision on Immediate Measures for Migrant Children Requires Urgent Action’ (7 June 2019) <https://reliefweb.int/report/greece/greece-european-committee-social-rights-decision-immediate-measures-migrant-children> accessed 26 July 2019.

211 Member States of the COE also include states outside the territory of the EU.

212 Art 1 of the ECHR states, ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.

213 COE/ECtHR, ‘Asylum’: Key Notions on Asylum and the ECHR’ 2. ‘This Court – the European Court of Human Rights – is not competent to examine the application of the Geneva Convention. And the European Convention on Human Rights does not provide for a right to asylum. As a matter of principle, the right to control the entry, residence and expulsion of non-nationals rests with the States.’ This latter sentence is often cited as a preface to ECtHR judgments on adult asylum seekers.

214 These rights are however set down in Arts 18 and 19 of the CFREU, respectively.

treatment<sup>215</sup> that reaches a minimum level of severity,<sup>216</sup> such as to engage the states' obligations under the convention.<sup>217</sup> Due to the fact that this provision applies to all people, regardless of their age or immigration status, it could therefore be said to offer a broader protection against *refoulement* than the 1951 Convention.

- 3.7 The Court has acknowledged the indisputable vulnerability of asylum seekers as a group<sup>218</sup> but rightly goes further to intervene when considering the extreme vulnerability of unaccompanied or separated children.<sup>219</sup> The ECtHR has established and continues to reiterate that states will not be granted a wide margin of appreciation when curtailing or failing to uphold the rights of the most vulnerable in their jurisdiction, particularly in the context of Article 3 of the ECHR and unsuitable reception conditions for accompanied or unaccompanied minors, even where the same conditions would not amount to a breach of Article 3 in respect of an adult.<sup>220</sup>
- 3.8 In *Rahimi v Greece*,<sup>221</sup> the Court found that the Greek government had failed in its positive obligations under Article 3 of the ECHR in respect of the applicant,<sup>222</sup> an unaccompanied minor who had been held in a detention centre by the authorities before being released on to the streets without adequate support or any attempt to find him a guardian. The conditions in the centre were found to be so deplorable that they undermined the human dignity of the applicant and were thereby found to violate Article 3 of the ECHR. Looking, *inter alia*, to IHR standards as enshrined in the CRC, the ECtHR noted that the Greek authorities had failed to uphold or even consider the 'best interests of the child' principle when they made a decision to detain the applicant under domestic immigration law,<sup>223</sup> even briefly.<sup>224</sup>

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215 Art 3 of the ECHR is the prohibition on torture and states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This is a non-derogable right.

216 *Ireland v United Kingdom*, Series A, No 25, 18 January 1978, para 162.

217 This was first established by the ECtHR in an extradition case. *Soering v United Kingdom* (App No 14038/88), 7 July 1989.

218 *MSS v Belgium and Greece* (App No 30696/09), 21 January 2011, para 251.

219 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (App No 13178/03), 12 October 2006, para 55. *Rahimi v Greece* App No 8687/08), 5 July 2011, para 87. See also, *AB and Others v France* (App No 11593/12), 12 July 2016, para 109.

220 *Ibid*, para 103.

221 *Rahimi v Greece* (App No 8687/08), 5 April 2011.

222 *Ibid*, para 87.

223 Greece: Law 3386/2005.

224 His status as an unaccompanied minor led the court to believe that the authorities had not acted in good faith in the circumstances and that they had detained him due to his migratory status, and not as a measure of last resort, which is contrary to Art 37 of the CRC. General Comment No 6 (Chapter V(i) para 61) contains guidelines on how to give substantive effect to Art 37 when read in accordance with the best interests of the child principle: 'Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time' (paras 62 and 63).

### Promising practice in Europe: proposal for a humanitarian visa

The European Parliament has been calling for humanitarian visas to be issued by the European Commission since 2016 as a result of the unacceptable death toll in the Mediterranean<sup>225</sup> and the glaring need for a holistic and alternative response to migration.

In 2018, the European Parliament adopted a resolution to propose a visa scheme and recommendations to the European Commission that would allow the holder to enter the issuing Member State to apply for international protection<sup>226</sup> and so create safe and legal pathways to Europe.<sup>227</sup> Such measures would help to combat human smuggling, human trafficking and the death and suffering experienced by migrants at sea.<sup>228</sup> There is a gender perspective in the proposal, with reference to women travelling with children, and a particular focus on the vulnerability of women and girls to different forms of exploitation.<sup>229</sup> The scheme would be significantly strengthened by specific provision being made for unaccompanied migrant children regardless of gender, in recognition of the precarious situation and extreme vulnerability of this group. Recent data indicates that there has been a disproportionate increase in unaccompanied child arrivals, despite an overall drop in migrant arrivals by sea over the past two years.<sup>230</sup> Meaningful consideration of this and other data on migrant children should shape all future policy and legislative developments in the region.

### 3.9 Weak practice in the Americas: the United States

The US has recently restricted its immigration policies to a great extent, forcing children who wish to reunite with a parent living in the US to migrate irregularly to do so.<sup>231</sup> The Central American Minors (CAM) Program was established in 2014 as a humanitarian programme and allows legally resident parents of children residing in the Northern Triangle states of Central America and who may have been affected by, inter alia, gang violence and endemic poverty,<sup>232</sup>

225 Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Juan Fernando López Aguilar, (Initiative – Rule 46 of the Rules of Procedure), *European Parliament Report, with recommendations to the Commission on Humanitarian Visas* (2018/2271(INL)) (December 4, 2018); *Explanatory Statement*.

226 European Parliament Report, with recommendations to the Commission on Humanitarian Visas; *Annex to the Motion for a Resolution; Recommendations as to the Content of the Proposal Requested*, (6).

227 *Ibid*. It is recognised that 90 per cent of those granted international protection in the EU have reached the territory by irregular means due to lack of safe legal pathways (E).

228 European Parliament Report, with recommendations to the Commission on Humanitarian Visas; *Motion for a European Parliament Resolution* (F) and (G).

229 *Ibid*, F.

230 Eg, in 2017, more than 90 per cent of children arriving from Africa to Italy through the Central Mediterranean route were separated or unaccompanied, UNICEF, *Data Brief: Children on the Move Key Facts and Figures* (February 2018), 3. More recent data shows a significant decline in the number of sea arrivals to Italy generally (as of the 31 March 2019, there was a 92 per cent decrease in sea arrivals compared to the same period last year, UNHCR, *Europe Monthly Report*, March 2019. The number of unaccompanied child migrants choosing to travel along this treacherous route is nevertheless high (4,000 is a conservative estimate for 2018, based on the number of applications by this group for asylum in Italy, and the vast majority of this group are made up of 16–17-year-old boys [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyunaa&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyunaa&lang=en) accessed 26 July 2019 and UNICEF, *Refugee and migrant children in Europe* [www.unicef.org/eca/emergencies/refugee-and-migrant-children-europe](http://www.unicef.org/eca/emergencies/refugee-and-migrant-children-europe) accessed 26 July 2019).

231 See n 81 above; and UNICEF, *Uprooted in Central America and Mexico* (August 2018) [www.unicef.org/child-alert/central-america-mexico-migration](http://www.unicef.org/child-alert/central-america-mexico-migration) accessed 26 July 2019. See data, ch 1 *supra*.

232 See ch 1, *supra*, para 1.9.

to apply for their children to join them as resettled refugees in the US.<sup>233</sup> The aim of establishing this programme was two-pronged: to facilitate family reunification and ensure that children did not set out on dangerous journeys alone to achieve this.<sup>234</sup> Where such children were deemed ineligible for refugee resettlement, they were then considered under the CAM parole humanitarian programme, which has recently been abolished and re-established, albeit on a severely restricted basis, following cessation of the programme by the Trump administration in 2017.<sup>235</sup> Although parents may still apply for their children under the CAM refugee programme, the majority of applications approved since 2014 have been under the CAM parole programme,<sup>236</sup> with only 30 per cent of children recognised as refugees and eligible for resettlement.<sup>237</sup> The curtailment of the programme has severely negative consequences for unaccompanied minors from Central America, the majority of whom must now face a treacherous journey in pursuit of family reunification.

- 3.10 Under the Trafficking Victims Protection Act of 2000,<sup>238</sup> a ‘T’ visa was created for victims of severe forms of trafficking, such as sex or labour trafficking,<sup>239</sup> and was available to identified child victims, among other groups. Although this visa programme has not yet been revoked, under the current administration refusal rates have risen steadily, with applicants from the Northern Triangle and Mexico disproportionately affected.<sup>240</sup> Prior to this latest restriction, unaccompanied child migrants from Mexico who were suspected victims of human trafficking were screened by US Customs and Border Protection (CBP) officials prior to being

233 The Department of Homeland Security (DHS), US Citizenship and Immigration Services (USCIS) [www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-parole-applicants](http://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-information-parole-applicants) accessed 26 July 2019. Eligibility requirements include that the ‘child’ be under the age of 21 and unmarried.

234 US Embassy in Honduras [https://hn.usembassy.gov/wpcontent/uploads/sites/109/2016/07/visas\\_camprogram-faqs.pdf](https://hn.usembassy.gov/wpcontent/uploads/sites/109/2016/07/visas_camprogram-faqs.pdf) accessed 26 July 2019.

