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Editorial

Early in 2016 we began planning migration as the feature topic for this Chronicle edition. As you are aware, global migration events have since accelerated with tragedy and injustice for children and families and show little sign of abating. In their recent report "Uprooted", UNICEF (2016, p.1) estimated 50 million children have recently migrated or been displaced within their own countries, with 28 million of these children affected by conflicts and violence. This represents a 75% increase between 2010 and 2015.

We are fortunate to present a strong collection of articles in this edition. The articles cover global and national perspectives about the legal dilemmas for children and families affected by migration and offer some possible solutions to strengthen human rights responses. Additional articles include developments in youth justice, the United Nations violence report, international child rights awards, and new and forthcoming publications.

Children and migration

To establish a global child rights perspective, **Justice Renate Winter*** examines the nine recommended principles to guide actions concerning children on the move and other children affected by migration, as based on the United Nations Convention on the Rights of the Child (UNCRC).

Taking a specific look at the principle of children's best interests, **Ben Lewis,** from the International Detention Coalition, provides a legal and historical analysis and recommendations about child rights violations when children are held in immigration detention for reasons related to their parents' migration status.

Associate Professor Katrin Križ and **Professor Tarja Pösö** argue for a global approach to child protection and welfare systems for children affected by migration. This article updates their recent work with colleagues – *Child welfare systems and migrant children: A cross-country study of policies and practices* published by Oxford University Press. We highly recommend the book for further reading, including case studies of Finland, Norway, Netherlands, Austria, Spain, Italy, United States, Canada, England, Australia, and Estonia, as well as a survey of 900 child welfare workers.

Martine Goeman's article provides a summary of her research with **Jorg Werner**, (Defence for Children International, Netherlands) about the best interests of the child evident in family migration policies. The UNCRC, the European Convention for the Protection of Fundamental Freedoms, the law of the European Union and case examples are analysed. She also shows how clarification of the interpretation of best interests and the weight to be given to best interests require stronger interpretation and application in the European Union.

Turning from the global to national examples of responses to child and family migration, **Madeline Gleeson**'s article analyses the facts and events surrounding the Australian High Court appeal that led to the government's use of offshore immigration detention being legitimised. **Michael Garcia Bochenek** from Human Rights Watch, discusses Mexico's failure to protect Central American refugees and migrant children and how improvements can be made. The article is based on his extensive research including interviews with children. **Judge Gabriela Ureta*** and **Claudia Miranda Fuentes** provide a national perspective of migration and refugee assistance and case law emerging in Chile over recent years. The authors identify important positive influences from the judiciary and initiatives by government and non-government agencies, however they also conclude that urgent challenges remain in updating legislation and standardising regulations.

Barrister **Anil Malhotra*** of India points up the vulnerabilities of smuggled migrants and suggests steps that might be taken to better protect them in South Asia.

Child trafficking in West Africa

In Part A of a closely argued two-part article (Part B will appear in the July edition) **Justice Bankole Thompson*** takes as his starting point statements by Kofi Annan that child trafficking presents one of the most urgent violations of rights. Significantly and importantly, Justice Bankole Thompson argues that the current epidemic proportions of child trafficking demand regional judicial mechanisms or an **international judicial mechanism** with authority to prosecute perpetrators to deal with this pernicious global problem.

Migration Resources

We wish to take this opportunity to draw your attention to two sources of information.

The first is the online information arising from the European Forum in the Rights of the Child held in Brussels on 29 -30 November 2016. There were 300 participants who heard from high-level representatives of the European Commission as well as Sra Caterina Chinicci[1], Member of the European Parliament (Sicily). Before being elected to the European Parliament, Sra Chinicci was a Juvenile Court Judge so she well

[1] Sra Chinicci was the Rapporteur responsible for guiding the May 2016 EU Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings through the European Parliament and Council

understands the challenges facing migrating children and families. The need now—as expressed to Avril Calder who attended the Forum—is for EU level formal follow-up to discussions and leadership to address the system gaps. The link to the Forum's deliberations is in Contact Corner.

The second is **Child Rights International network** (CRIN) which provides a legal database across a broad range of case topics in different languages, including cases relevant to migration. This is an excellent resource to use. A number of the 2016 cases relevant to migration in the CRIN database are consistent with the themes presented in these Chronicle articles, reflecting the universal and complex nature of the legal problems at hand. For example, the recent class action J.E. F.M. v Lynch (20 September 2016), heard in the United States Court of Appeals for the Ninth Circuit, found against a group of children (aged between 3 and 17 years old), who sought access to funded legal representation in their deportation process without requiring a complex *right to counsel* claim, which it was argued on their behalf they were not developmentally or financially equipped to carry out[2].

This reflects the barriers to applying children's best interests in immigration detention decisions identified by **Ben Lewis** and **Martine Goeman**, as well as the inadequate implementation of refugee protection processes for children in Central America reported by **Michael Garcia Bochenek**. During 2017 the IAYFJM plan to begin building a library of cases specific to youth and family law that members can refer to. More information about these plans and how you can contribute cases will be shared in the July 2017 Chronicle.

Youth justice

Participation of children in proceedings affecting them is a deeply held principle, perhaps more observed in the breach than in the observance. Working worldwide through their National **Socio-legal Defence Centres**, Defence for Children International affords children the chance of realising that principle. DCI Advocacy Co-ordinator **Anna Tomasi**, explains how the centres work.

District **Judge Tony Fitzgerald*** describes how recent implementation of features contained in New Zealand's *Children, Young Persons and Their Families Act 1989* have fundamentally changed that country's approach to children in conflict with the law, ushering in key community involvement and solution-focused approaches--well ahead of the restorative justice that we know today—and keeping court appearances to a minimum.

Hannah Couchman and **Fiona Abbott JP** report on the role of the **Magistrates Association (England and Wales)**, its Youth Court Committee, and involvement in addressing current issues facing the Youth Court. A brief overview of magistracy selection, training and specialisation in youth justice are also provided.

Bernard Boeton*, formerly of Terre des hommes and well known to readers of the Chronicle, is a founder member of a new NGO, *v i v e r e*. Bernard introduces us to its strong aims of advocating against the death penalty and life imprisonment for children and the plans to realise them.

The **2016 UN Report** of **Marta Santos Pais**, Special Representative of the Secretary General on **Violence against Children,** has been published. **Judge Patricia Klentak*** has kindly summarised the report bringing us an insight into its findings and its relationship to the UN 2030 Agenda for Sustainable Development and its target to end all forms of violence against children.

International awards

Two articles are about recent awards. The 2016 **Veillard Cybulski Foundation Prize** was awarded to **Judge Heemi Taumaunu** for his pioneering work on the youth justice Rangatahi Courts in New Zealand. The Award was judged by Judge Françoise Tulkens, formerly of the European Court of Human Rights (including Vice-President), Atilio Álvarez, Defensor Público de Menores, República, Argentina, and IAYFJM's President, Avril Calder. An article describing the Rangatahi Court will be in the July 2017 edition.

The proposed socio-legal defence centre model described by DCI's Anna Tomasi in the youth justice section above is part of the **2016 Child 10 Award** granted to **Abdul Manaff Kemokai** of DCI Sierra Leone. *'Children on the run'* formed the theme of the Child 10 Award, which is given to just 10 outstanding individuals and is provided by the Sophie Stenbeck Family Foundation and Reach for Change, a non-profit organisation.

New and forthcoming publications

The book *'Family Forms and Parenthood'* analyses Article 8 of the European Convention on Human Rights. **Judge Katarzyna Kościów-Kowalczyk*** of Poland praises the book and reports that it clearly sets out cases from different EU countries to illustrate how the *right to respect for private and family life* is argued in the family courts of those countries

2 See https://www.crin.org/en/library/legal-database/je-fm-v-lynch

Professor Helen Stalford, of the University of Liverpool, UK, writes about a two-year project--C*hildren's Rights Judgments*-- funded by the Arts and Humanities Research Council (AHRC)[3], The project is revisiting existing legal judgments relating to children and considering how they might have been drafted if adjudicated from a child's rights perspective. Professor Stalford and her colleague will present an example of such a judgment in the next edition of the Chronicle.

Conclusion

We wish to take this opportunity to thank the authors for donating their time and intellect to the Chronicle and to sincerely thank Judge Patricia Klentak for her help with translations.

Thank you also to all the members who support IAYFJM. May we wish you all a joyous 2017.

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[3] AHRC is a non-departmental public body sponsored by the Department for Business, Energy and Industrial Strategy (BEIS). It is governed by its Council, which is responsible for its overall strategic direction, and is incorporated by Royal Charter. http://www.ahrc.ac.uk

Children on the move

Justice Renate Winter*

Children on the move

They are so many and they come from Africa and Asia to Europe, almost 50 % of them children and young adults.

They are so many and they come from Latin America via Mexico to the US and Canada, almost 25000 children waiting at the border almost every day.

They are so many and they come from South Asia trying to get to Australia, many of them children, some born during the travel, no one among them allowed to enter the continent.

They are so many, internally displaced families in so many countries affected by armed conflicts, so many of them, living in terrible situations, with so many children without any future.

They are asylum seekers, refugees, migrants, displaced persons, unaccompanied children with rights and duties.

Their rights and duties are not the same, notwithstanding the fact that governments everywhere call all of them with the same name:" refugees."

There are asylum seekers, whose status is determined by a binding convention. They have to go through an asylum procedure and can be sent home, if asylum is not granted. This is not the case, if they are children.

There are refugees, coming from war- torn countries and their status is regulated by another convention. They cannot be sent back to their countries as long as there is war, but on the other hand, there is no duty of the receiving country to integrate them, as they will have to go home after peace is reached. This is not the case, if they are children.

There are migrants, people who look for a better life in another country, for more options, for a chance. Their status, again, is regulated as by another convention. They can get permits to stay and to work, but they can be refused entry also, especially if the arrive illegally. This is not the case, if they are children.

One out of 10 persons world- wide live in societies that have been torn apart by war or other emergencies. Half of the world's forcibly displaced persons are children. There are persons, chased away or forced to flee from their homes. They can get a place in a centre, in a camp, but they can be denied access as well, if there is no place anymore or if their identity is not clear. This is not the case, if they are children.

There are the many unaccompanied children, where it is not clear if they are still children in the first place. They can be denied access to a country if it is clear that they are now not children anymore. This is not the case, if there is a doubt, if they might still be children. Then again, the situation is different for them.

For children, from wherever they come, in whatsoever situation they are, whoever they are, there is one universal, binding document, ratified by all member States of the UN safe one that regulates their status: The Convention of the Rights of the Child.

And this Convention is very clear about the issue at hand: In whichever Member State a child stays at any given moment, this child has exactly the same rights as any child of the given Member State. This child has always the right not to be discriminated against, to have his/her best interests taken as the primary consideration, to have life and development granted and to be listened to in all issues that concern him or her. There is no exception possible for any child who had to move for a variety of reasons, voluntarily or involuntarily, with or without parents, within or between countries, left alone by migrating parents or living with his/her parents in the receiving country.

There are nine "Recommended principles to guide actions concerning children on the move and other children affected by migration". All of them are based on the Convention on the Rights of the Child.

1. Children on the move shall be considered children first and foremost.

That means that these children have all the rights as any other child concerning birth registration and nationality when born during travel or in the receiving country.

In a situation where nationality is not clear due to the status of the respective parents, the Member State has to do everything, including providing its own nationality, to avoid that a child becomes stateless. Children on the move have to have access to school, health care, housing and social protection. That is certainly not an easy task for a receiving country as children, especially when arriving in large quantities, might have no knowledge of the local language, no continuous education if any, maybe no school experience at all, but in any case no comparable education on an equal level among them. It means further that children shall not be refused entry without adequate and individual analysis of their situation and due guaranties for their best interests.

2. All children have the right to life, survival and development.

Here the Convention speaks first of all about a standard of survival, of not to be killed at the border, not to be recruited as child soldier out of a refugee camp, not to be sold in early marriage in order not to be a burden for the own family, not to be abducted to end up in a brothel or to have to work, steal, kill for smugglers and then only of a standard of living adequate for their physical, mental, spiritual moral educational and social development. Difficulties will arise certainly, if children move together with their family to a country where traditions, customs and upbringing of children differ greatly from their country of origin. Any attempt should be made to avoid that the child is torn between two cultures or that the way the family wants to raise its child, makes the children targets for discrimination by their peers.

3. Children have the right to liberty of movement

It goes without saying that children should (and will in many member States) be helped to find their family, parents, caregivers, if separated from them during their travel, even if this means that borders have to be crossed. Agencies like the Red Cross are busy all the time to reunite children with their family! It is a quite different situation, when children, hired by organized crime, want to travel (or are sent) to different countries , ordered by their bosses to commit crimes or to be misused in almost slave-like conditions. As administration is slow, especially, as already mentioned above, when there is a huge quantity of children on the move, children tend not to trust authorities, not to wait for decisions, rather to take any occasion to leave refugee centres or places where they have been placed. To find all these “disappeared children” is an almost impossible job!

4. Detention of children because of their status of “children on the move”

It is never ever in the best interests of a child to be detained. Every medical or psychological expert will confirm this statement. If parents are be detained for illegally entering the country for example, it is not in the best interests of the child to be detained with them in order to keep the family together. Nor is it in the best interests of the child to separate him/her from their parents and put him/her in a separate centre for children. The only solution that would be in the best interests of the child is to stay with the parents in a non-custodial setting, for instance in an apartment under the surveillance of the respective community. In no way should it be possible that unaccompanied minors without official documents are detained in order to examine their immigration status. This might also become a difficult issue as many young people are misused by traffickers and their own family to falsely state that they are children. Nevertheless, the Convention is clear: Even in such cases examinations have to be done without putting the young person in question into a closed institution. Rather a curator or a guardian has to be provided who can assist the young person throughout the whole procedure and if after a correct examination there is still a doubt about the age of the person, the principle “*in dubio* for the child” has to be used.

5. Children shall not be separated from their parents or primary caregiver unless this is in their best interests.

In addition to the recommendation under point 4), this recommendation tackles problems when for example. parents are detained as illegal immigrants and will be deported. Should their children be deported with them? Automatically, as being together with the family is always in the best interests of a child? Would an individual assessment not be a better solution? Another case under this recommendation deals with children who are supposed to be deported in order to be reunited with their families. Is this in any case in the best interests of the child in question? And if so, a child should never be expelled without accompaniment and monitoring of the situation before and after the expulsion.

6. No child is illegal

Children are on the move, they come with or without family but mostly at their request: the children have no choice. They are children first and foremost. To stigmatise them as illegal, as criminal, as profiting from social services, as being a second class citizen for whatsoever reason, is discrimination. Children are not responsible for the problems of adults, neither of the ones in their own country, nor of the ones in the receiving country. It is not they who choose! But once again, it might become very difficult for the population of a receiving country to accept, that children are sent by their families in order for these families who would not themselves be allowed to have access to the country to get that access via the children who cannot be refouled (sent back) and who are thought to immediately ask for family reunification. To misuse children is easy. Not to re-misuse children again by the receiving State is not that easy!

7. Child protection systems should protect all children

As already said, children are children first. Children are to be treated in every Member State the same way, if they are nationals or not. Whatever child protection system is available in the Member State, it has to serve all children alike. Thus, it is the duty of the Member State to protect children on the move as all other children in its territory against exploitation, violence, abuse, crimes and especially against resorting to crime or sexual exploitation to meet basic needs. In case children have to travel through different countries to find their families or to get to the country of destination, child protection mechanisms must be harmonized to secure safe travel.

8. Migration managements measures shall not adversely affect children's human rights

Children are subjects of internationally guaranteed human rights as well as of humanitarian law; the principle of *non-refoulement*[1] is valid for them, as is the right for safe travel. A Member State that makes travel or any other situation for children as cumbersome as possible in order to deter them from travelling breaks these laws, as the right of every child to healthy development is not granted under such circumstances. Whatever the situation of a child arriving in a Member State, his/her full chances for development have to be secured. Such policy, by the way, might be the best development aid a Member State can provide to a country in need, as a well -educated, well developed child returning as an adult to his/her country will be a real asset for it.

9. Children have the right to express their view freely in all matters affecting them and to have their views taken into consideration according to their age and maturity

In order to find out what the best interests of a child on the move would be, one has to discuss with the child in the first place. This is not possible, if the children have no access to information, free legal representation, interpreters and guardians/ curators, if they are separated from their family.

A child on the move is, as every child, a subject of law, not an object, and thus cannot be "administered" by institutions, experts, authorities without being heard.

Once again, this can be difficult, when hundreds of youngsters try to break through fences and force their entry into a country, when not enough assisting persons are available, no interpreters, no guardians, no guest families to give them shelter.

Furthermore, a report of the European Union Agency for Fundamental Rights (FRA) has established, that separated children, when registered, are classed as unaccompanied children without looking more closely into their specific situation; that they tend not to be informed about asylum procedures independently from a possible accompanying adult; that they are housed with an accompanying adult even before the assessment of an existing relationship, risking abuses of these children; that they might have been forced to marry outside the receiving State; and that responsibility for a given child in a reception facility is not really defined.

Children on the move. A real challenge for any transit or receiving country.

An insurmountable one?

Justice Renate Winter*

Member of the Committee of the Rights of the Child, 2013, Vice-president of the Committee, February 2015. President IAYFJM 2006-2010, President Special Residual Court Sierra Leone 2016-

[1] The forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution *https://en.oxforddictionaries.com/**definition/refoulement***

No reason to detain: Applying the best interests of the child in immigration detention decisions

Ben Lewis

Abstract

In recent years there has been a paradigm shift in the way that international and regional human rights experts have come to view the administrative immigration detention of refugee and migrant children—namely, that the detention of a child for reasons related to their or their parents' migration status is never in the best interests of the child and will always constitute a child rights violation. This article seeks to provide a legal and historical context for this emerging consensus as well as some practical recommendations for the role that judges and magistrates can play in upholding the best interests of the child in immigration decisions.

