

International Law Association

REPORT ON ENFORCING THE RIGHTS OF CHILDREN IN MIGRATION

BY

THE STUDY GROUP ON CROSS-BORDER VIOLATIONS OF CHILDREN'S RIGHTS

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Note from the Chair and Co-Rapporteurs

The Chair and Co-Rapporteurs would like to thank the members of the ILA Study Group on Cross-Border Violations of Children’s Rights for their focused diligence, collaboration, grace, and determination while working on this report. It was researched, drafted, and edited in record time during an extraordinary year in modern history.

We were forced to live and work locked inside our respective residences thousands of miles apart for over a year due to a deadly global pandemic. Some study group members were isolated. Others were surrounded 24/7 by children and partners vying for attention, quietude, and the ever-elusive internet bandwidth.

We never met face-to-face, but rather learned how to schedule, participate, and manage our few hours together on “Zoom”—a word unknown to us when we first agreed to undertake this study together pre-pandemic. Some members of the study group faced medical and mental health crises of our own or our loved ones. All witnessed, and some experienced first-hand, the threats and consequences of political divisions, manipulation, and instability, including riots, tear gas, and physical assaults. Some experienced not one, but two natural disasters within just a few months of each other. Some were compelled to become migrants ourselves, even as we studied children in migration.

Through it all, we kept scheduling and attending our study group meetings as often as we could. We kept promising contributions with the best of intentions. And in the end, you came through—not just for us and one another, but for the children worldwide who need access to your expertise.

For that, we are deeply grateful for this opportunity to work with such an extraordinarily knowledgeable, resilient, and selfless group of experts and colleagues.

Warren Binford, Chair (US Branch)

Emma Day, Co-Rapporteur (UK Branch/Resident of Thailand)

Julia Sloth-Nielsen, Co-Rapporteur (South Africa Branch)

ABBREVIATIONS

AAP	American Academy of Pediatrics
ARRA	Ethiopia’s Administration for Refugee and Returnee Affairs
ASEAN	Association of South East Asian Nations
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
CMW	OHCHR Committee of Migrant Workers
COE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DHS	U.S. Department of Homeland Security
DIPB	Australian Department of Immigration and Border Protection
ECHR	European Court of Human Rights
ECSR	European Committee of Social Rights
FGM	Female Genital Mutilation
HRC	United Nations Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICE	Immigration and Customs Enforcement, U.S. Department of Homeland Security
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMRW	International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families
ICJ	International Court of Justice
ILA	International Law Association
IMA	Illegal Maritime Arrival
IOM	International Organization for Migration
IPPDH	Instituto de Políticas Públicas en Derechos Humanos
LGBT	Lesbian, Gay, Bisexual, Transexual
MERCOSUR	Mercado Común del Sur
MIDSA	Migration Dialogue for Southern Africa
MOU	Memorandum of Understanding
MPP	Migrant Protection Protocol
NGO	Non-Governmental Organization

OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
ORR	Office of Refugee Resettlement, U.S. Department of Health and Human Services
OTP	Office of the Prosecutor of the ICC
PAM	DIPB's Procedures Advice Manual
SADC	Southern Africa Development Community
SIEV	Suspected Illegal Entry Vessel
SOP	DIPB's Standard Operating Procedures
TAM	Costa Rica's Administrative Migration Tribunal
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UN	United Nations

EXECUTIVE SUMMARY

Background

In early 2019, the Chair and Co-Rapporteurs submitted a proposal to the International Law Association (ILA) to create an ILA Committee on International Children’s Rights. It was the 30th Anniversary of the United Nations Convention on the Rights of the Child (CRC). The CRC is the most widely ratified human rights treaty in world history, and yet no ILA Committee had ever been chartered specifically to address an issue focused exclusively, or even primarily, on the rights of children.

At its meeting of May 11, 2019, the ILA Executive Council “readily agreed on the merit of an initiative to protect children under international law, but did not agree to approve the proposal to establish the new Committee on International Children’s Rights.”¹ The Chair and Co-Rapporteurs were given two options. The first option was to “begin with a small short-term study group of no more than ten experts representing diverse geographical backgrounds and viewpoints with the objective to report [at] the Kyoto Conference in 2020, which will be the basis for a decision on establishing a committee in this area.”² It was explained that “Establishing this study group would not require a new formal decision of the EC, but could start once we agree on a new title and mandate.”³ We were told, “The second option is to draft a new proposal for the establishment of a committee without first creating a study group. This would require consultations with [the Director of Studies who] would in turn consult with the ILA, on a reformulated mandate that takes into account” issues debated at the May 11 ILA Executive Council meeting, including (1) Title; (2) Focus; and (3) Multidisciplinarity.⁴

We chose to proceed with the first option and work with the Director of Studies to create a short-term Study Group, with a more focused title (“ILA Study Group on Cross-Border Violations of Children’s Rights”) and mandate. We addressed the second issue raised at the May 11, 2019, meeting of the ILA Executive Council by refining the scope of the Study Group to focus on one group of children, those in migration. Thus, the new mandate provided:

The “ILA Study Group on Cross-Border Violations of Children’s Rights” is to survey the appropriate treaties and enforcement options available to children in migration with a heightened focus specifically on remedies when their legal rights are violated. Where

¹ E-mail from Marcel Brus, Director of Studies, International Law Association, to W. Warren H. Binford, Professor of Law and Director of Clinical Law Program, Willamette University Coll. of Law, copied to Juliet Fussell, Study Group Secretary, Institute of Advanced Legal Studies, and James A. R. Nafziger, Professor of Law and Director of International Programs, Willamette University Coll. of Law (May 21, 2019, 13:15 PST) (on file with author).

² *Id.*

³ *Id.*

⁴ *Id.*

effective systems are in place, those will be highlighted so that they can be engaged by migrating children and their advocates when needed. Where there are lacunae, the Study Group can identify those and begin to develop ideas for filling those gaps. The Study Group is hopeful that the report it submits in spring 2021 will provide the ILA Executive Council with a solid basis to inform its decision to create an ILA Committee on this topic at that time.

As noted above, we also proposed extending the timeline of the Study Group's work to spring 2021.

At its November 2019 meeting, the ILA Executive Council approved the refined proposal with encouragement to articulate our work to the Committee on Migration (once established) and to consider the Study Group as a possible prefiguration of a wider committee in due course.

Originally, the Study Group's plan was to recruit five to seven additional members in late 2019 and early 2020, prepare a report for the Kyoto Conference in August 2020, and then propose conversion to a full committee at the ILA Executive Council meeting in May 2021. Almost nothing went as planned. The response to our effort to recruit "five to seven" additional members was overwhelmingly positive. Every single candidate we spoke to committed, such that the Study Group grew to over a dozen experts almost immediately. In its final form, the Study Group comprises 15 individuals from eight countries and five continents. The experts were of the highest quality and include past and current members of international and regional children's rights bodies, human rights organizations, and academic institutions. Together, they brought to the Study Group both public and private law expertise, frontline experience, knowledge of jurisprudence, and theoretical and normative frameworks.

As the Study Group was solidifying in early 2020, a new, potentially deadly coronavirus was spreading worldwide such that everyone's work and personal lives were turned upside down. A near universal lockdown took effect just as the Study Group was meeting remotely for the first time in Spring 2020. Nonetheless, the Study Group endeavored to continue its work as quickly as it could under the circumstances with the goal of submitting a report at the Kyoto Conference in August.

Due to the pandemic, the Kyoto Conference was rescheduled for November 2020 and converted to a virtual platform. The Study Group submitted a mid-term report at the Kyoto Conference and, once again, gathered together online. Following that event, we continued to work to fulfill our mandate, meeting virtually by Zoom every one to two months and working to advance drafts of this report. The Study Group is pleased to present the full report prior to the ILA Executive Council's meeting on May 8, 2021, in order to allow the ILA to consider our recommendation to create a full committee focused on children's rights.

Process

The ILA Study Group on Cross-Border Violations of Children’s Rights began its work by identifying guiding principles that should frame and inform state practices with respect to children in migration. The guiding principles included, but were not limited, to non-discrimination; the best interests of the child; the right to life, survival, and development; and the right of the child to express their views on all matters affecting them. The Study Group then identified some of the most common rights violations for children in migration such as arbitrary age assessment practices; inadequate and age-inappropriate reception policies and facilities; and immigration detention of children and other coercive practices. Consistent with the ILA Executive Council’s recommendation in May 2019, we undertook a multidisciplinary approach by summarizing the research documenting the harmful effects of these practices on child health and well-being. We surveyed (1) treaties and international instruments that might recognize a right or remedy for children on the move; (2) regional and international fora where the claims of children could be heard; and (3) the growing body of regional and international jurisprudence upholding the rights of children in migration. Finally, we identified some of the gaps in the international and regional frameworks and formulated recommendations as to how to ensure children in migration are able to enforce their rights and access justice.

The treaties surveyed include:

- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)
- African Charter on Human and People’s Rights
- African Charter on the Rights and Welfare of the Child
- American Convention on Human Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
- Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities
- ECOWAS Common Approach on Migration
- ECOWAS Gender and Migration Framework and Plan of Action
- ECOWAS Protocol relating to Free Movement of Persons, Residence and Establishment
- ECOWAS Treaty Establishing the Economic Community of West African States

- European Social Charter (Revised)
- IGAD Regional Migration Policy Framework
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography
- Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
- 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees

The regional and international bodies and mechanisms considered as possible fora for the claims of children in migration include:

- African Committee of Experts on the Rights and Welfare of the Child
- African Union rapporteur on refugees, asylum seekers, migrants, and internally displaced persons
- Court of Justice of the European Union
- Council of Europe
- European Commissioner for Human Rights
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- European Court of Human Rights
- European Committee of Social Rights
- Inter-American Commission on Human Rights
- Inter-American Court of Human Rights
- International Criminal Court
- International Court of Justice
- International Organization for Migration
- Organization of American States (OAS)
- OAS rapporteur on the rights of children
- OAS rapporteur on the rights of migrants
- Office of the U.N. High Commissioner for Human Rights

- U.N. Committee on Migrant Workers
- U.N. Committee on the Rights of the Child
- U.N. High Commissioner for Refugees
- U.N. Human Rights Committee
- U.N. special rapporteur on the human rights of migrants
- U.N. Universal Periodic Review
- U.N. Working Group on Arbitrary Detention

The report was researched and drafted through a collaborative process that allowed different Study Group members to volunteer to contribute different sections, comments, or edits. Study Group members sometimes contributed individually or in pairs or trios. The collective group agreed to the report’s general coverage and recommendations. Various drafts were circulated so Study Group members could provide feedback. The Chair and Michael Garcia Bochenek (UK Branch) led the effort to bring the contributions from the various Study Group members into one coherent whole.

Findings

The ILA Study Group on Cross-Border Violations of Children’s Rights almost immediately found that although there were many practices that violate the rights of children in migration, none of them were universal. For example, the notorious, near-universal forced separation of children from their parents by the U.S. government in 2017 and 2018 was deemed to be relatively exceptional on a global basis, and so is only treated in passing. However, unreliable and often invasive age-assessment procedures were common in some regions (North America and Europe, for example), but not others. Similarly, the immigration detention of children, often in unsanitary and wholly inappropriate facilities—sometimes for prolonged periods of time—is far too common, but not universal. What was nearly universal is that almost all countries have failed to develop child-centered reception facilities, policies, and procedures for children who arrive in a new country through irregular channels. Thus, children are thrust into punitive systems designed for adults and end up being traumatized at a time when they need care and protection.

The Study Group considered but then rejected proposals to recommend drafting a new treaty to recognize the rights of children on the move, and possibly, to create a new forum to enforce such rights. Instead, the Study Group recognizes that all children, including children in migration, possess almost all of the same rights that adults do, as well as additional rights in light of their status as children. Additionally, the most comprehensive and robust of those treaties, the U.N. Convention on the Rights of the Child enjoys near-universal ratification.⁵ Unfortunately, one of

⁵ Although the United States is not a state party to the Convention on the Rights of the Child, as a signatory it has the obligation to refrain from acts that would defeat the object and purpose of the convention. Vienna Convention on

the most likely reasons it is so widely ratified is that it is a reporting treaty and has no enforcement mechanism.

This gap was recently addressed by the entry of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure into force in 2014.⁶ The Optional CRC Communications Protocol allows the CRC Committee to hear communications alleging violations of rights recognized in the Convention on the Rights of the Child. In recent years, the CRC Committee has heard and issued decisions in a significant number of matters brought by children in migration, which is contributing to a growing body of jurisprudence internationally.⁷ However, only 47 states parties have ratified the Optional CRC Communications Protocol to date.⁸ Additionally, the Study Group recognizes that many of the treaty bodies in which communications alleging children's rights violations are likely to be heard lack the capacity, resources, and authority to enforce the decisions of the treaty bodies.

Thus, the Study Group agreed that international efforts should be focused on: (1) increasing the number of parties to the Optional CRC Communications Protocol, as well as other treaties that recognize and/or provide for the enforcement of the rights of children in migration; (2) encouraging utilization of regional and international fora already in existence to enforce the rights of children on the move; and (3) working with states parties to create more child-centered immigration processes and policies in light of the number of children expected to migrate in the 21st century. In other words, the current child rights framework must continue to be used to lead a values shift globally to create administrative and governance systems that are designed with the best interests of all children in mind, including especially vulnerable populations, such as children in migration.

Recommendations

In light of these findings, the work that has been done by the ILA Study Group on Cross-Border Violations of Children's Rights, and the significant amount of work that remains, the Study Group recommends that the ILA Executive Council form an ILA Committee to build upon the Study Group's work this past year.

the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. As with the Convention on the Rights of the Child, the United States has signed but not ratified the Vienna Convention on the Law of Treaties. Even so, the U.S. Department of State has recognized many of its provisions as customary international law. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 298-307 (1988).

⁶ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Dec. 19, 2011, 2173 U.N.T.S. 222 [hereinafter CRC Communications Protocol].

⁷ Sec. V. *infra*.

⁸ See *Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION (listing status of ratifications), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4 (last visited May 3, 2021).

The Study Group also recommends that the name of the Committee be different than the Study Group in order to better represent the breadth and nature of the rights violations and remedies to be addressed. Specifically, the name of the Study Group refers to “Cross-Border Violations,” which did not accurately reflect the nature of most of the violations described in this report. Instead, the Study Group focused more on regional and international remedies for common rights violations involving children in migration and a new title, such as “ILA Committee on Access to Justice for Children on the Move” or “ILA Committee on Enforcing the Rights of Children in Migration” would better reflect the work that has been done, and hopefully, to be continued.

If formed, the Study Group recommends that the Committee consider creating an online “toolbox” that can be accessed by children on the move and their advocates worldwide. This toolbox could include a summary of the rights of children in migration, a recognition of common violations of rights, and resources that can be used to enforce rights, such as summaries of and links to relevant treaties, processes, fora, and jurisprudence.

If an ILA Committee is formed, the Study Group also recommends that the Committee consider publishing a book that expands on this report. It might introduce the reader to the reasons that so many children are migrating in the 21st century and why that number is expected to increase in the coming decades; an overview of the rights of children in migration; mapping of the processes and remedies that can be utilized to enforce those rights; a summary of the growing international jurisprudence on the rights of children in migration; and a critical analysis of the current framework and recommendations for improvement.

Finally, we would like to make two recommendations if the Committee is formed. The first is to ensure more member representation from Asia and the Pacific. The second is to coordinate with the ILA Committee on Migration, if formed, and include several members on both committees. The Study Group believes that this endeavor would benefit from both of these changes going forward

I. Introduction

Migration is a common element of the human condition. Thus, it is natural that the international community would construct legal protections recognizing the rights of people in migration through the creation of treaties such as the 1951 Refugee Convention⁹ and its 1967 Protocol,¹⁰ as well as the International Convention for the Protection of the Rights of All Migrant Workers and Their Families.¹¹ When combined with the treaties that were subsequently adopted to recognize and protect children's rights in the late 20th and early 21st centuries, including but not limited to the United Nations Convention on the Rights of the Child¹² and its three optional protocols,¹³ one would expect that the rights of migrating children and other children in the context of international migration would be well established by 2021. Unfortunately, this is not the case.

First of all, with the exception of the Convention on the Rights of the Child, which has been nearly universally ratified, the ratification status of these international instruments is very uneven, as many states have failed to join these treaties. Secondly, current events make clear that despite the legal commitment almost 200 States made to protect, respect, and fulfill the rights enshrined in the Convention on the Rights of the Child, thousands of children in migration experience flagrant violations of their rights on a daily basis ranging from forced separation from family, detention, erroneous classification as adults, and denial of educational, social, legal, and cultural rights. Violations of the rights of children on the move often call for cross-border remedies, such as when a child whose rights were violated in an arrival country is deported to their home country or when a child who has the right to enter a country for the purpose of claiming asylum is denied access and suffers harm as a result.

Although many of the harms suffered by children in migration implicate a variety of enforcement mechanisms and legal remedies under domestic and international laws, the fact is that effective cross-border remedies are often elusive. This is especially problematic in light of the growing body of research that shows that untreated childhood trauma can have a lifelong negative effect on survivors and impose a high cost on society. Thus, it is critical that the global community protect children from severe trauma as much as possible, and when a child is harmed, ensure that the child and their family have access to the resources they need to recover fully from the harm.

⁹ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

¹⁰ Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

¹¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention].

¹² Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227; CRC Complaints Procedure, *supra* note 6.

In essence this requires adopting a human-rights-based approach to cross-border migration. Yet as state practice in this context reveals, these rights are routinely violated with serious consequences for children’s rights to life, survival, and development. There is thus an imperative to ensure that children have effective remedies, generally and specifically in the context of cross-border migration.¹⁴

This report on Enforcing the Rights of Children in Migration by the ILA Study Group on Cross-Border Violations of the Rights of Children is intended to: (1) provide an overview of common violations of rights experienced by children in migration; (2) document the established knowledge showing the potential harm those rights violations could have on children; (3) outline principles to guide analyses and proposed solutions focused on the rights and best interests of children in migration; (4) summarize the current international and domestic legal frameworks that recognize the rights of children in migration with an emphasis on enforcement mechanisms and legal remedies; (5) identify the challenges and enforcement gaps in those frameworks; and (6) propose solutions to help ensure that when the rights of children in migration are violated, those children have access to timely and effective legal remedies.

The Study Group recommends that the ILA continue the work of the Study Group by creating a committee to complete a more comprehensive report that could serve as the basis for a book-length treatment of the subject, as well as to develop an online, multi-lingual “toolbox” to be accessed and utilized by children whose rights have been violated while migrating, as well as their advocates.

II. Challenges Children in Migration Face

Children who migrate experience a host of barriers and other challenges in accessing the care and protection they are entitled to as children, as well as the specific measures of protection they require because they are far from their homes and, in many cases, their families and caregivers. Of the many issues arising in this context, this report focuses on three problem areas: A. arbitrary age assessment practices; B. inadequate reception conditions and other deficiencies in protection; and C. immigration detention of children and other coercive practices.

A. Arbitrary Age Assessment Practices

One challenge children face in many countries, especially in Europe, North America, and Australia, is difficulty establishing their status as a child, a threshold requirement to access the specialized care and protection to which they are entitled. In some countries, especially in Africa and South America, childhood status is declaratory—that is, a person’s stated age is accepted as

¹⁴ See, e.g., Ann Skelton, *International Children’s Law: Complaints and Remedies*, in INTERNATIONAL HUMAN RIGHTS OF CHILDREN 65 (Ursula Kilkelly & Ton Liefaard eds., 2019).

valid in the absence of serious reasons for doubt, in line with international standards.¹⁵ In practice, however, some authorities use age assessment as a migration control mechanism and reject children’s declarations regarding their age, even when validated by a companion’s attestation or accompanied by identity documents or medical records. Indeed, authorities in certain countries and regions frequently treat birth registration documents and other identity documents as presumptively fraudulent and compel children to undergo protracted and invasive medical and dental procedures, often without informed consent, for the sole purpose of age assessment (that is, not for treatment or diagnostic purposes).¹⁶

Medical age assessment methods are widely criticized as inherently unreliable, particularly for the age range from 16 to 21 years, as well as unethical. For instance, researchers from Stockholm University and the University of Copenhagen stated in a 2012 review of age assessment practices in Europe that “no currently available method has been demonstrated to have the accuracy needed to be of real use” in determining whether a young asylum seeker is a child or an adult.¹⁷ Similarly, the European Asylum Support Office, a European Union agency, has observed that “no single method currently available can determine the exact age of a person.”¹⁸ In conclusions that are notable exceptions to the prevailing view, some researchers have stated that specific methods such as evaluation of third molar maturation or clavicular ossification appear to be reliable in estimating whether a person is over the age of 18.¹⁹ There are numerous methodological, ethical, and health issues implicated in these age assessment practices, including the negative physical and mental health effects such practices can have on the children, including radiation exposure and “anxiety, depression, suicidal ideation, and posttraumatic stress disorder.”²⁰ The Council of Europe in 2019 reiterated that the U.N. Committee on the Rights of the Child advises states not to use medical methods based on bone and dental examination

¹⁵ U.N. Comm. on Migrant Workers & U.N. Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child) on the General Principles Regarding the Human Rights of Children in the Context of International Migration, ¶ 32, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).

¹⁶ The exposure of persons to radiology without informed consent advising the individual of the medical and non-medical consequences and risks could give rise to a private right of action in some jurisdictions, as well as ethics proceedings against the health care professional administering the procedure. *See generally* AM. DENTAL ASSOC., PRINCIPLES OF ETHICS & CODE OF PROFESSIONAL CONDUCT pt. 3, §1 (2018); *Cruzan v. Dir. Mo. Dep’t. of Health*, 497 U.S. 261, 269 (1990).

¹⁷ Anders Hjern et al., *Age Assessment of Young Asylum Seekers*, 101 ACTA PAEDATRICA 4 (2012).

¹⁸ EUROPEAN ASYLUM SUPPORT OFFICE, EASO PRACTICAL GUIDE ON AGE ASSESSMENT (2d. ed. 2018), <https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf>.

¹⁹ *See* M-D Marrero-Ramos et al., *Estimation of the Age of Majority Through Radiographic Evaluation of the Third Molar Maturation Degree*, 25 MEDICINA ORAL, PATOLOGÍA ORAL Y CIRUGÍA BUCAL e359 (2020); Coralie Hermetet et al., *Forensic Age Estimation Using Computed Tomography of the Medial Clavicular Epiphysis: A Systematic Review*, 132 INT’L J. LEGAL MED. 1415 (2018).

²⁰ Farzana Kapadia et al., *Dental Radiographs for Age Estimation in US Asylum Seekers: Methodological, Ethical, and Health Issues*, 110 AM. J. PUB. HEALTH 1786 (2020).

analysis as they may be inaccurate and can be traumatic and lead to unnecessary legal processes.²¹

Researchers and medical practitioners have also questioned the use of age assessments on ethical grounds, particularly when the methods of assessment involve the examination of genitalia or expose youths to radiation with no medical benefit.²² As the result of these ethical concerns, some medical associations have called for an end to medical age assessments.²³ The Committee on the Rights of the Child has declared genital examination for the purposes of age determination to be a violation of the right to privacy under article 16 of the Convention on the Rights of the Child). The committee directed the state party to provide effective reparation to the girl, and also to ensure, at a systemic level, that “genital examinations as a method of age determination are never applied to children.”²⁴

Several methods of medical age assessments are in use.²⁵ Historically, age estimates were most frequently derived from various methods of examining left hand and wrist radiographs.²⁶ The

²¹ URSULA KILKELLY ET AL., COUNCIL OF EUROPE, PROMOTING CHILD-FRIENDLY APPROACHES IN THE AREA OF MIGRATION: STANDARDS, GUIDANCE AND CURRENT PRACTICES (Dec. 2019) (citing Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. 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, ¶ 4, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017)).

²² See, e.g., Ranit Mishori, *The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights*, 6 CHILDREN (BASEL) 85 (2019); Henriette D.C. Roscam Abbing, *Age Determination of Unaccompanied Asylum Seeking Minors in the European Union: A Health Law Perspective*, 18 EUR. J. HEALTH L. 11 (2011); C.J. Van Ree & T.W. Schulp, *Ethische tekortkomingen van het leeftijdsonderzoek ter beoordeling van minderjarigheid van alleenstaande asielzoekers* [Ethical Shortcomings of Skeletal Age Determination to Establish Minority for Single Young Asylum Seekers], 145 NEDERLANDS TIJDSCHRIFT VOOR GENEESKUNDE 229 (2001), <https://www.ntvg.nl/artikelen/ethische-tekortkomingen-van-het-leeftijdsonderzoek-ter-beoordeling-van-minderjarigheid-van>. See also Erik Malmqvist et al., *Ethical Aspects of Medical Age Assessment in the Asylum Process: A Swedish Perspective*, 132 INT'L J. LEGAL MED. 815 (2018). As medical ethicists have explained, “[t]he X-rays foisted on immigrant children expose them to radiation, and thus to medical risk. Doing that is ethical only when there is a compensating benefit that is ‘in the best interest of the child.’” Brendan Parent & Nancy Neveloff Dubler, *The Unethical Behavior of Forensic Dentists at Our Southern Border*, STAT (Feb. 13, 2019), <https://www.statnews.com/2019/02/13/unethical-behavior-forensic-dentists-southern-border/>. “Instigating a medical procedure for the purpose of depriving a child of the right to be treated as a child — or for the purpose of facilitating and permitting imprisonment — is absolutely prohibited by the ethics of medicine, not to mention by the notions of fairness and decency.” *Id.*

²³ See, e.g., Comité consultatif national d'éthique pour les sciences de la vie et de la santé, *Avis No. 88: Sur les méthodes de détermination de l'âge à des fins juridiques*, at 5 (June 23, 2005) (Fr.), <http://www.ccneethique.fr/sites/default/files/publications/avis088.pdf>; Haut Conseil de la Santé Publique, *Avis relatif à l'évaluation de la minorité d'un jeune étranger isolé*, ¶ 7 (Jan. 23, 2014) (Fr.).

²⁴ R.Y.S. v. Spain, Commc'n No. 76/2019, Comm. on the Rights of the Child, U.N. Doc. CRC/C/86/D/76/2019 (Feb. 4, 2021).

²⁵ See GÜNTER SCHUMACHER ET AL., MEDICAL AGE ASSESSMENT OF JUVENILE MIGRANTS: AN ANALYSIS OF AGE MARKER-BASED ASSESSMENT CRITERIA, (2018) (an overview of common medical age assessment methods).

²⁶ Arsalan M. Mughal et al., *Bone Age Assessment Methods: A Critical Review*, 30 PAK. J. MED. SCI. 211 (2014).

bones of the hand and wrist undergo changes, both in size and form, which are associated with chronological age; specifically, the epiphyseal plate, a cartilage plate located at the end of long bones where new bone growth takes place, is only found in children and adolescents.²⁷ Through a process known as epiphyseal ossification, the plate is eventually replaced by the epiphyseal line, a marking that indicates where the two parts of the bone meet.²⁸ Complete ossification, or fusion, occurs in approximately 68 percent of females by age 17 and by age 18 for males.²⁹

Although there are multiple methods to assess bone age, the Greulich and Pyle method is, despite the criticism related below, still the preferred method among medical professionals for estimating bone age in the context of immigration.³⁰ The Greulich and Pyle method makes use of a standard bone development atlas of the left hand and wrist against which an individual's images are compared in order to estimate skeletal age.³¹ The Greulich and Pyle method is particularly problematic when used for the purpose of assisting in immigration age assessments. There are no developed standards for assessment of epiphyseal fusion for purposes of assignment of chronological age; thus, interpretation of individual radiographs is likely to vary among medical professionals.³² Further, atlas methods such as Greulich and Pyle are only able to provide estimates within a range of two years and systematically under- and over-estimate ages.³³

Questions have also been raised as to the method's applicability to ethnically diverse children. The current methods were developed based on studies from the 1930s and 1940s measuring bone growth in Caucasian children of northern European descent of upper socioeconomic class.³⁴ These results do not adequately account for the diverse geographic, ethnic, and socioeconomic groups that are subject to such age verification methods. For example, one study demonstrated significant discrepancies between ethnic groups of up to 11 months between bone and chronological age.³⁵ Other studies have shown an even greater discrepancy in bone age when

²⁷ Pieter J. Sauer et al., *Age Determination in Asylum Seekers: Physicians Should Not Be Implicated*, 175 EUR. J. PEDIATR. 299, 300 (2016).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Khalaf Alshamrani et al., *Is the Greulich and Pyle Atlas Applicable to All Ethnicities? A Systematic Review and Meta-Analysis*, 29 EURO. RADIOLOGY 2910, 2911 (2019) (concluding that the Greulich and Pyle standard is imprecise and should be used with caution when applied to Asian male and African female populations, particularly when aiming to determine chronological age for forensic or legal purposes).