235 *Ibid.* This programme allowed for conditional and temporary entry and permission to stay in the US. ‘Pursuant to the Final Judgment and Order for Permanent Injunction in *SA et al v Trump* issued on 17 May 2019 and related settlement agreement, USCIS is reopening and continuing processing of certain CAM parole cases under the previous CAM parole policies and procedures. Cases affected by this agreement include individuals who had received a conditional parole approval notice that USCIS then rescinded in 2017 following the CAM Parole program’s termination’.

236 Seventy per cent since 2014. The parole period was a temporary two-year stay in the US, with a possibility of renewal but no pathway to citizenship. US Embassy in Honduras, <https://hn.usembassy.gov/visas/central-american-minors-program> accessed 26 July 2019.

237 *Ibid.*

238 US: Victims of Trafficking and Violence Protection Act (TVPA) of 2000 [US], Public Law 106-386 [HR 3244], 28 October 2000, as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 [US], Public Law 110-457, 23 December 2008.

239 These are defined in the TVPA (2000) 22 USC 7102, ss 103 8(A) and 9 as ‘[t]he term “severe forms of trafficking in persons” means – (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery; (9) The term “sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.’ A victim need not be physically transported from one location to another for the crime to fall within this definition, US Department of State, *Trafficking in Persons Report* (June 2019), 5.

240 Refugees International, *Abused, Blamed, and Refused: Protection Denied to Women and Children Trafficked Over the US Southern Border* (May 2019), 5.

transferred to the Office of Refugee Resettlement (ORR). Screening by CBP officials mainly resulted in failure to identify child victims of trafficking and the return of the child to a dangerous situation, having deemed them ineligible for asylum under the Unaccompanied Refugee Minor Program (URM).<sup>241</sup> Actions such as these on the part of a state amount to a violation of the prohibition on *refoulement* in international law, as enshrined in Article 33(1) of the Refugee Convention<sup>242</sup> and Article 3 of the UN Convention Against Torture (CAT).<sup>243</sup>

- 3.11 According to the ORR, an unaccompanied child arriving at a US border is referred by the Department of Homeland Security (DHS) to the ORR<sup>244</sup> and is placed in the 'least restrictive setting that is in the best interests of the child',<sup>245</sup> but allows for the detention of a child in a 'secure facility' following an assessment.<sup>246</sup> Where the age of an unaccompanied minor is in doubt, or where the Department of Health and Human Services (HHS) has a 'reasonable suspicion' that the child in their custody is 18 years or older, the child must undergo age assessments, including interviews and medical assessments in order to establish that they are under 18 years old.<sup>247</sup> Procedures may include the use of radiography or physical examinations, which may be invasive and add to the risk of further trauma, particularly where the migrant child has been a victim of violence or human trafficking. Although such techniques are used with relative frequency to determine the age of a migrant child where it is in doubt, they have been shown to be widely inconclusive, and states are urged to refrain from utilising these procedures.<sup>248</sup>
- 3.12 The ORR notes that in the event of an 'influx', unaccompanied children should be housed at 'influx care facilities', which are exempt from state or local licensing standards.<sup>249</sup> The children must then be transferred to a child-friendly environment

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241 UNHCR, *Confidential Report, Findings and Recommendations Relating to the 2012–2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the US–Mexico Border* (June 2014), 8.

242 The Refugee Convention, Art 33 (1) states: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

243 CAT, Art 3 states: '1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.' UN Human Rights Committee (HRC), CCPR General Comment No 20: Art 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para 9; the *refoulement* of an individual to a place where they may face torture or inhuman or degrading treatment is prohibited by Art 7 of the ICCPR. See n 241 above, p 9, fn 8. It is pointed out here that the US does not agree with this interpretation by the HRC of Art 7 of the ICCPR.

244 Under the Homeland Security Act of 2002, S 462. The unaccompanied child must not yet have attained the age of 18 years under this legislation. The ORR coordinates two programmes for unaccompanied migrant children, the URM and the Unaccompanied Alien Children (UAC) Program.

245 ORR [www.acf.hhs.gov/orr/programmes/ucs/about](http://www.acf.hhs.gov/orr/programmes/ucs/about) accessed 26 July 2019, also, s 235(c) (2) of the TVPRA (2008).

246 ORR [www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-term#Secure%20Care](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-term#Secure%20Care) accessed 26 July 2019; these are described as the 'most restrictive' type of facilities.

247 ORR [www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.6](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.6) accessed 26 July 2019, para 1.6.2.

248 Joint General Comment No 4 (2017) CMW, and No 23 (2017) UNCRC, para 4.

249 ORR [www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.6](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.6) accessed 26 July 2019, para 1.7.

and be placed under the care of the ORR and DHS. In what can only be described as a blatant disregard for international law and, more importantly, for the welfare and human rights of children, migrant children arriving unaccompanied or with parents or family members at the Southern US border are now routinely detained in squalid conditions. President Trump's 'zero tolerance' immigration policy of 2018 shone a spotlight on the US government's policy of forcibly separating children from their families, where they had attempted to cross the US southern border irregularly.<sup>250</sup> Children as young as three years old arriving with parents or other adult relatives have been forcibly separated and detained in US Border Patrol chain-link cages or in freezing holding cells, such as those used in the Clint Border Patrol Station near El Paso, Texas.<sup>251</sup> This station typically houses up to 250 unaccompanied and separated migrant children but has been overcrowded, with many children detained for up to four weeks, contrary to domestic legislation.<sup>252</sup> Children as young as 11 years old are looking after much smaller children and have no access to showers or basic hygiene materials, such as soap and toothbrushes.<sup>253</sup> Conditions such as these, and the detention of children, are punitive measures and breach Articles 7, 19 and 25 of the American Convention on Human Rights, Articles 25 and 37 of the CRC, Articles 2 and 16 of the CAT, and according to several UN experts, may amount to torture.<sup>254</sup>

### 3.13 *Good practice in the Americas: recommendations to the US and promising developments in Canada and Mexico*

The Group of UN Experts<sup>255</sup> that demanded the release of migrant children and the cessation of their use by the US as an immigration deterrent has reiterated that 'the best interests of the child should be the paramount consideration, including in the context of migration management, and children should never be detained for

250 This policy was rescinded shortly after it was implemented; however, the detention of children, particularly unaccompanied minors continues at this border.

251 Human Rights Watch (HRW), *Children at Risk in US Border Jails: Congress Should End Abusive Conditions*, 20 June 2019 [www.hrw.org/news/2019/06/20/children-risk-us-border-jails](http://www.hrw.org/news/2019/06/20/children-risk-us-border-jails) accessed 26 July 2019.

252 TVPRA (2008), the maximum time limit for children to be detained in such a facility is 72 hours.

253 HRW, *Children at Risk in US Border Jails* and HRW, *US: Freezing Cells for Detained Migrants, Degrading Treatment by Border Officials* (28 February 2018), p 16.

254 OHCHR, *UN experts to US: 'Release migrant children from detention and stop using them to deter irregular migration'* (22 June 2018). This administration recently attempted to introduce more restrictive immigration policies, in a proposed rule, introduced by the DHS and HHS ('Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children', 7 September 2018 (DHS Docket No ICEB-2018-0002). This would enable them to detain unaccompanied children for longer periods of time by, inter alia, changing the definitions of 'influx' and 'emergency' in their legislation. HRW, *Human Rights Watch Submits Comments on Proposed Rule Regarding the Detention of Children and Families* (6 November 2018) [www.hrw.org/news/2018/11/06/human-rights-watch-submits-comments-proposed-rule-regarding-detention-children-and](http://www.hrw.org/news/2018/11/06/human-rights-watch-submits-comments-proposed-rule-regarding-detention-children-and) accessed 26 July 2019. See also, UN General Assembly, HRC, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, (2012) *A/HRC/20/24* at para 41, where he affirms that the detention of migrant children in an irregular situation, 'cannot be justified solely on the basis of their migratory or residence status, or lack thereof'.

255 The experts are Felipe González Morales, Special Rapporteur on the human rights of migrants; Victoria Tauli-Corpuz, Special Rapporteur on the rights of indigenous peoples; Catalina Devandas, Special Rapporteur on the rights of persons with disabilities; Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children; Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Dainius Pūras, Special Rapporteur on the right to health; Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children; Seong-Phil Hong, Chair-Rapporteur of the Working Group on Arbitrary Detention; Ivana Radačić, Chairperson of the Working Group on the issue of discrimination against women in law and in practice; Dubravka Šimonović, Special Rapporteur on violence against women; and E Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

reasons related to their own or their parents' migration status'. Furthermore, due process should be guaranteed for asylum seekers and victims or potential victims of trafficking who should not be returned to their country in violation of international law.