Introduction

Increasingly all around the world, children are on the move; forced to migrate across borders without adequate documentation, often fleeing war, violence, abuse, poverty, or as a result of trafficking or smuggling. Within this context, undocumented refugee, asylum seeker and irregular migrant children are highly vulnerable to a number of serious human rights abuses, including the threat of arbitrary arrest and detention on the basis of their irregular migration status.

It is important to recall that every child, regardless of their migration status, enjoys the fundamental right to liberty, which is guaranteed under the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Rights of the Child ("CRC"), and every other major international and regional human rights instrument. The prohibition on arbitrary detention, including any arbitrary detention that arises in the context of administrative immigration enforcement[1] is one of the few absolute and non-derogable human rights standards, a peremptory norm of customary international law or *jus cogens*.[2]

In accordance with the right to liberty, and being conscious of States' primary obligation to safeguard children from torture and ill-treatment, States have an obligation to protect migrant children against all forms of illegal or arbitrary deprivation of liberty, including practices that may amount to torture or other cruel, inhuman or degrading treatment or punishment. This right applies to all children, irrespective of their legal or migration status. According to the *lex specialis* of the UN Convention on the Rights of the Child, children are children first and foremost without distinction, discrimination or exception. The principle of non-discrimination ensures that all of the rights enshrined in the CRC apply equally to "each child within their (States Parties) jurisdiction, without discrimination of any kind irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status."[3] Specifically regarding refugee, asylum seeker and irregular migrant children, the CRC Committee has explicitly stated:

> "The enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness."[4]

Yet despite this clear and non-derogable international legal framework, every day, all around the world, refugee, asylum seeker and irregular migrant children continue to be subjected to arbitrary immigration detention practices. A number of human rights experts have noted that child migrants are systematically detained when crossing international borders, both with their parents or guardians, or when unaccompanied or separated from their caregivers.[5]

In practice, immigration detention practices are enabled because there is frequently a tension between national legal frameworks governing

1 Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, para. 51, Human Rights Council, U.N. Doc. A/HRC/22/44, (24 December 2012).

2 Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, para. 23, Human Rights Council, U.N. Doc. A/HRC/28/68 (March 5, 2015) [hereinafter *Report of the Special Rapporteur on Torture*].

3 CRC, art. 2.

4 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005.

5 See e.g., François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, 'Detention of Migrants in an Irregular Situation, A/HRC/20/24 (2 April 2012).

immigration control and those governing child protection. As a result, children in an irregular migration situation are not sufficiently considered or protected as children under national systems for child protection, but are often viewed first as "illegal" according to restrictive migration laws and policies, and may therefore be adversely subjected to harmful practices such as the use of detention.

As noted recently by the UN Special Rapporteur on torture, Mr. Juan E. Méndez, "States frequently detain children who are refugees, asylum seekers or irregular migrants for a number of reasons, such as health and security screening, to verify their identity or to facilitate their removal from the territory."[6] Sometimes, children are detained without the knowledge of State authorities, for example when there is a failure to properly conduct age assessments, or due to a lack of appropriate child screening and identification. At other times children are knowingly detained, such as when they are detained together with their parents or guardians on the basis of maintaining family unity.

Regardless of the reasons for the immigration detention of refugee, asylum seeker or irregular migrant children, a number of studies have shown that such detention has a profound and negative impact on child health and development, and that immigration detention practices in transit and destination countries have no statistical correlation with the rate of irregular arrivals,[7] calling into question both the efficacy and legality of such detention.

Immigration detention: never in the best interests of the child

Given what we know about the particular vulnerabilities of refugee, asylum seeker and irregular migrant children and the impacts of immigration detention, it is not difficult to comprehend why the practice fails to respect a child's best interests.

Refugee, asylum seeker and irregular migrant children are already in a situation of particular vulnerability to abuse, discrimination, and exploitation due to their age and irregular migration status. Furthermore, children are always vulnerable within places of detention because of their relative powerlessness compared to migration and/or detention officials. In general, detention centres are frequently unsafe, overcrowded, and are fundamentally ill-equipped to provide children with the proper support and protection which they require,[8] leading to profound and negative impacts on child health and well-being.[9] We also know that immigration detention is one of the "most opaque areas of public administration" making accountability for abuse and ill-treatment especially difficult, as opposed to criminal or institutional custody of children where there is often greater independent oversight and access to accountability mechanisms.[10]

Among the physical and mental health impacts of immigration detention, children are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bed-wetting.[11] Even very short periods of detention can undermine child psychological and physical well-being and compromise their cognitive development.[12] Reports on the effects of immigration detention on children have also found higher rates of suicide, suicide attempts and self-harm, mental disorder and developmental problems, including severe attachment disorder.[13] Importantly, they noted "marked differences between adults and children in the distress associated with various incidents",[14] lending evidence to the "unique vulnerability of children deprived of their liberty" and the subsequent requirement of higher standards for children in the assessment of whether detention is a truly necessary and proportionate measure.[15]

There are also numerous documented cases of physical and sexual abuse of children in places of

6 Juan E. Méndez, *Report of the Special Rapporteur on Torture, supra* note 1, para. 59.

7 International Detention Coalition (2015), *Briefing Paper: Does Detention Deter?*, available at: http://idcoalition.org/detentiondatabase/does-detention-deter/*; see also,* Alice Edwards, Back to Basics, page 1.

8 Juan E. Méndez, *Report of the Special Rapporteur on Torture, supra* note 1, para. 61.

9 See, e.g. International Detention Coalition, *Captured Childhood*, (2012), p 48; *see also* Alice Farmer, *The impact of immigration detention on children*, Forced Migration Review, September 2013.

10 UN High Commissioner for Refugees (UNHCR), *Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual*, p 21, 2014.

11 See, e.g. Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014); International Detention Coalition, *Captured Childhood*, (2012); Dudley, M, Steel, Z, Mares, S, and Newman, L. *Children and young people in immigration detention*, Curr Opinion Psych 25: 285–292, (2012); Hamilton, C, Anderson, K, Barnes, R, and Dorling, K. *Administrative detention of children: a global report*, United Nations Children's Fund, New York (2011); Lorek, A, Ehntholt, K, Nesbitt, A et al. *The mental and physical health difficulties of children held within a British immigration detention center: a pilot study*, Child Abuse Neglect 33: 571–585, (2009).

12 No Child in Detention Coalition, *'Dad, have we done something wrong?'*, 2014, p. 5.

13 M Dudley and B Blick, Appendix E to *The heart of the nation's existence – a review of reports on the treatment of children in Australian detention centres*, ChilOut (2002); S Mares and J Jreidini, *Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues*, Australian and New Zealand Journal of Public Health 520 (2004); Human Rights and Equal Opportunity Commission, *A Last Resort? National Enquiry into Children in Detention* HREOC, (April 2004); Z Steel, S Momartin, C Bateman, A Hafshejani, D M Silove, N Everson, K Roy, M Dudley, L Newman, B Blick, S; Z Steel, *The politics of exclusion and denial: the mental health costs of Australia's refugee policy*, p.10 (May 2003).

14 Z Steel, p.8 (May 2003).

15 Juan E. Méndez, *Report of the Special Rapporteur on Torture, supra* note 1, para. 17.

immigration detention. UN experts note that children in immigration detention "have been tied up, gagged, beaten with sticks, burned with cigarettes, given electric shocks, and placed in solitary confinement, causing severe anxiety and mental harm."[16] Similarly, successive Australian national inquiries into the immigration detention of children over a 10-year period noted an "unacceptably high risk of sexual and physical abuse" and "numerous incidents" of sexual assault, particularly for young girls.[17] Such practices are fundamentally at odds with the child's best interests, yet have been noted across geographic regions and immigration detention regimes.[18]

Even when States attempt to make their immigration detention practices more humane or "child friendly" this does not stop children from being harmed.[19] This is in part because children perceive that they are being punished, despite having committed no crime.[20] But it is also because immigration detention can contribute to or exacerbate a number of pre-existing psychosocial and developmental vulnerabilities frequently experienced by children in the context of migration. These vulnerabilities may include previous violence or trauma experienced in their home country or during migration; disruption of the family unit and parental roles; and a lack of basic needs being met. For these reasons, according to the European Court of Human Rights, even short-term immigration detention of children may be a violation of the prohibition on torture and other ill-treatment, because a child's vulnerability and best interests outweigh the Government's interest in attempting to control or prevent unwanted irregular migration.[21]

Finally, even so-called "family friendly" immigration detention has demonstrated profound and negative impacts on refugee and migrant families. Families who are detained together are more likely to breakdown, as detention undermines the ability of adults to parent adequately, creates or exacerbates parental mental health problems, and damages parents' ability to provide the emotional and physical support children need for healthy development.[22] The institutional effects of detention also disempower parents from their role as carers, providers and protectors, causing children to take on roles, responsibilities, and emotional burdens disproportionate to their age.[23]

The emerging prohibition on child immigration detention in international law

Based on this emerging awareness of the harms of immigration detention on children, in recent years there has been a paradigm shift in the way that international and regional human rights experts have come to view the issue—namely, that the detention of a child for reasons related to their or their parents' migration status is never in the best interests of the child and will always constitute a child rights violation.

While the general rule regarding the detention of children in the context of juvenile justice remains that the arrest, detention or imprisonment of a child may only be used "as a measure of last resort and for the shortest appropriate period of time"[24] this is not the case when detention is considered for purposes of administrative immigration enforcement.

Applying the principle of the best interests of the child to migration management, in 2005 the CRC Committee[25] produced General Comment No. 6 on the *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*.[26] In paragraph 61 of this General Comment, the Committee found explicitly that:

> "Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof."[27]

Later, in 2012, the CRC Committee held a Day of General Discussion on *The Rights of all Children in the Context of International Migration* in which they explored the protections States must afford all children in the context of international migration, whether accompanied or unaccompanied. In their Report of the 2012 Day of General Discussion, the CRC Committee found that the detention of children based on either their *or their parents'* migration status can never be in

16 Juan E. Méndez, *Report of the Special Rapporteur on Torture, supra* note 1, para. 60.

17 Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014).

18 See, e.g. Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, (25 August 2010).

19 See JRS Europe, *Becoming Vulnerable in Detention:* Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project), June 2010.

20 No Child in Detention Coalition, *'Dad, have we done something wrong?'*, 2014.

21 Juan E. Méndez, *Report of the Special Rapporteur on Torture, supra* note 1, para. 62, citing *Popov v. France*, judgement of 19 January 2012; *Rahimi v. Greece*, judgement of 5 April 2011; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, judgement of 12 October 2006.

22 International Detention Coalition, *Captured Childhood*, (2012).

23 Ibid.

24 CRC, art. 37(b).

25 United Nations Human Rights Office of the High Commissioner, 'Committee on the Rights of the Child', http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx.

26 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005.

27 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 61.

the best interests of the child, and will therefore always constitute a child rights violation:

> "Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status." [28]

This CRC Committee recommendation recognizes that immigration detention—even for relatively limited duration or in contexts that are relatively "child friendly"—is never an appropriate place for children, because it is not a strictly necessary or proportionate measure which respects the child's best interests. Furthermore, it derives from an ethos of enforcement rather than protection or care. These findings reinforce existing regional court jurisprudence that "The child's extreme vulnerability is the decisive factor and [the child's best interests] takes precedence over considerations relating to [migration] status."[29]

Since 2012, an overwhelming number of UN and regional human rights bodies have joined the CRC Committee in finding that immigration detention is never in the best interests of the child, and therefore a clear violation of child rights.[30] This finding has also been supported by a multitude of civil society and National Human Rights Institutions too numerous to list here.[31]

A growing clarity and international consensus has emerged that the use of detention for refugee, asylum seeker and irregular migrant children must be prohibited when the justification for such detention is based upon controlling or managing migration. This is precisely because the residency or migration status of the child—or of the child's parents or guardians—is secondary to the State responsibility to protect the best interests of the child. Instead, States are obligated to prioritize alternative measures that promote the care and well-being of the child.

The role of judges and magistrates

Within this context, judges and magistrates have an important role to play in safeguarding the best interests of the child. Judges and magistrates can ensure the prohibition on child immigration detention is respected and promote rights-based alternative measures that prioritize the child's care, protection and support.

1) Ensure the non-detention of children

At the outset, judges and magistrates are often called upon decide whether or not to detain refugees, asylum seekers, or irregular migrants in administrative immigration hearings. Decision-makers should ensure that the best interests of children are properly assessed in all such decisions, including decisions of adults who may have children or be family members or guardians of children. This is to ensure that children are not placed in detention on the basis of their or their parents' irregular migration status, and that children are not separated from or otherwise adversely affected by the detention of their parents or family members.

2) Safeguard the child's right to family

The CRC makes clear that children should never be separated from their parents or guardians unless it is considered in the child's best interests to do so.[32] Judges and magistrates play a key decision-making role in ordering family separation, but may sometimes unwittingly separate refugee, asylum-seeker, or irregular migrant families, for example when decisions are made to detain a parent or related adult without properly assessing the impact on the child.

The best interests of the child are often undermined when parents, guardians, or family members are detained and children are transferred to an alternative care system. As a result of family separation caused by the unnecessary detention of a parent or family member, children often lose the support and protection of their families and are forced to take on roles beyond their level of maturity.

It should also be recalled that the child's family extends beyond the mere biological family or any single or traditional model for a family. In this regard, the CRC Committee has stated that "[t]he term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom."[33] This includes not only those individuals holding legal custody rights, but also "persons with whom the child has a strong personal relationship."[34] Unless the child's best interests require separating the family, the imperative requirement not to deprive the child of liberty should extend to the *entire family*, and requires the authorities to choose alternative measures to

28 Committee 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*, para. 78.

29 Popov c. France, Requêtes nos 39472/07 et 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012, para. 91.

30 See, Inter-Agency Working Group (IAWG) to End Child Immigration Detention, *Summary of standards relating to child immigration detention*, November 2015.

31 See, e.g. the civil society submissions made to the Committee on the Rights of the Child's 2012 Day of General Discussion on "The Rights of All Children in the Context of International Migration."

32 CRC, art. 3(1).

33 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (Article 3, paragraph 1), para. 59.

34 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (Article 3, paragraph 1), para. 60.

detention for all those involved in caring for and supporting the child.[35]

3) Ensure rights-based alternatives to detention are implemented

For these reasons, the CRC Committee has recommended:

> "To the greatest extent possible, and always using the least restrictive means necessary, States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians … and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved."[36]

So what are appropriate alternatives to detention in the context of ensuring the best interests of refugee, asylum seeker, and irregular migrant children? The International Detention Coalition (IDC), a leading global expert on immigration detention and alternatives to detention, defines alternatives as "*any law, policy or practice by which persons are not detained for reasons relating to their migration status.*"[37] This includes a broad array of options available to judges and magistrates to ensure that children and families are cared for and protected during the determination of their asylum or migration claim.

In particular, a number of countries have had success with community-based models that use constructive engagement and support, rather than enforcement, to ensure individuals are able to comply with migration procedures.[38] These programs use early intervention to support individuals throughout the bureaucratic administrative process via the provision of interpreters, legal assistance, and case managers who provide quality advice and can assist individuals to explore all the legal options available to them, including both options to remain in the country legally and, if needed, avenues to depart the country safely. These programs also treat individuals with respect and dignity, both ensuring that basic needs are met, and working with individuals as part of the same "team", rather than through an adversarial process.

Although such programs sometimes make use of residential facilities as part of a migration management system, the location of the child or family is not of primary concern. Instead, the focus is on assessing each case and ensuring that the community setting contains the necessary structures and supports that will ensure the child's best interests are protected, and enable the family or guardian to work towards a successful resolution of the child's migration status with authorities.

Unfortunately, many governments that currently utilize alternatives to detention have focused on unnecessarily restrictive or criminal-justice based models, such as onerous reporting requirements, electronic monitoring or "tagging", and bail programs. However, such alternatives are largely inappropriate for refugee, asylum seeker and irregular migrant children as they have committed no crime and may require heightened levels of support and care. Additionally, research findings indicate that overly onerous conditions actually have an adverse effect on compliance and successful case resolution outcomes.

Conclusion

Would you like to learn more? The International Detention Coalition has recently undertaken a global program of research to identify and describe various rights-based alternative models around the world. This program of research is currently the most in-depth study on alternatives to immigration detention that exists, and is described in detail in the report, *There Are Alternatives*.[39] The report outlines a model framework for decision-makers to explore, develop and implement community-based alternatives to detention in line with existing human rights obligations. This framework is called the Community Assessment and Placement (CAP)[40] model and it represents a global best practice for judges and magistrates seeking to protect the best interests of refugee, asylum seeker, and migrant children.

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35 Inter-American Court of Human Rights, Advisory Opinion OC-21/14 of August 19, 2014, 'Rights And Guarantees of Children in The Context of Migration and/or in Need of International Protection'.

36 Committee 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*, para. 79.

37 Sampson et al., *There are alternatives,* p. 7.

38 See Jesuit Refugee Service Europe, *From Deprivation to Liberty. Alternatives to Detention in Belgium, Germany and the United Kingdom (*December 2011); Cathryn Costello & Esra Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva* (UNHCR, June 2013).

39 Sampson et al., *There are alternatives,* ii78.

40 See, http://idcoalition.org/CAP/.

Families constrained: An analysis of the best interests of the child in family migration policies

Martine Goeman

Martine Goeman

Introduction

The study 'Families constrained' asks the question: In what way should the concept 'primary consideration' from Article 3 CRC be construed in family migration policies? The question will be answered based on the establishment of the 'interests of the child' in the CRC, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the law of the European Union.

1. The establishment and the weighing of 'the interests of the child' in the CRC

A primary consideration?