³¹ *Id.*

³² Daniel Franklin et al., *Forensic Age Estimation in Living Individuals: Methodological Considerations in the Context of Medico-Legal Practice*, 5 RESEARCH & REPORTS FORENSIC MED.SCI. 53, 56-57 (2015).

³³ *Id.* at 56.

³⁴ *Id.* at 60-61.

³⁵ Alshamrani et al., *supra* note 30, at 212-13.

geographic location, in addition to ethnicity, is taken into consideration.³⁶ Other factors such as environment, nutrition, and health can also affect bone development.³⁷ Currently, there is no appropriate reference data for the populations most likely to undergo age assessments.

Assessment of the third molar, the only tooth that continues to develop after the age of 14, is commonly used, at least in the United States, for determining the age of children in migration.³⁸ Third molar assessment involves a visual examination of the teeth to assign a level of development across eight stages, a method known as Demirjian staging or classification.³⁹ Clinical interpretation indicates if the individual is dentally advanced, average, or delayed as compared to the reference.⁴⁰ Results are presented in a final report as the percentage likelihood that the individual is over the age of 18.⁴¹

Despite the extensive use of dental x-rays, there is little evidence to suggest that they can meaningfully determine a person's chronological age.⁴² Due to variable genetic and environmental factors, third molars can be seen as early as 15 years of age for some individuals, while in others, the third molars may not appear until between 25 and 30 years of age.⁴³ Additionally, the dental staging method is highly subjective and dentists will not always agree on the developmental stage of a molar.⁴⁴ A recent systematic review of age determination on the basis of dental maturation found that ages were consistently overestimated.⁴⁵ Moreover, factors such as nutrition, stress, and temperature, as well as cultural and ethnic differences, can dramatically affect tooth development.⁴⁶ The absence of appropriate reference data raises concerns over the accuracy of age estimations based on dental development in diverse populations.

³⁶ Franklin et al., *supra* note 32, at 59.

³⁶ *Id.* at 60-61.

³⁷ *Id.*

³⁸ James M. Lewis & David R. Senn, *Dental Age Estimation Utilizing Third Molar Development: A Review of Principles, Methods, and Population Studies Used in the United States*, 201 *FORENSIC SCI. INT.* 79 (2010).

³⁹ *Id.* at 81.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 80.

⁴³ *Id.*

⁴⁴ *Id.* at 81.

⁴⁵ Jayakumar Jayaraman et al., *The French–Canadian Data Set of Demirjian for Dental Age Estimation: A Systematic Review and Meta-analysis*, 20(5) *J. FORENSIC & LEGAL MED.* 373 (2013).

⁴⁶ Nils Chaillet et al., *Comparison of Dental Maturity in Children of Different Ethnic Origins: International Maturity Curves for Clinicians*, 50 *J. FORENSIC SCI.* 1164 (2005).

1. Age Assessments in Europe

Some countries in Europe have adopted the declaratory approach with respect to age. For instance, the U.N. special rapporteur on the human rights of migrants noted in a 2020 report that Bosnia and Herzegovina accepts age on a declaratory basis.⁴⁷

Similarly, by law, French authorities are required to do the same.⁴⁸ Unfortunately, in practice, unaccompanied migrant children in France routinely are subject to age assessments even when they provide passports, birth certificates, or other identity documents. The French Defender of Rights (a national ombudsperson appointed by the French president), medical bodies, and groups working with children in migration have documented the use of summary and otherwise arbitrary age assessment procedures across the country.⁴⁹

Other countries also challenge children with regard to age. For example, in the United Kingdom, immigration officers are allowed to assess children as adults based on their appearance in some circumstances.⁵⁰ At the time of writing, the U.K. government has proposed to reform the way they assess unaccompanied asylum-seeking children, under the government's new plan for immigration. The new plan aims to "create a robust approach to age assessment to ensure we act as swiftly as possible to safeguard against adults claiming to be children."⁵¹ The reforms will lower the protections offered to children, replacing the requirement that an individual should be assessed as an adult only if their physical appearance and demeanor strongly suggest they are over 25, with a requirement that they appear to be "significantly over 18" which is a far less precise standard. The U.K. government has stated it plans to use unspecified "new scientific methods" for age determination, and charities in the United Kingdom are calling for the U.K. government to provide further details of age assessment technologies they are planning to use.⁵²

⁴⁷ U.N. Human Rights Council, Visit to Bosnia and Herzegovina: Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶ 36, U.N. Doc. A/HRC/44/42/Add.2 (12 May 2020).

⁴⁸ C. Civ. art. 388 (Fr.).

⁴⁹ See, e.g., DEFENSEUR DES DROITS, DROITS DE L'ENFANT EN 2017, at 37 (2017); Défenseur des droits, *Décision du Défenseur des droits no. MDE 2016-183*, at 9, 12 (July 21, 2016); Défenseur des droits, *Décision du Défenseur des droits no. MDE-2014-127*, at 10 (Aug. 29, 2014); Défenseur des droits, Avis 17-03 du 7 février relatif à la prise en charge des mineurs isolés, at 5 (Feb. 7, 2017), https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21075; HUMAN RIGHTS WATCH, SUBJECT TO WHIM: THE TREATMENT OF UNACCOMPANIED CHILDREN IN THE HAUTES-ALPES 42-67 (2019); HUMAN RIGHTS WATCH, "LIKE A LOTTERY:" ARBITRARY TREATMENT OF UNACCOMPANIED CHILDREN IN PARIS 17-36 (2018).

⁵⁰ Comm. on the Rights of the Child, Concluding Observations: United Kingdom, ¶ 76(d), U.N. Doc. CRC/C/GBR/CO/5 (July 12, 2016).

⁵¹ U.K. Home Office, *Open Consultation: New Plan for Immigration* (Mar. 24, 2021), <https://www.gov.uk/government/consultations/new-plan-for-immigration>.

⁵² Alice Blackwell & Mithran Samuel, "Deeply Worrying" Age Assessment Changes "Will Increase Risks to Child Asylum Seekers," *Warn Charities*, COMMUNITY CARE (Mar. 26, 2021).

As in France, some countries conduct age assessments even when children have identity documents. Under the Belgian Guardianship Law, the Federal Guardianship Service within the Ministry of Justice, which is responsible for designating guardians for unaccompanied children, decides whether a person has attained the age of majority. If the Guardianship Service or the asylum and migration authorities have reasonable doubts as to the age of the person concerned, the Guardianship Service immediately orders a medical (skeletal and dental age) examination by a doctor.⁵³ Such practices are especially concerning since medical examinations have been determined to be unreliable as a means of establishing chronological age.⁵⁴ The Committee on the Rights of the Child has observed that Belgium’s age assessment procedures are “intrusive and unreliable.”⁵⁵

In Spain, the Committee on the Rights of the Child has found that the failure to consider proffered identity documents violates children’s right to an identity and leads to other rights violations.⁵⁶ The Spanish Supreme Court has also found that it is inappropriate for authorities to disregard identity documents of a person who initially entered Spain claiming to be an adult, since children may claim to be adults in order to work or to be able to travel to the mainland from their entry points in Ceuta and Melilla, Spanish enclaves accessible by land from Morocco.⁵⁷

The Committee on the Rights of the Child has also found deficiencies in age assessment procedures elsewhere in the region, including in Italy, Malta, and Portugal, finding that they do not uniformly incorporate a multidisciplinary approach, may not adequately consider

⁵³ Loi-programme du 24 décembre 2002: Tutelle des mineurs étrangers non accompagnés [Program Law of December 24, 2002: Guardianship of Foreign Unaccompanied Minors], art. 7, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Dec. 31, 2002, 58783, 58785 (Belg.).

⁵⁴ See, e.g., Conseil national de l’Ordre des médecins, *Séance du 20 février 2010*, <https://www.ordomedic.be/fr/avis/conseil/tests-de-determination-d-age-des-mineurs-etrangeurs-non-accompagnes>, avis maintenu par le Conseil le 14 octobre 2017, <https://www.ordomedic.be/fr/avis/conseil/testososseux-de-determination-d-age-des-mineurs-etrangeurs-non-accompagnes-mena>; Académie Nationale de Médecine, *La fiabilité des examens médicaux visant à déterminer l’âge à des fins judiciaires et la possibilité d’amélioration en la matière pour les mineurs étrangers isolés*, Jan. 16, 2007, http://www.infomie.net/IMG/pdf/Rapport_adopte_le_16_janvier_2007.pdf.

⁵⁵ Comm. on the Rights of the Child, Concluding Observations: Belgium, ¶ 41(a), U.N. Doc. CRC/C/BEL/CO/5-6 (Feb. 28, 2019).

⁵⁶ See *A.L. v. Spain*, Commc’n No. 16/2017, ¶ 12.10, Comm. on the Rights of the Child, U.N. Doc. CRC/C/81/D/16/2017 (July 10, 2019) (noting that “a child’s age and date of birth form part of his or her identity” and finding that Spanish authorities failed to respect the identity of a child by denying that his birth certificate had any probative value); *J.A.B. v. España*, Commc’n No. 22/2017, ¶ 13.10, Comm. on the Rights of the Child, U.N. Doc. CRC/C/81/D/22/2017 (July 9, 2019) (same). In *J.A.B.* and in *M.T. v Spain*, the age determination was carried out *after* the production of a birth certificate and other evidence. Commc’n No. 17/2017, Comm. on the Rights of the Child, U.N. Doc. CRC/C/82/D/17/2017 (Nov. 5, 2019). See also Comm. on the Rights of the Child, Concluding Observations: Spain, ¶ 44, U.N. Doc. CRC/C/ESP/CO/5-6 (Mar. 5, 2018).

⁵⁷ Casación e Infracción Procesal núm. 2629/2019, Sentencia núm. 307/2020, at 15 (Tribunal Supremo, Sala de lo Civil, June 16, 2020) (Spain).

psychological aspects and individual circumstances, and do not always afford the benefit of the doubt in close cases.⁵⁸

The procedure for appeals of adverse age assessments may also inadequately protect children's rights to due process, effective remedies, identity, and special protection and assistance for those not living with their families. For instance, the Committee on the Rights of the Child has observed that in Austria, "despite possible inaccuracy, it is not possible to appeal the outcome of the procedure separately."⁵⁹ Similarly, in France, nongovernmental organizations have observed that review of adverse age assessments can take six to eight months or more, during which time children do not receive child protection services.⁶⁰ In Spain, the lack of an appeal procedure to review age determinations has paved the way for many individual communications, as the hurdle of exhausting domestic remedies is easily cleared.⁶¹

In Germany and other countries, children are interviewed in the presence of a cultural mediator and experienced staff of youth welfare offices before turning to medical testing.

Within the European Union, some E.U. member states rely on age assessments conducted in other member states, even when the age assessments undertaken elsewhere are known to systematically overstate age.⁶² These differences "have resulted in discordant decisions on the age of the individuals and disruptions in the provision of care and protection" to unaccompanied migrant children.⁶³ To address such concerns, UNHCR and UNICEF have called for harmonized age assessment across Europe,⁶⁴ as have legal scholars in a report commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs.⁶⁵

⁵⁸ Comm. on the Rights of the Child, Concluding Observations: Italy, ¶¶ 33(b), 34(d), U.N. Doc. CRC/C/ITA/CO/5-6 (Feb. 28, 2019); Comm. on the Rights of the Child, Concluding Observations: Malta, ¶ 41(b), U.N. Doc. CRC/C/MLT/CO/3-6 (June 26, 2019); Comm. on the Rights of the Child, Concluding Observations: Portugal, ¶¶ 41(e), 42(e), U.N. Doc. CRC/C/PRT/CO/5-6 (Dec. 9, 2019).

⁵⁹ Comm. on the Rights of the Child, Concluding Observations: Austria, ¶ 39(c), U.N. Doc. CRC/C/AUT/CO/5-6 (Mar. 6, 2020).

⁶⁰ HUMAN RIGHTS WATCH, SUBJECT TO WHIM, *supra* note 49, at 59-60.

⁶¹ N.B.F. v Spain, Commc'n No. 11/2017, Comm. on the Rights of the Child, U.N. Doc. CRC/C/79/D/11/2017 (Sept. 27, 2018).

⁶² Moreover, under a proposed revision of the Common European Asylum System, E.U. member states would be required to recognize age assessments conducted by other member states. Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, art. 24(6), COM(2016) 467 final (July 13, 2017) ("A Member State shall recognise age assessment decisions taken by other Member States on the basis of a medical examination carried out in accordance with this Article and based on methods which are recognised under its national law.").

⁶³ UNHCR & UNICEF, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe* 9 (July 10, 2017).

⁶⁴ *Id.* at 9-12.

⁶⁵ Sabine Corneloup et al., *Children on the Move: A Private International Law Perspective* 38 (June 2017) [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU\(2017\)583158_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf).

Enforcement of such comprehensive assessment could be achieved through a collective or class action before civil courts.⁶⁶

The Council of Europe, which consists of 47 member states, published a report in December 2019, which includes good practices and standards for the use of age assessment in asylum cases, which are centered on the best interests of the child.⁶⁷ These Council of Europe standards require age assessments to be conducted in “a scientific, safe, fair and child- and gender-sensitive manner with due respect for human dignity,” and “by professionals who are skilled and professionally trained in child development and who operate in line with professional standards and guidance.”⁶⁸ Further, children subject to age verification should have independent representation, and documentation should be considered genuine unless there is proof to the contrary.⁶⁹

2. Age Assessments in the United States

In the United States, age assessments may be conducted at any point between apprehension and release from custody.⁷⁰ Without clear evidence indicating that a person is either an adult or child, the apprehending officer may take additional measures to determine an individual’s age. While there is no exact procedure for establishing a person’s age, age determinations are generally informed by agency guidelines and the “reasonable person” standard articulated in the *Flores* Settlement Agreement, which states that, “if a reasonable person would conclude that an alien detained by immigration officials is an adult, despite his or her claim to be a minor, the individual shall be treated as an adult.”⁷¹ Officials may rely on documentary evidence including birth certificates and school enrollment papers to establish age when it is in dispute.⁷² Children in migration who do not have documentation may be assessed by physical, dental, and psychological examination.⁷³ These methods of assessment produce unreliable results that often

⁶⁶ See Jinske Verhellen, *Class Actions in the Current Migration Context in Europe: With or Without Private International Law?*, in *GLOBAL PRIVATE INTERNATIONAL LAW : ADJUDICATION WITHOUT FRONTIERS* 557 (Horatia Muir Watt et al. eds. 2019).

⁶⁷ URSULA KILKELLY ET AL., *supra* note 21.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ OFFICE OF INSPECTOR GENERAL, DEP’T OF HOMELAND SECURITY, *AGE DETERMINATION PRACTICES FOR UNACCOMPANIED ALIEN CHILDREN IN ICE CUSTODY* 4 (Nov. 2009) (highlighting three typical scenarios when age-related assessments and determinations are made including: (1) at the initial apprehension for the purposes of determining appropriate placement; (2) when an individual already detained in an adult facility claims to be a juvenile; (3) when an individual at a juvenile facility is suspected of being an adult.).

⁷¹ See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. Jan. 17, 1997).

⁷² M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 325-26 (2010).

⁷³ *Id.* at 326.

lead to children being inappropriately assigned to adult facilities.⁷⁴ Misclassification denies children their identity and rights as a child under the Convention on the Rights of the Child. The United States has not yet ratified this treaty, but by its signature (1995) it “is obliged to refrain from acts which would defeat the object and purpose of a treaty . . . until it shall have made its intention clear not to become a party to the treaty.”⁷⁵

In the United States, U.S. Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS), has assumed age-determination authority of children as part of its general authority to arrest and detain.⁷⁶ While there is no exact procedure for establishing a person’s age, age determinations are generally informed by agency guidelines and the “reasonable person” standard articulated in the *Flores* Settlement Agreement.⁷⁷ According to agency guidelines, officials may rely on documentary evidence including birth certificates and school enrollment papers to establish chronological age when it is in question.⁷⁸ Children who do not have documentation may have their age assessed via examination of dental and/or skeletal radiographs, though federal law and agency guidelines prohibit officials from relying exclusively on radiographic reports in making age determinations.⁷⁹ In practice, however, DHS often relies solely on the results of medical and dental examinations to determine age, even when there may be documentary evidence available.⁸⁰

Radiographic assessments of an individual’s bones or teeth produce unreliable results that often lead to individuals being inappropriately assigned to adult or juvenile facilities.⁸¹ Yet, immigration officials continue to rely exclusively on radiographic assessments in violation of federal law and agency policy such that the accuracy of forensic testing to determine

⁷⁴ Mishori, *supra* note 22, at 85. *See also* Vincenzo De Sanctis et al., *Pros and Cons for the Medical Age Assessments in Unaccompanied Minors: A Mini-Review*, 87 ACTA BIOMED 121 (2016).

⁷⁵ Vienna Convention on the Law of Treaties, *supra* note 5, art. 18.

⁷⁶ *See generally* OFFICE OF INSPECTOR GENERAL, DEP’T OF HOMELAND SECURITY, *supra* note 70.

⁷⁷ *See* Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. Jan. 17, 1997). *See also* Amanda Levinson, Migration Policy Institute, *Unaccompanied Immigrant Children: A Growing Phenomenon with Few Easy Solutions* (Jan. 2011), <https://www.migrationpolicy.org/article/unaccompanied-immigrant-children-growing-phenomenon-few-easy-solutions>.

⁷⁸ M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 325-26 (2010).

⁷⁹ *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (Dec. 23, 2008) (requiring that age determination procedures “take into account multiple forms of evidence, including the non-exclusive use of radiographs.”). *See also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, MEMORANDUM FOR FIELD OFFICE DIRECTORS AND DEPUTY ASSISTANT DIRECTORS – AGE DETERMINATION PROCEDURES FOR CUSTODY DECISIONS (2004) (officers carrying out assessments “must base age determinations upon the totality of the evidence presented to them and not solely upon the results of dental and/or wrist-bone x-rays”).

⁸⁰ *See* Jennifer Smythe, *Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform*, 81 INTERPRETER RELEASES 753 (2004).

⁸¹ *See* Mishori, *supra* note 22, at 85; De Sanctis et al., *supra* note 74, at 121.

chronological age has increasingly become the subject of judicial review. Immigration officials refer children in migration to adult custody if results show at least a 75 percent probability that the individual is 18 years or older.⁸²

In 2015, a Somali child was removed from his foster home and held in an adult detention facility based on a radiographic report that stated that the youth was between 17 and 23 years old, concluding that there was a 92.55 percent probability that the youth had already reached 18 years of age.⁸³ A federal judge found that officials relied exclusively on the dental exam to make an age determination in violation of federal law.⁸⁴ The determination that the child was over 18 at the time he was placed into ICE custody was subsequently vacated and DHS was ordered to transfer custody of the child to the U.S. authority responsible for the care of unaccompanied children, the Office of Refugee Resettlement (ORR), an agency of the U.S. Department of Health and Human Services.⁸⁵

Similarly in 2018, a 17-year-old Bangladeshi boy was placed in an adult detention facility after a radiographic report estimated the child's age to be between 17.10 and 23.70 years with a 92.55 percent probability that the child had turned 18.⁸⁶ A federal judge determined that the government relied exclusively on the dental exam to determine his age and ordered the boy released to ORR custody after he had spent nearly two months incarcerated with unrelated adult males.⁸⁷

In New Mexico, ICE officials requested a dental or skeletal age exam to assist in verifying the age of an Indian child claiming to be 17 years old.⁸⁸ Since dental offices were closed due to COVID-19, a bone density exam was performed, the results of which showed complete epiphyseal fusion and concluded that the child's chronological age was 21 years and 5 months.⁸⁹ The court later determined that officials relied exclusively on the skeletal age assessment and enjoined the government from applying the age determination made by ICE until an age determination was made in accordance with 8 U.S.C. § 1232(b)(4).⁹⁰

⁸² See OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERV., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 1 PLACEMENT IN ORR CARE PROVIDER FACILITIES, (Jan. 30, 2015, rev. Feb. 17, 2021), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

⁸³ *B.I.C. v. Asher*, No. C16-132, 2016 WL 8672760, at *3 (W.D. Wash. Feb. 19, 2016).

⁸⁴ *Id.* at *5-6.

⁸⁵ *Id.* at *7.

⁸⁶ *L.B. v. Keeton*, No. CV-18-03435 (D. Ariz. Oct. 26, 2018).

⁸⁷ *Id.*

⁸⁸ *V.V. v. Orozco*, No. 20-560, 2020 WL 3542480, at *2 (D. N.M. June 30, 2020).

⁸⁹ *Id.*

⁹⁰ *Id.* at *10.

In 2019, a Congolese girl presented United States immigration officials with a Congolese birth certificate confirming her status as a child.⁹¹ Yet, ICE officials determined that the child was an adult after the results of a dental exam estimated that she was 20.46 years old, “plus or minus 4.87 years,” with an 84.35 percent probability that she had attained 18 years of age.⁹² An immigration judge initially determined that the individual was a child and ordered her transfer to ORR custody. Upon review of the record, including new information gleaned from a bone density exam ordered by DHS that showed her bones were fully developed, a district court judge determined that officials had *not* unlawfully relied on the exclusive use of the physical exams and reinstated the age determination made by immigration officials.⁹³

Similarly, an immigrant from the Republic of Guinea who presented immigration officials with a birth certificate and government-issued photo ID, both with birthdates indicating he was a child, was placed in expedited removal proceedings, held in solitary confinement for four days, and in an adult detention facility for another 24 days after a dental examination showed there was a 93.53 percent probability that the boy had attained 18 years of age.⁹⁴ A district court judge later determined that immigration officials erroneously discredited the documentary evidence and relied exclusively and illegally on the dental radiograph to determine chronological age and ordered that the boy be treated as a child.⁹⁵

Another child in migration, I.J., was held in a medium-security prison for adult immigrant detainees for five months as a result of a dental examination that showed an 87.7 percent probability that he had turned 18.⁹⁶ Similarly, a Guatemalan child was held in an adult detention facility for nearly a year after a dental exam showed he was likely 18, until his attorneys obtained his birth certificate which proved he was 17.⁹⁷ In both cases, a judge found that officials had violated federal law and ordered the children be released to ORR custody.⁹⁸

Even more concerning, immigration officials have ordered children into ICE custody and held in adult detention facilities even when the children provided bona fide birth certificates *and* dental radiographs affirmed their claims that they were children—that is they fell below the 75 percent

⁹¹ C.T.M. v. Moore, No. 3:20-cv-540, 2020 WL 5919737, at *1-2 (N.D. Tex. July 1, 2020).

⁹² *Id.*

⁹³ *Id.* at *3-5.

⁹⁴ N.B. v. Barr, No. 19-CV-1536, 2019 WL 4849175, at *3-5 (S.D. Cal. Oct. 1, 2019).

⁹⁵ *Id.* at *13.

⁹⁶ Brittny Mejia & Kate Morrissey, *U.S. Is Using Unreliable Dental Exams to Hold Teen Migrants in Adult Detention*, L.A. TIMES, June 2, 2019, <https://www.latimes.com/local/lanow/la-me-ln-immigrant-age-migrants-ice-dental-teeth-bangladesh-20190602-story.html>.

⁹⁷ *Id.*

⁹⁸ *Id.*

threshold established by agency guidelines.⁹⁹ There were at least three such instances documented in November 2018 alone—each child possessing a bona fide birth certificate indicating they were children and dental forensic reports indicating a 51.4 percent, 30 percent, and 68.45 percent probability respectively that they had attained 18 years of age.¹⁰⁰

Furthermore, a review of 205 agency memorandums of age redetermination revealed that approximately one out of four were relying on the ranges provided by forensic exams to assess that individual as an adult, even though the probability fell below the legal threshold.¹⁰¹ For example, one memo stated that the forensic report indicated just a 28 percent probability that the individual was 18 years of age; however, the official wrote, “[Because] the possible age range includes having reached the age of majority, it is our determination that the original determination that they are adults should stand.”¹⁰²

3. Age Assessments in Australia

Age determination procedures in Australia are carried out by the Department of Immigration and Border Protection (DIBP) officers and are governed by two key documents—the Department’s Procedures Advice Manual (PAM) and Standard Operating Procedures: Age Determination for IMAs and SIEV Crew (SOP).¹⁰³

Prior to 2011, the primary method of assessing age was through the analysis of wrist x-rays; however, after the practice was widely discredited in the early 2000s, the Department ceased medical testing as part of the age determination process.¹⁰⁴

The current approach, set forth in the PAM, is a focused interview that involves exploration of multiple factors including physical appearance, behavior and demeanor, documentation, family history, education and employment history, and any other information that may be relevant.¹⁰⁵

⁹⁹ Jackie Stevens, *Interim Report on Age Assessment Policy Violations by the U.S. Department of Health and Human Services, Office of Refugee and Resettlement*, STATES WITHOUT NATIONS (July 12, 2019, 17:01 CDT), <http://stateswithoutnations.blogspot.com/2019/07/age-assessments-for-unaccompanied.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Monique Hurley & Elizabeth Beaumont, *The Benefit of the Doubt: Improving the Procedures for Determining the Age of Asylum Seeker Children*, 41 ALT. L. J. 30 (2016). “IMA” is an abbreviation for “illegal maritime arrival”; “SIEV” is an abbreviation for “suspected illegal entry vessel.”

¹⁰⁴ *Id.* See also AMNESTY INT’L, THIS IS BREAKING PEOPLE: HUMAN RIGHTS VIOLATIONS AT AUSTRALIA’S ASYLUM SEEKER PROCESSING CENTRE ON MANUS ISLAND, PAPUA NEW GUINEA 79 (2013), <https://www.refworld.org/pdfid/52aac41cb.pdf>.

¹⁰⁵ PAM3: Act - Identity, Biometrics and Immigration Status, Age Determination - IMAs and SIEV Crew (May 15, 2013) at 9 [hereinafter PAM3]; Standard Operating Procedures: Age Determination for IMAs and SIEV Crew - Version 6.4 (Oct. 10, 2014) [hereinafter SOP].

The interview is conducted by two officers who then examine the evidence to determine whether the individual is more likely to be over or under 18 years of age.¹⁰⁶ In accordance with international guidelines, the PAM and SOP provide that if interview outcomes do not align as between the two officers, the individual should be afforded the “benefit of the doubt” and be assessed as a child.¹⁰⁷ The Department’s internal policies, however, undermine the benefit of the doubt principle by directing officers to make decisions on the “balance of probabilities” and to “err on the side of caution” when making an assessment of “adult.”¹⁰⁸

While a multifactorial approach is critical to provide the most accurate age determination outcome, there have been significant concerns regarding Australia’s use of this approach.¹⁰⁹ With the exception of documentation, which officers regularly disregard, the only information available to determine age requires a highly subjective assessment that is limited to the individual officer’s training, experience, and presuppositions about how children look and behave.¹¹⁰

Age determination officers rely heavily on physical appearance when making their assessment and have considered as part of their assessment factors such as whether (1) a child has acne or acne-related scarring; (2) the female children have well-developed breasts; and (3) the male children are muscular, tall, and have an appropriate level of growth of facial hair.¹¹¹ The scientific literature, however, does not support the notion that age can be accurately assessed on the basis of physical appearance alone and certainly not without a clinical appreciation of how physical age manifests in diverse populations and environments.¹¹² There are a number of factors

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See also Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 31(A), U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

¹⁰⁸ SOP, *supra* note 105, at 9.

¹⁰⁹ See, e.g., Monique Hurley & Elizabeth Beaumont, *Reforming Australia’s Age Determination Procedures: Giving Asylum Seekers the Benefit of the Doubt*, 41 ALT. L. J. 30 (2016). See also AMNESTY INT’L, THIS IS BREAKING PEOPLE, at 8, 76.

¹¹⁰ PAM3, *supra* note 105, at 10 (explaining that department places a lot of weight on documentary evidence but encouraging officers to consider documentary evidence presented by children as “presumptively fraudulent”); Hurley & Beaumont, *Reforming Australia’s Age Determination Procedures*, *supra* note 109, at 26; SOP, *supra* note 105, at 16 (advising that “there is a high level of fraud in the IMA [illegal maritime arrival] caseload, particularly in relation to identity documents”).

¹¹¹ Max Opray, *How Immigration Decides Asylum Seekers’ Age*, THE SATURDAY PAPER, Sept. 6, 2014, <https://www.thesaturdaypaper.com.au/news/politics/2014/09/06/how-immigration-decides-asylum-seekers-age/1409925600#hrd>.