- 3.14 Refugees International recommends the strengthening rather than curtailing of the 'T' visa programme to combat, inter alia, the human trafficking of children on the move. The DHS is urged to 'abide by the best practices and guidance that UNODC provides for assessing consent, the purpose of exploitation, and evidentiary requirements in trafficking cases'.<sup>256</sup> The US Congress has been requested to ensure that 'USCIS provide to Congress any internal policy guidance regarding the making of decisions in T visa cases involving ... unaccompanied minors'.<sup>257</sup> The Group of UN Experts has reiterated that a child's rights-based approach should be taken to migrant children arriving in the US, and the detention of whole families may not be justified on the basis of preserving family unity. This approach demands that a migrant child be treated as a rights-bearing child first and migrant second. Respect for the human rights of a migrant child, whether unaccompanied or separated, should trump the immigration control measures of any state.<sup>258</sup>

#### **Promising practice in the Americas: Canada and Mexico**

The drafting by UNHCR Canada of a Best Interests of the Child (BIOC) assessment template and standard operation procedures (SOPs) has been hailed as a step in the right direction by the state, following its adoption by the Canadian Border Service agency and its implementation as a pilot scheme in Toronto in 2018.<sup>259</sup> The detention of unaccompanied migrant children in all regions of Canada has been considerably lowered every year since 2016, with a number of measures introduced and implemented during this period, including the alignment of the Child, Youth and Family Services Act<sup>260</sup> to the CRC, raising the age of majority to 18 years old and thereby closing a protection gap for older migrant children who had previously been unable to benefit from the provisions of the CRC, due to their attainment of the age of majority at 16 years old.<sup>261</sup>

Also promising is the launch of a new tool in Mexico, designed to enhance the identification of unaccompanied children at the border where they are potentially refugees.<sup>262</sup> Information on asylum and their rights is presented to children in a child-friendly film, which is available in multiple languages.

<sup>256</sup> Refugees International, *Abused, Blamed, and Refused: Protection Denied to Women and Children Trafficked Over the US Southern Border* (May 2019), 7.

<sup>257</sup> *Ibid* 9.

<sup>258</sup> OHCHR, *UN experts to US: 'Release migrant children from detention and stop using them to deter irregular migration'* (22 June 2018). Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), 1.

<sup>259</sup> UNHCR, *Progress Report: A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014–2019* (February 2019), 13.

<sup>260</sup> Child, Youth and Family Services Act, 2017, SO 2017, c 14, Schedule 1, s 2(1).

<sup>261</sup> See n 259 above, 26.

<sup>262</sup> This is a joint initiative between the Mexican Refugee Commission (COMAR), the National Migration Institute (INM) and UNHCR.



### 3.15 *Weak practice in Asia and Oceania: unaccompanied minors in Australia*

Detention is mandatory for all persons arriving in Australia to seek international protection, including unaccompanied minors, where the individual does not hold a valid visa. Since 13 August 2012, asylum seekers arriving by boat or who are turned back while still at sea have been brought to what are known as 'offshore' or regional processing centres in Nauru and Papua New Guinea.<sup>263</sup> Successive Australian governments have varied and upheld agreements with these states, while claiming that their objective is to combat human trafficking and to deter migrants from making dangerous journeys by sea, using the services of human smugglers.<sup>264</sup> Policies and practice of this kind cannot, however, be justified, or interpreted as anything other than gross violations of human rights and international law, including where the indefinite detention of children is sanctioned in the name of immigration control.<sup>265</sup>

Australia's practice of intercepting irregular migrants at sea and the subsequent return of children to their country of origin where they may face persecution or their placement in dire reception conditions amounting to indefinite detention violates several provisions of the CRC<sup>266</sup> and also *non-refoulement* obligations under international covenants and the prohibition on torture and other cruel or inhuman and degrading treatment.<sup>267</sup>

- 3.16 Unaccompanied migrant children are not appointed an independent legal guardian, but are placed under the care of the Minister for Home Affairs, who is also responsible for border control and immigration.<sup>268</sup> The minister may appoint a custodian, but will retain guardianship and responsibility for the unaccompanied migrant child<sup>269</sup> and may revoke custody where it is in 'the *interests* of the child'.<sup>270</sup> The 1946 Act, as amended, does not refer to the CRC or the legal requirement therein that the best interests of the child principle be applied in all actions concerning all children.<sup>271</sup>

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263 National Legislative Bodies/National Authorities, *Regional resettlement arrangement between Australia and Papua New Guinea* (19 July 2013). The last asylum seekers, including children, were removed from the Nauru centre in March 2019 and, as of 27 June 2019, transfers to this detention centre had ceased and there are no children in offshore centres at present.

264 This is known as 'Operation Sovereign Borders' and is described by the Australian Department of Home Affairs as a 'military-led border security operation' <https://osb.homeaffairs.gov.au> accessed 26 July 2019.

265 Kaldor Centre for International Refugee Law, *Kaldor Centre Principles for Australian Refugee Policy*, 3 [www.kaldorcentre.unsw.edu.au/sites/default/files/kaldor\\_A4\\_short\\_E\\_singles.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/kaldor_A4_short_E_singles.pdf) accessed 26 July 2019.

266 CRC, Arts 22, 25 and 37. Australia has entered a reservation in relation to Art 37(c): '(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.' The Australian government recently affirmed that it has no intention of withdrawing this reservation at present: UNCRC, *Combined fifth and sixth periodic reports submitted by Australia under article 44 of the Convention* (November 2018), CRC/C/AUS/5-6, para 7.

267 UN Convention Against Torture (CAT), Art3 (1); Art 7 of the International Covenant on Civil and Political Rights (ICCPR).

268 Immigration (Guardianship of Children) Act 1946 (IGOC), s 6(1).

269 *Ibid*, s 7(2).

270 *Ibid*. Art 18(1) of the CRC states that the legal guardian of a child 'have the primary responsibility for the upbringing and development of the child' and that 'the best interests of the child will be their basic concern' [emphasis author's own].

271 Art 3 of the CRC. UNCRC, *Combined fifth and sixth periodic reports submitted by Australia under article 44 of the Convention* (November 2018), CRC/C/AUS/5-6. It was submitted by Australia to UNCRC in para 275 that '[t]he IGOC Act recognises that the Minister (and his delegates) have the same rights, powers, duties, obligations and liabilities as a natural guardian of a child. The best interests of the child are a primary consideration in all welfare, care and support services provided to IGOC minors.' See also para 279.

Significantly, where the chief executive officer of the Department of Communities is appointed as custodian of an 'Unaccompanied Humanitarian Minor' (UHM) by the Minister, the 'UHM is not a child in the CEO's care as defined in the Children and Community Services Act 2004'.<sup>272</sup> This act defines a child as a person of under 18 years old and it is also prescribed therein that the child should be given the benefit of the doubt where their age cannot be confirmed.<sup>273</sup> The stated objects of this legislation are, inter alia, to ensure that the wellbeing of the child is promoted<sup>274</sup> and 'to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care'.<sup>275</sup> The state and other actors are required to observe the best interests of the citizen child as *the paramount consideration*,<sup>276</sup> surpassing the requirement set down by the CRC that the best interests of the child are a primary consideration, in favour of the earlier proposed wording of that provision. The treatment of unaccompanied migrant children stands in stark contrast to the treatment of citizen children within the guardianship system of the state and contravenes Article 2 of the CRC, the principle of non-discrimination.

Various available visa schemes, including the Temporary Protection Visa (TPV) are either restrictive in nature<sup>277</sup> or could take 'many months, or even years' to issue.<sup>278</sup>

Unaccompanied minors may apply for government-funded free legal assistance, as one of a small number of migrant groups deemed eligible for this service;<sup>279</sup> however, the child must not have arrived to the territory of the state as an irregular migrant and this type of legal assistance is not available for 'judicial review or ministerial intervention'.<sup>280</sup> The conditional nature of this assistance contravenes the best interests of the child principle in relation to the 'search for short and long-term solutions'.<sup>281</sup>

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272 Child Protection and Family Support, para 2.2.13, Unaccompanied Humanitarian Minors (last modified 24 May 2019) <https://manuals.dcp.wa.gov.au/CPM/SitePages/Procedure.aspx?ProcedureId=238> accessed 26 July 2019.

273 The Children and Community Services Act (2004), Part 1, Preliminary, Terms Used, s 3 defines a child as follows: 'child means a person who is under 18 years of age, and in the absence of positive evidence as to age, means a person who is apparently under 18 years of age'.

274 *Ibid*, Part 2, Division 1, s 6 (a).

275 *Ibid*, Part 2, Division 1, s 6 (d).

276 The Children and Community Services Act (2004), Part 2, Division 2, s 7 [emphasis author's own].

277 Australian Human Rights Commission. The TPV is available to those arriving in Australia without a valid visa and in need of protection. The visa does not create a pathway to citizenship, being temporary in nature and, moreover, can be revoked if the holder wishes to leave Australia. There is no right to family reunification under this scheme [www.humanrights.gov.au/our-work/1-what-are-temporary-protection-visas](http://www.humanrights.gov.au/our-work/1-what-are-temporary-protection-visas) accessed 26 July 2019.

278 Eg, the Global Special Humanitarian Visa (Subclass 202) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/global-special-humanitarian-202#Overview> accessed 26 July 2019.

279 This is known as the Immigration Advice and Application Assistance Scheme (IAAAS) and is available to IGOC minors <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/iaaas> accessed 26 July 2019.

280 *Ibid*.

281 UNCRC, General Comment No 6, para 21: 'In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.' Also, Joint General Comment No 4 (2017) CMW and No 23 (2017) UNCRC, para 16, expressly stating that children deserve free legal counsel: 'States should ensure standardised policies to guide authorities in offering free, quality legal advice and representation for migrant, asylum-seeking and refugee children, including equal access for unaccompanied and separated children in local authority care and undocumented children.'