The English text of the UNCRC Article 3 states that the best interests of the child must be 'a primary consideration'. During the negotiations leading to the adoption of Article 3 CRC, there was some debate regarding the exact meaning that should be accorded to the wording 'best interests of the child'. Some proposals suggested that the 'best interests of the child' should be *the* primary consideration instead of *a* primary consideration. Others suggested the principle be a paramount consideration, which aligns with the Declaration of the Rights of the Child[1] and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Eventually the mentioned proposals did not make it through.[2]

What meaning does this give to the 'best interests of the child' with reference to other competing interests? Must Article 3 CRC be assigned a restrictive meaning only? Van Bueren seems to agree with the latter approach by arguing that a balance of interests beforehand would be an impossible position for drafters of conventions.[3] According to Smyth however, the word 'primary' under such approach is denuded of its meaning. The use of the word 'primary' clarifies that the 'best interests of the child' are not only equal to other interests, but in principle precede these interests.[4]

To assign a greater weight to the 'best interests of the child', which can exceptionally be departed from, seems to be in line with the intentions of the convention drafters. This appears to be even more evident from the Travaux préparatoires of the CRC which state that the 'best interests of the child' can only be set aside in cases of extreme necessary circumstances; in here an example is cited that the 'best interests of the child' cannot automatically be seen as the weightiest interests in a medical emergency situation during childbirth.[5]

Vision of the UN Committee on the Rights of the Child

In order to be able to give priority to the 'best interests of the child', implementation of the article in national legislation and policy is essential. According to the Committee on the Rights of the Child, Article 3 paragraph 1 has three distinguishable functions:

1. A substantial right: the right of the child to have his best interests determined and the acknowledgment that these interests in principle enjoy priority in the balance with other interests.
2. A fundamental, interpretative principle: when a provision leaves room for multiple interpretations, the interpretation that is in the best interests of the child must be chosen.

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[1] The Declaration of the Rights of the Child is the predecessor of the CRC.

[2] R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF 2007, p. 38-39; P. Alston (red.), *The best interests of the child. Reconciling Culture and Human Rights*, Oxford: Clarendon Press 1994, p. 12-13.

[3] G. van Bueren, *The International Law on the Rights of the Child*, The Hague/Boston/London: Martinus Nijhoff Publishers 1998, p. 47-8.

[4] C. Smyth, 'The Best Interests of the Immigrant Child in the European Courts: Problems and Prospects', in: G.G. Lodder and P.R. Rodrigues, *Het kind in het immigratierecht* (= The child in immigration law), The Hague: Sdu Uitgevers 2012, p. 150-151.

[5] See: S. Detrick (red.), *The United Nations Convention on the Rights of the Child. A Guide to the "Travaux Préparatoires"*, Dordrecht/Bostan/London: Martinus Nijhoff Publishers 1992, p. 133 and S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague: Martinus Nijhoff Publishers/Kluwer Law International 1999, p. 91 and 98. Both of these books refer to: UN Doc. E/CN.4/L.1575, para 24 (1981).

The CRC offers an interpretation framework for this.

3. A procedural rule: every decision that has an influence on a specific child, a certain group of children or children in general, must be underpinned by an assessment of the best interests of the child involved. In this respect, it must be motivated by how the best interests of the child are determined, based on which criteria and how these interests have been weighed against other interests.[6]

In General Comment 14 the UN Committee on the Rights of the Child puts forward a non-exhaustive list of aspects that should be taken into consideration.[7] For family migration it is important that several articles of the CRC address the relationship between parent(s) and children. A principal rule seems to be inferred from Article 9 paragraph 1 CRC: it is in theory in the interests of the child to be able to live together with their parent(s), unless it is explicitly proved that this is not in the interests of the child. Article 10 CRC furthermore indicates that the State must show a positive attitude when processing an application for family reunification. Separation of parents and children is only permitted for a particular reason if this is in the 'best interests of the child'. When parent(s) and children have already been separated, the government must hold a positive attitude with regards to requests for reunification.

In summary, the Committee stresses the term 'primary' means that the 'best interests of the child' in principle weigh heavier than other interests, but that there must be room in individual cases to acknowledge when another interest prevails.[8]

2. The establishment and weighing of 'the interests of the child' in the ECHR

Article 8 ECHR case law shows that there is no abstract concept of the best interests rule. The Court in some cases has considered the rule decisive, in others it acknowledges that the 'best interests of the child' are problematic, but not decisive.

Testing frameworks

Article 8 ECHR entails different testing frameworks for family migration cases. The basic principle for this is always that there exists no right to choice of residence. Although the divisions between the different testing frameworks are not fixed very precisely, in general a distinction can be made between:

- A test to Article 8 ECHR in the case of first admission[9]: *a fair balance test* is applied;
- A test to Article 8 ECHR for established private and/or family life in a State Party in which persons involved are aware of the uncertain residence status of one of them: a fair balance test is applied, only right of residence in *'exceptional circumstances'* and;[10]
- A test to Article 8 ECHR in cases where there is interference with the right to private and family life (for example) because of the withdrawal of a residence permit[11]; testing to Article 8 paragraph 2 ECHR and a fair balance test.

In all cases a balance must be made between the interests of the State and the interests of the individuals involved.[12] This *fair balance* test obligates to balance all interests involved in the case, among them in any case the 'best interests of the child'.

Especially for the testing framework of the '*exceptional circumstances*', the ECtHR leaves a great deal of freedom to the State. This testing framework is applicable to situations in which private and/or family life is formed during a period in which the persons involved were aware of the uncertain residence status of one of them. From the perspective of the child, the problematic issue about the testing framework is that (young) children will in fact often be unaware of their own or their family members' uncertain residence status.[13] But even if children are aware of this, they will often not have an influence on it. These are generally their parents' choices.

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6 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para. 6.

7 According to the Committee, in any case the following must be taken into account: views of the child (Article 12 CRC); identity of the child (Article 8 CRC); maintenance of family ties (Articles 9, 10, 18 and 20 CRC); care, protection and safety of the child (Article 3 paragraph 2 CRC), possible vulnerability of the child (22, 23, 30, 39 CRC); right to health care (Article 24 CRC); and right to education (28, 29 CRC).

8 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para. 37 and 39.

9 See, for example: ECtHR 21 December 2001, Sen v. the Netherlands, JV 2002/30 with commentary Van Walsum and ECtHR 1 December 2005, Tuquabo-Tekle v. the Netherlands, JV 2006/34 with commentary Van Walsum.

10 See, for example: ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, JV 2006/90 with commentary Boeles and ECtHR 28 June 2011, Nunez v. Norway, JV 2011/402 with commentary Van Walsum.

11 See, for example: ECtHR 2 August 2001, Boultif v. Switzerland, JV 2001/254 with commentary Boeles; ECtHR 18 October 2006, Uner v. the Netherlands, JV 2006/417 with commentary Boeles and ECtHR 23 June 2008, Maslov v. Austria, JV 2008/267 with commentary Boeles.

12 ECtHR 29 November 1996, 21702/93, Ahmut v. the Netherlands, para. 63.

13 P. Boeles, M. den Heijer, G. Lodder and K. Wouters, *European Migration Law*, Cambridge/Antwerp/Portland: Intersentia 2014, p. 213.

The Court even explicitly considers in two cases – Butt[14] and Kaplan[15] – that strong immigration policy consideration would in principle militate in favour of identifying children with the conduct of their parents, because there would otherwise be a great risk that parents exploit the situation of their children in order to secure a residence permit for themselves and for their children. What does the Court exactly do here? The *'exceptional circumstances'* test can in fact itself be perceived as an allocation of behaviour of parents to children. A condition of this test is that persons involved must be aware of their uncertain residence status when forming family life but children are not normally aware of this. Does the Court now allocate the parents' behaviour to children twice or does the Court only explain in Butt and Kaplan what it had already done more often in the context of the '*exceptional circumstances*' test? There is no consensus about this in the literature.[16]

Identity, family ties and nationality

Articles 8 and 16 CRC can be viewed as a concrete expression of the term 'best interests of the child'. There are also more concrete consequences to mention; because of the combination of nationality and family ties as aspects of identity, these must be weighed as special interests in the general testing frameworks of the Court. Such a consideration is now absent in the testing to Article 8 ECHR. In the case of Jeunesse[17] it is included in the individual weighing of interests, but it does not yet have a clear general place in the testing framework.

Stronger protection by CRC

Article 9 CRC has an evidently stronger protection for situations in which the right of residence of one of the family members is ended; in Article 8 ECHR that question is controlled by the second paragraph (in which exceptions on the right to family life are adopted) in combination with a *fair balance* test. Based on the fourth paragraph of Article 9 CRC it appears that the forced return of a family member is included in the definition of separation, and based on paragraph 1 of Article 9 CRC it appears that separation of parent(s) and children is only allowed when this is in the 'best interests of the child'. In situations in which a residence permit of one of the family members is withdrawn, testing to paragraph 2 of Article 8 ECHR is in fact a too flexible framework for situations involving children. The legitimacy of such a decision can in accordance with Article 9 CRC only lie in serving the 'best interests of the child'.

Positive basic attitude

Article 10 CRC includes a very important general starting point; the basic attitude towards family reunification must be positive. This is a fundamentally different position from what the Court shows in its case law on Article 8 ECHR. The basic idea here is that Article 8 ECHR does not include a right to choice of residence. This is correct and the CRC does not include such right either. Article 10, however, does limit the consequences that can be drawn from this; the basic attitude towards family reunification must be positive. Especially in the *'exceptional circumstances'* cases already discussed, there is no question of a positive basic attitude.

Prohibition of discrimination based on behaviour of parents

Finally, Article 2 paragraph 2 CRC must be mentioned. The article prohibits the discrimination of children based on the behaviour or status of their parent(s) or other family members. Allocating the parent(s)' behaviour to children because of the applicability of the '*exceptional circumstances*' test

14 ECtHR 4 December 2012, Butt v. Norway, JV 2013/85 with commentary Stronks, RV 2012/21 with commentary Brink.

15 ECtHR 24 July 2014, Kaplan and others v. Norway, JV 2014/320, with commentary Werner.

16 In her commentary on the Butt judgment Brink marks it as a breaking point with earlier case law of the Court in which the 'best interests of the child' were central (See note Brink, RV 2012/21.) In Stronks's commentary, however it seems to be assumed without this further being very specifically argued that the allocating of parent(s)' behaviour to children is part of the legitimacy of the '*exceptional circumstances*' test in situations involving children. It is surely remarkable that the consideration in Butt about the allocation of parent(s)' behaviour to children follows directly from the cited section from the Nunez judgment on the '*exceptional circumstances*' test and that this consideration is also directly linked to the applicability of the '*exceptional circumstances*' test. (ECtHR 4 December 2012, Butt v. Norway, JV 2013/85 with commentary Stronks, RV 2012/21 with commentary Brink, para. 79.). In Kaplan the consideration about the allocation of parent(s)' behaviour to children is also linked to the awareness of the uncertain character of the residence status of involved persons; the aspect on which the Court bases whether the '*exceptional circumstances*' test is applicable (ECtHR 24 July 2014, Kaplan and others v. Norway, JV 2014/320, with commentary Werner, para. 86.). The Court first considers that the children were born and raised in Turkey, which shows that they were unaware of the uncertain residence status at the moment the family life was formed. The Court then repeats the argument from Butt and states that the parents in the Kaplan case were aware of the uncertain residence status while having continued their family life in Norway. This behaviour is allocated to the children and the Court apparently uses that as a legitimacy to apply the '*exceptional circumstances*' test. In both Kaplan and Butt the Court thus only provides an explicit justification for the attribution of awareness of the parents to the children on the uncertain residence status, as it implicitly does in '*exceptional circumstances*' cases again and again (Werner 2015, p. 19-21.).

17 ECtHR 3 October 2013, Jeunesse v. the Netherlands, JV 2014/343.

does discriminate and is therefore in conflict with Article 2 CRC.[18]

It is clear that neither the CRC nor the ECHR entail a subjective right to family reunification. However, it is good to argue that the influence of the CRC must lead to the fact that the strictest testing framework of the ECtHR ('*exceptional circumstances*' test) must never be applied in situations concerning children. This test is surely *in abstracto* only regarded as applicable in those situations where all persons concerned at the moment of starting the family life were already aware of the uncertain residence status of one of them.[19] However the requirement of awareness is regularly allocated to the concerned children in practice. This allocation is a legal trick that is not only at odds with the independent legal position of the child, but also with the applicability requirement for the 'exceptional circumstances' test as the Court itself has stated repeatedly.

Objectifying the 'best interests of the child'

The concrete way in which the Court judges the best interests of children is difficult to generalize. The Court mentions circumstances that are remarkable and which are decisive or not. A constant factor, however, is that the Court for children often gives weight to the age of the children involved. How much weight is allocated to the age varies. For example, in the case of Arvelo Aponte, the seven-year-old son of the family is considered to be "*of a young and adaptable age.*"[20] The children of the Jeunesse family (aged 3, 8 and 15 years, covering almost all stages of childhood) are called "*relatively young*".[21] Moreover, the meaning that the Court in Jeunesse allocates to age is that there is admittedly no objective impediment to return, but that return will go hand in hand with a "*degree of hardship*".

Finally, the age factor in the case of Rodrigues da Silva & Hoogkamer must be mentioned. Rachael, Mrs. Rodrigues' daughter, at the moment of the judgement, was almost ten years old. A report by the Child Care and Protection Board, written when Rachael was one year old concluded that she –at this young age – was already rooted in Dutch society; it had a significant influence on the outcome of the case.[22] Here, an expert report determined the extent to which a child has an interest in the case about residence in The Netherlands, thus creating a very different picture from the cases in which the ECtHR itself seems to give an estimate of the consequences that can be related to the age of a child.

The Neulinger case

The ECtHR's substantive interpretation of the concept 'best interests of the child' cannot directly be derived from the case law of the Court on family reunification. In several family reunification cases, the Court has referred to the 'best interests of the child' to an earlier child abduction case dealt with by the ECtHR when applying a test.[23] It concerns the Neulinger case, in which the Court extensively discussed the substantial meaning of the 'best interests of the child' and how this term must be established in individual cases. Although Neulinger is not a migration law case, it is a very relevant one; the Neulinger case refers to earlier judgements on the expulsion of aliens [24] and, as mentioned, the ECtHR refers in later migration law cases back to Neulinger. In the Neulinger case, the ECtHR outlines a clear methodology as to how, the best interests of the child must be dealt with, after first establishing that the best interests of the child comprises two limbs: one, the interest to maintain ties with his/her family, and two, the developmental perspective of the child is required to be assessed on an individual level. According to the ECtHR, important factors are age, level of maturity, the presence or absence of the parents and the environment and experiences.[25] It further indicated that in the national procedure, an in-depth examination of the entire family situation, particularly including factual, emotional, psychological, material and medical factors, must be conducted to satisfy the balancing of interests.[26] Regarding the balance of interests the Court notes in the Neulinger judgment, there is an international consensus that the best interests of

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18 J. Werner, 'De (uitgestelde) rechtssubjectiviteit van het vreemdelingenkind' (= The (postponed) legal subjectivity of the alien child), *Asiel & Migrantenrecht (A&MR)* 2015-01, p. 17-21.

19 See, for example: ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, JV 2006/90 with commentary Boeles, para. 39; ECtHR 31 July 2008, Darren Omoregie v. Norway, JV 2008/330 with commentary Boeles, para. 57, ECtHR 3 November 2011, Arvelo Aponte v. the Netherlands, JV 2012/3, para. 55; ECtHR 12 February 2012, Antwi v. Norway, JV 2012/170 with commentary Van Walsum and RV 2012/18 with commentary Werner, para. 89; ECtHR 24 July 2014, Kaplan and others v. Norway, JV 2014/320, with commentary Werner, para. 81; ECtHR 3 October 2014, Jeunesse v. the Netherlands, JV 2014/343 with commentary P. Boeles, para. 108.

20 ECtHR 3 November 2001, Arvelo Aponte v. the Netherlands, JV 2012/3, para. 60. The ECtHR concluded that there was no violation of Article 8 ECHR in this case. In the Jeunesse case the Court concluded that there was a violaton of Article 8 ECHR.

21 ECtHR 3 October 2013, Jeunesse v. the Netherlands, JV 2014/343 with commentary P. Boeles, para. 117.

22 ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, JV 2006/90 with commentary Boeles, para. 12.

23 ECtHR 28 June 2011, Nunez v. Norway, JV 2011/402 with commentary Van Walsum, RV 2011/20 with commentary Ismaili, para. 78; ECtHR 30 July 2013, Berisha v. Switzerland, JV 2013/302, para. 51; ECtHR 8 July 2014, M.P.E.V. and others v. Switzerland, 3910/13, para. 57; ECtHR 3 October 2014, Jeunesse v. the Netherlands, JV 2014/343 with commentary P. Boeles, para. 75, 109 and 118.

24 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 146.

25 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 138.

26 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 139.

the child "must be paramount in all actions concerning children."[27]

The approach from the Neulinger judgement provides clear opportunities for objectifying the 'best interests of the child'. The emphasis the Court places on the responsibility of the State to actively gather information, makes it advisable for States in 8 ECHR cases involving children to turn to experts to investigate the 'best interests of the child' by default. Expert reports must be explicitly included in the furtherance of the balancing of interests. In this regard, the paragraph from the *Jeunesse case* in which it was decided that the *practicality, feasibility and the proportionality* of a negative decision must be examined and researched is particularly relevant when assessing delivered evidence on the position of the child.

In the *Jeunesse case* the Court also states that the 'best interests of the child' precedes other interests in weight, but the 'best interests of the child' alone is not decisive. .