¹¹² *Id.* See also Hurley & Beaumont, *Reforming Australia’s Age Determination Procedures*, *supra* note 109, at 33; AMNESTY INT’L, THIS IS BREAKING PEOPLE, *supra* note 104, at 76-77.

that can affect an individual's physical and emotional development including cultural differences, illness, malnutrition, extreme stress, and trauma.¹¹³

Anecdotal evidence also suggests that age determination officers often rely on their subjective opinions about an individual's behavior and demeanor during the interview to reach a determination as to chronological age.¹¹⁴ For example, factors that have been relied upon in making adverse assessments include whether an individual is vague in recalling events or evasive in answering questions, and whether the individual provides inconsistent accounts or responses to questions.¹¹⁵ This approach lacks any empirical basis and merely reflects the individual officer's subjective expectations regarding child behavior. To the contrary, science shows that children may provide misleading or plainly false information when being interviewed for a number of reasons including fear, confusion, or out of a desire to please the interviewer.¹¹⁶ Likewise, an individual may make inconsistent claims because of different cultural notions regarding adulthood or motivations for being treated as an adult.¹¹⁷

There is also a lack of methodology and explanation given by age determination officers in reaching their conclusions.¹¹⁸ Notably, age determination officers are not required to possess any special qualifications or experience working with children, nor are they provided with any meaningful training on the psychosocial, emotional, and physical development and behavior of children.¹¹⁹ This is compounded by the lack of guidance provided to officers through internal policies and procedures, the net effects of which undermine international obligations and fundamental fairness to the individual immigrant.¹²⁰

¹¹³ HEAVEN CRAWLEY, IMMIGRATION LAW PRACTITIONERS ASS'N, WHEN IS A CHILD NOT A CHILD? ASYLUM, AGE DISPUTES & THE PROCESS OF AGE ASSESSMENT 52-55 (2007).

¹¹⁴ Hurley & Beaumont, *Reforming Australia's Age Determination Procedures*, *supra* note 109, at 31-32.

¹¹⁵ *Id.*

¹¹⁶ AUSTRALIAN HUMAN RIGHTS COMM'N, AN AGE OF UNCERTAINTY: INQUIRY INTO THE TREATMENT OF INDIVIDUALS SUSPECTED OF PEOPLE SMUGGLING OFFENCES WHO SAY THAT THEY ARE CHILDREN ch. 5 (2012); Jane Herlihy & Stuart Turner, *Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making*, 6 EUR J. PSYCHOTRAUMATOL. (2015); Belinda Graham et al., *Overgeneral Memory in Asylum Seekers and Refugees*, 45 J. BEHAV. THER. EXP. PSYCH. 375 (2014) (noting that asylum seekers and refugees with PTSD and depression are less able to retrieve specific memories of their personal past within a given time limit when prompted to do so); Jane Herlihy et al., *What Assumptions About Human Behaviour Underlie Asylum Judgements?*, 22 INT'L J. REFUGEE L. 351 (2010) (highlighting the growing empirical literature emphasizing that memory for traumatic events may be inconsistent and difficult to recall).

¹¹⁷ Herlihy et al., *What Assumptions*, *supra* note 116, at 354.

¹¹⁸ Hurley & Beaumont, *Reforming Australia's Age Determination Procedures*, *supra* note 109, at 33.

¹¹⁹ *Id.* at 25.

¹²⁰ *Id.* (identifying discrepancies and inequities in the age determination process, noting that officers only receive a two-day training, and questioning whether the training includes any specific child-focused, cross-cultural training); AMNESTY INT'L, THIS IS BREAKING PEOPLE, *supra* note 104, at 76 (describing age assessments conducted by immigration officers as unlawful, in violation of international obligations, and "plainly inadequate").

4. Age Assessments in Ethiopia

Upon entry to Ethiopia, migration officials register arriving children and collect the children's personal information, including their age.¹²¹ This biographical data will be used for subsequent purposes, so it is important that the information is correct. In principle, countries in Eastern Africa, such as Ethiopia, require documentation such as a birth certificate or vaccine records to prove the age of a child in migration. If no documentation is available, migration officials use an age verification process that entails interviewing the person accompanying the child (even when a child is not accompanied by a parent or guardian, there is usually at least one adult traveling with the child). Migration officials normally accept the word of a child as to their age without documentation when verified by an adult accompanying the child. When there is reason to believe that a child's representation of their age is inaccurate, a member of the child protection and litigation team from UNHCR¹²² will conduct a comprehensive interview of the child and try to ascertain the child's age. If there is a discrepancy between the child's claims as to their age and the information in the child's biographical profile, the child must pursue a judicial process to have their age confirmed. Other African countries follow similar processes. Purportedly scientific procedures, such as bone density and dental examinations, are not used.

B. Inadequate Reception Conditions, Lack of Child-Sensitive Entry & Reception Procedures, and Other Deficiencies in Protection

Once status is established to the satisfaction of authorities in the country of arrival, many children in migration are subjected to inadequate housing, uneven access to health information and services, separation from family members and caregivers, and discriminatory denial of education. They may also face barriers in access to asylum, other international protections, and possible avenues for status available under domestic law. Similarly, in general, arrival and reception procedures evidence a total or partial lack of a children's rights lens, impacting the children's right to be heard and to have the child's best interests taken as a primary consideration, and then affecting several rights at stake on a case-by-case basis.

In recent years, the Committee on the Rights of the Child and other international authorities have found inadequate reception conditions for unaccompanied children and families with children migrating into Belgium, Bosnia and Herzegovina, Greece, Hungary, Italy, Portugal, and Spain,

¹²¹ Section II.A.4. is based on interviews conducted with officers in the UNHCR office in Addis Ababa, as well as with experts from the International Office for Migration in 2021. All interviews were conducted by Fasil Mulatu, Director of the Centre for Human Rights at Addis Ababa University.

¹²² In principle, Ethiopia's Administration for Refugee and Returnee Affairs (ARRA) has the mandate to register and amend refugee information and issue documentation (proof of registration and refugee identification). But in the current arrangement, ARRA delegated its authority to UNHCR to undertake these activities, except for initial registration and issuance of refugee identification. Children 15 years and older also receive refugee identification.

among other countries.¹²³ With respect to Norway, the Committee observed that variations in living conditions among reception centers and differential treatment between unaccompanied children age 15 years or older as compared with younger children impeded the country's efforts to integrate refugee children.¹²⁴

Asylum and immigration procedures may not afford children adequate safeguards, including the appointment of a guardian, and may not take children's best interests into account as a primary consideration. For instance, in Austria, child welfare and protection authorities are not immediately brought in when unaccompanied children over age 14 are identified, and children receive guardians only after the child is assigned to a reception facility.¹²⁵ Belgium, Malta, and the United Kingdom among other countries, have similar shortcomings in guardianship procedures for unaccompanied children.¹²⁶ Denmark and the United Kingdom do not adequately assess and take into account children's best interests in deciding asylum immigration cases.¹²⁷

These issues are not limited to Europe. For example, in Australia, the best interests of the child are not a primary consideration in asylum processes, and there is no independent guardianship entity for unaccompanied children. Legislation allows for the summary return of vessels, including those containing children, even when passengers may be in need of international protection.¹²⁸ And children on the move experience significant barriers in access to education in

¹²³ Comm. on the Rights of the Child, Concluding Observations: Belgium, *supra* note 55, ¶ 41(d) (“Unaccompanied children are housed in adult asylum-seeker centres . . .”); Human Rights Council, Visit to Bosnia and Herzegovina: Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶¶ 21, 33-35, U.N. Doc. A/HRC/44/42/Add.2 (May 12, 2020); Comm. on the Rights of the Child, Concluding Observations: Bosnia and Herzegovina, ¶ 43, U.N. Doc. CRC/C/BIH/O/5-6 (Dec. 5, 2019); Human Rights Council, Rep. of the Special Rapporteur on the Human Rights of Migrants on His Mission to Greece, ¶¶ 55, 63-67, U.N. Doc. A/HRC/35/25/Add.2 (Apr. 24, 2017); Human Rights Council, Visit to Hungary: Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶¶ 25-34, U.N. Doc. A/HRC/44/42/Add.1 (May 11, 2020); Comm. on the Rights of the Child, Concluding Observations: Hungary, ¶ 38, U.N. Doc. CRC/C/HUN/CO/6 (Mar. 3, 2020); Comm. on the Rights of the Child, Concluding Observations: Italy, *supra* note 58, ¶ 33; Comm. on the Rights of the Child, Concluding Observations: Portugal, *supra* note 58, ¶ 41, U.N. Doc. CRC/C/PRT/CO/5-6 (Dec. 9, 2019); Comm. on the Rights of the Child, Concluding Observations: Spain, *supra* note 56, ¶ 42. *See also* Human Rights Council, Rep. of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility, ¶ 55, U.N. Doc. A/HRC/35/25 (Apr. 28, 2017).

¹²⁴ Comm. on the Rights of the Child, Concluding Observations: Norway, ¶ 31, U.N. Doc. CRC/C/NOR/CO/5-6 (July 4, 2018).

¹²⁵ Comm. on the Rights of the Child, Concluding Observations: Austria, *supra* note 59, ¶ 39.

¹²⁶ Comm. on the Rights of the Child, Concluding Observations: Belgium, *supra* note 55, ¶ 41(b); Comm. on the Rights of the Child, Concluding Observations: Malta, ¶ 41(b), U.N. Doc. CRC/C/MLT/CO/3-6 (June 26, 2019); Comm. on the Rights of the Child, Concluding Observations: United Kingdom, *supra* note 50, ¶ 76(b).

¹²⁷ Comm. on the Rights of the Child, Concluding Observations: Denmark, ¶ 39, U.N. Doc. CRC/C/DNK/CO/5 (Oct. 26, 2017); Comm. on the Rights of the Child, Concluding Observations: United Kingdom, *supra* note 50, ¶ 26.

¹²⁸ Comm. on the Rights of the Child, Concluding Observations: Australia, ¶¶ 44(a), (c)-(e), U.N. Doc. CRC/C/AUS/CO/5-6 (Nov. 1, 2019).

Jordan, Lebanon, and Turkey, among other countries.¹²⁹ In Argentina, a “decree of necessity and emergency” issued in 2017 has negative impacts for family unity and the best interests of children in migration.¹³⁰ The decree was derogated in March 2021, in line with the recommendations made by the Committee on the Rights of the Child and other international human rights bodies.¹³¹

In South Africa, there is an incoherence regarding the legal and practical approach to the reception and care of children in migration. Although the official approach is to treat such children in the same manner as local children in need of care and protection, in practice this is not properly executed, with unaccompanied children often being accommodated in unregistered shelters near the border regions.¹³² Their asylum claims are often neglected. In 2016, the Committee on the Rights of the Child recommended the development and implementation of timely child protection services.¹³³ In 2019, a High Court judge confirmed the right of undocumented children, regardless of migration status, to have access to education.¹³⁴

In the case of Costa Rica, the Committee on the Rights of the Child recommended the state party adhere to the following measures:

- (a) Ensure that public authorities in charge of asylum procedures comply with the right of the child to have his or her best interests taken as a primary consideration in all decisions related to the transfer of any asylum-seeking or refugee children from the State party;
- (b) Ensure comprehensive referral and case management frameworks for services to children, including with regard to education, health, the police and the justice sector,

¹²⁹ HUMAN RIGHTS WATCH, “I WANT TO CONTINUE TO STUDY”: BARRIERS TO SECONDARY EDUCATION FOR SYRIAN REFUGEE CHILDREN IN JORDAN (2020); HUMAN RIGHTS WATCH, “WE’RE AFRAID FOR THEIR FUTURE”: BARRIERS TO EDUCATION FOR SYRIAN REFUGEE CHILDREN IN JORDAN (2016); Comm. on the Rights of the Child, Concluding Observations: Lebanon, ¶ 34, U.N. Doc. CRC/C/LBN/CO/4-5 (June 22, 2017); HUMAN RIGHTS WATCH, “GROWING UP WITHOUT AN EDUCATION”: BARRIERS TO EDUCATION FOR SYRIAN REFUGEE CHILDREN IN LEBANON (2016); HUMAN RIGHTS WATCH, “WHEN I PICTURE MY FUTURE, I SEE NOTHING”: BARRIERS TO EDUCATION FOR SYRIAN REFUGEE CHILDREN IN TURKEY (2015).

¹³⁰ Comm. on the Rights of the Child, Concluding Observations: Argentina, ¶ 39, U.N. Doc. CRC/C/ARG/CO/5-6 (Oct. 1, 2018). In 2018, a court found the decree unconstitutional. *See* Cámara Contencioso Administrativo Federal, Sala V, Expte. No. 3061/2017 (Mar. 22, 2018) (Arg.), <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>.

¹³¹ *See* Decree 138/2021, BOLETÍN OFICIAL [B.O.] No. 34,601 (Arg.).

¹³² SAVE THE CHILDREN, IN SEARCH OF A BETTER FUTURE: EXPERIENCES OF UNACCOMPANIED MIGRANT CHILDREN IN LIMPOPO AND MPUMULANGA (2016), <https://resourcecentre.savethechildren.net/library/search-better-future-experiences-unaccompanied-migrant-children-limpopo-mpumalanga-south>.

¹³³ Comm. on the Rights of the Child, Concluding Observations: South Africa, ¶ 62, UN.Doc. CRC/C/ZAF/CO/2 (Oct. 27, 2016).

¹³⁴ Centre for Child Law v. Minister of Basic Education, 2020 (3) SA 141 (High Ct. Eastern Cape Div. Dec. 12, 2019) (S. Afr.).

including the provision of free legal aid, for unaccompanied and separated children, and appropriate conditions in referral centers, including in temporary care centers for migrants; (...)

(d) Expedite all procedures involving unaccompanied, asylum-seeking and refugee children, and ensure that these procedures fully comply with the Convention.¹³⁵

Similarly, the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Committee on Migrant Workers), after expressing several concerns in regard to migration policies and procedures that impact migrant children entering Mexico or moving north throughout its territory, recommended the adoption of the following measures:

(a) Implement, as soon as possible, an inter-agency procedure for determining the best interests of the child, coordinated by the Federal Office for the Protection of Children and Adolescents within the framework of the System for the Comprehensive Protection of Children and Adolescents and the General Act on the Rights of Children and Adolescents, ensuring due process guarantees, including the right to information and free legal assistance from professionals specialized in the rights of children and adolescents and, in the case of unaccompanied children, the right to a guardian, who must uphold the best interests of children and adolescents throughout the process;

(b) Ensure that the systems and institutions for the protection of children and adolescents function independently of the National Institute for Migration and have the necessary capacity to apply the principle of the best interests of children and adolescents, and that those decisions take priority over other considerations relating to migration status;

(c) Redouble efforts to prevent violence against and abuse and exploitation of child and adolescent migrants, protect them against those crimes and investigate, prosecute and punish the perpetrators, including State officials;

(d) Ensure that children and adolescents have immediate access to procedures relating to regularization and international protection, and that migration policies respect the rights of children and adolescents in accordance with the international instruments, including the principle of non-refoulement¹³⁶

¹³⁵ Comm. on the Rights of the Child, Concluding Observations: Costa Rica, ¶ 43, U.N. Doc. CRC/C/CRI/CO/5-6 (Mar. 4, 2020).

¹³⁶ Comm. on Migrant Workers, Concluding Observations: Mexico, ¶ 56 (Sept. 27, 2017), U.N. Doc. CMW/C/MEX/CO/3.

Children, particularly those who are unaccompanied, may not benefit from secure status even if they are recognized as refugees. Most E.U. member states generally grant unaccompanied children temporary residence permits that may not necessarily be renewed.¹³⁷

Historically, immigration and asylum law in the United States did not afford any meaningful protections to children in migration based on their status as children.¹³⁸ However, that began to change in the late 20th century when a class action suit brought on behalf of unaccompanied children in immigration detention in the United States was finally settled in 1997 in a court-approved consent decree, the *Flores* Settlement Agreement. The consent decree established basic protections for unaccompanied children while in government custody, and provided that they would be released quickly to family in the United States or another adult authorized by the child's parents. If no family or authorized adults were available to take care of the child in the United States, the child is to be placed in licensed care in the least restrictive environment possible (for instance, foster care).¹³⁹

Following the *Flores* Settlement Agreement, incremental changes have been made in the administrative and legislative frameworks, as well as policy guidelines, to better address the unique needs of children. For example, the federal government is required to promptly transfer unaccompanied children from the Department of Homeland Security, which is focused on security, to the Office of Refugee Resettlement (ORR), an agency of the Department of Health and Human Services which has been given responsibility for the care and protection of unaccompanied children until they can be placed with family members or other sponsors in the United States. Also, standards U.S. Customs and Border Protection, the agency of the Department of Homeland Security that includes the Border Patrol, provide for transfer of unaccompanied children to ORR within a 72-hour period.¹⁴⁰ Additionally, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) established certain protections for

¹³⁷ EUROPEAN COMMISSION, APPROACHES TO UNACCOMPANIED MINORS FOLLOWING STATUS DETERMINATION IN THE EU PLUS NORWAY: SYNTHESIS REPORT FOR THE EMN STUDY 16 (2018).

¹³⁸ Levinson, *supra* note 77.

¹³⁹ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. Jan. 17, 1997).

¹⁴⁰ U.S. Customs and Border Protection (CBP) standards state that detention in holding cells should “generally” last no longer than 72 hours. U.S. CUSTOMS AND BORDER PROTECTION, NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 14 (2015), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>. Another CBP standard specific to Border Patrol holding cells states that “[w]henver possible, a detainee should not be held for more than 12 hours.” U.S. Border Patrol, *Policy: Hold Rooms and Short-Term Custody* § 6.2.1 (Jan. 31, 2008) (on file with authors). In addition to these standards, the detention of unaccompanied migrant children is subject to a strict 72-hour time limit: U.S. law requires that any federal agency with an “unaccompanied alien child” in custody transfer the child to the Department of Health and Human Services “not later than 72 hours after determining that such child is an unaccompanied alien child.” 8 U.S.C. § 1232(b)(3) (2020) (emphasis added).

children in migration who have been abandoned or subjected to trafficking or domestic violence, which allows them to be given specific forms of immigration status.¹⁴¹

Despite these piecemeal advances over the past quarter-century, the United States' immigration legal framework has significant procedural and substantive due process shortcomings for children who are seeking protection or facing deportation.¹⁴² The DHS agencies that are frequently the initial points of contact for children in migration do not apply a best interests standard for determining their custody and care, and immigration judges and asylum officers are not required to make decisions on the basis of that principle.¹⁴³

C. Immigration Detention of Children and Other Coercive Practices

Another practice that violates international norms and practices is the detention of children, with or without their families, solely for reasons relating to their or their parents' migration status.¹⁴⁴ At least 80 countries deprive children of liberty for migration purposes, in violation of international norms, as U.N. Independent Expert Manfred Nowak found in his 2019 *Global Study on Deprivation of Liberty of Children*. At least 330,000 children worldwide are deprived of liberty each year for reasons related to migration.¹⁴⁵

Although an increasing number of countries have forbidden in law or practice the detention of children for migration control, there is a disturbing trend in the opposite direction, as a growing number of countries use detention and other security-based approaches to undermine access to

¹⁴¹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 122 Stat. 5044 (Dec. 23, 2008).

¹⁴² Levinson, *supra* note 77. See also, e.g., Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, TEX. TRIB., June 27, 2018, <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/>; Vivian Lee & Miriam Jordan, *Migrant Children in Search of Justice: A 2-Year-Old's Day in Immigration Court*, N.Y. TIMES, Oct. 8, 2018, <https://www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html>.

¹⁴³ The "best interests" of the child is a fundamental principle in child welfare law and has become enshrined in international law. The actual best interests of a child must be determined case by case, but the Committee on the Rights of the Child has identified certain factors to consider in making the determination. They include the views of the child, cultural factors, preserving the family relationship, the child's care, protection, and safety, the right to health, and the child's situation of vulnerability. Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Rights of the Child to have His or Her Best Interests Taken as a Primary Consideration, ¶¶ 46-79, U.N. Doc. CRC/C/GC/14, (May 29, 2013). See also Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009).

¹⁴⁴ See, e.g., Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), *supra* note 21, ¶ 5; U.N. Working Group on Arbitrary Detention, Rev'd Delib. No. 5, ¶¶ 11, 40, in U.N. Human Rights Council, Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/39/45 annex (July 2, 2018). A more comprehensive list of international standards appears in Section IV of this Report.

¹⁴⁵ MANFRED NOWAK, THE UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY 455, 465 (2019). The independent expert cautions that that number "is likely to be a significant under-estimation of the true figure, due to limitations regarding the quality, consistency and coverage of information around the world." *Id.* at 465.

international protections, to improperly restrict or remove due process protections for the stated or implicit purpose of deterring irregular migration by others, and seemingly to punish children and adults who migrate irregularly. The use of security-based approaches¹⁴⁶ is deeply troubling in many respects, not least because of the way that these measures affect—and in some instances target—children.

Among the most egregious examples, Australia forcibly transferred hundreds of families with children to the island nation of Nauru beginning in late 2012, where they were detained in abusive conditions. Recognized refugees and, after October 2015, most asylum seekers were allowed greater freedom of movement on the island, but forcible transfer, prolonged detention, and profound uncertainty about the future took a tremendous toll on their mental well-being.¹⁴⁷ A 2016 study of children who had been held on Nauru described them as “amongst the most traumatized children the pediatricians have ever seen.”¹⁴⁸ Legislation providing for mandatory detention, including of children, remains in force in Australia, and its policy of using regional processing countries has not been formally revoked.¹⁴⁹

In recent years, U.S. officials have explicitly used family detention to serve the government’s goal of deterring other families from immigrating to the United States.¹⁵⁰ The practice of detaining children and families without making individualized findings that they pose a flight risk or danger to the community and without affording them an opportunity for independent

¹⁴⁶ The use of immigration-related detention measures (for both adults and children) is a tool used by states taking a narrow, securitized, approach to irregular migration. Irregularity is a symptom of vulnerability and a consequence of many factors that cannot be attributed to people in migration. Rather, states themselves are largely responsible for the lack of regular channels for those who need to flee their countries due to armed conflict, insecurity, poverty, natural disasters, persecution, violence, corruption, the climate crisis, and many other reasons. However, some states respond to this structural and multidimensional aspect of human mobility nowadays—that is, irregularity—with an extremely narrow and ineffective lens: the security one, instead of using a comprehensive approach with multiple tools, including protecting the rights of those in need. Therefore, those in power (states) are increasingly punishing people—including children—by depriving them of their liberty due to an administrative status that should be solved. In many democratic societies that have given a key value to personal freedom, the right to liberty has been restricted for people in migration, including children, on administrative grounds. It is critical to ensure that alternative, holistic responses to irregular migration by children in families rather than detention by shifting the focus from a punitive one (due to an administrative infraction) to one of human need.

¹⁴⁷ See, e.g., Michael Garcia Bochenek, Human Rights Watch, *Australia: Appalling Abuse, Neglect of Refugees on Nauru* (Aug. 2, 2016), <https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>.

¹⁴⁸ See Nicole Hasham, “*These Children Are Among the Most Traumatized We Have Ever Seen*,” SYDNEY MORNING HERALD, Feb. 4, 2016, <https://www.smh.com.au/politics/federal/these-children-are-among-the-most-traumatized-we-have-ever-seen-20160204-gml9dv.html>. For the full report, see ELIZABETH ELLIOTT & HASANTHA GUNASEKERA, *THE HEALTH AND WELL-BEING OF CHILDREN IN IMMIGRATION DETENTION: REPORT TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION* (2016), <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>.

¹⁴⁹ Comm. on the Rights of the Child, *Concluding Observations: Australia*, *supra* note 128, ¶¶ 44(b), (c).

¹⁵⁰ Am. Bar Ass’n, *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings* (June 2015).

judicial review is patently at odds with international and federal law.¹⁵¹ Such arbitrary detention is not only illegal on its own, but when it is imposed on an asylum seeker who is forcibly separated from their child, it also arguably amounts to torture under United States and international law absent a finding that the parent is unfit.¹⁵²

Under the United States' policy of deliberate family separation for the stated purpose of deterring future irregular migration, authorities separated some 5,500 children from their parents between April and June 2018,¹⁵³ only acknowledging that figure when compelled to do so in litigation.¹⁵⁴ That number did not include separations beginning as early as late 2017, when the policy was piloted, nor does it include forced family separations since then.¹⁵⁵ Although President Donald J. Trump issued an executive order on June 20, 2018, purporting to end his administration's forcible family separation policy,¹⁵⁶ children continued to be separated from parents well after that date¹⁵⁷ and are still routinely separated from relatives other than parents.¹⁵⁸

More generally, advocates have raised numerous concerns about the conditions in which immigrant children are initially received and detained in the United States.¹⁵⁹ For example, reception and detention centers are notoriously under-resourced and largely unable to meet the

¹⁵¹ U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO & THE NEED FOR INTERNATIONAL PROTECTION (2015).

¹⁵² Anjali Mehta et al., *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation* (Mar. 2019), <https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation/>; see also *Ms. L. v. U.S. Immigration & Customs Enforcement*, 302 F. Supp. 3d 1149, 1161-67 (S.D. Cal. 2018) (discussing whether due process rights are violated when the government separates families without a showing that the parents are unfit).

¹⁵³ Miriam Jordan, *Migrants Separated from Their Children Will Be Allowed into the U.S.*, N.Y. TIMES, May 3, 2021, <https://www.nytimes.com/2021/05/03/us/migrant-family-separation.html>.

¹⁵⁴ Human Rights Watch, *Separated Families Report Trauma, Lies, Coercion* (Jul. 26, 2018), <https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion>; Brian Root & Rachel Schmidt, *Family Separation: A Flashpoint in the Global Migrant Crisis*, OPEN GLOBAL RIGHTS (June 29, 2018), <https://www.openglobalrights.org/family-separation-a-flashpoint-in-the-global-migrant-crisis/>. See also Human Rights Watch, *Deported Parents' Agonizing Wait: New Video Shows Impact of Separation from Children* (Sept. 5, 2018), <https://www.hrw.org/news/2018/09/05/us-deported-parents-agonizing-wait>.

¹⁵⁵ Michael Garcia Bochenek, Human Rights Watch, *Trump's Family Separation Affected "Thousands" More Children Than Previously Known* (Jan. 18, 2019), <https://www.hrw.org/news/2019/01/018/trumps-family-separation-affected-thousands-more-children-previously-known>.

¹⁵⁶ *Affording Congress an Opportunity to Address Family Separation*, Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

¹⁵⁷ Miriam Jordan & Caitlin Dickerson, *US Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES, Mar. 9, 2019, <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html>.

¹⁵⁸ Human Rights Watch, *Family Separation Harming Children, Families: 5-Year-Olds Held Without Adult Caregivers* (July 11, 2019), <https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families>.

¹⁵⁹ NAT'L IMMIGRATION JUSTICE CTR., UNACCOMPANIED IMMIGRANT CHILDREN: VULNERABLE CHILDREN FACE INSURMOUNTABLE OBSTACLES (2014).

health and education needs of the children they serve.¹⁶⁰ Further, inadequate screening of children at reception and failure to provide legal counsel has resulted in children being inappropriately returned to their countries of origin.¹⁶¹ The American Civil Liberties Union has also received complaints within the United States of children being denied medical care, strip-searched, and shackled or otherwise restrained by border officials.¹⁶² There are also widespread reports of verbal and physical abuse of children by immigration officials.¹⁶³

In Mexico, for instance, where between 18,000 and 53,500 children have been held in immigration detention in each of the five years between 2015 and 2019,¹⁶⁴ immigration officials claimed that no children are apprehended and detained because the applicable legal provisions speak of children's "rescue" and "lodging" in "migration stations." While the 2014 General Law on the Rights of Children and Adolescents prohibits any deprivation of liberty for immigration purposes, "protection" grounds or lack of shelters or other alternative measures are mentioned for explaining the reason for detaining thousands of migrant and asylum seeking children and families every year. The Committee on Migrant Workers stated that it was "deeply concerned at the high number of custodial measures applied to migrants in the 58 migrant holding centres around the country" and noted "with particular concern the detention of children and adolescents, many of them unaccompanied or very young," concluding that it "constitutes without exception a violation of the rights of the child and the child's best interests." Consequently, the Committee recommended that the state party, as a matter of priority, "urgently take all necessary steps to put an immediate end to the deprivation of liberty of children and adolescents and of migrant families, guaranteeing in law and in practice adequate alternative measures based solely on the protection of rights under the General Act on the Rights of Children and Adolescents."¹⁶⁵ In November 2020, Mexico announced that it would amend its immigration laws within six months

¹⁶⁰ Jennifer Podkul, *Detention & Treatment of Unaccompanied Migrant Children at the U.S.-Mexico Border*, in CHILDHOOD, MIGRATION & HUMAN RIGHTS (Feb. 2015).

¹⁶¹ See KATE M. MANUEL, CONG. RESEARCH SERV., ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF (2016) (noting that the government has maintained that section 292 of the Immigration and Naturalization Act prohibits it from providing government-appointed legal counsel).