#### **Promising practice in Australia: the Modern Slavery Act 2018<sup>282</sup>**

This legislation came into effect on 1 January 2019 and aims, inter alia, to eradicate child labour and human trafficking. The definition of 'human trafficking' that is set down in Article 3 of the Palermo Protocol, as well as the definition of the 'worst forms of child labour' in Article 3 of the ILO Convention on the Worst Forms of Child Labour, are incorporated into the definition of 'modern slavery' for the purposes of this Act.<sup>283</sup> The Act also gives effect to the CRC<sup>284</sup> and CRC Optional Protocol II on the sale of Children, Child Prostitution and Child Pornography<sup>285</sup> in this context, and thereby marks an important step towards the protection of migrant children in Australia who have been victims of human trafficking.

#### *3.17 Good practice in Asia and Oceania: New Zealand*

New Zealand is party to the CRC and the Refugee Convention and sets out clear guidelines for asylum seekers, in a variety of languages on the New Zealand government's immigration website.<sup>286</sup>

Guidelines on children use the definitions in the CRC and state that the Immigration Act (2009) shall be implemented in accordance with, inter alia, the best interests of the child principle, the right of the child to be heard and the right of the child to have their claim assessed independently.<sup>287</sup> Where a migrant child is lodging a claim for international protection, they may do so on their own behalf and will be appointed a legal representative who will be instructed by the child and the appointed responsible adult (guardian), where the child is unaccompanied.<sup>288</sup>

#### **Promising practice in Asia: Thailand**

Thailand has recently taken comprehensive measures to ensure certain rights of migrant children are set down in domestic law and policy, irrespective of their status. Although implementation has been problematic for a variety of reasons,<sup>289</sup> at least 160,000 migrant children were enrolled in Thai schools in 2019. Migrant children also have the right to be registered at birth and to acquire a nationality in Thailand, even where their parents are irregular migrants, and they are not distinguished from citizen children in the Child Protection Act of 2003, which contains commitments to the best interests of the child and the principle of non-discrimination.<sup>290</sup>

282 Australia, Modern Slavery Act 2018, No 153, 2018.

283 *Ibid*, Part 1, Division 4.

284 *Ibid*, Part 1, Division 7, s 2(f).

285 *Ibid*, Part 1, Division 7, s 2(h).

286 Ministry for Business, Innovation and Employment New Zealand, New Zealand Immigration [www.immigration.govt.nz/audiences/supporting-refugees-and-asylum-seekers/asylum-seekers](http://www.immigration.govt.nz/audiences/supporting-refugees-and-asylum-seekers/asylum-seekers) accessed 26 July 2019.

287 New Zealand Immigration, *Guidelines on Children or Minors at the Refugee Status Branch* (2017) 2.

288 *Ibid* 3–5.

289 IOM Thailand, *Thailand Migration Report 2019* (2019) 112 <https://thailand.iom.int/thailand-migration-report-2019-0> accessed 26 July 2019.

290 *Ibid* 106.

3.18 *Good practice in Africa: African Committee of Experts on the Rights and Welfare of the Child*

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the body charged with overseeing the implementation of the African Charter on the Rights and Welfare of the Child, has expressed concern in a recent report that the well-documented lack of data collection and reporting by states in the region has led to a 'lack of a comprehensive response mechanism for protecting children'<sup>291</sup> leading to 'human rights violations that have reached unacceptable levels'.<sup>292</sup> In identifying several examples of gaps in protection across the region, the ACERWC shows a strong commitment to the human rights of the child and aligns relevant provisions of the ACRWC with the CRC, citing passages from the Convention, together with General Comments of the UNCRC, in a bid to aid governments and authorities of states in the region to operationalise the legal provisions therein correctly in this context and to apply them in practice to children on the move. Furthermore, the ACERWC calls out and condemns various African governments for their failures in respect of all migrant children and for the violations of their human rights that arise as a result.<sup>293</sup>

**Promising practice in Africa: alternatives to detention for unaccompanied migrant children<sup>294</sup> and addressing the issue of statelessness**

Drawing on the ACRWC, Articles 4<sup>295</sup> and 23,<sup>296</sup> several African states have incorporated protection for unaccompanied migrant children into their national child-specific legislation.<sup>297</sup>

Alternatives to detention for migrant children include the use of state or civil society-run shelters in countries such as Malawi and Uganda, and the more widespread 'care in the community' incentives that include foster care and guardianship for unaccompanied non-national children.<sup>298</sup>

Article 6(3) of the ACRWC sets down the right of every child to acquire a nationality.<sup>299</sup> This right can be vindicated by unaccompanied migrant children at the borders of Kenya, Swaziland, Tanzania and Zambia; where they are stateless or cannot prove their nationality, they are treated as nationals of these states.<sup>300</sup>

291 ACERWC, *Mapping Children on the Move within Africa* (November 2018) 2.

292 *Ibid.*

293 See n 291 above. See, eg, the committee's comments on the conflicts in Sudan, Nigeria and the situation in Libya, pp 41–42.

294 International Detention Coalition, *There are Alternatives: Africa* (2018) 5.

295 Art 4 of the ACRWC, Best Interests of the Child Principle.

296 Art 23 of the ACRWC, Protection for refugee and internally displaced children.

297 The following states have done so: Algeria, Botswana, Egypt, Kenya, Tunisia, , Lesotho, Mozambique, South Africa and Swaziland.

298 See n 294 above, 5. Several states have provided for these systems in domestic law, such as Kenya, Tanzania, Uganda, Zambia and Zimbabwe.

299 Art 7 of the CRC.

300 See n 294 above, 5.

### 3.19 *Weak practice: African examples*

A report compiled by the HRC on the situation of unaccompanied minors had to rely heavily on information from NGOs operating in Africa due to inaccuracy of data supplied by states in the region.<sup>301</sup> In a region fraught with internal armed conflict in many areas, civil strife, poverty and disease, the reasons why children migrate across vary greatly. Children are often internally displaced, moving within the borders of their own state. In Nigeria, it is estimated that approximately 1.5 million children have been internally displaced as a result of conflict in the North-East.<sup>302</sup> The UNHCR conducted a vulnerability survey in the Adawana, Borno and Yobe states in 2016, profiling 17,700 households, and found that 18 per cent were housing unaccompanied or separated children, with a further 14 per cent providing homes for children who were orphaned as a result of the conflict.<sup>303</sup> Children in Zimbabwe have reported that they are driven to migrate mainly due to a breakdown in the familial structure due to death of a caregiver or sexual abuse. Endemic poverty is the root cause of many of the problems experienced by children, and it leads to the breakdown of families and high dropout rates from school.<sup>304</sup> For children who migrate internationally within the region, life can be particularly hazardous due to a lack of legal documentation and heavy reliance on smugglers as a result.<sup>305</sup> There are no reception conditions for children in several states and children are often exploited upon arrival or trafficked for the purpose of labour exploitation. It is estimated that approximately 40,000 children, many of them unaccompanied migrant children, work in mines in the Democratic Republic of Congo, where they are exploited and deprived of an education.<sup>306</sup>

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301 See n 59 above, para 32.

302 IOM Displacement Tracking Matrix; <https://displacement.iom.int/Nigeria> accessed 26 July 2019.

303 UNHCR, *Supplementary Appeal: Nigeria* (revised July 2017) [www.unhcr.org/597704b87.pdf](http://www.unhcr.org/597704b87.pdf) accessed 26 July 2019.

304 See n 59 above, para 19.

305 See n 291 above, 45.

306 See n 59 above, para 55.

# Chapter 4: Strengthening the Effectiveness of International Legal Standards protecting Migrant Children

4.1 The CRC applies to all children within a State Party's jurisdiction, without discrimination of 'any kind' and irrespective of the child's or their parent or legal guardian's 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.<sup>307</sup> The universality of States parties' obligations concerning children are clearly stated, therefore, in the Convention text itself, as well as the positive obligations on States parties to give effect to the Convention guarantees.<sup>308</sup> As such, binding international legal obligations to protect the rights of all migrant children are already in place in the CRC, ratified by all states, except the US.<sup>309</sup> A new international treaty to safeguard the rights of migrant children is not, therefore, necessary. However, further elaboration of the existing CRC legal obligations, and of international and regional human rights and refugee law standards as they apply to migrant children, would strengthen the implementation of states' obligations. A range of possible measures, including standard setting and strengthened monitoring of states' compliance, are set out in this chapter. These proposals are supplemented further in Chapter 5, *infra*, by specific targeted actions for the International Bar Association (IBA), as a global leader on rule of law and human rights. The proposals for further standard setting and, most importantly, measures to strengthen compliance, draw on existing international and regional human rights and refugee law standards, providing a normative framework for action by states. Where gaps in such standards exist, proposals for progressive development of the law are stated. Measures to strengthen compliance by states, in the enforcement of criminal law to combat impunity for serious human rights violations, to strengthen child protection, and to prevent exploitation and abuse, are also set out.

## 4.2 *The CRC in domestic legal systems*

As required by UNCRC General Comment No 5,<sup>310</sup> states should ensure, by all appropriate means, that the provisions of the CRC are given legal effect within their domestic legal systems. To ensure the justiciability of child rights, 'the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with

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307 Art 2 of the CRC (the principle of non-discrimination).

308 Art 4 of the CRC.

309 See ch 2, *supra*.

310 UNCRC, General Comment No 5 (2003): General Measures of Implementation of CRC (2003), CRC/GC/2003/5.

necessary legal and other assistance' should be guaranteed to all migrant children in a language that they understand.<sup>311</sup>

The CRC should be referred to directly in all law and policy relating to the migrant child, beyond mere citation of the best interests of the child principle (Article 3 of the CRC). This will reflect an unequivocal recognition by states of the migrant child as an autonomous rights-bearer in international and domestic law, regardless of whether the child is accompanied or unaccompanied.