3. The establishment and the weighing of the 'interests of the child' in the European Union

Children's rights within the EU

Article 3 paragraph 3 of the Treaty on European Union from 1992, includes that the European Union promotes the protection of the rights of the child. In 2006 the European Commission (EC) published the communication '*Towards an EU Strategy on the Rights of the Child*'.[28] Also in 2006, the Court of Justice of the European Union (CJEU) acknowledges that although the Union is not a party to the CRC, the Court does give recognition and protection to fundamental rights in the form of general principles of EU law. For the question as to as to which fundamental rights are included, the Court is guided by the joint constitutional traditions of the Member States and by international legal instruments on human rights in which member states are involved or which they are affiliated to.[29] The Court recognizes in this manner that the provisions of the CRC are part of the fundamental rights protected by the Court as general principles of EU law.[30]

Although this is chronologically not entirely correct, Article 24 of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) must be seen as the hierarchical foundation of the child-legal provisions of the European Union.

The Charter was adopted in 2000, but became a legally binding document only with the Lisbon Treaty in 2009. Based on Article 51 paragraph 1 Charter, Member States are only bound to the Charter if they execute the law of the European Union. It furthermore follows from case law of the CJEU that the Charter must be seen as a text that reflects the general principles of Union law.[31] Even if these principles in the Charter are incomplete or addressed in a limited way, they still fully apply as a Union law principle.[32]

The CJEU considers in the judgment Deticek[33] that the right of the child to maintain a personal relationship and direct contact with both their parents (European Charter of Fundamental Rights, Article 24 paragraph 3) is an indisputable right of every child. According to the CJEU Provisions of Union Law cannot be explained in a way that would violate this fundamental right. The best interests of the child to maintain a personal relationship with both parents can only be waived according to the CJEU if such contact is contrary to the child's best interests.[34] Given the hierarchical position of the Charter, the judgment of the CJEU on the meaning of Article 24 has a long reach and is, for example, also applicable to the Family Reunification Directive.

Other judgments also show that the CJEU is willing to assign a great weight to the 'best interests of the child'. For example, on 6 June 2013 the CJEU acknowledged the importance of fast and short procedures for unaccompanied minors based on Article 24 paragraph 2 Charter.[35] The expectation is that the CJEU will also derive the importance of fast and short procedures from Article 24 of the of the Charter when it comes to procedures for children who are separated from their parent(s) or who are in danger of becoming separated by a similar procedure.

How the term 'primary consideration' is weighed exactly by the Court of Justice in the best interests of children cannot yet be precisely derived from the mentioned case law. What is clear is that the Court finds a balance in favour of the 'best interests of the child' to be important when the interests of the child are evidently harmed by a specific explanation of a provision of EU law.

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27 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 135.

28 COM(2006) 367 definite. In this strategy the EC stresses the importance of children's rights for the work of the EU and refers thereby directly to the CRC.

29 Although the EU is thus not a party itself, all the EU member states have indeed ratified the CRC.

30 P. Boeles, M. den Heijer, G. Lodder and K. Wouters, *European Migration Law*, Cambridge/Antwerp/Portland: Intersentia 2014, p. 45.

31 CJEU 26 June 2006, Parliament v. the Council, JV 2006/313 with commentary Boeles, point 38. See also: Boeles, den Heijer, Lodder and Wouters 2014, p. 45.

32 CJEU 11 December 2014, Boudjlida, ECLI: EU:c:2014:2431, para. 30-35.

33 CJEU 23 December 2009, c-403/09 Deticek.

34 Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

35 CJEU 6 June 2013, C-648/11, JV 2013/250, para. 61.

From Green Paper discussion to Guidelines

In 2011 the European Commission (EC) published a Green Paper[36] on the Family Reunification Directive.[37] The Guidelines from the Green Paper reflect the current views of the EC and can change. They address the position of children several times.[38] The EC further refers to jurisdiction of the CJEU, where it has been decided, that the criteria to determine family reunification must be answered in light of the right to private and family life and the rights of the child.[39]

The CJEU also acknowledges that children must grow up in a family environment for full and harmonious development of their personality. The EC states that, also for this reason, Member States dealing with a request for family reunification must ensure that a child is not separated from his parents against their will unless the best interests of children require such a separation.[40]

Although the Family Reunification Directive allows Member States to establish a limited number of conditions for family reunification, the EC constantly emphasizes that the interests of the involved children must still be looked at in cases of rejections based on those conditions the interests of involved children must be considered. The EC encourages Member States not to charge administrative costs for family reunification applications submitted by children based on the promotion of the 'best interests of the child'.

In the Green Paper discussion, the Defence for Children have advocated for separate guidelines that express the meaning and the method of testing the 'best interests of the child' in individual family reunification procedures.[41] The EC however, has not been willing to go this far yet. Even though the Guidelines of the EC are useful, it remains unsatisfactory that there has not yet been a further clarification on the concept 'best interests of the child', and the weight that is allocated to these interests compared to other interests. There remains a need for more authoritative interpretations of how the child-legal EU principles must be applied in practice.

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This article is a summary of the research by Jorg Werner and Martine Goeman published in June 2015:
'Families constrained: An analysis of the best interests of the child in family migration policies'.

The full report can be read at:
http://www.childrenslegalcentre.com/userfiles/Defence-for-Children-Families-constrained-an-analysis-of-the-best-interests-of-the-child-in-family-migration-policies-15-November-2015.pdf

36 COM(2011) 735 final.

37 COM(2014) 2010 final.

38 The EC emphasizes in multiple places that, in accordance with Article 5 paragraph 5 Family Reunification Directive, the 'best interests of the child' must be taken into account and based on Article 17 Family Reunification Directive that in case of a rejection of an application for family reunification the individual circumstances of the case must be taken into account. According to the EC Article 5 paragraph 5 Family Reunification Directive contains the duty to take into account the well-being of the child and the situation of the family. Here, the EC refers to the principle of respect for family life, as enshrined in the CRC and the Charter of Fundamental Rights of the EU.

39 COM(2014) 210 final, p. 26.

40 COM(2014) 210 final, p. 9.

41 http://www.defenceforchildren.nl/images/69/1835.pdf.

A call for global child protection thinking and acting: Migrant children and child welfare systems

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Introduction

Migration is an increasing global phenomenon that solves as well as generates problems for international migrants.[1] Children and their families may escape economic deprivation, political strife or natural disasters, or reunite with families when they migrate, but they may also face economic, physical, social and emotional challenges during their journey and the acculturation process in the new society.[2] Migration affects public child protection systems when migrant families come into contact with welfare services and when protecting migrant children from abuse and neglect. Yet there is little comparative research about how child welfare systems in different countries of the global north seek to meet the needs of vulnerable migrant children relative to one another. The term 'migrant children' here refers to children who move across international boundaries, by themselves or with their families or caregivers, as well as children who are born to international migrants in the destination society.

In this article, we will present some key findings of a recent comparative international analysis of how the child welfare systems of 11 countries, including Australia, Austria, Canada, England, Estonia, Finland, Italy, the Netherlands, Norway, Spain and the United States, conceptualize and practice with migrant children and their families. This analysis was published as a book entitled *Child welfare systems and migrant children*.[3] First, we will provide a general overview of children and migration.

Children and migration

According to the United Nations (2015), over the past 15 years world-wide migration has increased rapidly, with high-income countries hosting over two-thirds of all international migrants. In 2000, the number of international migrants amounted to 173 million; in 2015, the number was 244 million. Most migrants originate from middle-income countries, and nearly half were born in Asia, followed by Europe, Latin America and the Caribbean and Africa.[4] Table 1 illustrates the change in migration demographics in OECD countries between 2000 and 2013.[5]

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1 United Nations. (2015). *International Migration Report: Highlights*. Retrieved on Sept. 2, 2016 at <http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf>.

2 Dettlaff, A. J., Vidal de Haymes, M., Velazquez, S., Mindell, R., & Bruce, L. (2009). Emerging issues at the intersection of immigration and child welfare: Results from a transnational research and policy forum. *Child Welfare*, 88(2), 47–67; Johnson, M. A. (2007). The social ecology of acculturation: Implications for child welfare services to children of immigrants. *Children and Youth Services Review*, 29, 1426–1438; International Organization for Migration (IOM). 2016. *Mediterranean migrant arrivals reach 300,450; deaths at sea: 3,501*. Retrieved on Sept. 26, 2016 at <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-300450-deaths-sea-3501>.

3 Skivenes, M., Barm, R., Križ, K., Pösö, T. (2015). Child welfare systems and migrant children. A cross-country study of policies and practices. New York: Oxford University Press.

4 UN 2016, note 1 above.

5 OECD. (2016a). *OECD Factbook 2015-2016. Immigrant and foreign born population*. Retrieved on Sept. 22, 2016 at <http://www.oecd-ilibrary.org/docserver/download/3015041ec005.pdf?expires=1474900157&id=id&accname=guest&checksum=019D3356F1E76E74F4C5B45DAFE42994>.

Table 1. Foreign-born population in percentage of country population

Country	2000 or first available year	2013 or latest available year
Mexico	0.5	0.8
Poland	2.0	1.8
Chile	1.2	2.4
Slovak Republic	2.2	3.2
Hungary	2.9	4.5
Finland	2.6	5.6
Greece	10.3	6.6
Czech Republic	4.2	7.1
Portugal	5.1	8.3
Denmark	5.8	8.5
Italy	3.9	9.4
Estonia	18.4	10.1
Iceland	6.0	11.5
Netherlands	10.1	11.6
France	10.1	11.9
United Kingdom	7.9	12.3
Germany	12.5	12.8
United States	11.0	13.1
Spain	4.9	13.4
Norway	6.8	13.9
Belgium	10.3	15.5
Sweden	11.3	16.0
Slovenia	8.5	16.1
Ireland	8.7	16.4
Austria	10.4	16.7
Canada	17.4	20.0
Israel	32.2	22.6
Australia	23.0	27.6
New Zealand	17.2	28.2
Switzerland	21.9	28.3
Luxembourg	33.2	43.7

Children migrate with their families or on their own for a variety of reasons, sometimes forced (in the case of human trafficking, for example), sometimes not. They also may stay behind when their parents migrate,[6] which suggests that their childhood is profoundly influenced by migration, even though they may remain in their country of origin.

Many children migrate across borders on their own.[7] More specifically, 'child migrants' or 'unaccompanied migrant children' are terms that are used when children migrate across national borders separately from their families. For example, in 2014, an estimated 60,000 children crossed the Mexico-U.S. border without their parents or caregivers.[8] In 2014, 25,000 children came to Europe unaccompanied by a parent or other caregiver.[9] There are four broad categories of child migrants as suggested by Bhabha and Schmidt (2008): children who travel in search of opportunities, whether educational or employment-related; children who travel to survive and escape persecution or wars, family abuse, and dire poverty; children who travel for family reunion – to join documented or undocumented family members who have already migrated; and children who travel in the context of exploitation (including trafficking).

Foreign-born populations have been demonstrated to be more economically and socially vulnerable than native-born populations, and their children may therefore be more vulnerable. However, according to the UN:[10]

> *"In spite of the many benefits of migration, migrants themselves remain among the most vulnerable members of society. They are often the first to lose their job in the event of an economic downturn, often working for less pay, for longer hours, and in worse conditions than national workers. While for many migration is an empowering experience, others endure human rights violations, abuse and discrimination."*

Recent OECD statistics about unemployment rates of native and foreign-born populations, shown in Table 2 below, evidence the economic vulnerability of migrants compared to native-born populations.

6 Dreby, J. (2010). *Divided by borders: Mexican migrants and their children*. Berkeley: University of California Press; Levitt, P. (2001). *The transnational villagers*. Berkeley: University of California Press; Salazar- Parreñas, R. (2005). *Children of global migration: Transnational families and gendered woes*. Stanford: Stanford University Press; Schmalzbauer, L. (2005). *Striving and surviving: A daily life analysis of Honduran transnational families*. New York: Routledge 2005.

7 Bhaba, J., & Schmidt, S. (2008). Seeking asylum alone: Unaccompanied and separated children seeking protection in the U.S. *The Journal of the History of Childhood and Youth*, 1 (1), 126-138.

8 Tobia, P.J. (2014). *No country for lost kids*. June 20, 2014. PBS NewsHour. Retrieved on Sept. 26, 2016 at <http://www.pbs.org/newshour/updates/country-lost-kids/>.

9 UNICEF. (2015). Refugee and migrant crisis in Europe. Retrieved on Sept. 26, 2016 at <http://www.unicef.org/publicpartnerships/files/Refugee_and_migrant_children_in_Europe_-_Sept_2015.pdf.>

10 UN 2015 at p.3, note 1 above.

Table 2. Unemployment rates of native and foreign-born population as a percentage of total labour force in OECD countries with available data, in 2014[11]

Country	Foreign-born	Native-born
Australia	6.1	6.2
Austria	10.1	4.7
Belgium	17.6	6.9
Canada	7.9	6.7
Czech Republic	7.0	6.2
Denmark	12.3	6.0
Estonia	9.3	7.3
Finland	16.8	8.3
France	16.0	9.1
Germany	7.9	4.5
Greece	34.5	25.8
Hungary	6.0	7.8
Iceland	7.6	4.7
Ireland	13.5	11.0
Italy	16.4	12.3
Luxembourg	7.2	4.4
Mexico	6.8	5.0
Netherlands	12.0	6.1
New Zealand	6.3	5.9
Norway	7.9	2.9
Poland	12.1	9.1
Portugal	16.9	14.2
Slovak Republic	7.4	13.3
Slovenia	13.0	9.6
Spain	33.3	22.8
Sweden	16.4	6.2
Switzerland	7.7	3.3
Turkey	12.0	10.0
United Kingdom	7.1	6.1
United States	5.8	6.5
EU 28	14.9	9.8

For children, migration involves a number of serious challenges, as demonstrated by Hordyk and her colleagues (2015).[12] The following excerpt highlights what children face on an everyday level when migrating just because they are children:

> *"Upon their arrival in a host country, immigrant and refugee children are confronted with a rather intimidating 'to do' list. They must negotiate a new set of languages, foods, social spaces, physical geographies and education systems while simultaneously adjusting to new family and/or community constellations. They also face the more abstract challenge of adjusting to a host country's norms and expectations concerning childhood."*[13]

Children possess different resources to cope with their 'to-do-lists' than adults. This literature and recent scholarship on children's involvement in decision-making in migration[14] underscore that children are agents in the process of migration and families' decisions to migrate. These studies suggest that children may be involved, or that their well-being may a central factor in these decisions. However, in traditional migration research, children who migrate are viewed, as suggested by White et al. (2011), as being passive, needy and different; their accounts of themselves and their lives are silenced through adultist discourses about migration decision-making and experiences.[15] Further, refugee children and their families may be socially constructed as victims or untrustworthy, which may run counter to how they themselves see their situation.[16] Statements like these motivated us to explore in detail how child welfare systems 'meet' migrant children from an international-comparative perspective.

The international study on child welfare systems and migrant children that we are reporting on here was also motivated by a burgeoning theoretical platform on child-centrism that has developed since the 1990s.[17] The child-centric theoretical paradigm propelled us to focus on migrant children and their protection by public child protection systems. According to Skivenes & Strandbu (2006), this paradigm, which is still developing, underscores three levels of analysis that we consider pertinent to the study of migrant children and child welfare systems. First, a child-centric perspective involves a structural element, which considers the formal institutional arrangements promoting children's rights. In the context of child migrants or children in migrant families, this means analysing how governments ensure the protection of marginalized children

11 OECD. (2016b). *OECD Factbook 2015-2016. Unemployment rates of native-born and foreign-born populations.* Retrieved on Sept. 22, 2016 at <http://www.oecd-ilibrary.org/economics/oecd-factbook-2015-2016/unemployment-rates-of-native-and-foreign-born-population_factbook-2015-table18-en;jsessionid=1bn78lky9y9ov.x-oecd-live-02.>

12 Hordyk, S., R., Dulude, M. & Shem, M. (2015). When nature nurtures children: Nature as a containing and holding space. *Children's Geographies*, 13 (5),571-588.

13 Ibid at p. 571, citing Ensor and Gozdiak, 2010, Ensor, M. O., and E. Gozdiak (Eds.) (2010). Introduction: Migrant children at the cross roads. In *Children and migration: At the crossroads of resiliency and vulnerability*, 1–14. Basingstoke: Palgrave Macmillan.

14 Bushin, N. (2009). Researching family migration decision-making: A children-in-families approach." *Population, Space and Place*, 15, 429–443; Ryan, L. & Sales, R. (2011). Family migration: The role of children and education in family decision-making of Polish migrants in London. *International Migration*, 51 (2), 90-103; Moskall, M, & Tyurrell, N. (2016). Family migration decision-making, step-migration and separation: Children's experiences in European migrant-worker families. *Children's Geographies*, 14 (4), 453-467.

15 White, A., Ni Laoire, C, Tyrrell, N, & Carpena-Mendez, F. (2011). Children's roles in transnational migration. *Journal of Ethnic and Migration Studies*, 8 (37), 1159-1170.

16 Eastmond, M. & Ascher, H. (2011). In the best interest of the child? The politics of vulnerability and negotiations for asylum in Sweden. *Journal of Ethnic and Migration Studies*, 37 (8), 1185-1200.

17 James, A., & Prout, A. (1997). *Constructing and reconstructing childhood*. London: Falmer Press.

through laws and policies, both migration and child welfare laws.[18] Such an approach encourages scholars to analyse how governments facilitate institutional arrangements adjusted to children's needs and competencies. For example, Bhaba (2009) employs this element of a child-centric paradigm related to migrant children when she argues that the legal standard of the right to family life is tilted towards adults, not children, in the United States: in the U.S., adult citizens who have migrated to the U.S. are entitled to bring their dependents to the United States, whereas migrant children have no such equivalent right.[19] The focus on the structural element of a child-centric perspective has propelled us to examine the legal and policy platforms affecting the lives of vulnerable migrant children in the 11 countries under study.