¹⁶² ACLU Border Litigation Project, Americans for Immigrant Justice, Esperanza Immigrant Rights Project, Florence Immigrant and Refugee Rights Project & National Immigrant Justice Center, *Complaint Regarding the Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (June 11, 2014), <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

¹⁶³ WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 4 (Oct. 2012), <http://womensrefugeecommission.org/resources/document/844-forced-from-home-the-lost-boys-and-girls-of-central-america>; see also AMERICANS FOR IMMIGRANT JUSTICE, THE "HIELERAS": A REPORT ON HUMAN & CIVIL RIGHTS ABUSES COMMITTED BY U.S. CUSTOMS & BORDER PROTECTION 3 (Aug. 2013), <http://ajjustice.org/the-hieleras-a-report-on-human-civil-rights-abuses-committed-by-u-s-customs-border-protection-2/>.

¹⁶⁴ See Dirección de Estadística, Gobierno de México, *Boletín Estadística*, http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/Boletines_Estadisticos.

¹⁶⁵ Comm. on Migrant Workers, Concluding Observations: Mexico, *supra* note 136, ¶¶ 37-38.

to conform to the prohibition on immigration detention of children in the General Law on the Rights of Children and Adolescents.¹⁶⁶

Greece suspended access to asylum for irregular arrivals for one month beginning on March 1, 2020, several days after Turkey announced that it no longer will stop asylum seekers and migrants from leaving Turkish territory to reach the European Union.¹⁶⁷ People interdicted by the Greek Coast Guard after that date were held on a ship docked at a Lesbos harbor, which held 451 people on March 10, including many children.¹⁶⁸ And in February 2020, the European Union agreed that warships enforcing the UN-mandated Libyan arms embargo would avoid areas of the Mediterranean where they might have to respond to boats in distress carrying people in migration.¹⁶⁹ In January 2021, the Human Rights Committee found that Italy failed to protect the right to life of more than 200 people, including many children, on board a boat that sank in the Mediterranean Sea in 2013.¹⁷⁰

Immigration detention of children, unaccompanied or with their families, may be followed by other abusive policies. For instance, between January 2019 and March 2020, U.S. immigration authorities sent most people who entered the United States by land from Mexico to Mexican border towns while their asylum cases are pending in U.S. immigration courts, a process that can take a year or more.¹⁷¹ By the end of January 2021, U.S. authorities had sent more than 71,000 people to Mexico under the program, officially named the Migrant Protection Protocols (MPP)

¹⁶⁶ See *Celebra ONU que México prohíba la detención de menores migrantes*, LA JORNADA, Nov. 12, 2020, at 15, <https://www.jornada.com.mx/2020/11/12/politica/015n1pol>.

¹⁶⁷ See Bill Frelick, *Gunshots, Summary Trials, Deportations: The Reality for Refugees in the EU-Turkey Standoff*, EURO NEWS, Mar. 5, 2020, <https://www.euronews.com/2020/03/05/gunshots-summary-trials-deportations-reality-for-refugees-in-the-eu-turkey-stand-off-view>.

¹⁶⁸ Human Rights Watch, *Greece/EU: Allow New Arrivals to Claim Asylum* (Mar. 10, 2020), <https://www.hrw.org/news/2020/03/10/greece/eu-allow-new-arrivals-claim-asylum>.

¹⁶⁹ Jude Sunderland, Human Rights Watch, *EU Turns Its Back on Migrants in Distress* (Feb. 18, 2020), <https://www.hrw.org/news/2020/02/18/eu-turns-its-back-migrants-distress>.

¹⁷⁰ A.S., D.I., O.I. & G.D. v. Italy, Comm’n No. 3042/2017, Hum. Rts. Comm., U.N. Doc. CCPR/C/130/D/3042/2017 (Apr. 28, 2021). A similar case was brought against Malta regarding the same incident, but it was found inadmissible due to a failure to exhaust domestic remedies.

¹⁷¹ See generally HUMAN RIGHTS WATCH, “LIKE I’M DROWNING”: CHILDREN AND FAMILIES SENT TO HARM BY THE U.S. ‘REMAIN IN MEXICO’ PROGRAM (2021), <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>; Human Rights Watch, “*Remain in Mexico*” Program Harming Children: Families Seeking Asylum Exposed to Violence, Illness, Trauma (Feb. 12, 2020), <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children>; Human Rights Watch, *U.S. Move Puts More Asylum Seekers at Risk: Expanded “Remain in Mexico” Program Undermines Due Process* (Sept. 25, 2019), <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk>; HUMAN RIGHTS WATCH, “WE CAN’T HELP YOU HERE”: U.S. RETURNS OF ASYLUM SEEKERS TO MEXICO (2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>.

but more commonly known as “Remain in Mexico.”¹⁷² Mexican nationals were not subject to the program but were subject to “metering,” the practice of allowing a limited number of asylum seekers to enter at border posts each day.¹⁷³ Unaccompanied children were not in principle subject to the “Remain in Mexico” and “metering” policies, but U.S. immigration authorities at times denied entry to unaccompanied children at border crossings.¹⁷⁴

Malaysia’s immigration detention centers held some 360 children, nearly 90 percent of whom were boys, in 2017. Thailand also holds children in immigration detention, although it is difficult to obtain accurate numbers. In both countries, children and adults are potentially subject to indefinite immigration detention.¹⁷⁵ In a promising development, Thailand announced that “[i]nstead of staying in the Immigration Detention Centers, the children will be put either under the care of the Ministry of Social Development and Human Security, private organisations, or civil society organisations while waiting for long-term solutions.”¹⁷⁶ Even so, refugee and human rights groups in Thailand warned that the measure did not address family separation, that women “are only granted release from immigration detention following a cash bail payment of 50,000 Thai baht (US\$1,500) to reunite with children in holding shelters,” and that the bail provision does not cover men with children.¹⁷⁷

Alternatively, some states have turned away or pushed back children and adults. Croatia has engaged in summary collective expulsions and pushbacks to Serbia and Bosnia and Herzegovina,

¹⁷² Transactional Records Access Clearinghouse (TRAC), Syracuse University, *Details on MPP (Remain in Mexico) Deportation Proceedings* (data through Mar. 2021), <https://trac.syr.edu/phptools/immigration/mpp/> (select ‘initial filing’ measure, ‘month and year’ graph time scale, ‘all’ hearing locations).

¹⁷³ See Human Rights Watch, *Mexican Asylum Seekers Ordered to Wait: Mexicans Fleeing Violence Stuck in Dangerous Conditions at US Border* (Dec. 23, 2019), <https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait>.

¹⁷⁴ See, e.g., Human Rights Watch, *Unaccompanied Children Turned Back at Border: Face Risk of Return to Harm* (Dec. 24, 2018), <https://www.hrw.org/news/2018/12/24/us-unaccompanied-children-turned-back-border>.

¹⁷⁵ See Samitra Partiban & Khoo Ying Hooi, *Detention of Refugee Children in Malaysia and Thailand: Are Alternatives to Detention (ATD) Workable?*, 3 J. SOUTHEAST ASIAN HUM. RTS. 59, 65-66, 72 (2019); Asia Pacific Refugee Rts. Network, *Thailand Factsheet* (Mar. 2017), http://aprnr.info/wp-content/uploads/2017/03/Thailand-Factsheet_MAR-2017.pdf.

¹⁷⁶ Ministry of Foreign Affairs of the Kingdom of Thailand, *Signing Ceremony of the Memorandum of Understanding on the Determination of Measures and Approaches Alternative of Detention of Children in Immigration Detention Centers* (Jan. 24, 2019), <http://www3.mfa.go.th/main/en/news3/6886/98779-Signing-Ceremony-of-the-Memorandum-of-Understandin.html>. See also Vivienne Chew, Int’l Detention Coal., *How Change Happened in Thailand*, (Mar. 20, 2019), <https://idcoalition.org/news/how-change-happened-in-thailand/>.

¹⁷⁷ Asia Pacific Refugee Rts. Network et al., *Joint Statement on the Signing of the Memorandum of Understanding on the Determination of Measures and Approaches Alternative of Detention of Children in Immigration Detention Centers* (Jan. 21, 2019), <https://fortifyrights.org/downloads/Joint%20Statement%20-%20MoU%20on%20the%20Determination%20of%20Measures%20and%20Approaches%20to%20Detention%20of%20Children%20in%20Immigration%20Detention%20Centers.pdf>.

with border officials pummeling children and adults, kicking them, and making them run gauntlets.¹⁷⁸

Detention of children as well as adults, restrictions on access to asylum, and other abusive measures are sometimes justified on national security grounds, although on a case-by-case basis, administrative or judicial authorities do not provide any evidence of the security threat that an individual child or family might pose in order to properly legitimate the deprivation of their liberty. A general lack of due process safeguards within migration control procedures leads to practices contrary to basic principles of the rule of law in a democratic society.

In addition, in the context of the Covid-19 pandemic, some states have offered public health grounds as a purported justification for measures that abrogate their international obligations. For instance, at the end of March 2020, Greece was arbitrarily detaining nearly 2,000 asylum seekers and other migrants who had arrived after March 1, including children, in overcrowded, unsanitary camps on the mainland, ostensibly as a measure to prevent the spread of the coronavirus.¹⁷⁹ Prime Minister Viktor Orbán of Hungary has claimed that there is a link between “coronavirus and illegal migrants,” and on March 1, 2020, his government announced the immediate, indefinite suspension of admission to the two transit zones on the border with Serbia as a purported public health measure.¹⁸⁰

U.S. immigration authorities continued to send children and adults to Mexico under the MPP as the Covid-19 pandemic caused the indefinite postponement of most MPP immigration hearings. More frequently, however, U.S. immigration agents simply expelled children and adults summarily, with no opportunity to submit an asylum claim and no due process, purportedly as a disease control measure.¹⁸¹ Public health experts have described the order as premised on a

¹⁷⁸ Human Rights Watch, *EU: Address Croatia Border Pushbacks* (Nov. 8, 2019), <https://www.hrw.org/news/2019/11/08/eu-address-croatia-border-pushbacks>; Human Rights Watch, *Croatia: Migrants Pushed Back to Bosnia and Herzegovina* (Dec. 11, 2018), <https://www.hrw.org/news/2018/12/11/croatia-migrants-pushed-back-bosnia-and-herzegovina>; Human Rights Watch, *Croatia: Asylum Seekers Forced Back to Serbia* (Jan. 20, 2017), <https://www.hrw.org/news/2017/01/20/croatia-asylum-seekers-forced-back-serbia>.

¹⁷⁹ Human Rights Watch, *Greece: Nearly 2,000 New Arrivals Detained in Overcrowded Mainland Camps* (Mar. 31, 2020), <https://www.hrw.org/news/2020/03/31/greece-nearly-2000-new-arrivals-detained-overcrowded-mainland-camps>.

¹⁸⁰ Lydia Gall, Human Rights Watch, *Hungary Weaponizes Coronavirus to Stoke Xenophobia* (Mar. 19, 2020), <https://www.hrw.org/news/2020/03/19/hungary-weaponizes-coronavirus-stoke-xenophobia>.

¹⁸¹ See Hamed Aleaziz, *The Trump Administration Is Now Deporting Unaccompanied Kids Due to the Coronavirus*, BUZZFEED NEWS (Mar. 30, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/coronavirus-unaccompanied-minors-deported>; Morgan Sandhu, *Unprecedented Expulsion of Immigrants at the Southern Border: The Title 42 Process*, HARVARD LAW (Dec. 26, 2020), <https://covidseries.law.harvard.edu/unprecedented-expulsion-of-immigrants-at-the-southern-border-the-title-42-process/>. (For the orders, see CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEPT. OF HEALTH AND HUM. SERVS., ORDER UNDER SECTIONS 362 AND 365 OF THE PUBLIC HEALTH SERVICE ACT: ORDER SUSPENDING INTRODUCTION OF CERTAIN PERSONS FROM COUNTRIES WHERE A

“specious public health rationale,” and was “being used to target certain classes of noncitizens rather than to protect public health.”¹⁸² Between March 21 and the end of November 2020, immigration agents summarily expelled more than 330,000 people, including at least 9,000 unaccompanied children.¹⁸³ In November 2020, a federal court ordered the government to end summary expulsions of unaccompanied children.¹⁸⁴

On April 8, 2020, the Committee on the Rights of the Child issued a statement warning of the grave effects of the Covid-19 pandemic on children.¹⁸⁵ The statement acknowledged that in crisis situations international human rights law “exceptionally” permits limitations of certain human rights to protect public health. The Committee pointed out, however, that “such restrictions must be imposed only when necessary, be proportionate and kept to an absolute minimum.”¹⁸⁶ While some states have provided free health care and immunizations to people in migration,¹⁸⁷ other states appear to have weaponized public health justifications to enact repressive agendas.¹⁸⁸ Appeals to xenophobia and other animus commonly accompany these measures, reflecting a

COMMUNICABLE DISEASE EXISTS (Mar. 20, 2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf).

¹⁸² Letter from Joe Amon, Ph.D., et al. to Alex Azar, Secretary of Health and Human Serv. & Robert Redfield, Director, Centers for Disease Control and Prevention (May 18, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

¹⁸³ U.S. CUSTOMS AND BORDER PROTECTION, NATIONWIDE ENFORCEMENT ENCOUNTERS: TITLE 8 ENFORCEMENT ACTIONS AND TITLE 42 EXPULSIONS (Jan. 7, 2021), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>; U.S. CUSTOMS AND BORDER PROTECTION, FY 2020 NATIONWIDE ENFORCEMENT ENCOUNTERS: TITLE 8 ENFORCEMENT ACTIONS AND TITLE 42 EXPULSIONS (Nov. 20, 2020), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020>; John Burnett, *Judge Says Coronavirus Can't Be Used as Reason to Quickly Deport Unaccompanied Minors*, NPR (Nov. 18, 2020), <https://www.npr.org/2020/11/18/936312918/judge-says-coronavirus-cant-be-used-as-reason-to-deport-unaccompanied-minors>.

¹⁸⁴ P.J.E.S. v. Wolf, Memorandum Opinion, No. 20-2245, 2020 WL 6770508 (D.D.C. Nov. 18, 2020).

¹⁸⁵ Comm. on the Rights of the Child, *The Committee on the Rights of the Child Warns of the Grave Physical, Emotional and Psychological Effect of the COVID-19 Pandemic on Children and Calls on States to Protect the Rights of Children* (Apr. 8, 2020). Migrant children were identified in the statement as being at particular risk and the committee called on states to release children from any form of detention, where possible.

¹⁸⁶ *Id.*

¹⁸⁷ Jacqueline Weekers & Michele LeVoy, *No “Us Versus Them”: Why Equitable Inclusion of All Migrants in COVID-19 Vaccine Plans Is Essential*, GAVI: THE VACCINE ALLIANCE (Mar. 18, 2021), <https://www.gavi.org/vaccineswork/no-us-versus-them-why-equitable-inclusion-all-migrants-covid-19-vaccine-plans-essential>.

¹⁸⁸ See also Selam Gebrekidan, *For Autocrats and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>.

longstanding “association of immigrants with disease.”¹⁸⁹ Moreover, some of the most far-reaching measures risk undermining sound public health policies.¹⁹⁰

D. Legislation or Policies Restricting Immigration Detention of Children

In their joint General Comment in 2017, the Committee on the Protection of Migrant Workers and their Families and the Committee on the Rights of the Child took the position that although article 37(b) of the CRC provides that no child should be deprived of their liberty except as a measure of last resort, the rule in the case of children in migration, the last resort principle does not apply. The *U.N. Global Study on Detention of Children* took the position that article 37(b) does apply to children in situations of migration, but noted an international trend to move beyond article 37(b) in this context.¹⁹¹ Legal scholar Ciara Smyth has provided arguments in support of the joint General Comment position. She observes that article 37(b) of the CRC applies, keeping in mind that the first part of the provision reads “[n]o child must be deprived of his or her liberty unlawfully or arbitrarily.” A teleological approach should then be used to determine the harms caused by the detention of children – through a lens that considers the special care required for children. A proportionality analysis being applied, the use of detention for children in the context of migration is so disproportionate as to make its use arbitrary; thus, a consideration of the second leg of the provision, the last resort principle, is not reached.¹⁹²

According to the *U.N. Global Study*, 24 jurisdictions do not detain children for migration-related reasons. That list includes the vast majority of states in South and Central America¹⁹³; seven states in sub-Saharan Africa; three in the Asia-Pacific region, Japan, Laos, and Taiwan; and Ireland.¹⁹⁴

¹⁸⁹ Howard Merkel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 MILBANK Q. 758 (2002).

¹⁹⁰ See, e.g., Muzaffar Chishti & Sarah Pierce, Migration Policy Inst., *Crisis Within a Crisis: Immigration in the United States in a Time of COVID-19* (Mar. 26, 2020), <https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19>.

¹⁹¹ NOWAK, *supra* note 145, at 70. Nowak considers the legal status of this trend to be unclear, but the *Global Study* recommendation calls on states to end the detention of children in the context of migration (as opposed to reducing it to a measure of last resort, which the *Global Study* considers appropriate to the administration of juvenile justice as well as to situations of armed conflict and national security). *Id.* at 71.

¹⁹² Ciara Smyth, *Towards a Complete Prohibition on the Immigration Detention of Children*, 19 HUM. RTS. L. REV. 1 (2019).

¹⁹³ In South America, non-detention of children due to immigration grounds is in line with the exceptional use of migration-related detention practices with respect to adults. Pablo Ceriani Cernadas, *Immigration Detention Through the Lens of International Human Rights: Lessons from South America* (Global Detention Project Working Paper No. 23, Sept. 2017), <https://www.globaldetentionproject.org/wp-content/uploads/2017/09/Ceriani-Cernadas-GDP-working-paper.pdf>.

¹⁹⁴ NOWAK, *supra* note 145, at 463.

In some countries that do allow immigration detention of children, legislation or policies in principle limit the practice in ways that would offer significant protections if fully implemented. Too often, however, exceptions in law or policy blunt the effectiveness of these measures.

For example, in the United States, law and policy in principle require expeditious transfer of children from ill-suited immigration holding cells to specialized facilities and favor release to family members or foster care settings.¹⁹⁵ Nevertheless, US immigration authorities regularly hold unaccompanied children and families with children far longer than the time limits set in legislation, court orders, and operational guidance. In a stark illustration of this tendency, hundreds of unaccompanied children were held in a small border patrol station near El Paso, Texas, for weeks in mid-2019, left to care for themselves, deprived of regular access to soap and showers, and afforded little or no communication with their parents or other family members.¹⁹⁶

Most of the standards relating to immigration detention of children in the United States are contained in the *Flores* Settlement Agreement, described more fully in Section II.C., above.¹⁹⁷ The government has periodically sought modification of the agreement to give it greater flexibility with respect to the length and conditions of immigration detention of children. For instance, the U.S. Department of Justice argued in federal court in June 2019 that the requirement to hold children in “safe and sanitary” conditions did not necessarily require regular access to showers, soap, toothbrushes and toothpaste, and other means of maintaining personal hygiene.¹⁹⁸ The U.S. government also attempted to introduce regulations that would supersede and significantly weaken the standards set forth in the consent decree.¹⁹⁹

¹⁹⁵ Stipulated Settlement Agreement, ¶ 11, *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. Jan. 17, 1997); 6 C.F.R. § 115.114(a) (“Juveniles shall be detained in the least restrictive setting appropriate to the juvenile’s age and special needs.”).

¹⁹⁶ See Clara Long, Human Rights Watch, *Children at Risk in U.S. Jails* (June 20, 2019), <https://www.hrw.org/news/2019/06/20/children-risk-us-border-jails>; Nicole Austin-Hillary & Clara Long, *We Went to a U.S. Border Detention Center for Children. What We Saw Was Awful*, CNN, June 25, 2019, <https://www.cnn.com/2019/06/24/opinions/children-migrant-centers-at-border-long-austin-hillery/index.html>; Michael Garcia Bochenek, *Candidates’ Homestead Visits Will Highlight the Plight of Detained Migrant Children*, USA TODAY, June 27, 2019, <https://www.hrw.org/news/2019/06/27/candidates-homestead-visits-will-highlight-plight-detained-migrant-children>.

¹⁹⁷ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544. See Michael Shear et al., *The History of Migrant Children Protection in America Started with Two Girls in Los Angeles*, N.Y. TIMES, Aug. 20, 2019.

¹⁹⁸ See Manny Fernandez, *Lawyer Draws Outrage for Defending Lack of Toothbrushes in Border Detention*, N.Y. TIMES, June 25, 2019, <https://www.nytimes.com/2019/06/25/us/sarah-fabian-migrant-lawyer-doj.html>; Caitlyn Dickerson, *Migrant Children Are Entitled to Toothbrushes and Soap, Federal Court Rules*, N.Y. TIMES, Aug. 15, 2019, <https://www.nytimes.com/2019/08/15/us/migrant-children-toothbrushes-court.html>.

¹⁹⁹ See Human Rights Watch, *New Rules Allow Indefinite Detention of Children: Detention Has Severe Consequences for Children’s Health and Safety* (Aug. 21, 2019), <https://www.hrw.org/news/2019/08/21/us-new-rules-allow-indefinite-detention-children>.

In Greece, unaccompanied children have been detained as a matter of course and for prolonged periods. Greek law allows the detention of unaccompanied children in “protective custody” while awaiting transfer to a shelter for 25 days, and for up to 45 days under very limited circumstances. Yet children are held far longer than these already lengthy periods, some for up to two months.²⁰⁰ As of March 31, 2020, 331 children were held in “protective custody,” according to the most recent government data.²⁰¹

In 2019, the European Court of Human Rights ruled twice against Greece’s abusive practice of detaining unaccompanied migrant and asylum-seeking children in police cells under the “protective custody” regime.²⁰² In addition, in at least three other cases in 2019, the European Court of Human Rights issued interim measures against Greece ordering authorities to immediately transfer unaccompanied children out of detention and to suitable accommodations meeting the standards required under the European Convention for Human Rights.²⁰³ This is compatible with Article 3 of the European Convention for Human Rights. Moreover, the European Committee on Social Rights (ECSR) has also ordered the immediate release of unaccompanied children from “protective custody,” following a collective complaint brought by international, European and national non-governmental groups.²⁰⁴

In a 2006 decision against Belgium, the European Court of Human Rights found that the detention of an unaccompanied minor asylum seeker demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment and a violation of Article 3 of the European Convention on Human Rights.²⁰⁵

²⁰⁰ HUMAN RIGHTS WATCH, “WHY ARE YOU KEEPING ME HERE?” UNACCOMPANIED CHILDREN DETAINED IN GREECE (2016), <https://www.hrw.org/report/2016/09/08/why-are-you-keeping-me-here/unaccompanied-children-detained-greece>.

²⁰¹ Nat’l Ctr. for Social Solidarity, *Situation Update: Unaccompanied Children (UAC) in Greece* (Mar. 31, 2020), http://www.ekka.org.gr/images/ΣΤΑΤΙΣΤΙΚΑ_2020/EKKA%20Dashboard%2031-3-2020.pdf.

²⁰² See *Affaire H.A. et Autres c. Grèce*, Arrêt, Requête No. 19951/16 (Eur. Ct. H.R. Feb. 28, 2019); *Affaire Sh.D. et Autres c. Grèce, Autriche, Croatie, Hongrie, Macédoine du Nord, Serbie et Slovénie*, Arrêt, Requête No. 14165/16 (Eur. Ct. H.R. June 13, 2009).

²⁰³ See Greek Council for Refugees, *The European Court of Human Rights Grants Interim Measures in Favour of Two Detained Unaccompanied Girls*, Mar. 28, 2019, <https://www.gcr.gr/en/news/press-releases-announcements/item/1069-the-european-court-of-human-rights-grants-interim-measures-in-favour-of-two-detained-unaccompanied-girls>; Ass’n for the Social Support of Youth, *The ECHR Grants Interim Measures Putting an End to the Detention of Unaccompanied Minors in Police Stations* (Oct. 12, 2019), <http://www.arsis.gr/en/press-release-the-echr-grants-interim-measures-putting-an-end-to-the-detention-of-unaccompanied-minors-in-police-stations/>; Refugee Support Aegean, *European Court of Human Rights Asks Greece to Transfer Two Unaccompanied Boys Detained in Police Station to Suitable Shelter* (Nov. 6, 2019), <https://rsaegean.org/en/european-court-of-human-rights-asks-greece-to-transfer-two-unaccompanied-boys-detained-in-police-station-to-suitable-shelter/>.

²⁰⁴ Int’l Comm’n of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Decision on Admissibility and on Immediate Measures, Complaint No. 173/2018, European Comm. on Social Rights, May 23, 2019.

²⁰⁵ See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006-XI Eur. Ct. H.R. 267.

Another case against Belgium involved children who had been detained along with their mother in a closed center that was inapt for the reception of children. The Court attached importance to the worrying state of health of the children, who exhibited serious physical and psychosomatic symptoms as a consequence of trauma. The Court found violations of both article 3 and article 5 § 1 of the European Convention because the children were detained in a closed center for adults, under the same conditions as adults.²⁰⁶

As in Greece, where authorities justify the detention of unaccompanied children as a temporary protection measure in the child's best interest—although in practice children face unsanitary and degrading conditions and abusive treatment, including detention with unrelated adults and ill-treatment by police²⁰⁷—states often employ Orwellian euphemisms to feign compliance with international standards.²⁰⁸

In Canada, authorities distinguish between children who are placed under formal detention orders, and those who are “housed” in detention in order to avoid separation from their detained parents.²⁰⁹ In reality, children who are “housed” in detention facilities, a category that includes Canadian citizen children, are subject to the same detention conditions as children who are under formal detention orders. But because Canada's immigration authorities do not regard them as legally detained, the tribunal that conducts detention review hearings does not consider their situations.²¹⁰ In 2018-2019, the category of children “housed” in detention, but not technically subject to detention orders, constituted approximately 87 percent of all children who spent time in immigration detention. “Housed” children spent an average of 19.1 days in detention—nearly 5 times as long as children subject to formal detention orders.²¹¹

²⁰⁶ *Affaire Muskhadzhiyeva et autres c. Belgique*, App. No. 41442/07 (Eur. Ct. H.R. Apr. 19, 2010).

²⁰⁷ See HUMAN RIGHTS WATCH, “WHY ARE YOU KEEPING ME HERE?,” *supra* note 200.

²⁰⁸ See generally Human Rights Council, Rep. of the Working Group on Arbitrary Detention, ¶53, A/HRC/36/37, July 19, 2017.

²⁰⁹ See Joint Submission by Human Rights Watch and the University of Toronto's International Human Rights Program to the Committee on the Rights of the Child's Consideration of Canada's Fifth and Sixth Periodic Reports (Mar. 2020), <https://www.hrw.org/news/2020/03/04/joint-submission-committee-rights-childs-review-canada>.

²¹⁰ Immigration and Refugee Bd. of Canada, *Persons Subject to a Detention Review*, Feb. 20, 2020, <https://irb-cisr.gc.ca/en/statistics/detentions-reviews/Pages/detenSub.aspx>; Immigration and Refugee Protection Regulations (SOR/2002-227), §§ 248, 248.1, 249 (Can.).

²¹¹ Canada Border Services Agency, *Annual Detention Statistics – 2012-2019* (Aug. 20, 2019), <https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html>.

E. Rights-Based Solutions

While migration to Europe, North America, and Australia from the Global South generates considerable attention, much of the world’s migration is from countries in the Global South to neighboring countries also in the Global South.²¹²

It is noteworthy that many countries in the Global South that receive large numbers of people on the move do not hold children in immigration detention. Some of those that do have introduced non-custodial measures, sometimes on a limited or pilot basis. For instance, in Indonesia “women and children and other vulnerable asylum-seekers whose status is confirmed by [the United Nations High Commissioner for Refugees] are released to community accommodation centres operated by [the International Organization for Migration], or to shelters for unaccompanied minors operated by UNHCR through its partner, [Church World Service].”²¹³

Likewise, in the context of Venezuela’s current migration crisis, which has led to intra-regional migration of more than 4 million people, including asylum seekers, between 2017 and 2021 to other South American countries, detention has not been used by those States as a tool directed to prevent such displacement or forcing them to return. While there have been challenges and even contradictions in policies and decisions taken by each State, it is worth noting that no country from the region has resorted to the use of immigration detention practices for either adults or children.

In addition, it is important to note that in 2011, four South American States—Argentina, Brazil, Paraguay, and Uruguay (all members of Mercosur)—requested the Inter-American Court to develop an advisory opinion on the rights of children in the context of migration. In that request, the States asked the Court whether the American Convention on Human Rights would allow detaining children in migration—either unaccompanied or with their families—even as a measure of last resort.²¹⁴ Subsequently, in its Advisory Opinion OC-21/14, the Court recognized

²¹² Fiona Adamson & Gerasimos Tsourapas, *The Migration State in the Global South: Nationalizing, Developmental, and Neoliberal Models of Migration Management*, 54 INT’L. MIGRATION REV. 853 (2019).