The EU should accede to the CRC and update the instruments of the CEAS in relation to all migrant children accordingly and with no opportunity for opt-out or derogation, in recognition of the status of the CRC as an almost universally ratified, legally binding international human rights law treaty, which all EU Member States have ratified.

All states should ratify and ensure effective implementation of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. To strengthen enforcement of international standards on the rights of migrant children, all states should ratify the Optional Protocol to the CRC on a communications procedure and ensure effective support is given to migrant children to engage with it.

A child rights approach should be effectively integrated into the interpretation and implementation of all core international and regional human rights instruments, ensuring protection for the rights of all children within the jurisdiction of a state.

#### 4.3 *UN Human Rights Treaty Bodies and rights of the migrant child*

UN Human Rights Treaty Bodies, as well as regional human rights courts and monitoring bodies, should ensure that the universal protection of the migrant children's rights is guaranteed in all aspects of their work. The UN Committee Against Torture and the UN Human Rights Committee should explicitly recognise trafficking of children for the purpose of exploitation as torture in their monitoring and enforcement procedures, and in all standard setting. The work of the UNCRC is significant on an international level, as it authoritatively interprets the legal obligations imposed on states by the CRC through the issuance of Concluding Observations, following submission of reports by states, the drafting of General Comments designed to aid better implementation of the Convention specifically in relation to migrant children<sup>312</sup> and its new competence by virtue of the third Optional Protocol to the CRC on a communications procedure.

<sup>311</sup> *Ibid*, para 24. See also, Joint General Comment No 4 (2017) CMW and No 23 (2017) UNCRC, paras 14–16.

<sup>312</sup> See, eg, UNCRC, General Comment No 6, Joint General Comment No 3 (2017) CMW and No 22 (2017) UNCRC.

The work of UNCRC could be enhanced by cooperation with independent monitoring bodies (eg, the International Red Cross), which could then submit shadow reports to supplement the reports by States parties to the Committee, where this is not already the practice of the state. For example, the Memorandum of Understanding between the Canadian Red Cross and Canadian Border Patrol Services allows the Canadian Red Cross to inspect and report on immigration detention.<sup>313</sup> This has resulted in an ongoing decrease in the immigration detention of migrant children across all provinces in Canada.<sup>314</sup>

#### 4.4 *Definition of a child (Article 1 of the CRC)*

There should be a 'bright lines' approach to guaranteeing CRC rights to all migrant children who are under 18 years old. This should not mean that upon reaching the age of majority that all welfare supports should cease, rather that children should be supported prior to their 18th birthday by their legal guardian and the social services of a state, with measures put in place for a gradual phasing out of childhood support and into independent living. This is a critical measure for unaccompanied or separated migrant children who are without parents and may not have reunited with other family members, for whom turning 18 means that they 'age out' of their rights and protection available to them.

#### 4.5 *Non-discrimination (Article 2 of the CRC)*

The legal obligations of the CRC should be complied with by all states in immigration law, policy and practice so as to effectively guarantee the rights of the migrant child, with particular commitment to the principle of non-discrimination (Article 2),<sup>315</sup> the right to a nationality (Article 7), the right of the child to be heard and express their views (Article 12) and the prohibition on deprivation of liberty (Article 37). As required by the CRC, states should take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment 'on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'.<sup>316</sup>

Domestic law pertaining to migrant and refugee children should therefore be updated to reflect states' adherence to Article 2 of the CRC on the basis of a child's status or the status of their parent or legal guardian. The non-discrimination guaranteed should be explicitly referenced in all relevant domestic law and policy. In particular, discrimination on the basis of the child's, or their parent or legal guardian's nationality, race or ethnicity or immigration status, should be explicitly prohibited in all child protection and guardianship systems.

313 Canada Border Services Agency/Canadian Red Cross, *Immigration Detention Monitoring Programme (IDMP) Annual Monitoring Activity Report, Monitoring Period – September 2017 to March 2018* (2019) [www.cbsa-asfc.gc.ca/security-securite/detent/idmp-pscd-eng.html](http://www.cbsa-asfc.gc.ca/security-securite/detent/idmp-pscd-eng.html) accessed 26 July 2019.

314 Canada Border Services Agency [www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2018-eng.html](http://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2018-eng.html) accessed 26 July 2019.

315 See generally, CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), Section III (A) (paras 21–26).

316 Art 2 of the CRC.



#### 4.6 *Best interests of the child: application to the migrant child*

The best interests of the child principle should be fully operationalised as a binding legal norm in all regions and in domestic jurisdictions and respected by states in immigration law, policy and procedural guidelines on unaccompanied and separated migrant children.<sup>317</sup> This would entail, inter alia, the development of a specific and comprehensive set of guidelines for the competent authorities of states on the meaning of this principle, as it relates to procedures for asylum-seeking children or to migrant children who are identified as victims of human trafficking. Guidelines could draw on and expand the UNHCR *Guidelines on Determining the Best Interests of the Child*,<sup>318</sup> and UNCRC General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1).<sup>319</sup>

As recommended by UNHCR, it is essential that states consider specific child protection staffing needs, especially for voluntary repatriation, refugee status determination operations and durable solutions, including resettlement to ensure that a Best Interests Assessment/Best Interests Determination is conducted.<sup>320</sup> Coordination is essential to establish mechanisms for repatriation, cross-border monitoring and resettlement to ensure that specialised services continue to be made available to children at risk.

#### 4.7 *Business and human rights*

Ensuring the effective implementation of the UN Guiding Principles on Business and Human Rights<sup>321</sup> through all appropriate measures, including legislation, policy and national action plans, is critical to preventing abuses of child migrants, including trafficking for the purpose of labour exploitation. As required by the Guiding Principles, states must ensure that in a human rights due diligence process business enterprises have to identify, prevent, mitigate and account for how they address their impact on human rights, and have processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.<sup>322</sup> These requirements apply to the rights of migrant children, in particular in relation to risks of labour exploitation, including human trafficking. In situations of conflict, as is noted in the UN

317 See, generally, CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), Section III (B) (paras 27–33).

318 UNHCR, *Guidelines on Determining the Best Interests of the Child* (May 2008) [www.unhcr.org/en-ie/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html](http://www.unhcr.org/en-ie/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html) accessed 26 July 2019. UNHCR, *Field Handbook for the Implementation of UNHCR The Field Handbook for the Implementation of UNHCR BID Guidelines* (2011) [www.refworld.org/pdfid/4e4a57d02.pdf](http://www.refworld.org/pdfid/4e4a57d02.pdf) accessed 26 July 2019. See also eg, EASO, *Practical Guide on the best interests of the child in asylum procedures* (2019) [www.easo.europa.eu/news-events/new-easo-practical-guide-best-interests-child-asylum-procedures](http://www.easo.europa.eu/news-events/new-easo-practical-guide-best-interests-child-asylum-procedures) accessed 26 July 2019.

319 UNCRC, *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (Art 3, para 1) (2013), CRC/C/GC/14.

320 UNHCR, *A Framework for the Protection of Children* (June 2012), para 6.4 [www.refworld.org/docid/4fe875682.html](http://www.refworld.org/docid/4fe875682.html) accessed 26 July 2019.

321 OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, HRC (2011) A/HRC/17/31.

322 OHCHR, *Guiding Principles* (2011), paras 15 and 25.

Guiding Principles, risks of human rights violations are heightened, including for children who are forcibly displaced by conflict.<sup>323</sup> As such, all business enterprises and states should engage as early as possible to ensure that abuses against migrant children do not occur.

Legislative measures should be adopted by states to ensure mandatory reporting by business enterprises on compliance with international human rights standards, including on the prevention and protection of human rights abuses in relation to migrant children, as well as provision of effective remedies. Effective implementation by states and Business enterprises of the Organisation for Economic Cooperation and Development (OECD) *Due Diligence Guidance for Responsible Business Conduct*,<sup>324</sup> including in supply chains, can prevent and ensure accountability for abuses of migrant children.<sup>325</sup>

#### 4.8 *ILO standards and the rights of the migrant child*

The universal ratification and effective implementation of the ILO Convention on the Worst Forms of Child Labour Convention<sup>326</sup> and Protocol of 2014 to the ILO Convention on Forced Labour of 1930<sup>327</sup> are important to securing the rights of migrant children, preventing abuse and ensuring effective enforcement.<sup>328</sup>

#### 4.9 *International criminal law enforcement and the rights of the migrant child*

The OTP of the ICC should ensure the full and effective implementation of its Strategic Goal 4, to refine and reinforce its approach to victims, in particular as regards victims of SBGC and crimes against or affecting children.<sup>329</sup> The OTP Policy on Children<sup>330</sup> should be fully implemented and updated to reflect lessons learned in ongoing examinations, investigations and prosecutions relating to crimes against children.

The OTP Policy on Children should be expanded to explicitly recognise the specific risks faced by migrant children, the rights of migrant children that arise in the context of international crimes and implementation of the Rome Statute, internationally and domestically. Such elaboration would also play a significant normative role in ensuring positive complementarity at domestic level by states, and effective investigation and prosecution of international crimes against migrant children.