Second, a child-centric paradigm encourages researchers to analyse whether the interactions between adults and children, for example between adults working in the enforcement of migration laws or professionals employed in public child welfare agencies, perceive children as their focus and recognize children as people with their own views about their lives. When adults make decisions about children, it matters whether or not they perceive migrant children as competent or incompetent, as subjects or as objects, etc. More specifically, adults' perceptions of children make a difference to the degree to which migrant children are able to exercise their formal rights in the course of a law or policy being implemented (by adult professionals). In the context of children and migration, Bhaba (2009) discusses the adversarial interrogations that immigration officials conduct with asylum-seeking children in Australia and the United States as examples of practices that counter children's best interests.

Third, a child-centric perspective stresses the fact that children are individuals who have a life here and now, with a past and a future. It casts light on how children view their situation and the world and stresses that children's views are important. In the realm of research on migrant children, the study on asylum-seeking children and young people in Scotland by Hopkins and Hill (2010), which was based on interviews with children and service providers, shows that these children have a complex set of needs but also possess strength and resilience; thus the study embraces this perspective.[20]

How do child welfare systems meet children?

What we know about how different child welfare systems interact with children in general, based on previous scholarship, is that there are differences and similarities in how different child protection systems in the global north meet vulnerable children and their families. Until recently, child protection systems used to embrace different orientations when practicing with vulnerable children.[21] Child protection-oriented systems like the United States embrace a more legalistic, investigative and adversarial approach that focuses on protecting children from risk of harm, while family service-oriented systems such as Finland and Norway support children universally with the help of preventive services. However, these approaches have become more blended in recent years. Generally, child protection systems have moved towards a child-focused approach that has shifted from protection from risk to the provision of welfare by providing early intervention and prevention services.[22] However, there is very little knowledge about how these systems compare when interacting with migrant children. The aim of the book *Child welfare systems and migrant children* (Skivenes et al., 2015) was to provide a comparison about how different child welfare systems conceptualize and practice with migrant children and their families.

We asked the country contributors to the book to examine the following questions in their respective chapters:

- What do laws and policies say about the well-being of migrant children and services provided for them?
- How do child welfare systems organize the services they provide to migrant children, and how are practitioners trained to work with this population of children?
- To what extent are migrant children represented in the child welfare systems?
- What is child welfare practice with migrant children and their families like?

In order to study the latter element, we fielded a survey with child welfare workers, which was answered by a total of 838 child workers from nine countries (Australia and the Netherlands did not do field surveys). The survey asked respondents to react to two case vignettes, each involving a migrant child. One vignette delineated the case of a migrant family who had a newborn baby and live in extreme poverty in poor housing conditions. The other vignette involved the case of a 10 year-old migrant girl who was beaten by her parents.

[18] Skivenes, M., & Strandbu, A. (2006). A child perspective and participation for children. *Journal of Children, Youth and Environment*s, 16 (2), 10-27.

[19] Bhabha, J. (2009). Arendt's children: Do today's migrant children have a right to have rights? *Human Rights Quarterly*, 31 (2), 410-451.

[20] Hopkins. P. & Hill, M. (2010). The needs and strengths of unaccompanied asylum-seeking children and young people in Scotland. *Child & Family Social Work,* 15 (4), 399–408.

[21] Gilbert, N. (ed.) (1997). *Combatting child abuse: International perspectives and trends*. Oxford University Press, Oxford; Gilbert, N., Parton, N., & Skivenes, M. (2011). *Changing patterns of response and emerging orientations*. In N. Gilbert, N. Parton, & M. Skivenes (Eds.), Child protection systems: International trends and orientations (pp. 243–257). New York: Oxford University Press.

[22] Gilbert et al. (2011), ibid.

We asked respondents to assess the risk to the children and to make a decision about the cases. The survey also included questions about workers' training, their level of feeling competent when working with migrant children and families, and the level of challenge and systemic barriers they experience when working with migrant families. We also asked whether an undocumented child who is not attending school is the responsibility of the child welfare system.

The key findings of the book suggest that the needs of migrant children are not fully met by any of the child welfare systems we studied. Our findings also show that there are significant knowledge gaps and systemic challenges when child welfare systems meet migrant children. In many countries, including Austria, Australia, Canada, Estonia, Finland, Italy and Spain, there is a lack of consistent, longitudinal and systemic data collection by the state about the representation of migrant children and their families in public child welfare agencies; about their demographic characteristics, and their specific problems, risks and needs. Without these types of data it is impossible to assess whether migrant children and their families are over- or underrepresented in the child welfare system compared to non-migrants, and why that might be the case, how child welfare systems work with migrant children over time, and whether policy interventions on behalf of migrant children make a difference. The data we do have about the representation of migrant children in public child welfare systems in Norway, the Netherlands and the United States reveal that some migrant children are disproportionately represented in in-home and out-of-home services. This is salient knowledge for policy makers and practitioners who take seriously the specific challenges of this population.

At the level of child welfare legislation and policy, we found that the child welfare systems conceptualize migrant children as any other children, if they perceive them at all. Only very few countries have legislation that explicitly targets migrant children. On the other hand, there is evidence, as in the United States, that migration policies, including the detention and deportation of undocumented migrants, are at odds with the logic of child welfare policies, which seek to protect all children from risk of harm and promote their best interests regardless of their residency or citizenship status. In fact, Skivenes et al. (2015) found that undocumented migrant children and their families may be excluded from services that they may need.

At the organizational level, there are countries like Australia, Canada, England and the United States whose child welfare systems are protection-oriented and who provide services specifically targeting migrant children through service providers in the local community where migrants live. This is also the case in Austria and Italy.

In family service-oriented child welfare systems like Finland and Norway, the state itself provides preventive and ongoing services to migrant children via the universal public welfare state services. However, the state also offers public services specifically targeting migrant children to promote their education and foster their social inclusion.

In terms of training, in almost all countries there is evidence that training does not sufficiently prepare a large group of child welfare professionals to work with migrant children: 45% of the professionals surveyed felt that they had received insufficient training, and 40% felt less competent working with migrant families than with other families. We also found that the training of professionals in the field of child welfare has focused on multiculturalism and cultural competencies, whereas rights-based teaching is rare. The evidence suggests that other salient issues are often neglected in training curricula, including issues related to migrants' legal status or residency (especially in the case of undocumented or unaccompanied migrant children), problems resulting from different migration histories, experiences among different groups of migrants and information about migrants' experiences of disadvantage and discrimination. In several countries (Austria, England, Finland and Norway), survey responses showed that between 80% and 93% of professionals did not speak the same language as any of the immigrant groups they work with. At the same time, most of the countries evaluated do not present issues of communication and the use of interpreters as a major issue. If this means that countries have not given consideration (rather than solved) the issue of the lack of a shared language, then this is an issue that needs to be addressed in the future.

With regard to the results about child welfare practice with migrant children based on the survey findings, we found that there were few significant differences across countries in terms of risk assessment and decision-making in the two cases— but we did find considerable in-country variation. We had expected to find differences across countries as a result of systemic differences between child welfare systems, but did not find that the responses easily mapped onto different child welfare system types. We did find cross-country differences in the responses to the case vignette about the undocumented child, with 13% of respondents overall indicating that they did not know whether the child welfare system is responsible for an undocumented child who is not attending school.

A call for global child protection thinking and acting

As a result of our analysis, we proposed the development of a conceptual framework for child welfare policy, practice and research with migrant children that expands on the present approaches of child welfare systems when they meet migrant children. This approach should acknowledge migrant children as agents whose rights and specific needs in interactions with child welfare systems need to be understood and met. Building on the international premise of the 1989 UN Convention on the Rights of the Child, we also called for child welfare to be conceptualized as a global issue that transcends territorial boundaries, just as migrants do. The needs and rights of migrant children need to be protected at the national and supranational levels and in every situation when a migrant child meets the child welfare system and its representatives, whether social workers or judges. In this view, the child welfare systems should recognise the needs and rights of migrant children regardless of their migration status in the country they migrated to. Furthermore, the child welfare systems should also recognise the specific needs of children of transnational families who may have stayed behind the migrating parent(s) or families. A wide conceptualisation of migrant children is needed in a framework for practitioners, which includes skills of cultural competencies but also knowledge of children's rights as citizens. Last but not least, both children's agency and their vulnerability in migration should be given enough attention, calling for a nuanced view on childhood in migration.

Concluding remarks

We have shown here that in the past decade, international migration to high-income countries has surged, and that migrants are vulnerable in many ways. We have also demonstrated that child welfare systems still have a lot of pressing items on their 'to do list' when working with migrant children and their families. At the same time, the political support of pro-nationalist, anti-migrant parties has gained momentum in a number of high-income countries, including Austria, Denmark, England, France, Germany Hungary, Sweden, the Netherlands, and the United States, with calls from right-wing politicians to close down borders, build fences and exclude if not all, then certain groups of migrants.[23]

These political landscapes challenge the practice of every social worker and judge working with migrant children in the child welfare system. Based on what we have learned from our analysis of how the child welfare systems of 11 countries perceive and practice with migrant children,[24] we have called for an approach to child welfare that runs counter to these deeply troubling sentiments. We have proposed a global child protection thinking that understands child welfare as a global project that is focused on children's rights and takes a broader view of migration, beyond the confines of national boundaries, so migrant children can be effectively and fairly protected.

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[23] Shuster, S. (2016). Europe swings right. *Time*, 30-35, October 3, 2016.

[24] Skivenes et al (2015), note 3 above.

Australia's use of offshore immigration detention

Madeline Gleeson

Madeline Gleeson

Overview

This article provides an overview of the background, key facts and findings of the High Court of Australia in *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1. The plaintiff, a woman from Bangladesh who originally sought asylum in Australia, had been detained in the Republic of Nauru ('Nauru') before being brought back to Australia for medical treatment in 2014. She brought this case in an effort to prevent her subsequent return to Nauru. The main question was whether the Australian government had the power, either in the form of a statutory or non-statutory executive power, to contract for and control the detention of asylum seekers in the offshore detention centre in Nauru.

Introduction to Australia's offshore processing regime

Since 13 August 2012, any person arriving in Australia by sea without a valid visa has been subject to offshore processing (also referred to as 'regional' or 'third country' processing), even if they applied for asylum immediately upon arrival in Australia. Pursuant to the *Migration Act* 1958 (Cth), all asylum seekers arriving in this way must be detained in Australia, and then taken 'as soon as reasonably practicable' to one of two offshore processing countries in the Pacific: Nauru or Papua New Guinea (PNG).[1]

Asylum seekers who are or have been subject to offshore processing are divided into two groups depending on when they arrived in Australia and the agreements that were in place with Nauru and PNG at that time. Those who arrived between 13 August 2012 and 18 July 2013 comprise a first cohort of people, some of whom were sent offshore (while others remained in Australia), and all of whom were eventually brought back to Australia to be processed through a new 'fast track' system, with the possibility of being granted temporary protection visas if found to be refugees. By October 2016 the vast majority of people in this cohort were still waiting in Australia, either in the community or in detention, to be assessed.

Those who arrived on or after 19 July 2013 comprise a second cohort of people, subject to a new policy under which they must all be sent offshore for processing and will never be given an opportunity to settle in Australia.[2]

The only exceptions to this policy have been limited and occurred as a result of the subsequent Liberal government's political negotiations (under Prime Minister Tony Abbott) to secure the votes it needed to pass the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) in late 2014.[3]

[1] *Migration Act* 1958 (Cth), ss. 189, 198AD(2). The terms of Australia's agreements with these countries are set out in two memoranda of understanding signed in August 2013, both of which supersede agreements in largely similar terms that were previously signed with Nauru in August 2012, and PNG in September 2012. All agreements are available at http://www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing
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[2] Prime Minister Kevin Rudd announced the policy on 19 July 2013 together with PNG Prime Minister Peter O'Neill, just 16 days before the 2013 federal election date announcement. See: Kevin Rudd, Peter O'Neill et al, 'Transcript of Joint Press Conference', Brisbane, 19 July 2013, http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-joint-press-conference-2.html
; Kevin Rudd, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG', video transcript, 19 July 2013, http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html
Kevin Rudd, 'Australian and Papua New Guinea Regional Resettlement Arrangement', media release, 19 July 2013, http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/australia-and-papua-new-guinea-regional-settlement-arrangement.html

[3] Exceptions to the rule that everyone in this second cohort must be transferred offshore and never be resettled in Australia were made for people who arrived in Australia by boat between 19 July and 31 December 2013 but had not yet been transferred offshore, and for the families of thirty one babies who were born in Australia before 4 December 2014 after their mothers were transferred back from Nauru. For more information, see: Scott Morrison, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', press conference, Canberra, 26 September 2014, http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218131.htm Scott Morrison, 'Babies born to IMAs transferred from Nauru to remain in Australia', media release, 18 December 2014, http://pandora.nla.gov.au/pan/143035/20141222-

For example, in a 'special one-off arrangement' in December 2014, the Australian government approved a rare exception to this policy for thirty-one babies born in Australia and their families, all of whom had been transferred back to Australia from Nauru for the births before 4 December 2014. All babies born in Australia after this date to asylum seeker families that arrived in Australia by sea after 19 July 2013 have been subject to removal offshore.[4] There are otherwise no exceptions to offshore processing without resettlement in Australia for children (including unaccompanied minors), pregnant women, survivors of torture or trauma, people with disabilities, the elderly, or anyone else who is particularly vulnerable.

People in this second cohort may be brought back to Australia temporarily in certain circumstances (such as to receive medical treatment or, previously, to give birth), at which point they are called 'transitory persons'. All transitory persons must be sent back offshore as soon as the reason for their return to Australia has been resolved.[5]

Facts

The plaintiff in this case, a citizen of Bangladesh, was on board a vessel intercepted at sea by Australian officers on 19 October 2013. Following her interception, the plaintiff was transferred to Christmas Island,[6] and detained there, before being transferred to Nauru on 22 January 2014.

The transfer to Nauru was carried out by Australian authorities, without the plaintiff's consent, pursuant to Australian law and the Memorandum of Understanding relating to the transfer to and assessment of persons in Nauru ('MOU') signed by Australia and Nauru on 3 August 2013.[7]

The plaintiff was detained in Nauru at the regional processing centre ('RPC') at Topside, in a compound known as RPC3, until 2 August 2014, when she was transferred back to Australia for medical treatment. She was detained there by the combined effect of the following:

- her successive visas, which were sought from the relevant Nauruan authorities by an Australian officer , in the plaintiff's name but without her consent,[8] and which carried a condition that she 'reside' at the RPC;[9]

1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm

Commonwealth of Australia, *Parliamentary Debates* (Senate), 4 December 2014, p. 10,313 (Glenn Lazarus) http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/031d80d7-61ca-407e-9e56-9e2d9d467e42/toc_pdf/Senate_2014_12_04_3109_Official.pdf .

4 For more information see: Stephanie Anderson, 'Asylum seeker babies to stay in Australia under Muir deal', *News,* SBS, 18 December 2014, http://www.sbs.com.au/news/article/2014/12/18/asylum-seeker-babies-stay-australia-under-muir-deal

Scott Morrison, 'Babies born to IMAs transferred from Nauru to remain in Australia', press release, 18 December 2014, http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm

5 Under the *Migration Act,* an officer may bring a 'transitory person' back to Australia from an offshore processing country 'for a temporary purpose', however they must be transferred back offshore 'as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose'. Transitory persons cannot apply for a visa while in Australia unless given written permission from the Minister for Immigration and Border Protection to do so: *Migration Act,* ss. 46B, 198(1A), 198AH, 198B.

6 Christmas Island is Australian territory located in the Indian Ocean, 380 kilometres south of the Indonesian island of Java and approximately 1565 kilometres from the nearest point on the Australian mainland.

7 The MOU provides that Australia 'may transfer' and Nauru 'will accept' asylum seekers who travelled irregularly by sea to Australia or were intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means; are authorised by Australian law to be transferred to Nauru; and have undergone 'short health, security and identity checks' in Australia (articles 7, 9). Australia undertakes to bear all costs 'incurred under or incidental' to the MOU, and to 'assist' Nauru in settling in a 'third safe country' any person determined to be in need of international protection that Nauru does not allow to settle locally, and in returning any person found not to be in need of international protection to their country of origin or another third country where they have the right to enter and reside (articles 6, 13, 14). The MOU is available at http://www.kaldorcentre.unsw.edu.au/sites/default/files/australia-nauru-mou-2013.pdf

The MOU is supported by Administrative Arrangements for Regional Processing and Settlement Arrangements in Nauru, signed by Australia and Nauru on 11 April 2014, which 'provide guidance for the transfer of asylum seekers to Nauru, management of the centre and refugee status determination processes': Australian Department of Immigration and Border Protection, submission 31 to Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, May 2015, p. 9 (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions).

8 Section 10 of the *Immigration Act* 2014 (Nauru) provides that a person who is not a citizen of Nauru must have a valid visa to enter or remain in Nauru. Under reg 9 of the Immigration Regulations 2013 (Nauru), in force at the date of the plaintiff's transfer to Nauru, an application for an RPC visa had to be lodged with the relevant Nauruan authorities before the asylum seeker to whom it related entered Nauru. Applications for RPC visas could only be made by an Australian officer, and the visas would be valid for a maximum period of three months. Nauruan authorities could grant subsequent RPC visas, also for maximum periods of three months each, and also on the request of an Australian officer. Each three-month RPC visa carried a fee of $3,000 (Schedule 2, part 1), payable by Australia when a demand for its payment was made by Nauru (reg 5(7)). On 30 January 2014, shortly after the plaintiff was transferred to Nauru, the Immigration Regulations 2014 (Nauru) came into effect, providing for the grant of RPC visas in relevantly identical terms.