²¹³ UNHCR, *Beyond Detention 2014-2019: National Action Plan: Indonesia* (June 2017), <https://www.unhcr.org/5666a2ea9.pdf>. As of 2015, Indonesia detained 830 children for immigration-related purposes. UNHCR, *Indonesia: Progress Under the Global Strategy Beyond Detention 2014-2019, Mid-2016*, Aug. 2016, <https://www.unhcr.org/57b583457>. For background on immigration detention of children in Indonesia, see, for example, HUMAN RIGHTS WATCH, *BARELY SURVIVING: DETENTION, ABUSE, AND NEGLECT OF MIGRANT CHILDREN IN INDONESIA* (2013), <https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia>.

²¹⁴ Instituto de Políticas Públicas en Derechos Humanos, Mercosur, *Solicitud de opinión consultativa sobre niñez migrante ante la Corte Interamericana de Derechos Humanos* (Apr.6, 2011), https://www.ippdh.mercosur.int/wp-content/uploads/2011/04/dirdocumento2_espanol.pdf.

the “principle of non-deprivation of liberty” of children as a result of their migration status.²¹⁵ The Court concluded that “States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority.”²¹⁶

In 2018, Canadian authorities implemented an Alternatives to Detention program, which provides authorities with an expanded set of tools—including community case management and voice reporting—in order to facilitate the release of more individuals from immigration detention.²¹⁷ A thorough study of this program’s implementation has yet to be conducted; however, the number of children in immigration detention has decreased over the past two years.²¹⁸

Greece’s Supported Semi-Independent Living Program, run by the nongovernmental organization METAdrasi, provides supervised independent living arrangements for unaccompanied youth between the ages of 16 and 18 who are seeking asylum. In addition to housing, the program links children with education, health, psychosocial development, legal aid, and interpretation. An interdisciplinary team that includes a social worker, a psychologist, and other specialists “offers psychosocial support with a view to the teenagers’ gradual independence.”²¹⁹

F. Challenges and Obstacles in Implementation of Alternatives to Detention

As a general policy challenge, the lens many states use for responding to irregular migration, namely, a narrow approach focused on irregularity as a condition that should be sanctioned, is behind the lack or limited use of rights-based solutions. Irregular status is a condition resulting from multiple factors, which might be seen as grounds for the vulnerability of migrants and asylum seekers. Therefore, comprehensive responses, including legal migration pathways and mechanisms directed to protect people in vulnerable circumstances, are critical for coping with

²¹⁵ Rights and Guarantees of Children in the Context of Migration and/or In Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 163 (Aug. 19, 2014).

²¹⁶ *Id.* at ¶ 160.

²¹⁷ Canada Border Services Agency, *Alternatives to Detention: Questions and Answers* (July 24, 2018) <https://www.cbsa-asfc.gc.ca/security-securite/detent/qa-qr-eng.html>.

²¹⁸ Canada Border Services Agency, *Annual Detention Statistics*, *supra* note 211.

²¹⁹ METAdrasi, *Supported Independent Living for Unaccompanied Minors*, <https://metadrasi.org/en/campaigns/supported-semi-independent-living-for-unaccompanied-minors/> (last visited May 3, 2021).

all the challenges related to irregular migration. Nevertheless, responses based on the logic “infraction-sanction” lead to criminal policy tools—notably detention—for dealing with children and families who lack documents or are in an irregular administrative status for entering or staying.

Too often, promising practices are unevenly implemented or never expanded beyond their pilot phase. Canada has recently implemented several policy changes²²⁰ and regulatory amendments²²¹ regarding children in immigration detention. The National Directive for the Detention or Housing of Minors acknowledges that the best interests of the child must be a primary consideration, and can only be outweighed by public safety or national security concerns.²²² Furthermore, in the absence of alternatives to detention, children could only be detained or housed under “extremely limited circumstances,” such as “when identity is a serious concern but only insofar as there are well-founded reasons to believe the minor or his or her [parent/legal guardian] may be a risk to public safety and national security.”²²³

Despite positive policy developments, implementation has revealed serious gaps. In 2018-2019, 99 percent of cases where children were housed involved grounds of detention unrelated to public safety or national security concerns; the majority involved identity grounds.²²⁴ Furthermore, in the same year, 94 percent of housed children were held in the Québec Region, and spent an average of three weeks in detention.²²⁵ The number of housed children in Québec in 2018-2019 more than tripled from the previous year,²²⁶ and family separation has reportedly also become increasingly common in Québec.²²⁷ This significant regional variation reinforces longstanding concerns about inconsistent implementation of immigration detention policy across Canada.²²⁸

²²⁰ Public Safety Canada, *Ministerial Direction to the Canada Border Services Agency: Minors in Canada’s Immigration Detention System* (Nov. 6, 2017), <https://www.publicsafety.gc.ca/cnt/trnsprnc/ns-trnsprnc/mnstrl-drctn-cbsa-en.aspx>; Canada Border Services Agency, *National Directive for the Detention or Housing of Minors* (Sept. 26, 2019), <https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html>; Immigr. and Refugee Bd. of Canada, *Guidelines Issued by the Chairperson, Pursuant to Paragraph 159(1)(h) of the Immigration and Refugee Protection Act* (Apr. 1, 2019), <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx>.

²²¹ Immigration and Refugee Protection Regulations (SOR/2002-227), s§§ 248, 248.1 (Can.).

²²² Canada Border Services Agency, *National Directive for the Detention or Housing of Minors* (Sept. 26, 2019), <https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html>.

²²³ *Id.*

²²⁴ Canada Border Services Agency, *Annual Detention Statistics – 2012-2019*, *supra* note 211.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See Joint Submission by Human Rights Watch and the University of Toronto’s International Human Rights Program, *supra* note 209. See also Canadian Council for Refugees, *Immigration Detention and Children: Rights Still Ignored, Two Years Later*, Nov. 2019, <https://ccrweb.ca/sites/ccrweb.ca/files/children-detention-nov-2019.pdf>.

²²⁸ *Id.*

III. Impact of Harmful Practices on Child Health and Well-Being

The potential impact of childhood trauma that can be caused by these experiences is profound. For example, any period of detention may contribute to or exacerbate a number of pre-existing vulnerabilities often experienced by children in the context of immigration including previous violence or trauma experienced in their country of origin or during migration, disruption of the family unit and parental roles, and lack of basic needs being met.²²⁹ The longer the period of detention, the more likely it is to damage parents' ability to provide emotional and physical support to their children, thereby causing children to take on age-inappropriate roles and emotional burdens.²³⁰

For children who are forcibly separated from their parents, the traumatic effects are profound and lasting. Children who are separated abruptly from their parents experience a massive biological stress response. This includes elevated heart rate, activation of stress hormones, increased blood pressure, and mobilized inflammatory responses. These reactions are related to the fight-or-flight response, which is protective in an acute situation, but can have serious negative impacts if not resolved.²³¹

A. Medical Effects of Harmful Migration Practices

A wide range of adverse childhood experiences have been shown to affect multiple biological systems with lifelong consequences.²³² Persistent inflammation can lead to greater likelihood of heart disease, obesity, diabetes, later dementia, and other chronic impairments later in life.²³³ Persistent elevation of stress hormones disrupts developing brain architecture that affects memory, attention, and behavior regulation, leading to problems in learning and long-term emotional well-being.²³⁴ Brain circuits especially susceptible to stress during early childhood are involved in detecting and responding to threats as well as later regulation of the stress response. Brain regions affected by adversity during the pre-pubertal and teenage years are involved in

²²⁹ INTER-AGENCY WORKING GROUP TO END CHILD IMMIGRATION DETENTION, ENDING CHILD IMMIGRATION DETENTION (Aug. 2016), https://endchilddetention.org/wp-content/uploads/2016/09/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf.

²³⁰ DAVID CORLETT, INT'L DETENTION COAL., CAPTURED CHILDHOOD (2012). *See also* Comm. on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration* 78 (Nov. 2012).

²³¹ Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232 (2012).

²³² Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-Analysis*, 2 LANCET PUB. HEALTH e356–66 (2017), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(17\)30118-4/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(17)30118-4/fulltext).

²³³ *Id.*

²³⁴ Charles B. Nemeroff, *Paradise Lost: The Neurobiological and Clinical Consequences of Child Abuse and Neglect*, 89 NEURON 892 (2016).

emotional regulation, impulse control, and other executive functions. These kinds of disruptions in brain development have lifelong impacts on the ability to respond to and recover from stress, and often lead to a host of stress-related diseases in adulthood.²³⁵

Moreover, extensive neurobiological research demonstrates that significant trauma can disrupt the architecture and function of the developing brain as well as other biological systems (for example, immune, metabolic, and cardiovascular) beginning in infancy and extending through adolescence.²³⁶ While research on the neurobiology of detention affecting arriving children explicitly is limited, there is extensive evidence that circumstances that trigger persistent fear and anxiety can produce “toxic stress” responses with negative impacts on child development and learning.²³⁷

In the migration context, it is important to underscore both the mitigating effects of responsive caregiving for children facing adversity and the “psychological unavailability” of a physically present parent or other familiar caregiver whose ability to provide nurturing care is severely compromised by her own traumatized condition. Stated simply, the psychological trauma of detention, family separation, or other disruption to care and protection affects both adults and children—and a depressed or highly anxious caregiver may be too impaired to protect the child from a toxic stress response.²³⁸

B. Impacts on Mental Health and Well-Being

It is critical to understand that migration policies and practices can have long-term effects not only on children’s physical health, but also on their mental health. Consider the anecdotal evidence that adverse age assessments and, more generally, the routine use of age assessments have an adverse impact on mental health. For instance, a psychologist working in Paris with Médecins sans Frontières (Doctors without Borders) commented that the experience of receiving a negative age assessment deeply affected the children she saw: “They associate the denial of

²³⁵ Jack P. Shonkoff et al., *Neuroscience, Molecular Biology, and the Childhood Roots of Health Disparities: Building a New Framework for Health Promotion and Disease Prevention*, 301 JAMA 2252 (2009).

²³⁶ Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD & ADOLESCENT PSYCH. CLIN. NORTH AM. 185 (2014).

²³⁷ Nat’l Scientific Council on the Developing Child, *Persistent Fear and Anxiety Can Affect Young Children’s Learning and Development* (Working Paper No. 9, 2010), <https://developingchild.harvard.edu/resources/persistent-fear-and-anxiety-can-affect-young-childrens-learning-and-development/>.

²³⁸ Nat’l Scientific Council on the Developing Child, *The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain* (Working Paper No.12, 2012), <https://developingchild.harvard.edu/resources/the-science-of-neglect-the-persistent-absence-of-responsive-care-disrupts-the-developing-brain/>.

recognition of their age with what they said [about their lives], as if what they told the official about their experiences was false. It's seen as a denigration or as an erasure."²³⁹

Clinical experience and research on child traumatic stress support the conclusion that children who are subjected to detention and family separations are vulnerable to posttraumatic stress disorders, long-term negative health consequences,²⁴⁰ and have poorer outcomes as compared to immigrant refugee children living in the community with caregivers.²⁴¹ Children in immigration detention experience negative mental health outcomes similar to those that result from other forms of severe trauma. This includes significantly elevated rates of emotional and behavioral problems as well as symptoms of depression, anxiety, post-traumatic stress disorder (PTSD), and suicidal ideation.²⁴²

The environment of immigration detention has a detrimental effect on the psychological well-being of children. Children in migration commonly experience denial of access to basic needs including adequate medical and mental health care, educational services and recreation and are often separated from caregivers and family members.²⁴³ Each of these experiences constitutes a form of traumatization, maltreatment, and neglect. At its core, trauma results from a lack of control or personal agency while experiencing adversity or threat to an individual's (or a loved one's) well-being. Children are particularly vulnerable for developing PTSD, as compared to adults, when exposed to such experiences and conditions. Furthermore, when trauma occurs during a time of critical brain development, there is a significant risk of disrupting normal neurological and cognitive development permanently.²⁴⁴

A recent review of the research on immigration detainees, including adults, adolescents, and children concludes that all three age groups demonstrated higher levels of mental health problems during and following detention as compared to individuals who had not been detained. Those who were detained for longer periods demonstrate more severe symptoms, as did those

²³⁹ Interview by Michael Garcia Bochenek, Human Rights Watch, with Mélanie Kerloc'h, psychologist, Médecins sans Frontières, Pantin, France Feb. 16, 2018, *quoted in* HUMAN RIGHTS WATCH, "LIKE A LOTTERY," *supra* note 49, at 42. *See also* Maryline Baumard, *Au centre pour mineurs de Pantin, 'on n'imaginait pas l'urgence du suivi psychologique'*, LE MONDE, Mar. 8, 2018, www.lemonde.fr/societe/article/2018/03/08/au-centre-pour-mineurs-de-pantin-on-n-imaginait-pas-l-urgence-du-sui-vi-psychologique_5267580_3224.html.

²⁴⁰ *Id.*

²⁴¹ Karen Zwi et al., *The Impact of Detention on the Social-Emotional Wellbeing of Children Seeking Asylum: A Comparison with Community-Based Children*, 27 EUR. CHILD ADOLESCENT PSYCH. 411 (2018).

²⁴² Ann Lorek et al., *The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study*, 33 CHILD ABUSE & NEGLECT 573 (2009); Louise Newman & Z. Steel, *The Child Asylum Seeker: Psychological and Development Impact of Immigration Detention*, 17 CHILD & ADOLESCENT PSYCH. CLIN. NORTH AM. 665 (2008); Sarah Mares, *Fifteen Years of Detaining Children Who Seek Asylum in Australia: Evidence and Consequences*, 24 AUSTRALASIAN PSYCH. 11 (2016).

²⁴³ Gillian Calvert, *Childhood in Detention*, 25 AUSTR. & NEW ZEALAND J. FAM. THERAPY 113 (2004).

²⁴⁴ *Id.*; Ryan Herringa, *Trauma, PTSD, and the Developing Brain*, 19 CURRENT PSYCH. REP. 69 (2017).

who had greater exposure to trauma prior to detention.²⁴⁵ The duration of detention is positively correlated with deterioration of mental health and overall functioning and this is attributable to the ongoing uncertainty and associated distress of immigration detention.²⁴⁶ Being detained for prolonged and uncertain periods can induce profound hopelessness, despair, depression, and even suicidal urges.²⁴⁷ Other studies have similarly found that both adults and children held in immigration detention demonstrate poor mental health outcomes, including depression, anxiety, and PTSD.²⁴⁸ Children detained in immigration facilities may experience higher rates of social, emotional, and behavioral difficulties as well as developmental delays and regression.

Research has consistently found that that early separation from parents is associated with psychiatric symptoms that can continue into adulthood.²⁴⁹ In a study of 425 children detained with their mothers at an immigration center in the United States in mid-2018, the researchers found that almost half of the children still experience psychological distress, and that those who had been forcibly separated from their mothers, experience the most significant psychological distress.²⁵⁰ Depressed individuals who in childhood have experienced parental loss have poor coping skills and functional outcomes compared to age-matched controls and this, in turn, is a risk factor for long-term health problems.²⁵¹ Even temporary separation from parents in childhood has been found to be associated with an increased risk for mental health and substance use disorders severe enough to contribute to psychiatric hospitalizations and increased risk of early death later in life.²⁵²

Current government responses around the globe to the arrival of children in migration create the conditions for trauma, as children in migration frequently describe: (1) chronic fear, anxiety, worry, and sadness; (2) a lack of information regarding what is happening to them or their loved ones; (3) a lack of agency, autonomy, or personal or family control over their situation and well-being; (4) denial of access to caregiving support and protective buffers typical of child development; and (5) denial of access to standard resources and protections available elsewhere

²⁴⁵ Martha von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCH. no. 382 (2018).

²⁴⁶ Calvert, *supra* note 243, at 113; Mares, *supra* note 241, at 11; Zwi et al., *supra* note 241, at 411.

²⁴⁷ Mina Fazel & Derrick Silove, *Detention of Refugees*, 332 BMJ 251 (2006).

²⁴⁸ von Werthern et al., *supra* note 245, at 382.

²⁴⁹ A.K. Pesonen et al., *Childhood Separation Experience Predicts HPA Axis Hormonal Responses in Late Adulthood*, 35 PSYCHONEUROENDOCRINOLOGY 758 (2009); A.K. Pesonen et al., *Depressive Symptoms in Adults Separated from Their Parents as Children*, 166 AM. J. EPIDEMIOLOGY 1126 (2007).

²⁵⁰ Sarah A. MacLean et al., *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCI. MED. 303 (2019).

²⁵¹ Hideyuki Takeuchi et al., *Childhood Parental Separation Experiences and Depressive Symptomatology in Acute Major Depression*, 53 PSYCH. & CLIN. NEUROSCIENCE 215 (2002).

²⁵² Marius Lahti et al., *Temporary Separation from Parents in Early Childhood and Serious Personality Disorders in Adult Life*, 26 J. PERSONALITY DISORDERS 751 (2012).

in society.²⁵³ The resulting traumatic experiences of children in migration, including immigration detention (which include risk for exposure to physical, sexual, and/or psychological abuse) are compounded with prior traumas experienced before or during the migration process, thereby increasing the burden on children and increasing the prevalence and severity of both immediate and long-lasting negative psychological outcomes, maladaptive behaviors, poorer cognitive functioning, and impaired social attachments.²⁵⁴

Parental presence and comfort is the most important buffer against distress and mental health problems developing in children who have been exposed to severe adversity and trauma. The environment and circumstances of immigration detention, especially indefinite prolonged detention, is detrimental for children and families and poses a significant risk to overwhelm the ability of both parental caregivers and children to cope with and overcome the cumulative effects of the trauma they have experienced.

Thus, it is not surprising that the American Academy of Pediatrics (AAP) has issued a policy statement that “children in the custody of their parents should never be detained, nor should they be separated from a parent, unless a competent family court makes that determination.”²⁵⁵ The AAP recommends that children have “limited exposure” to immigration detention facilities and that follow-up monitoring and care be provided to those children who experienced detention.²⁵⁶

IV. Overview of the Rights of Children in Migration

International law has long recognized children’s standing as subjects of human rights including their right to special measures of protection.²⁵⁷ Child-specific treaty law, in particular the Convention on the Rights of the Child has clarified the content and scope of children’s human rights.²⁵⁸ In complement with international refugee law,²⁵⁹ international human rights law,

²⁵³ See Memorandum in Support of Motion to Enforce Class Action Settlement, *Flores v. Sessions*, No. CV 85-4544 (C.D. Cal. 2018).

²⁵⁴ Martin H. Teicher, *Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border*, 16 BMC MEDICINE No. 146 (2018).

²⁵⁵ Am. Acad. Pediatrics, AAP Statement Opposing the Border Security and Immigration Reform Act, <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementOpposingBorderSecurityandImmigrationReformAct.aspx> (2018).

²⁵⁶ See also Ann Skelton, *Separation of Children from Parents in the Context of Migrancy: Avoidable Trauma*, 49 S. AFR. J. PSYCHOLOGY 3 (2019) (calling on South African psycho-social professionals to demand the avoidance of trauma caused by separation in the context of migration).

²⁵⁷ See e.g., International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; U.N. Human Rights Comm., General Comment No. 17: Article 24 (Rights of the Child), in U.N. GAOR, 44th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/44/40 (1989).

²⁵⁸ Convention on the Rights of the Child, *supra* note 12.

²⁵⁹ Convention relating to the Status of Refugees, *supra* note 9; Protocol relating to the Status of Refugees, *supra* note 10; Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

therefore, affirms and specifies the human rights of children in the context of international or cross border migration. At its most elemental, it demands that children’s specific standing is officially recognized, and their associated rights respected and ensured. On all matters, the CRC, for example, requires particular regard to the following fundamental rights:

- Children’s right to non-discrimination and equality in the enjoyment of their rights irrespective of their own or their parents’ or legal guardians’ migration or other status (art. 2).
- Children’s right for their best interests to be assessed, determined, and considered as primary consideration (art. 3).
- Children’s rights to life, survival, and development (art 6).
- Children’s right for their views to be freely expressed and given due weight in accordance with their age and maturity (art. 12).²⁶⁰

By virtue of the CRC’s near-universal ratification, this generates legal obligations on almost all States.²⁶¹ (To the extent that the rights in the Convention are norms of customary international law, they also generate obligations on the United States,²⁶² and at a minimum, the CRC may be viewed as authoritative source for interpreting the content and scope of the United States’ obligations to children under the International Covenant on Civil and Political Rights.²⁶³ In particular for State Parties to the CRC then giving effect to these obligations demands taking legal and other measures to:

- Officially recognize children’s status as children by developing human-rights-based processes for determining their age and in the case of uncertainty, establishing a rebuttable presumption that the claimant is under 18.²⁶⁴

²⁶⁰ See, e.g., Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

²⁶¹ *Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&clang=_en (last visited May 3, 2021).

²⁶² See, e.g., JENNY KUPER, *INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT* (1997); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (Can.).

²⁶³ The International Court of Justice, for example, has held that “an international instrument has to be interpreted and applied within the framework for the entire legal system prevailing at the time of interpretation.” *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion*, 1971 ICJ 1 (June 21). See also *Vienna Convention on the Law of Treaties*, *supra* note 5, art. 31. On a coherent approach to interpretation of the CRC and international law, see *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY* 13-16 (John Tobin ed., 2019). Although the United States has not ratified the Convention on the Rights of the Child, its ratification of the ICCPR means that it is obligated under ICCPR art. 24 to ensure children’s right to special measures of protection.

²⁶⁴ Comm. on the Rights of the Child, General Comment No. 6, *supra* note 107, ¶ 31; Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), *supra* note 21, ¶¶ 3-4.

- Give effect to their civil, political, social, economic, and cultural rights without discrimination, irrespective of their own or their parent’s/legal guardian’s migration or other status, on the basis of substantive equality²⁶⁵
- Ensure their best interests are assessed, determined and considered as primary consideration and their views are freely elicited and given due weight on all matters—whether affecting children associated with migration as individuals or a group.
- Interpret their right to receive refuge from persecution — including the principle of *non-refoulement* under the 1951 Refugee Convention and complementary protection under international human rights law — and right to family reunification with due regard to their status as children and associated human rights.²⁶⁶
- Ensure children’s right to access child- and gender-responsive procedural and remedial justice.²⁶⁷

As with all actions concerning children, state practices with respect to children in migration should be guided by the overarching principles of non-discrimination; the best interests of the child; the right to life, survival, and development; and the right of the child to express their views on all matters affecting them.²⁶⁸

To give effect to the principle of non-discrimination, states should “conduct a robust gender analysis of the specific impacts of migration policies and programmes on children of all genders”²⁶⁹ and should “put special emphasis on the policies and related regulations about the prevention of discriminatory practices towards migrant and refugee children with disabilities,”²⁷⁰ among other measures.

²⁶⁵ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) & No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶¶ 21-26.

²⁶⁶ *Id.* ¶¶ 27-39. *See also, e.g.*, GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (4th ed. 2011); Jason M. Pobjoy, *Art. 22 Refugee Children*, in *THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY*, *supra* note 263, at 840-41; *Kim v. Canada (Citizenship and Immigration)*, 2010 F.C. 149 (Can. Fed. Ct.) (“If the CRC recognizes that children have human rights and that “persecution” amounts to the denial of basic human rights, then if a child’s rights under the CRC are violated in a sustained or systematic manner demonstrative of a failure of state protection, that child may qualify for refugee status.”).

²⁶⁷ Comm. on the Rights of the Child, General Comment No. 5, *supra* note 260, ¶ 24; Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 33 on Women’s Access to Justice, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015).

²⁶⁸ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 19.

²⁶⁹ *Id.* ¶ 24.

²⁷⁰ *Id.* ¶ 25.

Children’s right to have their best interests taken as “a primary consideration”²⁷¹ in all actions that concern them “means that the child’s interests have high priority and are not just one of several considerations.”²⁷² In the context of migration-related procedures, implementation of the best-interests principle means that states should “conduct systematically best-interests assessments and determination procedures as part of, or to inform, migration-related and other decisions that affect migrant children.”²⁷³ In particular, decisions to return a child to their country of origin or last residence should include “a robust individual assessment and determination of the best-interests of the child,” among other due process safeguards, and “should ensure, *inter alia*, that the child, upon return, will be safe and provided with proper care and enjoyment of rights.”²⁷⁴ In combination, the best interests principle and the principle of non-refoulement mean that “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child.”²⁷⁵

Reading the right to life, survival, and development together with other rights set forth in the Convention on the Rights of the Child, the UN Committee on the Rights of the Child has observed that states should ensure that children have access to education at all stages of migration,²⁷⁶ receive “material assistance and support, . . . particularly with regard to nutrition, clothing, and housing,”²⁷⁷ and have the same access to health care as children who are nationals.²⁷⁸ Children in migration should receive appropriate guidance and other assistance from child protection authorities.²⁷⁹

Children have the right to seek and receive asylum, including for child-specific forms of persecution,²⁸⁰ and the right to due process and access to justice in any migration procedures.²⁸¹

²⁷¹ Convention on the Rights of the Child, *supra* note 12, art. 3(1).

²⁷² Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 28; Comm. on the Rights of the Child, General Comment No. 14, *supra* note 143, ¶ 39.

²⁷³ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 31.

²⁷⁴ *Id.* ¶ 33.

²⁷⁵ Comm. on the Rights of the Child, General Comment No. 6, *supra* note 107, ¶ 27.

²⁷⁶ *Id.* ¶ 41.

²⁷⁷ *Id.* ¶ 44.

²⁷⁸ *Id.* ¶ 46.

²⁷⁹ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), *supra* note 21, ¶ 14.

²⁸⁰ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 32.

²⁸¹ *Id.* ¶ 14; Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), *supra* note 21, ¶¶ 15-17, 19.

These procedures should result in sustainable and durable solutions²⁸² and should respect the child's right to family life.²⁸³

Considerations such as those relating to general migration control cannot override best-interests considerations. The Committees stress that return is only one of the various sustainable solutions for unaccompanied and separated children and children with their families. Other solutions include integration in countries of residence — either temporarily or permanently — according to each child's circumstances, resettlement in a third country, e.g. based on family reunification grounds, or other solutions that could be identified on a case-by-case basis, by referring to existing cooperation mechanisms

These rights are complemented by the specific provisions of specialized treaties, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons,²⁸⁴ the ILO Worst Forms of Child Labour Convention,²⁸⁵ the ILO Minimum Age Convention,²⁸⁶ the Hague Child Protection Convention,²⁸⁷ and regional treaties.

V. Overview of Cross-Border Enforcement Mechanisms and Remedies for Violations of the Rights of Children in the Context of Migration

This section provides an overview of enforcement mechanisms and remedies for violations of the rights of children in the context of migration. The overview is by no means exhaustive, but it gives an indication of the types of avenues that children could consider in order to access justice and seek effective remedies. The section starts with a brief overview of monitoring and adjudication mechanisms at the international and regional level, followed by some general reflections on children's access to justice as a means to obtain remedies for rights violations. Subsequently, it will pay particular attention to specific mechanisms and remedies that can be used (and have been used) by children in the context of migration. It also presents a selection of relevant international, regional, and domestic jurisprudence specifically relevant for children in

²⁸² Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 32(j) & n.9.

²⁸³ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), *supra* note 21, ¶¶ 28-34.

²⁸⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

²⁸⁵ Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161 [hereinafter Worst Forms of Child Labour Convention].

²⁸⁶ Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter Minimum Age Convention].

²⁸⁷ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 2204 U.N.T.S. 503 [hereinafter 1996 Hague Child Protection Convention].

migration. The section concludes with some reflections on the need for additional research including on the specificity of the remedies, compliance by states, and the impact of the remedies sought by children or others on their behalf.

A. International and Regional Monitoring and Adjudication

International and regional human rights treaties provide for oversight of compliance with treaty obligations and in some instances offer opportunities for the adjudication of individual claims for violations of these obligations. Regional human rights tribunals in Africa, the Americas, and Europe also adjudicate individual claims and may order interim or precautionary measures, award monetary damages, and in some cases, make other orders to remedy human rights violations.

Other international and regional accountability mechanisms include the U.N. Universal Periodic Review process, country visits and thematic reports by U.N. special rapporteurs, the U.N. Secretary-General's special representatives, working groups and other independent experts, and similar reporting by regional experts such as the African Union rapporteur on refugees, asylum seekers, migrants, and internally displaced persons, the European Commissioner for Human Rights, the Organization of American States (OAS) rapporteur on the rights of children, and the OAS rapporteur on the rights of migrants. In addition, the Court of Justice of the European Union (CJEU) serves as an accountability mechanism for E.U. member states and its case law has proved to be of specific relevance for children in the context of migration.

Beyond these traditional human rights mechanisms, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Child Protection Convention) offers an important—and underutilized—basis for the protection of children in migration. The Study Group recommends its global ratification.

In addition, national courts are an important avenue for the vindication of the rights of children in migration. To cite only two recent examples, a South African High Court decision has upheld the right to education for undocumented children, regardless of their migration status,²⁸⁸ and courts in the United States have upheld the right to family integrity in the migration context.²⁸⁹ It should also be noted that exhaustion of domestic remedies is an admissibility requirement for most regional and international treaty bodies and courts. Therefore, the national development of means of access to justice for children, and the right to a remedy, is crucially important.