323 OHCHR, *Guiding Principles* (2011), para 7.

324 OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018) <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> accessed 26 July 2019.

325 Also, generally, CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), s G (paras 45–48).

326 The ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182) (1999).

327 Protocol of 2014 to the Forced Labour Convention (1930).

328 CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), para 44.

329 OTP ICC, *Strategic Plan 2019–2021* (May 2019), pp 23–24 [www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con...pdf](http://www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con...pdf) accessed 26 July 2019.

330 OTP ICC, *Policy on Children* (November 2016) [www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](http://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF) accessed 26 July 2019.

#### 4.10 Data collection<sup>331</sup>

All UN agencies and other international organisations should immediately adopt the CRC definition of the child (Article 1) and revise their procedures on data collection accordingly so that comprehensive, disaggregated data on migration flows can be examined and so that the protection needs of all migrant children under 18 years old can be ascertained accordingly. Distinctions between ‘children’ and ‘youth’ are outmoded and data that is disaggregated using several different age brackets does not serve a purpose in the context of considerable numbers of children on the move internationally. Where appropriate, overarching guidelines should be revised to reflect these changes and the CRC should be cited therein. This is the very first step to achieving a holistic approach to the protection of children on the move.

Governments should immediately and unequivocally undertake to register and report unaccompanied child arrivals in their data on children. They may be assisted where appropriate by organisations, such as UNHCR, where appropriate and necessary in an emergency context or limited capacity, and for a limited period only. All individuals undertaking data collection tasks should receive appropriate training and have a good understanding of their role, as well as of the rights of migrant children (whether accompanied or unaccompanied) presenting themselves at the borders.

To strengthen compliance with requirements for data collection, the UNCRC or UNICEF could consider publishing an annual list of governments that fail to implement such measures.

#### 4.11 Family reunification

Family unity is a fundamental right and is an important pathway to safe and legal migration.<sup>332</sup> Family reunification can provide a safe and legal pathway to migration for children, reducing vulnerability to trafficking and exploitation. It is essential, therefore, that barriers to family reunification are removed, to avoid prolonged separation, reduced integration prospects and irregular onward movement, which heightens risks experienced by migrant children.<sup>333</sup> States should ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents and siblings, where this is in the best interest of the child.<sup>334</sup> Recognising the particular difficulties faced by undocumented children in the context of international migration, states should implement guidelines, taking particular care that ‘time limits, discretionary powers, and/or lack of transparency in administration procedures should not hinder the child’s right to family reunification’.<sup>335</sup> Recognising that insufficient financial resources hinder the exercise of the right to family reunification

331 See generally, CMW/UNCRC, Joint General Comment No 3 (2017) and No 22 (2017), s II, paras 16–17.

332 See, generally, CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), s II (E)(2), (paras 32–38).

333 UNHCR, *Position on Safe and Legal Pathways*, (February 2019) [www.refworld.org/docid/5ce4f6d37.html](http://www.refworld.org/docid/5ce4f6d37.html) accessed 26 July 2019.

334 CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), s II (E) (2), para 32.

335 *Ibid*, para 33.

and that ‘the lack of proof of adequate family income can constitute a barrier to reunion procedures’, states should ensure that ‘adequate financial support and other social services’ are provided to facilitate and support family reunification.<sup>336</sup>

Legal and practical obstacles to family reunification should be removed by states and family reunification supported through positive action for children, where it is in the best interests of the child to be reunited with their family.

#### 4.12 Refugee resettlement

Refugee resettlement quotas should be increased with provision in relevant policies made to recognise children and adolescents at risk, as a group with special needs, where this is not already the case. As a general response to expand safe and legal pathways to migration, states should increase their refugee resettlement quotas in response to a crisis or emergency in their region that could foreseeably lead to an increase in child migration, in light of what we know from current global trends.<sup>337</sup>

UNHCR: ‘The category of “Children and Adolescents at Risk” may include unaccompanied and separated children, children without legal documentation, children with specific medical needs or children with disabilities, child carers, children at risk or survivors of harmful traditional practices, including child marriage and female genital mutilation, working children or children at risk of child labour, children associated with armed forces or armed groups, children in detention and/or in conflict with the law, children at risk of *refoulement*, children at risk of not attending school, and children survivors of (or at risk of) violence, abuse or exploitation, including Sexual and Gender-Based Violence (SGBV).’<sup>338</sup>

Recognising UNHCR guidance, the best interests of the child is a primary consideration in all decisions concerning children, including in resettlement. In the context of resettlement programmes, a child’s current protection situation; prospects for family reunification with parents, other relatives or previous primary caregivers; possibilities for integration in the country of destination; and the child’s own views are essential considerations.<sup>339</sup>

#### 4.13 International cooperation

As required by the UNCRC and CMW Joint General Comments, states should strengthen regional and bilateral cooperation recognising the roles and

<sup>336</sup> *Ibid*, para 38.

<sup>337</sup> The New Zealand refugee resettlement scheme does not specifically name unaccompanied and separated children as a group with special needs, although the scheme and New Zealand’s migration policy generally is an example of good practice. The UK only accepted 20 unaccompanied child refugees between 2016–2018 under the Home Office’s Vulnerable Children’s Resettlement Scheme (HOVCRS), a scheme introduced with the intention of resettling up to 3,000 unaccompanied children from conflict zones in Africa and the Middle East. See, Home Office (UK) *Resettlement: Policy Statement* (July 2018) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/730643/Resettlement\\_Policy\\_document\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730643/Resettlement_Policy_document_.pdf) accessed 26 July 2019 and also Mark Townsend, ‘UK admits only 20 unaccompanied child refugees in two years’ *The Guardian* (London, 3 November 2018) [www.theguardian.com/world/2018/nov/03/uk-admits-only-20-unaccompanied-child-refugees-in-two-years](http://www.theguardian.com/world/2018/nov/03/uk-admits-only-20-unaccompanied-child-refugees-in-two-years) accessed 26 July 2019.

<sup>338</sup> UNHCR, *Resettlement of Children and Adolescents at Risk* (June 2016), 1 [www.refworld.org/publisher,UNHCR,,,50ffbce561,,0.html](http://www.refworld.org/publisher,UNHCR,,,50ffbce561,,0.html) accessed 26 July 2019.

<sup>339</sup> *Ibid*.

responsibilities of countries of origin, transit, destination and return in promoting and protecting the human rights of children in the context of international migration, so as to ensure safe, orderly and regular migration for children.

Cross-border case management procedures should be established in a timely manner, in conformity with the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Refugee Convention and its 1967 Protocol thereto and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.<sup>340</sup>

#### 4.14 *Humanitarian visas*

States should commit to the establishment of a special humanitarian visa programme designed for children, where their claim for international protection can be processed in their country of origin or in a country of transit. Qualification criteria for this visa scheme should be broad and each case should be assessed on an individual basis, with an independent body to oversee and monitor decisions, to prevent high refusal rates.

Special protection measures should be extended to unaccompanied and separated children in this respect, where the child may risk their life to reach safety, coming from a dangerous situation and with no family or government to protect them. States that do not participate in this visa programme, or who have a high refusal rate, could be listed and publicised.

Where the child's claim for international protection is not recognised, the migrant child should be granted a temporary visa ensuring entry to, and the protection of, the state that they are attempting to enter, particularly if a parent or member of the child's immediate family is residing there. Children who have not been recognised as refugees under the 1951 Convention but who are temporarily protected by a receiving state or region should be offered a pathway to regular migratory status and permanent residence or citizenship.

#### 4.15 *Strengthened protection of the rights of adolescent children*

Recalling UNCRC General Comment No 20 on Adolescents,<sup>341</sup> all states should ensure that the rights of refugee and asylum-seeking children to special measures are guaranteed. Adolescent migrant children should not be subjected to expedited removal procedures but rather be considered for entry into the territory. They should not be returned or refused entry before a determination of their best interests has been made and a need for international protection has been established. The particular vulnerability of adolescent migrant children should be

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<sup>340</sup> The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (The Hague Convention of 1996) 35 ILM 1391 (1996), para 64.

<sup>341</sup> UNCRC, General Comment No 20 on the implementation of the rights of the child during adolescence, (2016), CRC/C/GC/20.

recognised in legislation, policy and practice, underpinned by the best interests principle, 'prioritising the assessment of protection needs over the determination of immigration status, prohibiting immigration-related detention and referring to the recommendations in General Comment No 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin'.<sup>342</sup>

#### 4.16 *Age assessment and presumption of childhood: reception conditions and child protection*

Children should be registered at borders and identified as unaccompanied without delay so that they may be placed in safe and appropriate reception centres and so that their needs may be assessed in a child-friendly manner. As required by UNCRC General Comment No 6, the timely appointment of a trained and qualified guardian should be ensured in relation to migrant children.<sup>343</sup>

Specialised support services should be provided for all migrant children, especially unaccompanied and separated children, upon arrival in the country of destination/resettlement/asylum. This should include appropriate accommodation and family-based care (if they are not travelling with a foster family), counselling and assistance in accessing health, education and other services (socialisation/recreation, vocational training, mental health services, family reunification, access to legal services and case management) at a minimum.

This is particularly important for migrant child victims of trafficking, where failure to identify victims in a timely way can result in further trauma or re-trafficking, or both. Children who do not possess documentation should be treated as children where they claim to be such, until their age can be verified.