9 Immigration Regulations 2013, reg 9(6)(a); Immigration Regulations 2014, reg 9(6)(a).

- her status as a 'protected person' for the purposes of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ('RPC Act'). Section 18C of this act provided that 'a protected person must not leave, or attempt to leave the Centre without prior approval from an authorised officer, an Operational Manager or other authorised persons'. Any protected person found to have left or to be attempting to leave the RPC without relevant approval would commit an offence, and could face up to six months imprisonment; and
- rule 3.1.3 of the Centre Rules, made in July 2014, which provided that asylum seekers 'residing' at the RPC must 'not leave, or attempt to leave, the Centre without prior approval from an authorised officer, an Operational Manager or other authorised persons, except in the case of emergency or other extraordinary circumstance'.[10]

When the plaintiff was returned to Australia on 2 August 2014 she was approximately 20 weeks pregnant. She had applied to the relevant Nauruan authorities to be recognised as a refugee, but her application was yet to be determined. Back in Australia the plaintiff was detained, and gave birth to a daughter in Brisbane on 16 December 2014.

In June 2015 the Australian Department of Immigration and Border Protection ('the Department') was advised that the plaintiff was medically fit for return to Nauru. Before she could be sent back the plaintiff commenced these proceedings in the High Court of Australia, arguing that she had been subjected to restrictions upon her liberty at the Nauru RPC amounting to detention, and that such detention had been contracted for and effectively controlled by Australia without lawful authority.

The Minister for Immigration and Border Protection ('the Minister') and the Commonwealth of Australia were the first and second defendants (collectively, 'the Commonwealth parties'). The third defendant was Transfield Services (Australia) Pty Ltd ('Transfield'),[11] an Australian company that had been contracted by the Australian government to provide garrison and welfare services at the Nauru RPC since 2012.[12]

By way of relief the plaintiff sought an injunction and writ of prohibition. These orders would have prohibited the Minister and other Australian officers from taking steps to remove her to Nauru if she would be detained there. The plaintiff also sought orders restraining the Australian government from making any further payments to Transfield under its contract, and a declaration to the effect that the Commonwealth parties' involvement in her detention in Nauru had been (and if committed in the future would be) unlawful under Australian law. At no stage did the plaintiff seek damages for wrongful imprisonment.

The case as originally filed

The development of this case was somewhat extraordinary, with both the facts and the law in question undergoing fundamental changes in the five months between the plaintiff's original case being filed in May, and heard by the High Court in October 2015.

The issue at the core of this case was always whether the Australian executive government was authorised to contract for, and in effect control, the detention of asylum seekers overseas. This authorisation could have been pursuant to a valid statutory conferral of power or because the power fell within the non-statutory executive power that forms part of the executive power in section 61 of the Constitution. Having argued that there was no relevant legislative authority, the plaintiff's case focused originally on an argument that the Commonwealth parties had acted beyond the scope of their non-statutory executive power in continuing to detain the plaintiff after she had been removed from Australia, and in entering into a contract with Transfield and spending public moneys for that purpose.

***First development between commencement and hearing: insertion of s198AHA into the* Migration Act**

On 30 June 2015, the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth) entered into force, after passing both houses of parliament in record time with bipartisan support. This Act inserted s198AHA into the *Migration Act,* with retroactive effect from 18 August 2012. This new section granted broad power to the Australian government to enter into an arrangement with a 'person or body' for the purpose of 'regional processing', and to take 'any action' in relation to this regional processing arrangement.

[10] The Centre Rules were published in the Republic of Nauru Government Gazette on 16 July 2014, pp. 2-7 (available at http://ronlaw.gov.nr/nauru_lpms/files/gazettes/76554e71ea2ca72dc7fc11747ef60d3c.pdf).

[11] Transfield was renamed Broadspectrum Limited in 2015 after Transfield Holdings, a privately held company owned by the sons of Transfield's founder Franco Belgiorno-Nettis, withdrew Transfield's rights to use the Transfield name, reportedly because of the controversy over the company's contracts in Nauru and on Manus Island: Jenny Wiggins and Michael Smith, 'Transfield Services to change name to Broadspectrum as founders sever ties', *Sydney Morning Herald,* 25 September 2015, http://www.smh.com.au/business/transfield-services-to-change-name-to-broadspectrum-as-founders-sever-ties-20150924-gjum0b.html

[12] The Department concluded a series of heads of agreement and contracts with Transfield from 2012 onwards. For the purpose of this proceeding, only the contract dated 24 March 2014, and the payments made under that contract, were in issue. At no time was Nauru a party to the contract with Transfield for the provision of services at the RPC. Transfield subcontracted the security services aspects of its contract to another Australian company, Wilson Security Pty Ltd, which was not a party to the proceedings.

The insertion of s198AHA into the *Migration Act* shifted the focus of this case from whether the impugned conduct was unlawful by reason of it not being supported by or based on a valid exercise of the non-statutory executive power under s61, to a case primarily concerned with the construction, scope and validity of the new statutory provision. Indeed the majority judges, having reached their respective conclusions about s198AHA, ultimately found it unnecessary to make a separate determination on the non-statutory executive power issue.

Second development between commencement and hearing: full open centre arrangements

In early October 2015, immediately before the start of the hearing, the Nauruan government announced that the RPC would become a fully open centre 'to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week'.[13] The Nauruan regulations that required asylum seekers not to leave the RPC without permission were repealed, although asylum seekers were still required to 'reside' there.[14] The Nauruan government indicated that it intended to legislate for the full open centre arrangements at the next sitting of parliament,[15] however at the date of the hearing this had not yet occurred, and it remained a criminal offence for an asylum seeker to leave the RPC without prior approval from an authorised officer, an Operational Manager or another authorised person.[16]

Standing

The introduction of these open centre arrangements raised fresh questions about whether the plaintiff had standing to bring her case. From the outset, the Commonwealth parties had argued that the plaintiff lacked standing to challenge her *past* detention, because a declaration on this matter would produce no foreseeable consequences for her.[17]

A few days before the hearing, when it appeared the plaintiff would no longer be detained in the future if returned to Nauru, the Commonwealth parties filed supplementary submissions maintaining their position with respect to the plaintiff's claims about past detention, as well as contending that there was now nothing left in the proceedings with respect to the claims about future detention either.

All the judges held that the plaintiff did have standing to seek the declaration regarding the lawfulness of her past detention by the Commonwealth parties:

- French CJ, Kiefel and Nettle JJ held that this was 'not a hypothetical question' as it would determine whether the Commonwealth was at liberty to repeat its impugned conduct in the event detention was reinstated in Nauru;[18]
- Bell J also noted that Nauru could choose at any time to revert to a scheme under which asylum seekers taken to it by Australia were detained, and thus that the declaratory relief sought by the plaintiff involved 'the determination of a legal controversy' in respect of which the plaintiff had a 'real interest';[19]
- Keane J found the plaintiff had standing on the ground that interference with a person's liberty is 'sufficient to confer standing to seek a declaration of the legal position from a court even though no other legal consequences are said to attend the case' (while also noting that it was difficult not to be 'impressed with the view that really what is at issue is whether what has been done can be repeated');[20] and
- Gageler and Gordon JJ rejected the Commonwealth parties' submission that the declaration would have no foreseeable consequences for the plaintiff, with Gageler J finding that she had a 'sufficient interest' in the case and Gordon J concluding that the declaration was indeed 'directed to a live legal question'.[21]

A special case

Although the Court made various findings of law, it is relevant to note that the matter was put to it by way of a special case, meaning the parties agreed to a set of stated facts and questions of law in advance which were then put to the Court to resolve. The parties did not tender evidence in chief to support their assertions of fact, neither party was given the opportunity to seek discovery or cross-examine witnesses, and the Court was not called upon to make specific findings of fact as to the nature and level of Australian involvement in the RPC (beyond what was necessary to deal with the case).

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13 Republic of Nauru, Government Gazette, No. 142, G. N. No. 634/2015, 2 October 2015, <http://ronlaw.gov.nr/nauru_lpms/files/gazettes/138257d9f8e4223789b5f93e466d76aa.pdf>, p. 1.

14 On 4 October 2015 the Immigration (Amendment) Regulations No. 3 2015 (Nauru) repealed regs 9(6)(b) and (c) of the Immigration Regulations 2014, thereby removing two of the conditions that had previously been attached to a RPC visa (namely, requirements that the holder of a RPC visa remain at the PRC until and after being granted a health and security clearance certificate, except in the case of an emergency or in limited circumstances with the permission of a service provider).

15 Republic of Nauru, Government Gazette, 2 October 2015, p 1.

16 RPC Act, s 18C.

17 *Plaintiff M68,* submissions of the first and second defendants, filed 18 September 2015, http://www.hcourt.gov.au/assets/cases/M68-2015/PlfM68-2015_Def1-2.pdf [26]-[32].

18 *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [23].

19 *Plaintiff M68,* Bell J at [64].

20 *Plaintiff M68,* Keane J at [235].

21 *Plaintiff M68,* Gageler J at [112]; Gordon J at [350].

Factual vacuums make it hard to establish an arguable case upon which proceedings can be commenced.[22] Given the secrecy and lack of transparency around Australia's offshore processing regime, a proper interrogation of evidence may have been the only way to establish conclusively the level of Australian involvement in the detention of asylum seekers and refugees offshore. In the absence of such an interrogation, the Court's statements on this matter must be understood as somewhat limited by procedural constraints, and may not reflect the reality of who was in control of detention on the ground in Nauru.

Judgment: The main arguments and findings[23]

For the Commonwealth government to enter into a contract and spend money or detain an individual, there must be a source of legal authority to do so. The plaintiff, having claimed that the Commonwealth parties 'procured, caused and effectively controlled' her detention in Nauru, submitted that this conduct was unlawful on the basis that it was neither authorised by any valid Australian law, nor based upon a valid exercise of the government's non-statutory executive power in s61 of the Constitution. The Commonwealth parties denied that the plaintiff had been in their custody during her detention in Nauru, but argued in any case that s198AHA was a valid statute authorising their impugned conduct (including their involvement in the plaintiff's past detention).

As an initial argument the plaintiff contended that s198AHA did not provide the relevant authority because it did not apply to the MOU in question as a matter of construction. All seven judges dismissed this argument summarily by reference to general principles of statutory interpretation and s2C(1) of the *Acts Interpretation Act* 1901 (Cth).[24]

Alternatively, the plaintiff argued that this section was an invalid exercise of legislative power for two reasons.

First, she argued that it was not supported by a head of federal legislative power under the Constitution, challenging the Commonwealth parties' reliance on the aliens power (s51(xix)), the external affairs power (s51(xxix)) and/or the Pacific islands power (s51(xxx)). Six judges (Gordon J dissenting) dismissed this argument and declared s198AHA to be a law with respect to aliens. Gageler J also found that it was a law with respect to external affairs.

Second, the plaintiff argued that s198AHA was in breach of the constitutional separation and protection of federal judicial power, and more specifically the principles that limit the executive's power to detain identified by the High Court in the case of *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 (*Lim*). The *Lim* principles start from the general proposition that public officials have no power to detain non-citizens, whether in the country lawfully or otherwise, except under and in accordance with some positive authority conferred by law. Detention by the state is generally penal or punitive in character and, as such, 'exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[25] The detention of non-citizens by the executive may constitute an exception to this general rule in certain circumstances, including where it is for the purposes of expelling or deporting them or investigating and determining immigration claims for admission to Australia, and is limited to what is necessary to achieve these purposes. The bulk of the judges' reasons dealt with this issue.

The respective findings of the judges on this point turned on the conclusions they each reached about the level of Australian involvement in the plaintiff's former detention in Nauru. French CJ, Kiefel, Nettle and Keane JJ, concluded that the plaintiff had been detained by the executive government of Nauru, not by the Australian government. Since the *Lim* principles only apply to detention in the custody of the Australian executive government, these judges found them not to be relevant in this case. To the extent that Australia had otherwise been involved in the plaintiff's detention, and statutory authority was necessary for that lesser degree of involvement, these judges held that such authority was provided by s198AHA. They did note, however, that this section does not confer on the Australian government an unfettered power to cause or spend public moneys on detention offshore. Instead, under s198AHA, the Commonwealth parties are only authorised to participate in an offshore detention regime if, and for so long as, it serves the purpose of processing the claims of those who are detained.

In separate judgments, Bell and Gageler JJ took a different approach. Both held that Australian involvement in the plaintiff's detention in Nauru had reached the level of control necessary to engage the constitutional limits identified or established in *Lim.* They concluded, however, that these limits had not been breached in this case. In reaching this conclusion, Gageler J restated the

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22 David Hume, 'Plaintiff M68-2015 – offshore processing and the limits of Chapter III', *AusPubLaw Blog,* 26 February 2016, https://auspublaw.org/2016/02/plaintiff-m68-2015/

23 The submissions, transcripts of hearings and full judgment in this case are available from the High Court of Australia at http://www.hcourt.gov.au/cases/case_m68-2015.

24 *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [43]-[44]; Bell J at [73]-[74]; Gageler J at [177]; Keane J at [246]; Gordon J at [363]-[364].

25 Brennan, Deane and Dawson JJ held: 'Where Parliament seeks to confer an authority to detain on the executive, the question of whether detention has a punitive character (and thus is of an exclusively judicial nature) will be a matter of substance rather than form. That is, a statutory provision seeking to invest the executive government with an arbitrary power to detain will be invalid 'notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt': *Lim* at [23]

test he had set out previously, namely that a law conferring a power of executive detention will only escape characterisation as punitive (and therefore as inherently judicial) if the duration of detention meets two conditions: first, it must be 'reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment'; and second, it must be 'capable of objective determination by a court at any time and from time to time'.[26] He was satisfied both conditions were met in relation to detention in Nauru.

Gordon J dissented, finding that the Commonwealth parties' involvement in the detention did reach the necessary level of control, and did breach the *Lim* principles. Whereas the other judges dealt relatively briefly with whether s198AHA was supported by a head of legislative power under s51 of the Constitution, Gordon J explored the validity of this section in greater depth, considering the aliens, immigration, external affairs and Pacific islands powers in turn. She framed her analysis around the principle that these legislative powers are circumscribed by Chapter III of the Constitution, meaning they do not permit the conferral upon any organ of the executive government of any part of the judicial power of the Commonwealth. Gordon J then concluded that the plaintiff's continued detention in Nauru, after her removal to that country had been completed, went beyond what was reasonably necessary for the purposes of deporting an alien from Australia or enabling an application for an entry permit to be made and considered.[27] Moreover, she reiterated that the Commonwealth parties could not do abroad what they were constitutionally refrained from doing in Australia, and noted that the executive government could not 'agree the Parliament of Australia into power' by entering into an agreement with a foreign state.[28]

Section 61 of the Australian Constitution and non-statutory executive power

Section 61 of the Constitution vests federal executive power. This power includes statutory powers conferred on the executive as well as non-statutory executive powers, including the prerogative powers of the Crown and other powers that are necessary for the Commonwealth to function as a nation state. The plaintiff's original argument, which she maintained after the introduction of s198AHA, was that in the absence of clear statutory authorisation, s61 of the Constitution could not authorise the Commonwealth parties' conduct in detaining her in Nauru.

The six majority judges, having found that s198AHA provided the requisite statutory authority to support the Commonwealth parties' conduct, concluded that it was not necessary to consider the hypothetical question whether, absent that authority, these parties would otherwise have been authorised by s61 or as a matter of non-statutory executive power to participate in Nauru's detention of the plaintiff.[29] On the basis of her findings, Gordon J also held that no separate question arose about executive power under s61 of the Constitution.[30]

Consideration of Nauruan law

If necessary, depending on its other findings, the plaintiff invited the court to consider whether she had been lawfully detained under Nauruan law, and in particular whether the relevant laws were valid in light of article 5(1) of the Nauruan Constitution (which provides that no person shall be deprived of his or her personal liberty, except as authorised by law in certain enumerated cases).[31] She submitted that it was necessary to agitate this question because the Commonwealth parties' primary defence to all of her claims was that her detention had been in accordance with and required by the laws of Nauru.[32] She also argued as a matter of construction that the authority to take action conferred on the Commonwealth parties by s198AHA should not be construed as referring to detention which is unlawful under the law of the country where it is occurring.[33]

The Court was reluctant to pronounce on the constitutional validity of a law of another country. On the basis of their earlier findings and the case presented, French CJ, Kiefel, Nettle and Bell JJ concluded that it was not necessary to make such a pronouncement.[34] Gageler J merely noted that the constitutional validity of the relevant laws were 'controversial'.[35] Gordon J insisted that the proceedings should be concerned only with the conduct of the Commonwealth parties, and that it was 'neither relevant nor appropriate for this Court to pass any judgment upon what the Government of Nauru has done or proposes to do'.[36]

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26 Plaintiff M68, Gageler J at [184].

27 *Plaintiff M68,* Gordon J at [376]-[393].

28 Plaintiff M68, Gordon J at [394]-[396].

29 *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [41]; Bell J at [66]; Gageler J at [187]; Keane J at [265].

30 *Plaintiff M68,* Gordon J at [368]-[373].

31 For a parallel case on this issue in the PNG context, see: Namah v Pato [2016] PGSC 13; SC1497 (26 April 2016) <http://www.paclii.org/pg/cases/PGSC/2016/13.html>.

32 *Plaintiff M68,* transcript of proceedings, 7 October 2015, [2015] HCATrans 255 at [1565] (Merkel QC).

33 *Plaintiff M68,* plaintiff's amended submissions, filed 23 September 2015, http://www.hcourt.gov.au/assets/cases/M68-2015/PlfM68-2015_Plf-Amend.pdf [97]; *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [47].

34 *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [47]-[52]; Bell J at [102].

35 *Plaintiff M68,* Gageler J at [106].

36 *Plaintiff M68,* Gordon J at [276]. See also [413]-[414].