²⁸⁸ Centre for Child Law v. Minister of Basic Education, 2020 (3) SA 141 (High Ct. Eastern Cape Div. Dec. 12, 2019) (S. Afr.).

²⁸⁹ Ms. L. v. U.S Immigration & Customs Enforcement, 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

B. Access to Justice for Children

The Committee on the Rights of the Child has made clear that children whose rights have been violated should receive “appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39” of the Convention on the Rights of the Child.²⁹⁰ In addition, it underscores the significance of children having access to effective remedies, even though the convention contains no explicit reference to the right to a remedy.²⁹¹ In the committee’s analysis, in order for “[children’s] rights to have meaning, effective remedies must be available to redress violations.”²⁹² The U.N. High Commissioner for Human Rights has usefully described access to justice for children as “the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards.”²⁹³ Access to justice “is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights.”²⁹⁴ Professor Ton Liefaard has observed that “[t]his suggests that access to justice for children should be understood both as a fundamental right and as a means to safeguard the enjoyment of just and timely remedies in relation to the protection of substantive rights of the child.”²⁹⁵

Although the Convention on the Rights of the Child does not directly refer to the right to a remedy as a general matter, it does provide for legal remedies, for example in the context of deprivation of liberty (right to habeas corpus, art. 37 (d)), juvenile justice (right to appeal, art. 40 (2)(b)(v)) and alternative care (right to periodic review, art. 25). In addition, the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure (the CRC Communications Protocol) provides children within the jurisdiction of the states that have ratified this protocol with a specific international avenue to access justice.²⁹⁶ This international remedy should be seen as a child-specific avenue in addition to the complaint mechanisms under the general and other specific human rights treaties, at the UN level, providing remedies to children as well. These other international remedies include the communications procedures under the International Covenant on Civil and Political Rights before the Human Rights Committee, under the Convention against Torture before the Subcommittee on Prevention of

²⁹⁰ Comm. on the Rights of the Child, General Comment No. 5, *supra* note 260, ¶ 25.

²⁹¹ See, e.g., DANIEL O’DONNELL, *THE RIGHT OF CHILDREN TO BE HEARD: CHILDREN’S RIGHT TO HAVE THEIR VIEWS TAKEN INTO ACCOUNT AND TO PARTICIPATE IN LEGAL AND ADMINISTRATIVE PROCEEDINGS* 2-3 (2009).

²⁹² Comm. on the Rights of the Child, General Comment No. 5, *supra* note 260, ¶ 24.

²⁹³ U.N. Human Rights Council, *Access to Justice for Children: Rep. of the U.N. High Comm’r for Human Rights*, ¶ 4, U.N. Doc. A/HRC/25/35 (Dec. 16, 2013).

²⁹⁴ *Id.* ¶ 3.

²⁹⁵ Ton Liefaard, *Access to Justice for Children: Towards a Specific Research and Implementation Agenda*, 27 INT’L J. CHILD. RTS. 195, 198 (2019).

²⁹⁶ CRC Communications Procedure, *supra* note 6.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under the Convention on Persons with Disabilities (CRPD) before the CRPD Committee, among others.

1. International Avenues to Access Justice for Children

a. Optional Protocol to the CRC on a Communications Procedure

At the time of writing this report, the CRC Communications Protocol has been ratified by 47 states.²⁹⁷ The protocol recognizes the competence of the Committee on the Rights of the Child to receive complaints. These complaints may only be made by or on behalf of individuals or groups of individuals, within the jurisdiction of a state party, claiming to be victims of a violation by that state party of any of the rights set forth in any of the following instruments to which that state is a party. The CRC Communications Protocol in its preamble encourages “States parties to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level.” Under Article 8 of the protocol the responding state “shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided.”

The majority of individual communications considered on the merits through the CRC Communications Protocol concern migration and asylum-related issues. Among these, most have been brought against Spain and relate to age determination assessments of unaccompanied children in migration. In the cases in which authors have successfully claimed rights violations, their right to have their best interests considered as a primary consideration (Convention on the Rights of the Child, art. 3 (1)) is consistently found to be violated in conjunction with a number of other rights, usually including their right to be heard (art. 12), as well as violations of right to identity (art. 8), protection of refugee children (art. 22) and right to health (art. 24).

The committee’s jurisprudence has also found violations of a number of rights in the Convention on the Rights of the Child pertaining to a range of migration issues. The committee found Denmark’s proposed deportation order of a girl to Somalia where she would face the risk of FGM to be a violation of articles 3 and 19 (right to be protected from violence).²⁹⁸ Belgium’s refusal to grant a young child’s visa on the basis the (legal) parents were foster parents under *kafalah* and not adoptive parents was found to be a violation of the girl’s right to be heard and best interests and failed to factor in the *de facto* family ties (art. 10).²⁹⁹ In a recent case against Finland, the Committee on the Rights of the Child issued the first decision by a U.N. human rights treaty body concerning LGBT families in the asylum context, finding Finland’s failure to

²⁹⁷ *Id.*

²⁹⁸ I.A.M. v. Denmark, Commc’n No. 3/2016, ¶ 11.9, Comm. on the Rights of the Child, U.N. Doc. CRC/C/77/D/3/2016 (Jan. 25, 2018).

²⁹⁹ Y.B. and N.S. v. Belgium, Commc’n No. 12/2017, ¶ 8.12, Comm. on the Rights of the Child, U.N. Doc. CRC/C/79/D/12/2017 (Nov. 5, 2018).

assess the risk of irreparable (psychological) harm of being returned to an environment hostile to LGBT families violated its non-refoulement obligations.³⁰⁰ In two recent decisions concerning admissibility, the committee found France has a positive obligation to protect the human rights of child nationals in the Syrian camps, despite the fact that these camps are under the control of a non-state armed group.³⁰¹ The committee has taken an innovative approach in individual communications relating to non-refoulement, effectively calling on states parties to apply the “principle of proportion” and refrain from deportation where reasonable doubts exist that the receiving state will not protect the child.

The Committee on the Rights of the Child regularly highlights the procedural rights of children and elements of access to justice in the context of migration in general remedies that go into quite some detail. For example, in the context of age-assessment cases against Spain, the committee has required Spain to ensure unaccompanied children are always appointed a free lawyer; that an effective and accessible redress mechanism be developed for unaccompanied children to apply for review; and to ensure unaccompanied children seeking asylum and claiming to have been victims of violence receive qualified psychosocial counseling to facilitate their rehabilitation.³⁰² The committee has also called on respondent states to train immigration officers, police officers, officials of the public prosecution service, judges and other relevant professionals on the rights of children in migration and, in particular, on the committee’s General Comment No. 6 and joint General Comment No. 3/22 on integration of a gender perspective where girls in migration are concerned. The committee has found the examination of genitals for the purposes of age determination to be a particularly egregious violation of the right to privacy. The committee has provided valuable clarification on how to apply best interests in migration cases and what this entails in concrete contexts and has emphasized that the right to be heard imposes no age limits in the context of migration.

With regard to remedies, the Committee on the Rights of the Child has included both individual and systemic remedies. In terms of individual remedies awarded to the author in the complaint, the committee has requested states to provide the author with effective reparation for the violations in question, including adequate compensation extending to non-pecuniary damages, specialized psychological counseling appropriate for victims of sexual abuse, and rectification of the date of birth that appears in her identity and other documents.

³⁰⁰ A.B. v. Finland, Commc’n No. 51/2018, ¶ 12.6, Comm. on the Rights of the Child, U.N. Doc. CRC/C/86/D/51/2018 (Feb. 5, 2021).

³⁰¹ S.H. et al. v. France, Commc’n Nos. 79/2019 & 109/2019, ¶¶ 9.6-9.7, Comm. on the Rights of the Child, U.N. Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019 (Nov. 2, 2020); Helen Duffy, *Case Note 2021/3: Communications No. 79/2019 and 109/2019 L.H. et al v. France and 77/2019 F.B. et al v. France*, LEIDEN CHILDREN’S RIGHTS OBSERVATORY CASE NOTES, <https://childrensrightsobservatory.nl/case-notes/casenote2021-3> (last visited May 3, 2021).

³⁰² See, e.g., M.B. v Spain, Commc’n No. 28/2017, Comm. on the Rights of the Child, U.N. Doc. CRC/C/85/D/28/2017 (Oct. 27, 2020).

The delay involved with U.N. treaty body decisions together with the non-compliance by states parties with remedies required in Views is often subject to criticism. However, the CRC Communications Protocol provides for the granting of interim measures immediately after a complaint is filed (art. 26), which has been frequently applied in the context of migration to prevent deportation, and this has been met with a high rate of compliance by the States Parties, sometimes within a remarkably short timeframe. This is best reflected in discontinuance decisions (Rule 26 of Rules of Procedure). For example, Spain's compliance with the committee's measures enabled a 12-year-old author, who was born in Spain but characterized as an irregular resident, to attend a public school in Melilla. The child and her mother filed a complaint in November 2019 and the child was told in March 2020 that she had been admitted to a public school. Another example is illustrated by Denmark's decision to grant asylum to a mother of six Syrian refugee children living in Denmark. The children brought the complaint in August 2018 as the Danish government was about to deport their mother to Greece, stating her deportation would violate their rights under the Convention on the Rights of the Child. The committee requested that the Danish government refrain from deporting her as an interim measure. Denmark complied and in June 2019 decided that the authors' mother was not to be returned to Greece as her application for asylum was to be processed in Denmark. The mother was granted asylum late in 2019 and the children in this case undeniably received "quick redress." The Committee on the Rights of the Child appears to issue a higher rate of interim measures than any other UN treaty body communications procedure, mostly in the context of migration.

While the CRC Communications Protocol presents an opportunity to issue findings of violations of children's rights, and remedies for those violations, there are some limitations that restrict the efficacy of the protocol. The individual communications system is slow, and there has been some criticism that there is no adjustment to time frames in children's cases under the protocol. Also, the admissibility requirements are similar to those of other treaty bodies, and do not make special exceptions for children. An example is article 7(e) of the protocol, which stipulates that complaints are only eligible for review by the committee if all domestic remedies have been exhausted, unless the application of remedies is unreasonably prolonged or unlikely to bring effective relief. This clause is a challenge for children who lack the necessary resources to access domestic remedies. Furthermore, the remedies provided in the protocol apply exclusively to states that have ratified it, amounting to merely 47 parties.

In addition to the individual communications discussed above, the CRC Communications Protocol includes two other avenues for access to justice. One of these is inter-state communications, in which the committee may receive a communication in which a state party claims that another state party is not fulfilling its obligations under the convention and associated optional protocols (art. 12). To date, this mechanism of the protocol has not been used. The remaining avenue is the inquiry procedure, in terms of which, if the committee receives reliable

information indicating a grave or systematic violation of children’s rights by a state party, the committee can initiate an inquiry (including possibly visiting the state), make findings, and carry out follow-up actions (art. 13). The committee has concluded one inquiry, which concerned children in institutions in Chile,³⁰³ but this was unrelated to migration. This remains a likely recourse option for complaints relating to migration, and it is regrettable that this aspect of the CRC Communications Protocol has been underutilized.

b. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly in 1966 and ratified by 173 countries. The unifying themes and values of the ICCPR are found in articles 2 and 3 and are based on the notion of non-discrimination. Article 10 specifically refers to the rights of detainees and article 13 refers to the rights of noncitizens (“aliens,” in the wording used in the article). Also notable are articles 14, 16, 24, and 26, which focus on a person’s equality before the courts and tribunals, the right to recognition as a person before the law, the rights of children, and the right to equality before the law.

A limitation of the ICCPR includes article 4, which allows for circumstances in which states Parties may deviate from their responsibilities under the covenant. States parties cannot deviate from articles 6, 7, 8, 11, 15, 16, and 18. Notice here, however, that article 24, focusing on the rights of children, is not included in the before-mentioned list. Article 24 specifically states that every child shall have, without discrimination as to race, color, sex, language, religion, national or social origin, property, or birth, the right to such measures of protection as are required by the child’s status as a minor, on the part of their family, society, and state. In addition, these rights include a right to registration immediately after birth, the right to a name, and the right to a nationality.

The covenant establishes a Human Rights Committee (art. 28). States parties must submit reports on the measures they have adopted to give effect to the covenant. Submissions shall be made to the UN Secretary-General, who shall transmit them to the committee. States parties may declare that they recognize the competence of the committee to receive communications that a state party claims that another state party is not fulfilling its obligations under the covenant. In a way analogous to the Convention on the Rights of the Child, under the First Optional Protocol to the

³⁰³ Comm. on the Rights of the Child, Inquiry Concerning Chile Under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Report of the Committee, U.N. Doc. CRC/C/CHL/IR/1 (May 6, 2020); Comité de los Derechos del Niño, Investigación relacionada con Chile en virtud del artículo 13 del Protocolo Facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de comunicaciones: observaciones de Chile, U.N. Doc. CRC/C/CHL/OIR/1 (May 20, 2020). *See also* Nicolás Espejo Yaksic, *Case Note 2018/2: Report of the Investigation in Chile Under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, CRC/C/CHL/INQ/1*, LEIDEN CHILDREN’S OBSERVATORY CASE NOTES, <https://childrensrightsobservatory.nl/case-notes/casenote2018-2> (last visited May 3, 2021).

ICCPR, a state party may declare that it recognizes the competence of the Human Rights Committee to receive communications from individuals subject to its jurisdiction.

Enforcement of the ICCPR is found in article 2(3)(a)-(c), which outlines what each state party to the present treaty shall undertake to ensure compliance with the current order.

Recent jurisprudence under the First Optional Protocol concerning children in migration contexts is somewhat limited. Most jurisprudence on this topic, both old and new, concerns deportation claims and non-refoulement, as opposed to the large number of decisions about age-determination assessments under the CRC Communications Protocol. The jurisprudence suggests that the Human Rights Committee may place less emphasis on procedural safeguards than the Committee on the Rights of the Child and considers children more from a protective stance without necessarily considering the views of the child concerned. In *OA v Denmark*, the Human Rights Committee found that the author's removal would violate the child's rights, but rather than emphasizing safeguards that would enable the child to participate in the process, the committee focuses on the State's failure to take reasonable measures to assess the child's age and to adequately factor in background information.³⁰⁴

B.D.K. v. Canada concerned a deportation order of a mother and her two children to Angola. The author submitted that the deportation would expose her and her children to the risk of persecution by security forces in the Democratic Republic of Congo given family history and would interfere with their right to family life by dividing the family (some of whom would remain in Canada). The Human Rights Committee found no violation; however, the partial dissent by Jose Santos Pais underscores the best interests of the children and finds the State's assessment dissatisfactory. Although the children were 12 and 13 years old at the time, their views are not mentioned in the decision.³⁰⁵ The Human Rights Committee also found no violation in another recent deportation claim in *Hussein v. Denmark*, which concerned the deportation to Italy of a mother and her one-year-old son. The Human Rights Committee found no violation due to its confidence that Denmark would inform the Italian authorities of the mother's removal in order to ensure the mother and her child would be kept together.³⁰⁶ In dissent, Santos Pais argued that returning the child to Italy, where he has never been, would not be in the child's best interests, which should be a primary consideration in all actions.³⁰⁷

³⁰⁴ *O.A. v. Denmark*, Commc'n No. 2770/2106, Human Rights Comm., U.N. Doc. CCPR/C/121/D/2770/2016 (Dec. 11, 2017).

³⁰⁵ *B.D.K. v. Canada*, Commc'n No. 3014/2017, Human Rights Comm., U.N. Doc. CCPR/C/125/D/3041/2017 (June 6, 2019).

³⁰⁶ *Hussein v. Denmark*, Commc'n No. 2734/2016, Human Rights Comm., U.N. Doc. CCPR/C/124/D/2734/2016 (Feb. 14, 2019).

³⁰⁷ *Id.*, annex I (individual opinion of José Manuel Santos Pais, dissenting).

More recently, in the case of *Denny Zhao v. the Netherlands*, the Human Rights Committee concluded that by registering a child's nationality as "unknown" since his birth in 2010, authorities in the Netherlands had effectively left him stateless with no prospect of acquiring a nationality.³⁰⁸ The Human Rights Committee ordered the Netherlands to make full reparation, including to provide the child with adequate compensation and review its decision regarding his nationality taking into account the Human Rights Committee's analysis. In terms of a general remedy, the state is required to take all steps necessary to avoid similar violations in the future, and to ensure that legislation and procedures comply with article 24 of the ICCPR. This is notably less detailed than the general remedies typically provided by the Committee on the Rights of the Child which aim to enhance the procedural rights of children throughout migration procedures. Given the various shortcomings of the administrative authorities in failing to remedy the issue (identified in para. 8.5), training of authorities working in migration could be a further tool to prevent similar violations in future.

Although the value of treaty body decisions to bring individual justice has been questioned, their ability to enhance general implementation of human rights is considerable. The Human Rights Committee has established precedents that have served as advocacy tools for tackling systemic violations and, in conjunction with reporting procedures and general comments, have eroded the acceptability of certain practices in states. Given this, the Human Rights Committee could devote more time to formulating general remedies that can potentially promote access to justice for children in the long run.

The jurisprudence discussed here suggests that the Human Rights Committee does not consider the child's position (for example, their views or procedural rights) in its decisions to the same extent as the Committee on the Rights of the Child. Whether this makes any practical difference to the ultimate outcome or the remedies required of the state in question lacks thorough research. Nonetheless, the optional protocol (ratified by 116 states) remains a valuable tool for those wishing to bring complaints in countries that have not ratified the CRC Communications Protocol.

c. International Covenant on Economic, Social and Cultural Rights and Protocol

There are no listed individual remedies under the International Covenant on Economic, Social and Cultural Rights.³⁰⁹ The covenant affords an individual the rights to "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the

³⁰⁸ *Zhao v. The Netherlands*, Commc'n No. 2918/2016, Human Rights Comm., U.N. Doc. CCPR/C/130/D/2918/2016 (Dec. 28, 2020).

³⁰⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. The covenant has 171 states parties. See *Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4 (last visited May 3, 2021).

continuous improvement of living conditions.” Under article 2(1), states agree to “to take steps, individually and through international assistance and cooperation,” and to undertake these agreements and “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The covenant requires states parties to “take appropriate steps to ensure the realization of these rights, recognizing to this effect the essential importance of international cooperation based on free consent.” States parties to the covenant agree to take these steps to provide resources needed for an adequate standard of living and to move as quickly as possible to provide these to the persons within their borders. States must respect human rights, protect these rights, and fulfill these rights by taking actions against violations by third parties such as individuals or corporations. In addition, all states parties are obliged to submit regular reports to the Committee on Economic, Social and Cultural Rights, set up by the Economic and Social Council to monitor implementation of the covenant. States parties must report initially within two years of accepting the covenant and every five years thereafter. The committee examines each report and addresses its concerns and recommendations to the state party in the form of “concluding observations.”

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the U.N. General Assembly in 2008.³¹⁰ Article 2 of the optional protocol outlines that communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the covenant by that state party. There is no specific remedy listed under the optional protocol, but enforcement mechanisms can be provided through recommendations to the Committee on Economic, Social and Cultural Rights. The optional protocol also establishes a mechanism for inter-state communications (articles 10 and ff.)

d. International Court of Justice

There are 193 state parties to the Statute of the International Court of Justice, and they are all U.N. members as well. There are no listed remedies for individuals under the statute. As established in article 1 of the statute, the International Court of Justice is established by the U.N. Charter as the principal judicial organ of the United Nations. The court consists of fifteen members, no two of whom may be nationals of the same state. The International Court of Justice is a continuing and autonomous body that is permanently in session.

³¹⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted Dec. 10, 2008, in UN General Assembly, Res. 63/117, U.N. Doc. A/RES/63/117 (Mar. 5, 2009). The optional protocol has 26 states parties. See *Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3-a&chapter=4&clang=_en (last visited May 3, 2021).

Non-U.N. members can also become parties to the statute. Because the International Court of Justice can only deal with disputes between states, litigation in which individuals or non-governmental organizations wish to invoke international law obligations as a cause of action cannot be brought to the court. One of the contributory elements to a less than speedy service by the court is the fact that its jurisdiction is based on the consent of the parties. The various remedies which have been sought by states from the court have included mere declarations of a breach, the designation of a boundary line, restitution, the award of damages, and orders of specific performance.

e. 1951 Refugee Convention and Protocol

The 1951 Refugee Convention³¹¹ establishes who is considered a refugee and who may be granted asylum, and how states who host refugees must treat and support asylum seekers. For example, under article 33, no refugee shall be subject to refoulement or movement to a “frontier” that would discriminate against the refugee by his race, color, or creed. States parties (or “Contracting Parties”) must offer their cooperation with the Office of the U.N. High Commissioner for Refugees.

The 1967 Refugee Protocol³¹² lists no remedy but requires states parties to cooperate with the Office of the U.N. High Commissioner for Refugees. The Refugee Protocol allows state parties to submit communications, although individuals are unable to raise concerns regarding violations of their individual rights. The Refugee Convention is a post-World War II instrument and was initially limited to the scope of persons fleeing from events occurring before January 1, 1959, and within the boundaries of Europe. This supplemental treaty to the Refugee Convention rid the time frame of refugees being recognized as such. Additionally, it also removes the geographical limits of the 1951 convention. The protocol reiterates that state parties’ claims against each other for issues pertaining to refugees may be referred to the International Court of Justice if they cannot be settled by other means.

The Office of the U.N. High Commissioner for Refugees periodically updates its *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*.³¹³ This document sets forth authoritative criteria for determining refugee status as

³¹¹ Convention relating to the Status of Refugees, *supra* note 9. The convention has 146 states parties. See *Multilateral Treaties Deposited with the Secretary-General, Chapter V: Refugees and Stateless Persons*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (last visited May 3, 2021).

³¹² Protocol relating to the Status of Refugees, *supra* note 10. The protocol has 147 states parties. See *Multilateral Treaties Deposited with the Secretary-General, Chapter V: Refugees and Stateless Persons*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (last visited May 3, 2021).

³¹³ UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (2019) [HCR/1P/4/ENG/REV.4].

well as guidance on the treatment of refugees. The U.N. High Commissioner for Refugees has always pleaded for a generous asylum policy in accordance with the spirit of the Universal Declaration of Human Rights.

f. International Criminal Court

The Rome Statute³¹⁴ is the treaty that created the International Criminal Court, and 123 States are parties to the treaty. Claims may be brought against individuals who have committed four serious crimes over which the court has jurisdiction: genocide, crimes against humanity, war crimes, and the crime of aggression. Under the treaty there are remedies for compensation, reparations, and restitution, including victim trust funds paid for by the violator. Typically, the court only has jurisdiction over states parties to the Rome Statute and individuals thereof, but the court has recently expanded their reach to include cases where refugees have fled from a non-signatory state to a signatory state. Pursuant to article 15 of the Rome Statute, any individual, group, or organization may submit information about violators of the four aforementioned crimes to the Office of the Prosecutor of the International Criminal Court, and the Office of the Prosecutor may bring the claim against the individual.

g. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination³¹⁵ commits its members to the elimination of racism. The convention encourages members to outlaw hate speech and criminalize participation in racist groups. It is monitored by the Committee on the Elimination of Racial Discrimination.

There is no specific remedy listed under the convention. State parties may bring action against another state party to the committee if the “State Party is not giving effect to the provisions of this Convention.” There is a connection between racism and abuse of refugees, and children seeking asylum are able to use this relationship in order to enforce their rights under the convention. Complaints are primarily brought to the committee by the state, though article 14(1) stipulates that a state party may declare that it recognizes the competence of the committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that state party of any of the rights set forth in the convention. The committee may, in principle, only consider communications from a petitioner if the petitioner has exhausted all available domestic remedies.

³¹⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

³¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. The convention has 182 states parties. *See Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en (last visited May 3, 2020).

h. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

There is no listed remedy within the text of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³¹⁶ States parties may send communications to the Committee against Torture, set up under the convention. A state party to the convention may declare under article 22 that it recognizes the competence of the committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the convention. Only 28 states parties have made the necessary declaration under article 22 of the convention.

The committee has found that it would violate the convention to “return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”³¹⁷ The committee has also found, in the context of a female adult, that her deportation to Guinea would violate the convention given the high risk she would be forced to undergo female genital mutilation.³¹⁸

i. International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families

Under article 76 of the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers Convention),³¹⁹ when a state recognizes that another state is not abiding by or fulfilling its obligations to the convention, it can submit a complaint to the Committee on Migrant Workers (formed and established per articles 72-75). After deliberation, the committee will decide on a remedy.

Limitations to this remedy include that the committee can only receive communications concerning a state party that has recognized the competence of the committee. Additionally, the committee, per the procedure outlined in article 76, may only consider the issue after all domestic remedies have been exhausted.

³¹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. There are 171 states parties to the Convention Against Torture. *See Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (last visited May 3, 2020).

³¹⁷ *Mutumbo v. Switzerland*, Commc’n No. 13/1993, Comm. against Torture, in U.N. General Assembly, Report of the Committee Against Torture, U.N. Doc. A/49/44, at 45 (1994).

³¹⁸ *F.B. v The Netherlands*, Commc’n No. 580/2014, Comm. against Torture, U.N. Doc. CAT/C/56/D/580/2014 (Dec. 15, 2015).

³¹⁹ Migrant Workers Convention, *supra* note 11. There are 56 states parties to the convention. *See Multilateral Treaties Deposited with the Secretary-General, Chapter IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en (last visited May 3, 2020).

Under article 77, an individual may bring a complaint to the committee establishing that a state party has violated their rights in accordance with the convention.

Limitations include that there are only 55 states that have ratified the treaty; thus, the convention is minimally effective as the states who are not signatories are not bound to the convention. For a child to try to implement rights or complain about violations of the convention, the parties must be a part of the small group of parties to the convention. Additional limitations include that the committee shall not consider any communication from an individual under the present article that is anonymous or which is considered to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present convention.

Furthermore, the committee shall not hear complaints that have already been examined under another procedure of international investigation and the individual will have to have exhausted all domestic remedies.

The time limitations are prevalent with the procedure established by this convention. Per article 77(4), “the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.” Six months is a very long period of time for children and families in migration to wait for a remedy.

2. Regional Avenues to Access Justice for Children

a. Africa

Several treaties, notable the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child (the African Children’s Charter), are applicable to all or nearly all 54 countries on the continent. A specialized treaty body, the African Committee of Experts on the Rights and Welfare of the Child, issues authoritative guidance on the binding content of the African Children’s Charter and is also empowered to decide individual cases arising under the charter. Its authority to enter into “amicable settlements” to resolve cases offers opportunities for creative and potentially effective resolution of cases, and it has begun to exercise that authority to positive effect.

In addition to these continent-wide instruments and bodies, several regional bodies have developed regional instruments relevant to the protection of children’s rights. The Economic Community of West African States (ECOWAS) has perhaps the most well-developed of these regional children’s rights protections, and its Community Court of Justice has issued landmark

decisions on access to education and other human rights concerns³²⁰—though none to date on children in the context of migration.

i. African Charter on Human and Peoples’ Rights

There is a right to a judicial remedy, a right to seek and obtain asylum, a right to the recovery of property and adequate compensation under the African Charter on Human and People’s Rights,³²¹ which has 54 states parties. Individuals and states may bring actions against States for harm done. These actions are submitted and decided by the African Commission on Human and Peoples’ Rights established within the Organisation of African Unity. Every individual has the right to appeal/judicial remedy, to seek and obtain asylum, recovery of property and adequate compensation. Article 7 holds that every individual shall have the right to have his cause heard. Article 12(3) states every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. Under article 18, the family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and morals. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community. Article 50 states that the commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the commission that the procedure of achieving these remedies would be unduly prolonged.

i. African Charter on the Rights and Welfare of the Child

There are no specific remedies provided within the African Charter on the Rights and Welfare of the Child,³²² but in the articles or rights guaranteed to children there is an obligation set forth in each article for member states to undertake and pursue the full implementation of rights given. Groups, NGOs, States, and other “institutions recognized” are allowed to bring issues to the African Union. Articles 15 and 16 state they will provide appropriate penalties or other sanctions to ensure the effective enforcement of these articles.

An African Committee of Experts on the Rights and Welfare of the Child has been established within the African Union to promote the rights and the welfare of the child. The committee draws inspiration from the provisions of the Universal Declaration on Human Rights, the Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

³²⁰ See, e.g., Socio-Economic Rights and Accountability Project (SERAP) v. Fed. Rep. of Nigeria & Universal Basic Educ. Comm’n, No. ECW/CCJ/APP/0808 (ECOWAS Community Ct. Justice Oct. 27, 2009), https://www.escri-net.org/sites/default/files/SERAP_v_Nigeria.pdf.

³²¹ African Charter on Human and People’s Rights, June 27, 1981, 1520 U.N.T.S. 217.