#### 4.17 *Prohibition of the detention of migrant children*

Recalling Joint General Comment of the CMW No 4 and No 23 (2017) of the UNCRC on the human rights of children in the context of international migration, all states should prohibit the detention of refugee and asylum-seeking children and adopt alternatives to detention to allow children to remain with family members or guardians in non-custodial, community-based contexts, consistent with their best interests and their rights to liberty and a family environment.

#### 4.18 *Rights of child victims of trafficking*

All migrant children are especially vulnerable to exploitation by human traffickers.<sup>344</sup> The majority of unaccompanied and separated migrant children are adolescent boys who are increasingly trafficked for the purpose of labour and sexual exploitation. The gender dimension of specific risks faced by boys and girls must be recognised by states in policies, action plans and measures adopted to combat child trafficking.

<sup>342</sup> *Ibid*, para 77.

<sup>343</sup> UNCRC General Comment No 6, para 33.

<sup>344</sup> See, generally, CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), s II (F), (paras 39–44).

Child-specific identification measures within National Referral Mechanisms are essential to ensure the timely detection, identification and protection of child victims and potential victims of trafficking. Recognising the positive obligations on states arising from international and regional human rights law, 'the spectrum of safeguards set out in national legislation must be *adequate* to ensure the *practical and effective protection* of the rights of victims or potential victims of trafficking'.<sup>345</sup> Implementing states' positive legal obligations requires going beyond criminal laws to prosecute and punish traffickers. Positive obligations also require that 'a State's immigration rules [...] address[es] relevant concerns relating to encouragement, facilitation or tolerance of trafficking', so as to ensure 'the practical and effective protection of the rights of victims or potential victims of trafficking'.<sup>346</sup>

National Action Plans on Child Rights should incorporate specific actions, targets, timelines and resources to safeguard the rights of migrant children. Implementation Plans on the SDGs and promotion of Agenda 2030 domestically, and through international cooperation, requires meeting SDG Target 16.2, which calls for ending abuse, exploitation, trafficking, torture of children and all forms of violence against them.

#### 4.19 *Trafficking for the purpose of child marriage*

Drawing on Article 16 of the UN Convention on the Elimination of All Forms of Discrimination Against Women,<sup>347</sup> General Recommendation No 21 on Eliminating Discrimination in Marriage and Family Relations,<sup>348</sup> Joint General Recommendation No 31 of the CEDAW Committee and General Comment No 18 of UNCRC on harmful practices,<sup>349</sup> and recognising that trafficking in women and girls for purposes of forced marriage is a growing phenomenon, states should strengthen measures to prohibit and sanction child marriage and marriage without the full, free and informed consent of both parties.

#### 4.20 *Child trafficking: strengthening the implementation of international legal obligations*

To ensure a comprehensive response to child trafficking, a new General Comment of the UNCRC focused on trafficking for the purpose of all forms of exploitation would strengthen existing CRC, international criminal law and human rights law obligations.

<sup>345</sup> *Rantsev v Cyprus and Russia* (App No 25965/04) (7 January 2010), para 284 [emphasis author's own].

<sup>346</sup> *Ibid.*

<sup>347</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) 1249 UNTS 13.

<sup>348</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 21: Equality in Marriage and Family Relations*, (1994), AJ49/38.

<sup>349</sup> Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, *Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/ General Comment No 18 of the Committee on the Rights of the Child on harmful practices* (2014), CEDAW/C/GC/31-CRC/C/GC/18, (particularly paras 20–24).

To strengthen the implementation of existing international law obligations in relation to child victims or potential victims of trafficking for the purpose of any form of exploitation, states should:

- establish early identification measures to detect victims of sale, trafficking and abuse, as well as referral mechanisms;
- carry out mandatory training for social workers, border police, lawyers, medical professionals, teachers, airline and other transport carriers staff, and all other staff who come into contact with children;
- ensure that the most protective migration status (ie, asylum or residence on humanitarian grounds) should be applied, in accordance with the best interests of the child;
- ensure that the granting of residence status, asylum or other forms of international protection, or assistance to migrant child victims of sale, trafficking or other forms of sexual exploitation is not made conditional on the initiation of criminal proceedings or their cooperation with law enforcement authorities;<sup>350</sup> and
- ensure that criminal sanctions imposed are effective, dissuasive and proportionate, recognising the gravity of the crime and seriousness of the human rights violation.

The UN CEDAW Committee is currently drafting a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration. It will be critical to ensure that the new General Recommendation incorporates a strong child rights perspective, fulfilling the CRC, its protocols and enhancing protection and implementation.

#### 4.20 Reducing statelessness

The Global Compact on Migration commits states to strengthen measures to reduce statelessness.<sup>351</sup> The Global Compact on Refugees includes similar obligations on states and commits states, UNHCR and other relevant stakeholders to contributing resources and expertise to support the 'sharing of good, gender-sensitive practices for the prevention and reduction of statelessness, and the development of, as appropriate, national and regional and international action plans to end statelessness'.<sup>352</sup>

350 CMW/UNCRC, Joint General Comment No 4 (2017) and No 23 (2017), para 43.

351 GCM Objective 4: Ensure that all migrants have proof of legal identity and adequate documentation, para 20(e).

352 Global Compact on Refugees (2018), A/73/12 Part 11, para 83.



Realising states' obligations under the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, together with the obligation to ensure a child's right to a nationality, states should adopt comprehensive measures to ensure registration of all children at birth, including in situations of conflict and forced displacement, and legislative, policy and procedural measures to avoid statelessness and facilitate the acquisition of a nationality.

#### 4.21 *Global Compacts on Refugees and Safe Orderly and Regular Migration*

The full implementation of the Global Compacts' commitments on migrant children and adolescents, together with continued strengthening of the effectiveness and implementation of the CRC and all core UN human rights and international labour standards, will ensure the legal and policy framework necessary for the protection of the rights of migrant children. Continued effective monitoring and enforcement, through domestic law, regional and international human rights bodies and international cooperation in law enforcement and victim protection, can prevent violations of the rights of migrant children.

#### 4.22 *Sustainable Development Goals and Agenda 2030*

Achievements of the targets set by the SDGs and Agenda 2030 are critical to addressing the root causes of forced migration, displacement and violations of the rights of migrant children. As such, full implementation of the agreed targets is a critical prevention measure.

#### 4.23 *Standard setting: proposing a declaration or framework document on the rights of child migrants*

A declaration, statement or pact by states elaborating on the rights of migrant children could usefully add to the content and scope of existing international law standards. Any such international legal instrument should take as a minimum standard the guarantees stated in international human rights and refugee law, specifically in the CRC, the Refugee Convention and its 1967 Protocol. This should reflect an international recognition of the rights of migrant children arriving at borders daily. Migrant children have left their country of origin for a variety of reasons, depending where they are from in the world, but the vast majority will have experienced extreme hardship or persecution of some kind. Most will have undertaken a dangerous journey to reach their destination, using the services of smugglers or falling prey to human traffickers. A comprehensive declaration or framework document, commencing with the standards set out in the CRC and the Refugee Convention and its 1967 Protocol, could provide a useful starting point for strengthened implementation, action plans and timelines for states.

# Chapter 5: Role of the International Bar Association: strengthening enforcement and implementation of international legal standards relating to the migrant child

The IBA is uniquely placed to contribute to the progressive development of international law and to international law reform. Drawing on the expertise, influence and collaborative networks of the global legal community, the IBA can provide assistance at this critical moment in the international legal protection of human rights and of the rights of migrant children in particular.

In all parts of the world, we are witnessing the dehumanisation of migrant children and serious human rights violations committed by states and non-state actors against extremely vulnerable children. Through its global membership, the IBA can make an important intervention to call on states to meet their international legal obligations to fully vindicate and protect the rights of migrant children, to adopt all necessary measures to prevent exploitation and abuse, and to ensure the effective protection of migrant children.

As this report highlights, international legal standards and core UN human rights treaties provide the framework within which the rights of migrant children can be protected. Serious gaps in implementation and enforcement of such standards exist, however, and universal ratification of such treaties remains aspirational.

The progressive development of international law, and more effective enforcement and implementation, requires targeted resources, financial and human, and mobilisation of the necessary political will to protect the rights of migrant children.

The IBA, as the voice of the global legal community, is well positioned to highlight the importance and imperative of ensuring that the rule of law and core human rights obligations are met by states and that the migrant child is fully recognised as a bearer of and subject of human rights. Through its international networks across the globe, in all regions, IBA members can influence domestic law enforcement and international law-making to strengthen the protection of the rights of migrant children.