Keane J went into greatest depth, relying on international comity and judicial restraint, as well as a textual analysis of s198AHA, to support his finding that the outcome of the case did not rest on any finding as to validity of Nauruan law, and that the Court should not engage in such a task.[37]

Subsequent developments and #LetThemStay public campaign

This case was linked to a series of challenges launched on behalf of 267 people, many of whom had been brought back to Australia from offshore detention centres for urgent medical treatment. This group included 37 babies born in Australia. Despite the court's judgment, many of these people were subsequently permitted to remain in Australia, living freely in the community on a temporary basis (at the Minister's discretion).[38] This outcome was believed to be the result of the #LetThemStay public campaign that was launched after the judgment in February 2016. As part of this campaign, church leaders took the extraordinary step of offering 'sanctuary' to people facing deportation, state Premiers came out in public support of allowing the group to settle in the Australian community, and the United Nations warned the Australian government that deporting the group would risk breaching Australia's obligations under international law.[39]

As at October 2016, it remains unclear where the people found to be refugees in Nauru (and on Manus Island in PNG) will eventually be settled.

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An extended version of this case note can be read at:
http://www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1d

37 *Plaintiff M68,* Keane J at [248]-[258]. See also French CJ, Kiefel and Nettle JJ at [52].

38 Thomas Oriti, 'Let Them Stay labelled a success, more than half of 267 asylum seekers in community detention', *AM,* ABC, 2 April 2016, http://www.abc.net.au/news/2016-04-02/let-them-stay-labelled-success-asylum-seeker-community-detention/7294456

39 UN Office of the High Commissioner for Human Rights, 'Best interests of the child must come first, UN child rights committee reminds Australia', 3 February 2016, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17008&LangID=E; UN Office of the High Commissioner for Human Rights, 'Comment by the Spokesperson for the UN High Commissioner for Human Rights, Rupert Colville, on the possible transfer of 267 people from Australia to Nauru', 3 February 2016, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17024&LangID=E

Mexico's Failure to Protect Central American Refugee Children

Michael Garcia Bochenek

Tens of thousands of children flee Central America's "Northern Triangle"—El Salvador, Guatemala, and Honduras—each year, on their own or with family members. Many abandon their homes because they have been pressured to join local gangs, threatened with sexual violence and exploitation, held for ransom, subjected to extortion, or suffered other harm.

Mexican law provides for refugee protection for children and adults who face persecution or other threats to their lives and safety in their home countries. Even so, less than 1 percent of the children who are apprehended by Mexican immigration authorities are recognized as refugees.

This article examines the reasons for the gulf between children's need for protection and Mexico's low refugee recognition rates and concludes with specific steps that Mexico should undertake to address these shortcomings.

Why Children Are Fleeing Central America

"I left Honduras because of problems with the gang. They wanted me to join them, and I didn't want to, so I had to flee," Edgar V. (not his real name) told me, in an account that was typical of those I've heard from Central American children who flee to Mexico. The intimidation he faced at school was intense, and shortly after one of his classmates was killed for wearing a shirt of a colour associated with a rival gang, Edgar stopped attending. Even though Edgar tried not to attract attention to himself, the gang continued to pressure him to join their ranks. "They came to my house and told me, 'Join the gang,'" he said. "They hit me and I fell to the ground." Gang members later threatened to kill his mother and him.

His mother took him to a police station to make a complaint, and he took refuge for a time in a shelter run by missionaries. "I spent two months and 21 days there," Edgar said. "I needed to be there for my protection, because they [the gang] were hunting for me. But I would have been there my entire life. I would lose the rest of my adolescence. I wouldn't be able to study. I would become an adult and wouldn't know anything. I told myself, 'I can't do this. I have to leave."

He made it as far as the Mexican state of Oaxaca before he was apprehended at an immigration checkpoint. "I told the immigration official that I couldn't return," he said. He showed the official a copy of the complaint he and his mother had filed. "Then they said, 'You know, you can ask for asylum.' I said yes. But I was already locked up, and they said it would be a long time before I heard. I couldn't handle that. At least two months, up to six months [longer in detention], just for the response." Instead, he accepted deportation to Honduras.[1]

Gang violence in the region is nothing new—it has plagued El Salvador, Guatemala, and Honduras for more than a decade.[2] The government of each of these countries has proven unable or unwilling to control gangs: as the United Nations High Commissioner for Refugees (UNHCR) observed in an October 2015 report, "[i]n large parts of the territory [of El Salvador, Guatemala, and Honduras], the violence has surpassed governments' abilities to protect victims and provide redress."[3]

And it is well-known, at least to those who work on these issues, that children are specifically targeted by gangs in all three countries. In Honduras, for example, some 570 children under age 18 were killed in 2015, many thought to be the victims of gang violence.[4] It is not uncommon to hear reports of 13-year-olds, or even younger children, being shot in the head, having their throats slit, or being tortured and left to die.[5]

But these serious concerns did not gain significant visibility until 2014, when record numbers of unaccompanied children and families from the Northern Triangle arrived in the United States, in what was widely referred to as a "surge."[6] In

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[1] Human Rights Watch interview, San Pedro Sula, Honduras, June 8, 2015.

[2] See Ana Arana, "How the Street Gangs Took Central America," *Foreign Affairs,* May/June 2005, https://www.foreignaffairs.com/articles/central-america-caribbean/2005-05-01/how-street-gangs-took-central-america (accessed September 27, 2016).

[3] United Nations High Commissioner for Refugees (UNHCR), *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (Washington, D.C.: UNHCR, 2015), p. 2.

[4] "Más de mil niños murieron violentamente en Honduras en 2015," *La Prensa* (San Pedro Sula), August 10, 2016, http://www.laprensa.hn/honduras/988443-410/m%C3%A1s-de-mil-ni%C3%B1os-murieron-violentamente-en-honduras-en-2015 (accessed September 27, 2016).

[5] Óscar Martínez, "Why the Children Fleeing Central America Will Not Stop Coming," *Nation,* July 30, 2014, https://www.thenation.com/article/why-children-fleeing-central-america-will-not-stop-coming/ (accessed September 27, 2016).

[6] See, for example, Ian Gordon, "70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?" *Mother Jones,* July/August 2014, http://www.motherjones.com/politics/2014/06/child-migrants-

response, the United States increased its support for immigration enforcement in Mexico—without any real effort to help strengthen Mexico's refugee protection system. Despite U.S. government efforts to encourage Mexico to stem the flow of Central American migrants, arrivals in the United States of Central American unaccompanied children began rising again at the end of 2015 and have continued to increase in 2016.[7]

U.S. policymakers have frequently referred to Central American children and adults who travel to and through Mexico as "illegal migrants,"[8] but this pejorative term fails to acknowledge the serious protection needs that lead many to abandon their homes in search of safety.

As many as half of the children who travel from Central America to Mexico each year are fleeing serious threats, meaning that they have plausible claims to international protection, the UNHCR has estimated.[9]

As Edgar did, most of the children with whom I spoke during a year-long investigation for Human Rights Watch told me they fled to escape violence and pervasive insecurity. I heard accounts of children who left in search of safety, with or without their parents and other family members, after they or their families were pressured to join local gangs, threatened with sexual violence and exploitation, held for ransom, subject to extortion, or suffered domestic violence. In some instances, children left after their grandparents or other elderly caregivers died, or left because they feared there would be no one to care for them in their home countries when these relatives passed away.[10]

Mexican immigration authorities apprehended more than 20,000 unaccompanied children from the three countries of the Northern Triangle in 2015 and 7,800 in the first half of 2016, detaining the vast majority.[11] Following UNHCR's estimate, some 10,000 unaccompanied children each year have asylum claims that should be seriously considered. But Mexico's refugee agency, the Mexican Commission for Refugee Assistance (Comisión Mexicana de Ayuda a Refugiados, COMAR), recognized just 44 unaccompanied children as refugees in 2015 and 48 in the first six months of 2016,[12] a figure that represents less than 1 percent of the unaccompanied children apprehended in each of those years.[13]

Refugee Protection Under Mexican and International Law

By law, Mexico offers protection to refugees following criteria that essentially match the 1951 Refugee Convention and the 1967 Refugee Protocol.[14] In addition, Mexican law recognizes refugee status for those who have fled their country of origin because their lives, security, or liberty have been threatened by generalized violence, foreign aggression, internal conflict, mass violations of human rights, or other circumstances that have seriously affected public order,[15] grounds that track those identified in the 1984 Cartagena Declaration on Refugees.[16] Mexican law also affords the possibility of "complementary protection" in situations where, even though a person does not qualify as a refugee, the individual's life would be threatened or he or she would be in danger of being subjected to torture or other ill-treatment.[17]

surge-unaccompanied-central-america (accessed September 27, 2016).

7 See Jerry Markon and Joshua Parlow, "Unaccompanied Children Crossing Southern Border in Greater Numbers Again, Raising Fears of New Migrant Crisis," *Washington Post,* December 16, 2015, https://www.washingtonpost.com/news/federal-eye/wp/2015/12/16/unaccompanied-children-crossing-southern-border-in-greater-numbers-again-raising-fears-of-new-migrant-crisis/ (accessed September 27, 2016); David Nakamura, "Flow of Central Americans to U.S. Surging, Expected to Exceed 2014 Numbers," *Washington Post,* September 22, 2016, https://www.washingtonpost.com/politics/flow-of-central-americans-to-us-surging-expected-to-exceed-2014-numbers/2016/09/22/ee127578-80da-11e6-8327-f141a7beb626_story.html (accessed September 27, 2016).

8 See, for example, US Department of Homeland Security, Statement by Secretary Jeh Johson about the Situation along the Southwest Border, September 8, 2014, http://www.dhs.gov/news/2014/09/08/statement-secretary-johnson-about-situation-along-southwestborder (accessed September 27, 2016).

9 Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), *Arrancados de raíz* (Ciudad de México: Oficina de ACNUR en México, 2014), p. 12.

10 See Human Rights Watch, *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children* (New York: Human Rights Watch, 2016).

11 See Secretaría de Gobernación (SEGOB), *Boletines estadísticos 2015, 2016*, http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Boletines_Estadisticos (accessed September 27, 2016).

12 SEGOB, Comisión Mexicana de Ayuda a Refugiados (COMAR), *Estadísticas 2015, 2016*, http://www.comar.gob.mx/work/models/COMAR/Resource/267/6/images/ESTADISTICAS_2013_A_06-2016_act.pdf (accessed September 27, 2016).

13 For a fuller analysis, see Human Rights Watch, *Closed Doors,* pp. 141-150.

14 Compare Ley sobre Refugiados, Protección Complementaria y Asilo Político [Law on Refugees, Complementary Protection, and Political Asylum], art. 13(I), *Diario Oficial de la Federación*, January 27, 2011, as amended, *Diario Oficial de la Federación*, October 30, 2014, http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP_301014.pdf (accessed September 27, 2016), with Convention relating to the Status of Refugees, art. 1(A)(2), done July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954); Protocol relating to the Status of Refugees, art. I(2), done January 31, 1967, 606 U.N.T.S. 267 (entered into force October 4, 1967).

15 Law on Refugees, Complementary Protection, and Political Asylum, art. 13(II).

16 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, held at Cartagena, Colombia, November 19-22, 1984, concl. 3, https://www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf (accessed September 27, 2016).

17 Law on Refugees, Complementary Protection, and Political Asylum, art. 28.

Mexican law specifically prohibits the return of children under the age of 18 when their lives, safety, or liberty are at risk from persecution, generalized violence, or large-scale human rights violations, or where they may be subjected to torture or other ill-treatment.[18]

International standards call for a fair hearing on every claim for refugee recognition.[19] Resolving claims by children requires an appreciation of child-specific bases for international protection—including, in the Central American context, the ways that children are targeted by gangs.[20] Unaccompanied and separated children should receive legal representation and other assistance in making claims for refugee recognition.[21]

Children should never be detained as a means of immigration control; international standards call on states to "expeditiously and completely cease the detention of children on the basis of their immigration status."[22] Compliance with this standard does not mean that Mexico must allow unaccompanied and separated children to roam freely throughout the country; to the contrary, Mexico has an obligation to provide these children with appropriate care and protection.[23]

On paper, Mexican law and procedures reflect international standards in many respects. When agents of the National Institute of Migration (Instituto Nacional de Migración, INM), Mexico's immigration agency, encounter children, INM's child protection officers should screen them for possible protection needs.[24] While Mexico's Immigration Law requires the holding of adult migrants who are undocumented,[25] it requires children to be transferred to shelters operated by Mexico's child protection system, the National System for Integral Family Development (Sistema Nacional para el Desarrollo Integral de la Familia, DIF).[26]

In addition, under Mexican law, any INM or other government official who receives a verbal or written request for asylum from a migrant of any age must forward the application to the Mexican Commission for Refugee Assistance (Comisión Mexicana de Ayuda a Refugiados, COMAR), Mexico's refugee agency.[27] Children and adults who are not apprehended by INM agents and who instead submit applications for refugee recognition directly to COMAR are typically not detained while their applications are pending.[28] Unaccompanied children, children and adults who apply for refugee recognition, and migrants of any age who are the victims of serious crime in Mexico can also apply to the INM for a humanitarian visa, a status that allows them to live and work in Mexico for one year, and which may be renewed indefinitely.[29]

Barriers in Practice

My research for Human Rights Watch found wide discrepancies between Mexico's law and the way it is enforced. Children who may have claims for refugee recognition confront numerous obstacles in applying for refugee recognition from the moment they are taken into custody by INM. As one UNHCR official told us, "the biggest problem in Mexico is not the [asylum] procedure itself, but access to the procedure."[30]

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18 Ley General de los Derechos de Niñas, Niños y Adolescentes [General Law on the Rights of Girls, Boys, and Adolescents], art. 96, *Diario Oficial de la Federación*, December 4, 2014, http://www.diputados.gob.mx/LeyesBiblio/pdf/LGDNNA_041214.pdf (accessed September 27, 2016).

19 See, for example, Executive Committee of the High Commissioner's Programme, General Conclusion on International Protection No. 81 (XLVIII), 1997, para. (h); Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6 (September 1, 2005), paras. 66-73.

20 UNHCR, 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 ["Guidelines on Child Asylum Claims"], U.N. Doc. HCR/GIP/09/08 (December 22, 2009), para. 3; Committee on the Rights of the Child, General Comment No. 6, para. 74.

21 Committee on the Rights of the Child, General Comment No. 6, paras. 21, 33-34, 36; UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention [UNHCR Detention Guidelines] (2012), para. 56; UNHCR, Guidelines on Child Asylum Claims, para. 69.

22 Committee 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 (2012), para. 78. See also Committee on the Rights of the Child, General Comment No. 6, para. 61; UNHCR Detention Guidelines, para. 51; Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14 of August 19, 2014 (Inter-Am. Ct. H.R.), paras. 154-60.

23 See Convention on the Rights of the Child, arts. 20(1), 22(1), adopted November 20, 1989, 1577 U.N.T.S. 3 (entered into force September 2, 1990).

24 Reglamento de la Ley sobre Refugiados y Protección Complementaria [Regulations for the Law on Refugees and Complementary Protection], art. 16(I), *Diario Oficial de la Federación*, February 23, 2012, http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LRPC.pdf (accessed September 27, 2016).

25 Immigration Law, art. 3(XX).

26 Ibid., art. 112(I); Reglamento de la Ley de Migración [Regulations for the Immigration Law], art. 175, *Diario Oficial de la Federación*, September 28, 2012, as amended, *Diario Oficial de la Federación*, May 23, 2014. Nevertheless, the Immigration Law and its regulations allow unaccompanied and separated children to remain in immigration detention centres "in exceptional circumstances," including when DIF shelters are at capacity or when they cannot provide appropriate attention for a particular child. Regulations for the Immigration Law, art. 176. See also Immigration Law, art. 112(I).

27 Law on Refugees, Complementary Protection, and Political Asylum, art. 21.

28 See Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II, Doc. 48/13 (2013), para. 537, http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf (accessed September 27, 2016).

29 Immigration Law, art. 52(V); Regulations for the Immigration Law, art. 137.

30 Human Rights Watch interview with UNHCR official from the Regional Office for Central America, Mexico and Cuba, UNHCR, Tegucigalpa, Honduras, May 14, 2015.

One barrier is the failure of INM agents to inform migrant children of their right to seek refugee recognition. A 2014 UNHCR study found that two-thirds of undocumented Central American children in Mexico are not informed of their rights by INM agents.[31] I heard the same in my interviews with children,[32] and research by groups that work with asylum seekers and migrants, including the Fray Matías Human Rights Centre, La 72, and Sin Fronteras, made similar findings.[33] INM agents also do not as a rule inform children that they can seek humanitarian visas, as is likewise required by Mexican law.[34] Although the INM employs special child protection officers, unaccompanied children rarely have contact with these officials, our interviews found and an October 2016 report by Mexico's National Human Rights Commission (Comisión Nacional de los Derechos Humanos, CNDH) confirmed.[35]

Second, government authorities do not, as a rule, properly screen child migrants to determine whether they may have viable refugee claims. INM agents, including INM child protection officers, rarely actively question children about their reasons for migrating.[36] Proper screening of migrant children would reveal that many have valid claims for refugee recognition.

Third, is the absence of legal or other assistance for most children who do apply for refugee recognition, unless they are fortunate enough to be represented by one of the handful of nongovernmental organizations that provide legal assistance to asylum seekers.[37] The processes for determining applications are not designed with children in mind and are frequently confusing to them.[38]

A fourth obstacle, perhaps the most daunting, is the practice of holding all child migrants in prison-like conditions. Although Mexican law provides that migrant children should be transferred to DIF custody and should be detained only in exceptional circumstances,[39] detention of migrant children is the rule, according to the interviews I did for Human Rights Watch and the findings of the Inter-American Commission on Human Rights, UNHCR, and nongovernmental organizations.[40] Over 35,000 children were held in immigration detention centres in 2015; more than half were unaccompanied.[41]

Even those children lucky enough to be handed over by INM agents to DIF shelters experienced a form of detention.[42] Children in most DIF shelters do not attend local schools, are not taken on supervised visits to local playgrounds, parks, or churches, and do not have other interactions with the community; unless they need specialized medical care, they remain within the four walls of the shelter 24 hours a day, seven days a week, for the duration of their stay.[43]

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31 ACNUR, *Arrancados de raíz,* pp. 14, 61.