³²² African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49, https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf [hereinafter African Children’s Charter].

The communications procedure under the African Children’s Charter is a fundamental element of the protective mandate of the African Committee.³²³ Article 44 provides in part that the “Committee may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations”³²⁴ In respect of investigations, it provides that the

Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the State Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.³²⁵

To date the African Committee has received 16 communications of which ten are finalized.³²⁶ Some examples include the following:

- *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v Kenya*, dealing with the question of the right of the child to acquire a nationality and not be discriminated against in accessing services on the basis of nationality.³²⁷
- *Hunsungule and others (on behalf of children in Northern Uganda) v Uganda*, finding a violation in respect of the prohibition on recruitment and use of children in armed conflict.³²⁸
- *Centre for Human Rights (University of Pretoria) and La Recontre Africaine sur la Defense des Droits de l’Homme (Senegal) v Senegal*, finding the Government of Senegal

³²³ It is considered so fundamental that the African Committee has declared reservations entered into these provisions as being incompatible with the object and purpose of the Charter. See Benyam Dawit Mezmur, *The African Children’s Charter @ 30: A Distinction Without a Difference?* 28 INT’L J. CHILD. RTS. 693, 704-705 (2020).

³²⁴ African Children’s Charter, *supra* note 322, art. 44(1).

³²⁵ *Id.* art. 45(1).

³²⁶ African Committee of Experts on the Rights and Welfare of the Child, *Table of Communications*, <https://www.acerwc.africa/table-of-communications/> (last visited May 3, 2021).

³²⁷ Inst. for Human Rights & Development in Africa (IHRDA) & Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. Kenya, Commc’n No. Com/002/2009, Afr. Comm. of Experts on the Rights and Welfare of the Child, Decision No. 002/Com/002/2009 (Mar. 22, 2011), <https://acerwc.africa/wp-content/uploads/2018/07/ACERWC-Decision-on-the-Communication-submitted-by-IRDHA-on-behalf-of-Children-of-Nubian-Descent-Vs-The-Government-of-Kenya-1.pdf>.

³²⁸ Hunsungule & Others (on Behalf of Children in Northern Uganda) v. Uganda, Commc’n No. 1/2005, Afr. Comm. of Experts on the Rights and Welfare of the Child, Decision No. 001/Com/001/2009 (Apr. 15-19, 2013), <https://acerwc.africa/wp-content/uploads/2018/07/decision-on-uganda-comment-edited.pdf>. See also Benyam Dawit Mezmur, *Happy 18th Birthday to the African Children’s Rights Charter: Not Counting Its Days But Making Its Days Count*, 1 AFR. HUM. RTS. Y.B. 143 (2017).

in violation of protecting children against enforced begging by religious teachers (*Marabouts*).³²⁹

- *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, grappling with the issue of contemporary forms of slavery, and the responsibility of the Government to address it.³³⁰

The African Committee also has the opportunity to finalize communications by facilitating amicable settlements between the parties.³³¹ To date the committee has facilitated two amicable settlements. In the first one, *Institute for Human Rights and Development in Africa (IHRDA) v Malawi*,³³² section 23(5) of the Malawi Constitution, which provides that “for the purposes of this section, children shall be persons under sixteen years of age,” was challenged. This provision was subsequently amended by complying with article 2 of the African Children’s Charter by raising the definition of a child to 18 years of age.³³³ More recently, in November 2020, an amicable settlement was reached in respect of the communication in *Project Expedite Justice et al vs The Republic of the Sudan*, which dealt with violations of the rights of the child in the context of the armed conflict in Blue Nile State and South Kordofan in the Sudan.³³⁴

As with other treaty bodies, the decisions from the African Committee are not binding.³³⁵

Fortunately, however, the committee has so far seen a lot of goodwill on the part of states to comply with its decisions. A similar sentiment can be shared in respect of investigative missions, where all state parties that have been approached for investigative missions have accepted or

³²⁹ Ctr. for Human Rights (Univ. of Pretoria) & La Rencontre Africaine pour la Défense des Droits de l’Homme (Senegal) v. Senegal, Commc’n 003/Com/001/2012, Afr. Comm. of Experts on the Rights and Welfare of the Child, Decision No. 003/Com/001/2012 (Apr. 15, 2014), https://www.escri-net.org/sites/default/files/caselaw/decision_on_the_communication.pdf.

³³⁰ Minority Rights Group Int’l & SOS-Esclaves on Behalf of Said Ould Salem & Yarg Ould Salem v. Mauritania, Commc’n No. 007/Com/003/2015, Afr. Comm. of Experts on the Rights and Welfare of the Child, Decision No. 003/2017, <https://acerwc.africa/wp-content/uploads/2018/13/ACERWC%20Decision%20Final%20ON%20Mauritania.pdf>.

³³¹ For a detailed discussion, see Benyam Dawit Mezmur, *No Second Chance for First Impressions: The First Amicable Settlement Under the African Children’s Charter*, 19 AFR. HUM. RTS. L.J. 62 (2019).

³³² Inst. for Human Rights and Development in Africa v. Malawi, Commc’n No. 004/Com/001/2014, Afr. Comm. of Experts on the Rights and Welfare of the Child (received Oct. 29, 2014). See also Brice Martial Djeugoue, *IHRDA on Behalf of Malawian Children v. the Republic of Malawi*, Dec. 8, 2015, <https://www.ihrda.org/2015/12/ihrda-on-behalf-of-malawian-children-v-the-republic-of-malawi/>.

³³³ M. Yadessa, *Malawi Amends Its Constitution to Comply with Article 2 of the Charter*, 1 ACERWC TRIB. 11 (2017).

³³⁴ Project Expedite Justice, *AU Children’s Committee Approves Settlement to Benefit Sudanese Children*, Feb. 24, 2021, <https://www.projectexpeditejustice.org/2021/02/24/au-childrens-committee-approves-settlement-to-benefit-sudanese-children/>.

³³⁵ Benyam Dawit Mezmur & Mbuton Ulrike Kahbila, *Follow-Up as a “Choice-Less Choice”: Towards Improving the Implementation of Decisions on Communications of the African Children’s Committee*, 2 AFR. HUM. RTS. Y.B. 200, 204.

actually invited the committee to undertake a mission.³³⁶ Since 2014, an active follow-up mechanism for implementation of decisions is undertaken making the procedure relatively effective. Moreover, while the procedure has not yet been used for cases involving the rights of children in migration, the generous standing criteria applied, the mandate to deal with “class action” type of cases involving large number of victims, the opportunity to listen to children directly, and the well-established practice of accompanying communications within *situ* investigations are some of the appealing features of the procedure for the purposes of addressing violations.

The committee has also conducted a study on children in the context of migration in Africa.³³⁷ The findings of this study shed light on the main challenges faced by children on the move within Africa, including discrimination, arbitrary arrests, detention and deportation, child abuse and torture, loss of identity, name and nationality, lack of access to education and economic opportunities, child labor, trafficking, smuggling and exploitation, violation of the right to a family, parental care and protection, and denial of health services. In particular, the study found that most of the fundamental rights of children on the move, including their best interests, are either not protected or are tacitly abused. For instance, the study indicates that there are situations where children on the move are returned to their countries of origin despite the threats they may face again and which triggered their movement in the first place. In sending them back to their countries of origin, the best interest of the child is often disregarded and the reasons why they are migrating is often not explored.

The study develops a number of recommendations, including that border control measures should not include detention of children and children in migration should not be subjected to discrimination or torture; that pursuant to the principle of non-refoulement, transit, and destination countries should ensure that children are not returned or taken to a country where their rights may be violated, and that children in migration should not be returned or removed from a transit or destination country as a punitive measure; that states of origin, transit, and destination should strengthen measures to combat smuggling and trafficking particularly in children; that greater coordination within the AU-recognised regional economic communities (RECs) is needed; and that member states should treat the situation of children on the move as a child protection issue.

³³⁶ *Id.*

³³⁷ AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD, MAPPING CHILDREN ON THE MOVE WITHIN AFRICA (2018), https://www.acerwc.africa/wp-content/uploads/2019/03/ACERWC_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-_A4_Website-version.pdf.

ii. Relevant Treaties of the Economic Community of West African States (ECOWAS)

The 15 members of the Economic Community of West African States (ECOWAS) are Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

The ECOWAS Treaty, adopted in Lagos in 1975 and revised in 1993, guarantees for citizens of the signatory countries freedom of movement and residence and establishment within the Community.³³⁸ The treaty exempts the citizens from visa requirements (art. 59) and enshrines their right to employment and to undertake commercial and industrial activities in the countries of the community. Articles 3(2)(d)(iii), 32(1), and 55 of the revised treaty recognize the need to facilitate, and indeed encourage, international migration in the region. Migration is thus regarded as beneficial, as it allows for the optimal utilization of labor force at the intra-regional level.

The ECOWAS Protocol on Free Movement is a facilitator of intra-regional mobility,³³⁹ while the ECOWAS Common Approach on Migration proffers solutions to migration challenges.³⁴⁰ As a result of political and social instability, limited opportunities for educational advancement and employment as well as the harsh consequences of poverty, there is a massive migration of young people from rural and urban communities in West Africa in search of better living conditions in the cities and countries of the western world. One migratory trend in West Africa is the movement of vulnerable children attending religious-based schools within the region under the guise of acquiring religious knowledge, but who eventually end up as street children.

The ECOWAS Common Approach on Migration, which was adopted by ECOWAS heads of state and government in 2008, provides the framework for addressing migration and development issues in West Africa on the basis of six main axes, namely promoting free movement within the ECOWAS zone; promoting the management of regular migration; policy harmonization; controlling irregular migration and human trafficking; promoting the rights of migrants, asylum seekers and refugees; and actions to take into account the gender and migration dimension.

³³⁸ Treaty Establishing the Economic Community of West African States, May 28, 1975, 1010 U.N.T.S. 17; Revised Treaty of the Economic Community of West African States, July 24, 1993, 2373 U.N.T.S. 233.

³³⁹ Protocol relating to Free Movement of Persons, Residence and Establishment, May 1, 1979, 1 O.J. ECOWAS 3, <https://www.refworld.org/docid/492187502.html> [A/P 1/5/79 Protocol]. See also Aderanti Adepoju, Alistair Boulton and Mariah Levin, *Promoting Integration Through Mobility: Free Movement Under ECOWAS*, <https://www.unhcr.org/49e479c811.pdf> (last viewed May 3, 2021).

³⁴⁰ ECOWAS COMM'N, ECOWAS COMMON APPROACH ON MIGRATION (2008), <https://www.unhcr.org/49e47c8f11.pdf>.

The ECOWAS Gender and Migration Framework and Plan of Action is a complement to the ECOWAS Common Approach on Migration.³⁴¹

iii. Inter-Governmental Authority on Development Region

The Inter-Governmental Authority on Development (IGAD) region, which consists of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, and Uganda, launched the IGAD-Migration Action Plan (MAP) to operationalize the IGAD Regional Migration Policy Framework (IGAD-RMPF) 2015-2020.³⁴² The IGAD members seek to focus on efforts that help find ways to enhance the benefits of migration for the development of the region, especially through the development of “a common strategy for implementing migration policy among IGAD Member States (MSs) that reflects harmonization of laws, standards, procedures, information, dissemination and sharing; compilation of statistics; production of documents, and efficient use of resources.”³⁴³ These efforts are welcome because they have a bearing on the improvement of coordination of regional policies on the migration of children.

b. Europe

i. European Convention on Human Rights (47 states parties)

Under the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights) there is a potential for non-refoulement rights, an enforceable right to compensation, and an effective remedy against officials. Individuals, states, organizations, groups of individuals, and any “High Contracting Party” (that is, a state party to the convention) may refer to the European Court of Human Rights an alleged breach of the provisions of the convention and the protocols thereto by another High Contracting Party. Anyone, including a child or group of children, can bring a claim to the European Court provided they have been personally affected by the violation, and meet the admissibility criteria (arts. 34 and 35). The role of the court is limited to considering compliance with the convention, as opposed to acting as a final court of appeal. Individuals are entitled to trial within a reasonable time or to release pending trial. Everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. Under article 13, anyone whose rights and freedoms as set

³⁴¹ ECOWAS COMM’N, GENDER AND MIGRATION FRAMEWORK AND PLAN OF ACTION 2015-2020, https://www.ccdg.ecowas.int/wp-content/uploads/Plan-of-Action_Gender-and-Migration.pdf (last visited May 3, 2021).

³⁴² INTERGOVERNMENTAL AUTH. ON DEVEL., IGAD MIGRATION ACTION PLAN, 2015-2020 (2014), https://www.iom.int/sites/default/files/our_work/ICP/RCP/2018/igad/igadmigrationactionplan2015-2020.pdf.

³⁴³ INTERGOVERNMENTAL AUTH. ON DEVEL., IGAD REGIONAL MIGRATION POLICY FRAMEWORK 53 (2012), 53, <https://www.iom.int/sites/default/files/icp/igad-regional-migration-policy-framework1.pdf>.

forth in the European Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The European Court has established that where a state takes action to prevent foreign nationals from entering its territory or to return them to another state, such conduct constitutes an exercise of jurisdiction that engages the responsibility of the state in question. Construing the obligations of the state in this manner is necessary in order to avoid depriving the convention rights of effectiveness and that such an interpretation must be applied irrespective of the border control methods employed by the state. The state must grant access to its territory to children at its border who are subject to its authority or effective control, as a prerequisite to the initial assessment process. Children should have the opportunity to present meaningful objections to their potential expulsion, as required by the principle of non-refoulement and the prohibition of collective expulsions.

ii. Court of Justice of the European Union

The jurisprudence of the Court of Justice of the European Union (CJEU) has contributed towards further protection of the rights of children. Unlike the European Court of Human Rights, the CJEU is not accessible to individuals and is, therefore, not a mechanism through which children can seek access to justice directly. The role of the CJEU is to interpret E.U. law to make sure it is applied in the same way in all E.U. countries (it also settles legal disputes between national governments and E.U. institutions). In this sense, its focus is more on harmonizing standards than creating them. The cases brought before the CJEU are often brought by domestic courts seeking a preliminary ruling on a matter of E.U. law. In these cases, the national courts act as the main gatekeepers of individual access to E.U.-level justice, in that they retain the authority to initiate a preliminary reference to the CJEU guidance on how to interpret the E.U. provision at hand.

The CJEU's jurisprudence relating to migration and children is usually connected to article 24 of the Charter of Fundamental Rights of the European Union, which requires 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" (article 24(2)). Despite this connection, it has been observed that CJEU decisions making explicit reference to the best interests of the child – or the Convention on the Rights of the Child – are rare (as contrasted with the European Court of Human Rights, which regularly reflects on the Convention on the Rights of the Child and related standard and instruments, such as general comments, in its decisions). However, this trend appears to be changing in recent decisions that underscore the importance of the best interests principle in the migration context.

A recent ruling by the CJEU concerns a decision by Dutch authorities that a Guinean child was not eligible for a residence permit due to the fact that he was over 15 years of age. In its decision, the CJEU underscores the obligation of E.U. member states to apply the best interests principle at all stages of proceedings, to all children, regardless of their age. While age is a factor to be considered in best interest assessments, it cannot be the only factor taken into account in order to ascertain whether there are adequate reception facilities in a State of return and subsequently make a decision to return. The CJEU has also recently ruled that E.U. member states are required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a child but his or her father.

Other recent decisions by the CJEU include the case of *O, S & L* concerning family reunification, wherein the Court held Member States may not apply the implementation of an instrument of E.U. law in a way that disregards fundamental rights such as the right to respect for family life and best interests of the child.³⁴⁴ The CJEU has also established that the right to family reunification of unaccompanied children may not be made dependent on the moment at which E.U. member states adopt the decision to recognize the applicant as a refugee.

Chavez-Vilchez concerned eight different families with children of E.U. citizenship (obtained through their fathers). The fathers did not take real parental responsibility of the children; however, the mothers were from outside the European Union and without E.U. citizenship. The CJEU was asked to consider whether the mothers of children with E.U. citizenship could stay in the European Union given that denying their residence would force the child to leave E.U. territory as well. The court held that it should be determined whether the parent in question is the actual caregiver and to what extent the child is dependent on that parent, stressing that authorities must take into account the right to family life (art. 7 of the Charter of Fundamental Rights) together with the best interests of the child (art. 24(2)).³⁴⁵

The CJEU's ingenuity in extending interpretation of E.U. laws in a way that is favorable to children has been celebrated. However, explicit references to the Convention on the Rights of the Child, coupled with relevant general comments, could supply scaffolding to support such arguments.

³⁴⁴ Cases C-356/11 & C-357/11, *O and S v. Maahanmuuttovirasto, Maahanmuuttovirasto v. L*, ECLI:EU:C:2012:776 (CJEU Dec. 6, 2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CA0356&rid=1>.

³⁴⁵ Case C-133/15, *Chavez-Vilchez & Others*, ECLI:EU:C:2017:354 (CJEU May 10, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0133&from=en>.

iii. European Committee of Social Rights

The European Committee of Social Rights (established under the auspices of the Council of Europe) is designed to complement the European Court of Human Rights and oversees the protection of economic and social rights in most of Europe. It is made up of 15 independent experts who oversees compliance of national law and practice with the 1961 European Social Charter either through a collective complaints procedure or a national reporting procedure. Forty-three of the 47 member states of Europe have ratified the European Social Charter, and currently 15 have accepted the jurisdiction of the committee to hear complaints through its collective complaints procedure. States are able to decide which provisions of the charter to accept. In terms of promoting the legal empowerment of children, the charter requires states to promote the legal (as well as social and economic) development of the family (art. 16), and article 19(1) requires states maintain “adequate and free services” and to ensure that migrant workers and their families receive accurate information relating to emigration and immigration.

The collective (as opposed to individual) complaints procedure is found in the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, which entered into force in 1998. It enables institutional complainants, such as nongovernmental organizations and social partners to directly apply to the European Committee of Social Rights for rulings in those countries that have accepted the relevant provisions of the charter ratified the procedure on broader policy matters. Although its decisions are not directly enforceable, like the decisions of U.N. treaty bodies, they can provide the basis for positive developments in rights compliance through legislation and case law at national level, as the following cases illustrate.

In a case brought against Greece in 2008, the International Commission of Jurists claimed the situation in Greece breached the rights of children to protection, health, social and medical assistance, education, and housing. Allegations included that children are subject to deleterious conditions for lengthy periods as a result of serious shortcomings in reception and care. The European Committee of Social Rights responded by recommending Greece implement immediate measures to remedy these violations including the release of unaccompanied children from “protective custody.”

In *Defence for Children International (DCI) v Belgium*, the European Committee of Social Rights found a violation of the charter (including the right of children and young persons to appropriate social, legal and economic protection) because of restrictions to resources, including housing and medical assistance to undocumented migrant children. In its decision, which refers to the Convention on the Rights of the Child, the committee pointed out a heightened risk of impairment of fundamental rights and therefore a heightened duty on the part of states when conditions of “vulnerability and limited autonomy” are combined (for instance, in the case of “migrant children unlawfully present in a country”), especially when these children are unaccompanied (paragraph 37). The committee found that both foreign children unlawfully

resident in a contracting state should be considered rights holders under the charter, so as not to “expos[e] the children and young persons in question to serious threats to their rights to life, health and psychological and physical integrity and to the preservation of their human dignity” which would violate article 17 of the charter. The committee noted that if the enforcement of a right is particularly complex or expensive, steps must be taken in order for states to realize the right within a reasonable time, with measurable progress, while prioritizing the needs of the most vulnerable.³⁴⁶

In a case against the Netherlands, also involving DCI as complainant, DCI alleged that Dutch legislation deprives children residing illegally in the Netherlands of the right to housing (article 31) and consequently of a series of additional rights. The European Committee of Social Rights concluded that the charter obliges states parties to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction, stating that, any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children.³⁴⁷ In a case against France, the committee ruled that individuals who have not reached the age of majority, including unaccompanied children, must be provided with free medical care.³⁴⁸

Although the collective complaints procedure is advantageous from the perspective of a strategic litigant seeking systemic change, the fact that individual complaints are not possible is potentially problematic with regards to ensuring children are heard in proceedings affecting them, and the European Committee of Social Rights does not have the mandate to hear testimony or conduct interviews with affected individuals, including children. Given that it is not designed to provide individual remedies, its ability to provide redress to individual complaints has also been questioned. Nonetheless, the collective complaints mechanism has enabled the committee to address critical issues concerning the economic and social rights of children in migration contexts, as illustrated by the above cases.

iv. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is not a complaints mechanism but plays an important role in monitoring detention facilities, including immigration detention facilities holding children. The CPT visits places of detention on an ad-hoc or periodic basis and assesses how those deprived of their

³⁴⁶ Defence for Children Int’l v. Belgium, Collective Complaint No. 69/2011, ¶ 38, European Comm. of Social Rights, Oct. 23, 2012.

³⁴⁷ Defence for Children Int’l v. Netherlands, Collective Complaint No. 47/2008, European Comm. of Social Rights, Oct. 20, 2009.

³⁴⁸ European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, European Comm. of Social Rights, Jan. 24, 2018.

liberty are treated with a preview to preventing ill-treatment. The CPT then produces a report of its visit and the State's response are published, at the state's discretion. This can provide an important source of information about the reality of detention of children in migration in Council of Europe member states. A number of standards have emerged from the CPT's reports, which have contributed to international human rights jurisprudence concerning the treatment of children in detention. The CPT has also produced a fact sheet on immigration detention. Although the CPT does not process individual complaints, the CPT can raise individual cases with the authorities (with the consent of the person concerned) and request that an investigation into allegations of ill-treatment be carried out by the competent investigative body.

The CPT has highlighted that complaints mechanisms are essential to protect children in detention from harm and according to the CPT, detainees, including children, should "have avenues of complaint open to them, internally and externally, and be entitled to confidential access to an appropriate complaints authority." There is potential to promote the role of the CPT further in this area by ensuring that it operates in a child-friendly manner and by using its authority to raise the profile of detention of children in migration through a targeted visit strategy and the adoption of a comprehensive body of standards on child detention.

c. Americas

The Inter-American system of human rights protection is well-developed, robust, and innovative. In addition to general human rights treaties—the American Convention of Human Rights and the Protocol of San Salvador, specialized regional treaties address torture, violence against women and girls, enforced disappearances, and discrimination against persons with disabilities. Its standing human rights court, the Inter-American Court of Human Rights, has issued landmark decisions on the rights of children, including a comprehensive advisory opinion on the rights of children in migration. The court routinely orders provisional measures, takes a broad view of the remedies it can order, and has the power to monitor compliance with its judgments. The separate Inter-American Commission on Human Rights not only reaches decisions on individual petitions, channeling some to the Inter-American Court for its resolution, but also carries out ongoing monitoring of human rights in Organization of American States (OAS) member states and prepares thematic reports on selected issues. The Inter-American system, therefore, offers a wide range of remedies for human rights violations committed against children in the context of migration.

i. American Convention on Human Rights

Article 25 of the American Convention on Human Rights states, "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been

committed by persons acting in the course of their official duties.”³⁴⁹ Though the state parties are then given the authority to determine whom the competent authority is provided for by the legal system of the state and to develop the possibilities of judicial remedies. Article 19 provides directly for the rights of the child, holding that every child has the right to the measures of protection required by their condition as a minor on the part of the child’s family, society, and the state.

Section 4 of this convention outlines the procedure to hear human rights violations of this convention submitted to the Inter-American Commission on Human Rights established in Chapter 7 of the convention. Per article 41(e)-(f), this commission functions “to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request” and “to take action on petitions and other communications pursuant to its authority established in Articles 44-51 of the Convention.” The Inter-American Commission established the view that, “a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime,” through a case involving the potential execution of a man that committed the crimes when he was 16. The commission looked at the practices of the global community in order to determine that the United States would become “increasingly isolated” if it chose to continue with this practice.

Article 45 examines how a state may bring an action against another state through this convention:

“Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.”

Limitations include that “communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.” In understanding the inability for non-state parties to bring forward communications, it is concerning that several countries that are significant receiving countries of migrants, with alleged human rights violations, are not parties to the convention.

³⁴⁹ American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123.

Furthermore, article 47 lists when the commission may not hear a complaint, which would be a limitation on a states' ability to bring an action against another state.

ii. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) 17 States are Parties

There are no remedies within the text of this protocol. The Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social, and cultural rights established in the protocol in all or some of the states parties, which it may include in its annual report to the OAS General Assembly or in a special report, whichever it considers more appropriate.

If the exercise of the rights set forth in the protocol is not already guaranteed by legislative or other provisions, the states parties undertake to adopt, in accordance with their constitutional processes and the provisions of this protocol, such legislative or other measures as may be necessary for making those rights a reality. The rights ensured under this protocol include the right to work, the right to health, the right to education, and rights to the formation and protection of families, among others. Article 16 provides specifically for the protection of children, holding that every child, regardless of parentage, has the right to the protection that their status as a minor requires from their family, society and the state.

iii. Inter-American Court of Human Rights

The Inter-American Court of Human Rights decides cases to resolve specific disputes and also issues advisory opinions on issues of general concern. In the exercise of each of these functions, the Inter-American Court has developed detailed jurisprudence on the rights of children in migration.

The power to hear individual (or “contentious”) cases has two important limitations. First, the Inter-American Court may only decide cases brought against those OAS member states that have accepted the court’s contentious jurisdiction. Of the 35 OAS member states, 24 have ratified the American Convention on Human Rights,³⁵⁰ and of those, 20 have accepted the contentious jurisdiction of the Inter-American Court. Second, the Inter-American Court may only consider

³⁵⁰ Compare Organization of American States (OAS), *Member States*, http://www.oas.org/en/member_states/default.asp (last visited May 3, 2021), with OAS, *Multilateral Treaties: American Convention on Human Rights*, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm (last visited May 3, 2021). Trinidad and Tobago was a state party to the American Convention until 1999, when its denunciation of the convention took effect. Venezuela denounced the convention in 2012, but the OAS recognized the instrument of ratification submitted by Juan Guaidó on behalf of Venezuela in 2019. See generally La denuncia de la Convención Americana sobre Derechos Humanos y sus efectos sobre las obligaciones estatales en materia de derechos humanos, Opinión Consultativa OC-26/20, Inter-Am. Ct. H.R. (ser A.) No. 26 (Nov. 9, 2020).

cases after they are heard by the Inter-American Commission on Human Rights, and then only if the commission or a state party refers the case to the court.³⁵¹

That said, once it establishes its jurisdiction in a contentious case, the Inter-American Court can make broad use of its powers to order provisional measures, including requiring states to refrain from carrying out deportations, allow individuals to return after deportation, reunify family members separated by deportation, obtain information about relatives' whereabouts, and update the court periodically on measures taken to comply with its orders.³⁵² If it finds that a violation has been committed, it can award pecuniary damages; compensation for distress, suffering, "tampering with the victim's core values,"³⁵³ and other changes in a person's life as a result of the violation. To provide measures of satisfaction and guarantees of non-repetition, the Court has also ordered states to conduct investigations and identify, try, and punish perpetrators; provide medical and psychological treatment to victims; disseminate its judgments and regional and international standards; and establish or strengthen monitoring institutions. Reparations can also include "public actions or works" that "acknowledge the victim's dignity and . . . avoid new violations of human rights."³⁵⁴ Moreover, the court has developed a separate category of reparations for damage to a person's "life project," which "deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set up for herself, in a reasonable manner, specific goals, and to attain those goals."³⁵⁵

Contentious cases on children in the context of migration have found that the Dominican Republic's nationality laws and the summary expulsion of people of Haitian descent violated children's rights to a name, nationality, identity, and to special measures of protection, among other rights.³⁵⁶

Advisory opinions can be requested by any OAS member state, whether or not party to the American Convention, as well as many OAS agencies. The court's advisory jurisdiction is not limited to interpretation of the American Convention; it extends to "other treaties concerning the

³⁵¹ American Convention, *supra* note 349, art. 61.

³⁵² *See, e.g.*, Order, Provisional Measures Requested by the Inter-American Commission on Human Rights in the Matter of the Dominican Republic, Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic, Inter-Am. Ct. H.R. (ser. E) No.3 (Sept. 14, 2000), https://www.corteidh.or.cr/docs/medidas/haitianos_se_02_ing.pdf.

³⁵³ *Gutiérrez Soler v. Colombia*, Judgment on Merits, Reparations, and Costs, ¶ 82, Inter-Am. Ct. H.R. (ser. C) No. 132.

³⁵⁴ *Id.*

³⁵⁵ *Loayza Tamayo v. Peru*, Reparations and Costs, ¶ 147, Inter-Am. Ct. H.R. (ser. C) No. 42.