## Recommendations

The IBA, building on its role as the voice of the global legal community, contributing to the progressive development of international law, should:

1. through its members, work to secure universal ratification of the CRC and its optional protocols;
2. support engagement with the CRC communications procedure by migrant children and their representatives, through training, capacity-building and technical assistance;
3. advocate and promote law reform measures to ensure legal effect of the CRC and its optional protocols in domestic legal systems, through incorporation into domestic law or other measures required to ensure its effectiveness and justiciability;
4. ensure that the rights of migrant children are integrated into all work of the IBA, beyond immigration or refugee law, to include any project or programme work relating to human rights, family law, criminal law, child protection, business and human rights, conflict and international humanitarian law;
5. prioritise the rights of child migrants in the work of the IBA's Human Rights Institute, including a standard-setting initiatives and technical assistance;
6. propose and support the adoption of a new General Comment by the UNCRC on child trafficking, to strengthen the enforcement of existing legal standards, strengthen the protection of child victims and support criminal law enforcement practitioners;
7. advocate for universal ratification and effective implementation of 2014 Protocol to the 1930 ILO Convention on Forced Labour and the 1999 ILO Worst Forms of Child Labour Convention;
8. in cooperation with UNHCR at international, regional and domestic levels, advocate for an expanded programme of humanitarian visas to facilitate safe migration for migrant children;
9. secure law reform, policy and practical measures to expand and strengthen family reunification, where it is in the best interests of the child;
10. build capacity through training, education and judicial studies, on the rights of migrant children, enabling IBA members to effectively vindicate the rights of migrant children in all branches of the legal profession;
11. ensure that the core standards of the CRC and its optional protocols, as applied to migrant children, are incorporated into all policy papers, legal submissions and law reform initiatives;
12. advocate for full implementation of CRC General Comment No 6 (2005) on Treatment of Unaccompanied and Separated Children Outside their Country of

Origin to ensure human rights compliant age assessment procedures, presumption of childhood in cases of dispute, timely appointment of suitably qualified guardians and legal representatives for children, and best interests determination in all decisions relating to migrant children;

13. advocate for legislative and policy measures to be adopted by states to ensure mandatory reporting by business enterprises on compliance with international human rights standards, including on the prevention and protection of human rights abuses in relation to migrant children, as well as provision of effective remedies;
14. advocate for the effective implementation by states and business enterprises of the OECD Due Diligence Guidance for Responsible Business Conduct, including in supply chains, to prevent and ensure accountability for abuses of migrant children;
15. through engagement with the ICC, advocate for the OTP Policy on Children to recognise the specific risks faced by migrant children, the rights of migrant children that arise in the context of international crimes and implementation of the Rome Statute, internationally and domestically;
16. advocate for strengthened international, regional and bilateral cooperation and cross-border case management procedures, recognising the roles and responsibilities of countries of origin, transit, destination and return in promoting and protecting the human rights of children in the context of international migration, in conformity with the CRC and its protocols, the Refugee Convention and its 1967 Protocol thereto, and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children;
17. ensure that states meet positive obligations of international legal cooperation and mutual legal assistance to secure effective investigations and prosecutions of crimes against migrant children, including child trafficking;
18. ensure through advocacy, expert guidance and technical assistance that effective, dissuasive and proportionate criminal sanctions are imposed for all crimes against migrant children, recognising the aggravated nature of such crimes;
19. advocate for continued search and rescue missions by states and support for the work of humanitarian organisations and NGOs engaged in such missions, recognising the international law duty to rescue and to protect the right to life without discrimination, in compliance with international human rights law, international refugee law and law of the sea;<sup>353</sup>
20. through cooperation with international and regional bodies, such as the UNODC, the International Criminal Police Organization (INTERPOL) and the European Police Office (EUROPOL), support international and bilateral initiatives to prioritise

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353 HRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the unlawful deaths of refugees and migrants* (2017) UN Doc A/72/335, para 107.

investigations into child trafficking, including through expert meetings, guidelines and technical assistance;<sup>354</sup>

21. through submissions and engagement in the consultation process, ensure that the new UN CEDAW Committee General Recommendation on Trafficking in Women and Girls in the Context of Global Migration incorporates a strong child rights perspective, fulfilling the legal obligations of the CRC, its protocols and enhancing protection and implementation;
22. in line with commitments in the Global Compact for Refugees and for Safe Orderly and Regular Migration, advocate for the universal ratification of the 1954 Convention Relating to the Status of Stateless Persons<sup>355</sup> and the 1961 Convention on the Reduction of Statelessness and for international, regional and national action plans to reduce statelessness, ensure children's right to a nationality and registration at birth;
23. support awareness-raising campaigns and training initiatives that move beyond traditional stereotypes of migrant children, and highlight the gender dimension of risks faced by migrant children, including the risks of sexual exploitation of both boys and girls, labour exploitation and forced criminality, as well as the particular vulnerabilities of adolescents;
24. advocate for an enabling legal framework for NGOs and decriminalisation of humanitarian assistance activities of civil society, to reduce vulnerability to exploitation of children and facilitate safe, legal migration;
25. recalling Joint General Comment of the CMW No 4 and No 23 (2017) of the UNCRC on the human rights of children in the context of international migration, advocate for the prohibition of detention of migrant children and adopt alternatives to detention to allow children to remain with family members or guardians in non-custodial, community-based contexts, consistent with their best interests and their rights to liberty and a family environment;
26. advocate for the full implementation of the UN Guiding Principles on Business and Human Rights and the adoption of legislative and policy measures to ensure mandatory reporting by business enterprises on compliance with international human rights and labour law standards, international criminal law and international refugee law, on the prevention and protection of human rights violations in relation to migrant children, as well as provision of effective remedies; and
27. raise awareness through training, technical assistance and expert guidance to ensure effective implementation by states and business enterprises of the OECD *Due Diligence Guidance for Responsible Business Conduct*<sup>356</sup> including in supply chains to prevent abuses of migrant children and ensure protection.

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354 *Ibid*, para 89.

355 UN General Assembly, Convention Relating to the Status of Stateless Persons (1954) 360 UNTS 117.

356 OECD *Due Diligence Guidance for Responsible Business Conduct* (2018) <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> accessed 26 July 2019.

## Chapter 6: Conclusion

- 6.1 The rights of migrant children are under threat in all parts of the world. Despite the risks faced and the vulnerability created by immigration laws, policies and practices, migrant children continue to be viewed primarily as migrants and often irregular migrants.
- 6.2 The rights to international protection and universal recognition of the rights of the child, as a child first, are frequently overlooked and dismissed by states. While the CRC is almost universally ratified, implementation and enforcement remain weak, and a child rights response to the needs, interests and rights claims of migrant children, in particular, is under threat. At the same time, international criminal law, international human rights and labour law and international refugee law are not consistently interpreted and applied from a child rights perspective.
- 6.3 Key legal instruments on trafficking in persons include only brief references to child trafficking and to the specific measures required to prevent child trafficking and to protect migrant children from all forms of exploitation. Capacity to investigate and prosecute for crimes against migrant children, including child trafficking, is limited.
- 6.4 While a comprehensive declaration or framework on the rights of migrant children could usefully codify existing legal standards, there is a risk of further delay in negotiating any such instrument, particularly in the context of current threats to multilateralism. The risks of a diminution of international legal standards are significant. It is essential to strengthen the existing binding legal obligations, as set out in the core UN human rights treaties, ILO standards, international criminal and refugee law. The binding nature of such obligations on states and the progressive development of such treaty obligations to include positive obligations, of prevention, prosecution, protection and partnership, provide the legal framework necessary for advocacy by the IBA, as the voice of the global legal community.
- 6.5 The rights of migrant children need to be addressed as child rights, in all legislative and policy measures, including national action plans on children. To address the root causes of forced migration and child trafficking, it is essential to tackle systemic poverty, discrimination, inequality, conflicts and climate change, which lead to displacement and a heightened risk of exploitation.
- 6.6 Concerted action by states and civil society can expand pathways for the safe and regular migration for children. Such action must include humanitarian visa programmes, expanded resettlement and family reunification, where such measures are determined to be in the best interests of the child.
- 6.7 Significant standard-setting initiatives by the UNCRC and other UN bodies have already led to the progressive development of the legal framework on the rights of

migrant children. Strengthened action is needed to secure universal ratification of the CRC, its optional protocols and all core UN human rights treaties.

- 6.8 The effective implementation of the UNCRC General Comments, including in particular, General Comment No 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, General Comment No 20 (2016) on the implementation of the rights of the child during adolescence, Joint General Comment No 4 (2017) of the CMW and No 23 (2017) of the Committee on the Rights of the Child on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, should significantly strengthen domestic legal frameworks.
- 6.9 The exploitation and abuse of migrant children by non-state actors, including business enterprises, continues to be a serious risk. The implementation of the UN Guiding Principles on Business and Human Rights and adoption of legislative and policy measures to ensure mandatory reporting by business enterprises on compliance with international legal standards relating to migrant children, including effective prevention measures, are critical to combating impunity. Compliance with the OECD *Due Diligence Guidance for Responsible Business Conduct*, including in supply chains, can prevent abuses of migrant children and ensure protection. The universal ratification of ILO standards relating to children, as well as trafficking for the purpose of forced labour, is necessary to address the full panoply of risks and exploitation faced by migrant children.
- 6.10 Civil society plays a crucial role in providing specialised services and support to migrant children, as well as in identifying children at risk. Yet, globally civil society and human rights defenders assisting migrants are under threat. An enabling legal framework is necessary to ensure that civil society continues to play an important role in identifying children at risk and is provided with protection and legal assistance.
- 6.11 The voices of migrant children should be heard in all decisions affecting them. All necessary measures, legislative and policy, should be taken to ensure that child-friendly procedures are implemented in refugee status determination processes. The best interests of the child must remain the primary consideration in any decision taken relating to a migrant child.
- 6.12 Continued international cooperation by all states, effective mutual legal assistance and strengthened capacity to combat child trafficking will be necessary to fulfil the positive obligations of due diligence required by international human rights law. Implementation of the SDGs in the context of Agenda 2030 and meeting targets to combat child trafficking and exploitation will require prioritisation of child rights over securitisation and criminalisation of migration.

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