³⁵⁶ *Case of Expelled Dominicans & Haitians v. Dominican Republic*, Judgment, ¶¶ 276, 301, 303, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014). *See also* *Yean & Bosco Children v. Dominican Republic*, Judgment, ¶¶ 166-67, 172-72, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

protection of human rights in the American states.”³⁵⁷ A 2014 advisory opinion on children in migration outlines minimum due process and other protections states must afford children who face age assessment determinations, are in immigration proceedings, or are in need of international protection. In particular, the advisory opinion notes, “As established in the Convention on the Rights of the Child and other provisions for the protection of human rights, any decision on the return of a child to the country of origin or to a safe third country shall only be based on the requirements of her or his best interest, taking into account that the risk of violation of the child’s rights may be manifested in particular and specific ways owing to age.”³⁵⁸ The court has also issued advisory opinions on the rights of the child and on the rights of undocumented migrants.³⁵⁹

iv. Inter-American Commission on Human Rights

In addition to its role in adjudicating cases (“petitions”), requesting that states take precautionary measures to prevent immediate harm, and referring cases, as appropriate, to the Inter-American Court, the Inter-American Commission on Human Rights carries out country visits and holds thematic hearings. It has established rapporteurships on the rights of migrants and on the rights of the child to provide expert guidance to the commission as it carries out these functions.

In December 2019, the Inter-American Commission issued the Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking,³⁶⁰ “arguably the most expansive articulation of the rights of all migrants ever to be issued by an international body.”³⁶¹ Among the 80 principles set forth in this document are provisions that family unity and family reunification shall be paramount considerations in decisions about migration status (princ. 33) and that due process for children requires the appointment of a guardian and an attorney, adjudication by officials with specialized training, regular contact with family and protection against family separation, and priority handling of their applications for protection (princ. 51).

³⁵⁷ American Convention, *supra* note 349, art. 64(1). *See also* Bert B. Lockwood, Jr., *Advisory Opinions of the Inter-American Court of Human Rights*, 13 DENV. J. INT’L L. & POL’Y 245 (1984).

³⁵⁸ Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, ¶ 283(11), Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (Aug. 19, 2014).

³⁵⁹ Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002); Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 (Sept. 17, 2003).

³⁶⁰ Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, *in* Inter-American Commission on Human Rights, Res. 4/19 (Dec. 7, 2019), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>.

³⁶¹ Ian Kysel and Chantal Thomas, *The Contested Boundaries of Emerging International Migration Law in the Post-Pandemic*, 114 AJIL UNBOUND 349 (2020).

d. ASEAN Region

The Association of Southeast Asian Nations (ASEAN) has developed several nonbinding human rights instruments, including the ASEAN Human Rights Declaration,³⁶² the ASEAN Declaration on the Rights of Children in the Context of Migration,³⁶³ and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers,³⁶⁴ as well as a treaty and action plan on trafficking in persons.³⁶⁵ ASEAN's standing bodies include the Intergovernmental Commission on Human Rights (AICHR), the Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and the Committee on Migrant Workers.

The ASEAN Human Rights Declaration “reflects tensions between ASEAN governments’ interests in preserving principles of sovereignty and non-interference and in promoting the development of a credible regional human rights system” and “[f]rom the point of view of international law . . . contains both progressive and problematic elements.”³⁶⁶

With the ASEAN Convention against Trafficking in Persons, southeast Asia is, together with Europe, one of two regions to have binding anti-trafficking treaties. The convention has been ratified by eight out of 10 ASEAN Member States. Nonetheless, it is in many respects a weak legal instrument: it lacks well-developed measures for the protection of victims, specialized child protection, and specific prevention measures.³⁶⁷

The AICHR has a very restricted scope of action because one of its founding rules is that the primary responsibility to promote and protect the fundamental freedoms and rights of women and children rests with each Member State. It limits the power of the commission as it reinforces

³⁶² Ass’n of Southeast Asian Nations, ASEAN Human Rights Declaration, Nov. 18, 2012, *reprinted in* 32 Hum. Rts. L.J. 219 (2012), https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

³⁶³ Ass’n of Southeast Asian Nations, ASEAN Declaration on the Rights of Children in the Context of Migration, adopted at the 35th ASEAN Summit, Bangkok, Thailand, Nov. 2, 2019, <https://asean.org/storage/2019/11/4-ASEAN-Declaration-on-the-Rights-of-Children-in-the-Context-of-Migration.pdf>.

³⁶⁴ Ass’n of Southeast Asian Nations, ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted at the 12th ASEAN Summit, Cebu, Philippines, Jan. 13, 2007, https://humanrightsinasean.info/wp-content/uploads/files/documents/ASEAN_Declaration_on_the_Protection_and_Promotion_of_the_Rights_of_Migrant_Workers.pdf.

³⁶⁵ ASEAN Convention against Trafficking in Persons, Especially Women and Children, adopted in Kuala Lumpur, Malaysia, Nov. 21, 2015, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54455/Part/I-54455-08000002804af9e4.pdf>; Ass’n of Southeast Asian Nations, ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children, <https://asean.org/wp-content/uploads/2012/05/APA-FINAL.pdf> (last visited May 3, 2021).

³⁶⁶ AM. BAR ASS’N RULE OF LAW INITIATIVE, THE ASEAN HUMAN RIGHTS DECLARATION: A LEGAL ANALYSIS I (2014).

³⁶⁷ MARIJA JOVANOVIĆ, SECRETARIAT OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, COMPARISON OF ANTI-TRAFFICKING LEGAL REGIMES AND ACTIONS IN THE COUNCIL OF EUROPE AND ASEAN: REALITIES, FRAMEWORKS AND POSSIBILITIES FOR COLLABORATION 40-41 (2018).

that violations against women's and children's human rights are a matter of domestic jurisdiction.

The ACWC produces annual reports on the situation of the human rights of women and children in the region. It also has a very limited scope because the commission has to achieve an agreement among the 10 member states to take any sort of concrete action. This gives each member state veto powers over decisions, or even discussions, on a topic or issues its government does not wish to discuss or act upon, creating a body that acts on the basis of the lowest common denominator. The commission does not possess a monitoring and evaluation mechanism or activities.

The lack of binding instruments for the protection of children's rights (with the exception of the ASEAN Convention Against Trafficking in Persons) and the reality that ASEAN human rights bodies do not have the mandate to investigate violations and decide cases means that the overall implementation of policies and laws on children are left to national governments, which can lead to conflicts with international human rights standards.

3. 1996 Hague Child Protection Convention

The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Child Protection Convention) covers a wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property.

The 1996 Hague Child Protection Convention excludes asylum and other immigration status from its scope of decisions but does cover the "protection and representation of children who are applying for asylum or for a residence permit."³⁶⁸ In these migration contexts, the convention provides direct access to justice for children, allowing them to have their rights enforced in court.

The convention further provides for the law to be applied to those measures (arts. 15-22), for the recognition and enforcement of those measures in other Contracting States when the child moves on to one of those states (arts. 23-28), and last but not least, for cooperation between the Contracting States to facilitate the protection of the child, assistance in discovering the whereabouts of a child, report on the situation of the child, and the like (chapters 29-39).

All E.U. member states along with Albania, Armenia, Russia, Ukraine, Serbia, Montenegro, North Macedonia, and Switzerland are party to the convention. States parties in Latin America and the Caribbean are Barbados, Costa Rica, Cuba, Dominican Republic, Ecuador, Guyana,

³⁶⁸ Sabine Courneloup et al., *CHILDREN ON THE MOVE: A PRIVATE INTERNATIONAL LAW PERSPECTIVE* (2017) (citing PAUL LAGARDE, *EXPLANATORY REPORT ON THE 1996 HAGUE CHILD PROTECTION CONVENTION* (1998)).

Honduras, Nicaragua, Paraguay, and Uruguay. Australia and Canada are also states parties. Elsewhere in the world, few states are party to the convention. In the Asia-Pacific region, for example, Fiji is the lone state party. Of the countries on the African continent, only Lesotho and Morocco are party to the convention. As a result, many states of origin, transit, or destination of children in migration are not yet bound by the convention.

The legal framework set forth in the convention provides a minimum infrastructure for the legal protection of children in migration. It is for that reason that the convention is mentioned in the preamble of the Optional Protocol on the Sale of Children.

The 1996 Hague Child Protection Convention is the central instrument that should be in force worldwide as an indispensable tool for children to assert their civil rights before the courts, to have those rights determined by the proper court, in accordance with the proper law, and with the certainty that this determination will be respected when they move to another country, and to be able to rely on a system of cooperation for their protection.

The Study Group recommends the global ratification of the convention as an integral part of an effective global framework for the protection of children in migration under civil law.

4. Other Regional and National Processes

a. The Quito Process and Other Regional Processes

The Quito Process is a regional state-led process on the responses to Venezuelan's migration crisis. In this context, states from the region requested UNICEF, the International Organization for Migration, and UNHCR to provide technical assistance for developing a regional response aimed at protecting children in the context of Venezuela's migration crisis. U.N. agencies, along with Mercosur's Instituto de Políticas Públicas en Derechos Humanos (IPPDH), civil society actors, and after consultations at national level with key stakeholders, including governmental experts, developed a draft protocol. The draft was submitted by the Colombian government in September 2020. States are currently discussing the draft and other possible tools to implement at either national, bilateral, or regional level in order to improve the protection of migrant and refugee children in the region.

François Crépeau, the UN special rapporteur on the human rights of migrants, observed in 2014 that transnational cooperation processes and institutions have the potential to ensure that migrant children's rights are guaranteed. There are some regional coordination mechanisms regarding unaccompanied migrant children in Southern Africa. An important platform for cooperation is the Migration Dialogue for Southern Africa. MIDSAs were established in 2000, with the overall objective of facilitating dialogue and cooperation among Southern African Development

Community (SADC) Member States and contributing to improved regional migration management.

Bilateral efforts have been developed in order to ensure appropriate treatment of unaccompanied migrant children. A Memorandum of Understanding between Zimbabwe and South Africa was signed in November 2011. The document refers to the “competent authorities,” being the social welfare ministries of the two countries. The MOU defines the basis for institutional cooperation, including in respect of care and services to children. Under this MOU, standard operating procedures have been developed which guide the co-operation for the safe management of child migrants. A similar MOU was signed between the governments of South Africa and Lesotho in October 2015. Cross-border working groups have been established with the assistance of Save the Children at the borders of Mozambique and South Africa, and between South Africa and Zimbabwe. There is evidence that the practice is growing in the region. Botswana, Lesotho, Swaziland, and Zambia are now engaged in similar working groups.

b. National Remedies

i. Cases on Children’s Best Interests and Their Right to Family Life Within Migration Procedures

In Argentina, migration law adopted in 2003 included a set of due process guarantees within immigration procedures, including the right to free legal advice and representation and the right to access to justice. This legislative reform led to an increasing number of judicial decisions, mainly on deportation cases, which often impact children’s rights, as their right to family life and protection against separation from their parents.

In recent years, a growing number of sentences revoked the expulsion measure made by migration authorities, since children’s best interests had not been taken into account. As children’s rights, including the right to family life, had not been considered by the administrative authority, the courts found that decisions were arbitrary and contrary to human rights treaties provisions and the standards developed by competent international bodies, including U.N. treaty bodies and the Inter-American Court of Human Rights. In this direction, in one of these cases the court affirmed that children’s rights protection must prevail over any goal or interest of migration policy.

Similarly, in Chile, the Supreme Court adopted the same position. The court asserted that expelling a parent that would be separated from his children would violate their best interests as recognized in international human rights treaties. Then, it concluded, such measure is disproportionate and violates state’s obligation to give a primary consideration to children’s best interests.

ii. Cases on Children’s Right to Be Heard in Migration Procedures

Immigration-related cases that impacted children’s rights have also been submitted to judicial courts due to the lack of child-sensitive procedures, including the absence of any instance directed to guarantee child participation and his or her right to be heard, as it is recognized in article 12 of the Convention on the Rights of the Child. In Argentina, within an expulsion case, a court stated that in any administrative or judicial procedure that impacts a child, an omission of ensuring his or her opportunity to be heard violates basic rules of due process that should be guaranteed according to article 8 of the American Convention on Human Rights. Then, quoting the Inter-American Court’s Advisory Opinion 21/14, the court affirmed that a new sentence should evidence the way the child’s opinions have been taken into account, along with the form in which best interests of the child have been assessed. In another case, the court revoked the decision of migration authority due to the fact that the child’s right to be heard was not respected; neither was the right to have his or her best interests assessed, determined, and protected as a primary consideration.

In Costa Rica, the Administrative Migration Tribunal asserted that in order to ensure the existence of a due process, it is not enough to carry out an administrative procedure formally based in the legislation that leads to denying an administrative status of a migrant. It is also needed specific mechanisms directed to guarantee the right to be heard by the child that will be affected by the administrative decision, as the administrative authority has to analyze such opinion into and adopt a decision accordingly.

iii. Cases on Child-Specific Forms of Persecution

As UNHCR notes, children may have claims for international protection that are based on “child-specific forms and manifestations of persecution.”³⁶⁹ For instance, recruitment by gangs, an activity that frequently requires children to engage in criminal activity, may be a basis for recognition as a refugee. The same is true for gang-related violence: UNHCR observes that “[y]oung people, in particular, who live in communities with a pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention.”³⁷⁰ The Committee on the Rights of the Child has observed that persecution of family members, underage recruitment into military service, trafficking of children for sexual exploitation, other forms of sexual exploitation, and being subjected to

³⁶⁹ U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: CHILD ASYLUM CLAIMS UNDER ARTICLES 1(A)2 AND 1(F) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 3 (2009), <https://www.unhcr.org/en-us/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html>.

³⁷⁰ U.N. HIGH COMM’R FOR REFUGEES, DIVISION OF INTERNATIONAL PROTECTION, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS (2010), <https://www.refworld.org/docid/4bb21fa02.html>.

female genital mutilation (FGM) are other child-specific forms and manifestations of persecution.³⁷¹

U.N. authorities have noted that since the early 1990s, there is a growing number of countries that recognize FGM as a form of persecution in their asylum and refugee decisions.³⁷² Given that FGM is considered to be a form of gender-based violence, a number of rights of women and girls are violated as a result of FGM. The practice violates a person's rights to health, security and physical integrity; the right to protection from physical and mental violence; the right to the highest attainable standard of health; and the right to be free from torture and cruel, inhuman or degrading treatment. The right to life is implicated when the procedure runs the risk of death.³⁷³

Since the practice disproportionately affects women and girls, it has been said to violate the right to non-discrimination. UNHCR has further elaborated that FGM may be considered a child-specific form of persecution since it invariably and disproportionately affects girls under age 15.³⁷⁴

The House of Lords, then the United Kingdom's highest court, held that girls and women in societies that practice FGM are a "particular social group" within the meaning of the Refugee Convention and that FGM was a form of torture.³⁷⁵

E.U. member states have received refugee claims from female (and male) activists persecuted for their opinions and commitment to end FGM, whether they come directly from FGM-practicing countries, or have lived most of their lives in Europe and may be at risk of being mutilated upon return; women and girls who have already been subjected to FGM and seek protection from re-excision, defibulation, or reinfibulation upon marriage (including child marriage) or at childbirth; parents who seek protection in order to protect their daughters from FGM; women who are under pressure from their family and community but refuse to become "cutters" in their country of origin; and women who have been subjected to FGM, have accessed reconstructive surgery (often while in Europe), and who fear being mutilated again upon return.³⁷⁶

³⁷¹ Comm. on the Rights of the Child, General Comment No. 6, *supra* note 107, ¶ 74.

³⁷² U.N. HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION ¶ 8 (2009), <https://www.refworld.org/docid/4a0c28492.html>.

³⁷³ *Id.* ¶ 7; UNHCR, UNHCR'S CONTRIBUTION TO THE EUROPEAN COMMISSION'S CONSULTATION ON FEMALE GENITAL MUTILATION IN THE EU (2013), <http://www.refworld.org/docid/51a701594.html>.

³⁷⁴ U.N. HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION, *supra* note 372, ¶ 4.

³⁷⁵ Secretary of State for the Home Department v. K (FC) Appellant, Fornah (FC) (Appellant) v. Secretary of State for the Home Secretary, [2006] UKHL 46 (H.L.).

³⁷⁶ Fadela Novak-Irons, *Female Genital Mutilation: A Case for Asylum in Europe*, FORCED MIGRATION REV., issue 49, May 2015, at 78.

In general, women and girls face more obstacles in their applications for asylum and refugee status than their male counterparts.³⁷⁷ This is in part because, while the issue of gender-based persecution has continued to benefit from more attention in refugee status determination in the last two decades, the threshold and methods to prove it are complicated. Moreover, credibility assessments, usually used when the case is not sufficiently clear from the facts on record, is indispensable in refugee status determination. This is so despite the fact that credibility assessments are very subjective, look into the personal and situational facts including demeanor, plausibility, consistency, and verbal behavior of the applicants, made from the impressions of the decision maker.

Citing various studies, Drudy has drawn attention to the fact that refugee determination processes in countries such as Australia, Canada, Ireland, the Netherlands, and the United Kingdom rely heavily on credibility assessments of applicants.³⁷⁸ In the instances where children especially young unaccompanied children that are not in a position to express their views are dependent on the application made by their parents, it begs the question if the best interests of the child obliges states to ensure that credibility assessments should err on the side of protection.

Applications for asylum on the basis of fear of future exposure to FGM also have to be treated differently from an application made on the basis of past exposure to FGM. In the case of the former, because of lack of physical evidence such as documents and pictures, it is important for the applicants, but also decision makers, to seek information on the matter proactively and from secondary sources. This includes research on country information on FGM. Oral testimony of the applicant might be sought where possible as well as in-depth interviews with similar claimants or nationals, obtaining background information of the applicant's country of origin, as well as traditions prevalent that might be relevant to the determination of the applicant's claim. It is important for an adjudicating body to have comprehensive information at its disposal to avoid a scenario where a decision is reached on the basis of biased or lopsided claims and findings.

It is usually individuals or groups of individuals often falling within the same religious group or tribe that conduct FGM. In other words, in general, FGM is not a violation conducted by a government.³⁷⁹ Nonetheless, the state has the responsibility to protect, and also take measures against those who violate. It has been argued that in the case of FGM, "tribes act as de facto

³⁷⁷ Annemarie Middelburg & Alina Balta, *Female Genital Mutilation/Cutting as a Ground for Asylum in Europe*, 28 INT'L J. REFUGEE L. 416, 422-427 (2016).

³⁷⁸ A. Drudy, *Credibility Assessments and Victims of Female Genital Mutilation: A Re-Evaluation of the Refugee Determination Process*, 14 IRISH STUDENT L. REV. 88 (2016).

³⁷⁹ This would not hold for cases where in the context of the medicalization of FGM, medical officials employed by the state conduct it.

governments.”³⁸⁰ It is often critical to prove the level of acquiescence by the government and its officials, to establish accountability.

It remains to be settled how jurisdictions will treat a claim of FGM as a past persecution. In general, asylum seekers and applicants for refugee status invoke a fear of undergoing FGM if they are returned to their countries of origin. However, an individual who has experienced past persecution will be assumed to have a well-founded fear of future persecution. This position originating from the UNHCR has been contested by decision makers who view FGM as a one-time event that cannot be repeated on the same girl or woman.³⁸¹ UNHCR has pointed out that while each individual case should be treated on its merits, an individual who has undergone one type of FGM may be subjected to another form of FGM and/or suffer particularly serious long-term consequences of the procedure. There is, therefore, according to the UNHCR, no requirement that the future persecution complained be identical to the one previously endured.³⁸²

There is abundant case law that shows that applicants have been successful in their bid to secure refugee status on the basis of fear of FGM if deported back to country of origin.³⁸³

In *re Fauziya Kasinga*,³⁸⁴ for example, the U.S. Board of Immigration Appeals had to consider whether the practice of FGM can be the basis for the grant of asylum under the United States’ Immigration and Nationality Act. Some principles can be inferred from *Kasinga*.³⁸⁵ In that case, the board established for the first time that FGM, as a form of persecution, could be a ground for asylum in the United States. In particular, it also confirmed several important elements, such as that the source of the fear of the persecution—the FGM—was not a direct act of a state but that of individuals; that even though harm imposed is not with punitive intent, it could still meet the persecution criteria; and that members of a tribe who oppose the practice can be recognized as members of a “particular social group” within the definition of a “refugee under the U.S.

³⁸⁰ Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 318 (2003).

³⁸¹ U.N. HIGH COMM’R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION, *supra* note 372, ¶ 13.

³⁸² *Id.* ¶¶ 13-14.

³⁸³ *See, e.g.*, *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (where a mother who feared that her daughter would be forcibly subjected to FGM in Ethiopia qualified as a refugee); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (a Nigerian woman contended that her U.S. citizen daughter would face FGM in Nigeria); *Abebe v. Ashcroft*, 379 F.3d 755, 764 (9th Cir. 2004) (Ferguson, Cir. J., dissenting).

³⁸⁴ *Matter of Kasinga*, 21 I. & N. Dec. 357, 368 (Bd. Immigr. App. 1996).

³⁸⁵ *Id.*

Immigration and Nationality Act.³⁸⁶ Canada was the first country to give asylum on the basis of fear of exposure to FGM.³⁸⁷

Growing jurisprudence has labeled FGM as a direct violation of article 37(a) of the Convention on the Rights of the Child.³⁸⁸ The first time the Human Rights Committee found a violation of the ICCPR in the context of a return of an asylum seeker to his or her country of origin is in the case of *C v Australia* in 2002.³⁸⁹ The Committee against Torture dealt with similar cases much earlier. Article 3 of the Convention against Torture provides that “[n]o 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.” It is the only provision among the core U.N. human rights instruments that explicitly prohibits refoulement. It is then no surprise that the Committee against Torture has received a large number of communications similar to *K.Y.M v Denmark*, a communication before the Committee on the Rights of the Child that concerned a complaint lodged by a woman, I.A.M, a Somali national, on behalf of her child, K.Y.M., who was born in Denmark in 2016.³⁹⁰ In that case, both the woman and child were subject to deportation orders to Puntland, Somalia. At the center of the complaint was the contention that if K.Y.M were deported, it would violate multiple rights under the Convention on the Rights of the Child—namely articles 1 (definition of a child), 2 (non-discrimination), 3 (best interests), and 19 (violence against children). In particular, it was argued that the return would subject K.Y.M. to FGM. The committee, found, among others, that that the author’s claims concerning the obligation of the state to act in the best interests of the child and to take measures to protect the child from all forms of physical or mental violence, injury, or abuse were admissible.³⁹¹ It agreed with the author on the violations of articles 3 and 9. Central to the committee’s decision was the failure of the state to uphold its obligation to consider the best interests of the child. The committee noted that the author’s allegations that she would be unable to protect her daughter from being subjected to FGM in a country where 98 percent of women

³⁸⁶ See generally Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 376 (1997) (quoting Matter of Kasinga, 21 I. & N. Dec. at 361); Celia W. Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, Apr. 15, 1996, <https://www.nytimes.com/1996/04/15/nyregion/woman-s-plea-for-asylum-puts-tribal-ritual-on-trial.html>.

³⁸⁷ Gregory A. Kelson, *Granting Political Asylum to Potential Victims of Female Circumcision*, 3 MICH. J. GENDER & L. 270 (1996).

³⁸⁸ See Secretary of State for the Home Department v. K (FC) Appellant, Fornah (FC) (Appellant) v. Secretary of State for the Home Secretary, [2006] UKHL 46 (H.L.). See generally Kathrin A. Schwedtfeger, *Female Genital Mutilation as a Reason to Obtain Asylum in the European Union* (2012) (B.A. thesis, University of Twente), https://essay.utwente.nl/61974/1/BA-Kathrin_Schwedtfeger_2012_-_Final.pdf.

³⁸⁹ *C. v. Australia*, Commc’n No. 900/1999, Human Rights Comm., U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002).

³⁹⁰ *I.A.M. (on behalf of K.Y.M.) v Denmark*, Commc’n No. 3/2016, ¶ 1.1, Comm. on the Rights of the Child, U.N. Doc. CRC/C/77/D/3/2016 (Jan. 25, 2018).

³⁹¹ *Id.* ¶ 11.2.

have been subjected to the practice and where she would not be afforded protection by local or national authorities.³⁹² The committee considered the fact that although the prevalence of FGM appears to have declined in Puntland due to several legislative and community initiatives, the practice is still deeply engrained in Somali society. The committee noted that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child.³⁹³

iv. Cases on Detention of Migrant Children

In Mexico, a country with one of the worst records on child migration-related detention policies, courts have been increasingly involved in cases on this issue. In a case submitted before a Mexico City court related to children detained in a migration detention center, the decision of the judges, which includes references to the Convention on the Rights of the Child and judgments of the Inter-American Court of Human Rights, ordered migration authorities to individually identify any child in the detention center, accompanied or not. The court also ordered child protection authorities (*procuradurías*) to implement, in an urgent and immediate manner, a plan aimed at ensuring alternatives to detention and housing solutions, as well as to elaborate—according to the children’s best interests—a diagnosis of rights violations and a plan for a proper restitution of the rights affected.

v. Consular Services

Consular services are important to address a large number of issues pertaining to migrant children. Consular services are important, among others, to verify or certify identification documents that are needed for age assessment; to facilitate information between country of origin and country of destination; to facilitate safe returns, or assist family reunification. In the Committee on Migrant Workers and Committee on the Rights of the Child’s joint General Comment No. 3/22, the committees underscored that the need to integrate and consistently interpret the best interests of the child applies in respect of “consular protection policies and services.”³⁹⁴

The existence or otherwise of an embassy or consular services of a state from which a migrant child is a citizen of in a country of transit or a country of destination could have a number of implications for the child. In one example involving more than 40 unaccompanied migrant children transiting through Malawi to South Africa, the Committee on the Rights of the Child has raised concerns about the deprivation of liberty of such children,³⁹⁵ and the absence of an Ethiopian embassy in Malawi further extended the amount of time the children had to spend in

³⁹² *Id.* ¶ 11.5.

³⁹³ *Id.* ¶ 11.8(a).

³⁹⁴ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 19.

³⁹⁵ Comm. on the Rights of the Child, List of Issues: Malawi, ¶ 13, U.N. Doc. CRC/C/MWI/Q/3-5 (July 20, 2016).

detention before being returned to their country of origin. To highlight an additional example, at a meeting between authorities from Ethiopia, Kenya, and Tanzania in April 2019, and in recognition of the large number of migrants including children who use the “Southern Route” and violate immigration rules (and often end up in prison), the need to facilitate “simplified consular assistance that in turn will enable easier access to irregular migrants in prisons” was underscored.³⁹⁶ In recognition of the various important roles that consular service staff could play in respect of the protection of migrant children, joint General Comment No. 3/22 highlighted the need provide “ongoing training to consular staff on the two Conventions.”³⁹⁷

C. Concluding Observations

Part V has been limited to an overview of the existing international, regional and national avenues to seek effective remedies for rights violations (and access justice) and some reflections on the case law from the various treaty bodies, committees and judicial authorities. This study has not reflected on the specific nature of the interim measures or remedies that were granted, nor on the compliance with such measures or remedies by the states concerned. Furthermore, the impact of these measures or remedies for the protection of the rights of children in situations of migration have not been evaluated. These aspects will form part of future studies by the study group, among others revolving around case law, strategic litigation, and impact of remedies in countries across the globe, and as part of the growing body of jurisprudence from regional and international human rights courts and other authorities, relevant for children crossing borders as refugees or migrants.

VI. Conclusion and Recommendations

The ILA Study Group on Cross-Border Violations of the Rights of Children has examined what resources are available to children in migration when their rights have been violated and determined how those resources can be improved and expanded. We have identified guiding principles and recognized common challenges children commonly face during the migration experience. We have also identified and analyzed the institutions, fora, and processes available to children on the move when they need to enforce their rights or seek remedies for human rights violations, and the many lacunae that still exist concerning ratification of available international instruments; implementation of these instruments; domestic legislation and regulation, and their implementation.

³⁹⁶ Int’l Org. for Migration, *Tanzania, Ethiopia, Kenya Agree on a Roadmap for Addressing Irregular Migration*, Apr. 5, 2019, <https://www.iom.int/news/tanzania-ethiopia-kenya-agree-roadmap-addressing-irregular-migration>.

In this respect, the advantage of having embassies or consular services in countries to ensure the best interests of migrant children can be gauged from the opening of the Ethiopian embassy in 2018 in Dar es Salaam and the subsequent return of more than 300 Ethiopian migrants.

³⁹⁷ Comm. on Migrant Workers & Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), *supra* note 15, ¶ 19.

We believe that there is far more work to be done and recommend to the ILA Executive Council that they support the continuation of this work through an ILA Committee structure in order to: (1) further develop this research and analysis and then (2) disseminate it in the form of (a) an academic book as well as (b) an user-friendly online toolbox that children and advocates can use to help navigate a journey that is often more challenging and disorienting than the child's original migration itself. The ultimate goal is both to improve the experience of migration for children by adapting and creating relevant systems and resources, and possibly creating new ones, so that they are more centered on the child, recognizing the unique challenges and limitations children face, especially during the migration process that is so common in human history and experience.

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