32 See Human Rights Watch, *Closed Doors,* pp. 53-56.

33 See, for example, José Knippen, Clay Boggs, and Maureen Meyer, *Un camino incierto: Justicia para delitos y violaciones a los derechos humanos contra personas migrantes y refugiadas en México* (Ciudad de México: Casa del Migrante de Saltillo "Frontera con Justicia," AC, et al., November 2015), p. 31; Centro de Derechos Humanos Fray Matías de Córdova, AC, "Tapachula, Chiapas: La experiencia de detención en la frontera sur mexicana," in Joselin Barja Coria, *Derechos cautivos: La situación de las personas migrantes y sujetas a protección internacional en los centros de detención migratoria: Siete experiencias de monitoreo desde la sociedad civil* (México, DF: Frontera con Justicia AC et al., 2015), p. 61; Sin Fronteras, "Oaxaca de Juárez, San Pedro Tapanatepec, La Ventosa, y Salina Cruz: La experiencia de detención en el Pacífico," in Joselin Barja Coria, *Derechos cautivos*, p. 73; Sin Fronteras, "Distrito Federal: La experiencia de detención en la zona metropolitana del Valle de México," in Joselin Barja Coria, *Derechos cautivos*, p. 89; Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico,* paras. 520, 535. See also i(dh)eas, Litigio Estratégico en Derechos Humanos A.C., *En tierra de nadie: El laberinto de la impunidad: Violaciones de los derechos humanos de las personas migrantes en la región del Soconusco* (Ciudad de México: i(dh)eas, 2011), p. 39 (finding that 95 percent of migrants detained at the Siglo XXI detention center reported that INM personnel had not informed them, in writing and in a language they understood, of their right to communicate with a person they trusted or a legal representative); Insyde, *Diagnóstico del Instituto Nacional de Migración*, pp. 337-40.Georgetown Law Human Rights Institute Fact-Finding Project, *The Cost of Stemming the Tide: How Immigration Enforcement Practices in Southern Mexico Limit Migrant Children's Access to International Protection* (Washington, DC: Georgetown Law Human Rights Institute, 2015), p. 48.

34 See Human Rights Watch, *Closed Doors,* p. 76.

35 See ibid., p. 54; Comisión Nacional de los Derechos Humanos (CNDH), *Informe sobre la problemática de niñas, niños y adolescentes centroamericanos en contexto de migración internacional no acompañados en su tránsito por México, y con necesidades de protección internacional* (Ciudad de México: CNDH, October 2016), para. 152.

36 See Human Rights Watch, *Closed Doors*, pp. 49-53.

37 Pablo Ceriani Cernadas, ed., *Niñez detenida: Los derechos de los niños, niñas y adolescentes migrantes en la frontera México-Guatemala: Diagnóstico y propuestas para pasar del control migratorio a la protección integral de la niñez* (Tapachula, Chiapas, Mexico, and Lanús, Province of Buenos Aires, Argentina: Universidad Nacional de Lanús and Centro de Derechos Humanos Fray Matías de Córdova, 2012), p. 16.

38 See Human Rights Watch, *Closed Doors,* pp. 71-73.

39 Immigration Law, art. 112(I); Regulations for the Immigration Law, arts. 175-76.

40 See Human Rights Watch, *Closed Doors,* pp. 81-91; Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 569; Joselin Barja Coria, *Derechos cautivos,* p, 27; Aldo Ledón Pereyra et al., "Mexico: Southern Border," in Karen Musalo, Lisa Frydman, and Pablo Ceriani Cernadas, eds., *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (San Francisco and Buenos Aires: Center for Gender and Refugee Studies, University of California Hastings and Universidad Nacional de Lanus, 2015), p.

41 SEGOB, *Boletín estadístico 2015,* Table 3.1.5. See also Human Rights Watch, *Closed Doors,* p. 144.

42 DIF shelters are places of detention as that term is used in international standards: Principles and Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser/L/V/II.131 Doc. 26, approved by the Inter-American Commission on Human Rights, 131st sess., March 3-14, 2008, http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp (accessed September 27, 2016); UNHCR Detention Guidelines, para. 5;UN General Assembly, UN Rules for the Protection of Juveniles Deprived of Their Liberty, U.N. Doc. A/RES/45/113 (1990), para. 11(b).

43 See Human Rights Watch, *Closed Doors,* pp. 91-93.

Detention—never appropriate for children—is particularly problematic for those who want to apply for refugee recognition. Children report being told by INM agents that merely applying for recognition will result in protracted detention, either in INM-run facilities or in the virtual detention of DIF shelters, while their applications are considered. I heard from children and parents who decided not to apply or who withdrew applications because they did not want to remain locked up.[44] Some children remained in immigration detention centres for a month or more, and those who exercise their right to appeal adverse decisions on their applications for refugee recognition might be held in immigration detention centres for six months or more.[45]

These obstacles are serious barriers for children who have claims for refugee recognition. Where the indirect pressure on individuals is so intense that it leads them to believe that they have no access to the asylum process and no practical option but to return to countries where they face serious risk of persecution or threats to their lives and safety, these factors in combination may constitute constructive *refoulement*, in violation of international law.[46]

Moreover, in cases where children have been targeted by gangs or reasonably fear they will suffer violence or other human rights abuses in their countries of origin, their return is almost certainly not in their best interests. The same is true where family members in their countries of origin are unable or unwilling to care for the children. The return of children to their home countries under these circumstances breaches Mexico's obligations to protect children and ensure that its actions are in their best interests.[47]

Positive Steps

I saw some good practices by Mexican officials. In northern Mexico, unaccompanied children appeared to be quickly and routinely housed in DIF-run shelters, rather than in INM-run detention centres. DIF officials in every part of Mexico I visited displayed an understanding of Mexico's children's rights law, and I heard of cases in which they had identified and referred children with possible international protection needs to COMAR. I heard other individual accounts of positive experiences with other Mexican officials—of one police officer who took a family to a migrant shelter, another who helped a 15-year-old boy who had been abandoned by the guide he had paid to take him through Mexico, and of an INM agent who meticulously advised a 17-year-old boy of his right to apply for refugee recognition, for instance.

Such experiences are unfortunately not the norm for most children who come into contact with INM agents. But these exceptions demonstrate that Mexico is capable of complying with its international obligations and the requirements of its own laws in the treatment of Central American children and adults who are fleeing violence in their home countries.

Moreover, Mexico's president, Enrique Peña Nieto, took a strong stand for safeguarding the rights of refugees and migrants at the Leaders' Summit on Refugees in September 2016. He announced that Mexico will strengthen its refugee recognition procedures and substantially increase the staffing of its refugee agency. It will carry out an awareness-raising campaign to inform potential applicants about the right to seek asylum. And it will "develop alternatives to immigration detention for asylum seekers, particularly children" and take other steps to ensure protection of unaccompanied and separated children.[48]

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[44] See ibid, pp. 61-64. See also ACNUR, *Arrancados de raíz,* p. 18; Georgetown Law Human Rights Institute Fact-Finding Project, *The Cost of Stemming the Tide,* pp. 35-37; Michael Garcia Bochenek, "How Immigration Detention and Procedural Shortcomings Undermine Children's Right to Seek Asylum," *Birkbeck Law Review,* vol. 3 (2015), pp. 258-77.

[45] See Human Rights Watch, *Closed Doors,* pp. 90-91, 84; Georgetown Law Human Rights Institute Fact-Finding Project, *The Cost of Stemming the Tide,* pp. 29-30; Aldo Ledón Pereyra et al., "Mexico: Southern Border," in *Childhood, Migration, and Human Rights,* p. 238.

[46] The prohibition on *refoulement* bars constructive as well as direct state action that results in an individual's return to risk. As a result, states may not indirectly force individuals back to countries where they are likely to face persecution or threats to their lives and safety. See, for example, *M.S.S. v. Belgium and Greece,* App. No. 50012/08 (Eur. Ct. H.R. Grand Chamber January 21, 2011), paras. 286, 347 (evaluating adequacy of protections against "direct or indirect" *refoulement*); UNGA, Executive Committee of the High Commissioner's Programme, 52d sess., Note on International Protection, U.N. Doc. A/AC.96/951 (September 13, 2001), para. 16 (noting that "the duty not to *refoule* . . . encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution," including "indirect *refoulement*"), http://www.unhcr.org/excom/excomrep/3bb1c6cc4/note-international-protection.html (accessed September 27, 2016); James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), p. 318.

[47] See Advisory Opinion OC-21/14, para. 242 ("best interests"); Committee on the Rights of the Child, General Comment No. 6, para. 84 ("Return….. …in best interests"). See also Committee on the Rights of the Child, Concluding Observations: Mexico, U.N. Doc. CRC/C/MEX/CO/4-5 (July 3, 2015), para. 60(c) ("best interests" and deportation); Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Concluding Observations: Mexico, U.N. Doc. CMW/C/MEX/CO/2 (May 3, 2011), para. 56(e) (same). See generally Alice Farmer, "A Commentary on the Committee of the Rights of the Child's Definition of Non-*Refoulement* for Children: Broad Protection for Fundamental Rights," *Fordham Law Review*, vol. 80 (2011), pp. 39-48.

[48] See Presidencia de la República, "El Presidente de la República, Enrique Peña Nieto, delineó siete acciones concretas que México está impulsando para brindar un trato más digno y humano a migrantes y refugiados," September 20, 2016, http://www.gob.mx/presidencia/articulos/cumbre-de-lideres-sobre-refugiados?idiom=es (accessed September 27, 2016).

There's reason to be sceptical that he's serious about these initiatives, and not just because they would be a substantial departure from established practice. Peña Nieto's presidency has been marred by a series of egregious missteps and unfulfilled promises on human rights—most notably the mishandling of an investigation into the enforced disappearance of 43 students in Guerrero in 2014 and the failure to ensure accountability for mass killings in Michoacán and the state of Mexico, among the many cases of enforced disappearances and other abuses by security forces over the past decade.[49]

But if they are carried out, the commitments Peña Nieto announced will address some of the shortcomings of Mexico's refugee protection system. For instance, he recognized that the state's refugee agency is under-resourced, with only one office along the southern border, and pledged to increase its staff by 80 percent. More information for people entering the country about the right to seek asylum will be helpful, especially if accompanied by greater awareness among immigration agents, with accountability for lapses.

And any reduction in Mexico's near-routine use of immigration detention for children will go a long way toward ensuring that those most in need of protection have effective access to it. As my investigation for Human Rights Watch found, being detained was in many cases the most important factor in decisions by unaccompanied children and families with children not to pursue asylum claims.

Mexico has already taken some positive steps. It has established new child protection agencies, which have begun the painstaking work of integrating operations among federal, state, and local entities. Refugee recognition rates have substantially increased in recent years and in the first half of 2016 were already more than double that of all of 2015.[50]

Its refugee law is, on paper, model legislation. But in Mexico there has long been a yawning gap between rights-respecting laws, regulations, and high-level pronouncements, on the one hand, and the reality on the ground, on the other.

The Way Forward

Mexico should do more to ensure that children have effective access to refugee recognition procedures, including by providing them with appropriate legal and other assistance in the preparation and presentation of applications. In line with the presidential commitment, the government should expand the capacity of COMAR, the Mexican refugee agency, including by establishing a presence across Mexico's southern border.

Mexico has a right to control its borders and to apprehend people who enter the country irregularly, including children. However, migrant children should in no circumstances be held in detention. Mexico should make greater use of alternatives to detention already available under Mexican law—in particular, by expanding the capacity of DIF shelters and by giving DIF discretion to place unaccompanied children in the most suitable facilities, including open institutions or community-based placements. To be sure, some children will need a greater degree of supervision and may well be need to be housed in closed facilities, but DIF should be empowered to identify, on a case-by-case basis, the housing arrangement that is most consistent with an individual child's best interest.

Mexico can provide appropriate care and protection to unaccompanied and separated children in a variety of ways, whether by housing children with families or in state or privately run facilities. But locking children up in prison-like settings does not meet international standards.

For its part, the U.S. government, which has pressured Mexico to interdict Central Americans and has spent considerable sums to enhance Mexico's immigration enforcement capacity, should provide additional funding and support to improve and expand Mexico's capacity to process asylum claims and to provide social support for asylum seekers and refugees. The U.S. government should also link funding of Mexican entities engaged in immigration and border control to their demonstrated compliance with national and international human rights standards and anti-corruption measures.

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[49] See, for example, Human Rights Watch, "Mexico: Delays, Cover-Up Mar Atrocities Response," November 7, 2014, https://www.hrw.org/news/2014/11/07/mexico-delays-cover-mar-atrocities-response (accessed September 27, 2016); Human Rights Watch, "Mexico: Police Killings in Michoacán," October 28, 2015, https://www.hrw.org/news/2015/10/28/mexico-police-killings-michoacan (accessed September 27, 2016); Human Rights Watch, *Mexico's Disappeared: The Enduring Cost of a Crisis Ignored* (New York: Human Rights Watch, 2013); Human Rights Watch, *Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"* (New York: Human Rights Watch, 2011).

[50] SEGOB, COMAR, *Estadísticas 2015, 2016.*

Migration and refugee assistance in Chile

Judge Gabriela Ureta Roiron & Claudia Miranda Fuentes

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Background

Chile's geographical location has not made the country prone to substantial migratory inflows or outflows, except for those that resulted from the political situation that prevailed in Chile during the period 1973-1990, which led to a high flow of Chileans emigrating or seeking refuge abroad. However, during the last three decades, there has been a significant increase in migration flows into the country, including refuge seekers, which has meant that the number of migrants is, in absolute terms, the highest that has been recorded in the history of the country.

According to the CASEN survey of 2013[1], in that year the immigrant population numbered 354,581 people, accounting for 2.1% of the Chilean population. The five regions in the country with the largest numbers of immigrants are the Metropolitan Area and the borders. First in the list is the Central Metropolitan Area that harbours 66.4% of total immigrants, second is the northern region of Antofagasta, with 7.5%, third Valparaiso, the major port in Chile, with 7.2%, followed in fourth place by the northern Region of Tarapaca with 5.1% and fifth the area forming the frontier with Peru and Bolivia, the region of Arica and Parinacota, with 2.3%.

The same survey showed that women are overrepresented in the migrant population, accounting for 55.1% of the total, and that the age of immigration to our country has been increasing.

Whereas in 2009 the modal age range was 15-29 years, in 2013 the modal range increased to 30-44 years of age.

According to estimates by the Department of Immigration Matters of the Ministry of the Interior (DEM), in 2014 there were 410,000 immigrants in Chile. This figure does not include individuals with a provisional residence permit or those who have irregular status.

Immigrants are now estimated to account for 2.4% of the population in Chile, which in international terms does not seem high, but it has had a remarkable impact in Chile since the country was not prepared in terms of infrastructure; nor did it have the necessary public policies in place to accommodate the large number of foreign individuals who have recently entered the country. According to DEM, immigrants now amount to approximately 460,000 persons; and, by the time of the next census due to take place in 2017, the number is expected to have increased to around 500,000.

South America appears to be the main place of origin of migrants coming to Chile, accounting for 75% of the total. The trend seems to have been growing since 2005, when South America contributed 67.7% of international migration, with bordering countries being overrepresented, accounting for 56.8% of the total. (Peru 31.7%, Argentina 16.3% and Bolivia 8.8%)

The role of the administration

The situation described above has resulted in cultural, economic and labour changes and the government has tried to adapt to the new reality by implementing new public policies.

From 2005 to date, 622 applications for declaration of nationality in birth registrations have been filed.

[1] The CASEN survey is a national socioeconomic study conducted by the Ministry of Social Development of Chile. This survey measures the economic welbeing of households and, based on its data, national indicators of income distribution, access to social services and poverty are elaborated. This is the main socioeconomic instrument for the design and evaluation of public policies. The next CASEN survey is in the phase of data processing. Data collection took place between 02/11/2015 and 31/0/2016. Available on the web site: < http://www.ministeriodesarrollosocial.gob.cl/btca/txtcompleto/midesocial/casen2013-inmigrantes.pdf>

DEM has a programme designed to strengthen migration policies[2] in order to give a comprehensive response to migration in Chile[3]. At the same time it has become necessary to update legislation on migration matters in order to strengthen institutions and provide for inclusion, regional integration and human rights.

There is also a collaboration agreement between DEM and the National Agency for Minors (SENAME) on the recognition of refugee status. This complements the work of the Network for the Protection of Childhood which has the objective of providing special protection and responding to the specific vulnerability of children and adolescents by requesting recognition of their refugee status.. Childhood protection agencies in Chile undertake the role of representing children and adolescents before migration authorities.

At the same time, institutions such as the, the Ministry of Education, the National Health Fund (FONASA), local governments, hospitals and civil society organizations[4], have adopted a number of integration initiatives and taken administrative action. These have helped to move forward the implementation of the commitments undertaken by Chile in the field of international migration that seek, among other things, to strengthen the rights of migrant children and adolescents (NNA)[5].

In order to pursue this goal, the following actions have been implemented:

1. **maternity protection.** Immigrant mothers who become pregnant are allowed to obtain a provisional residency permit if they certify supervision of their pregnancy in a public health care centre[6];
2. **access to education.** Access to elementary and secondary education for migrant children and adolescents is promoted and encouraged, regardless of the migratory status of their parents. [7]
3. **access to preschool education (prior to elementary school)**. This agreement is aimed at facilitating the entrance of children under five of immigrant or refugee parents, regardless of the migratory status of the minors[8].
4. **access of children and adolescents to the public health care system**. This agreement facilitates access to health care for children under 18 under the same conditions as their Chilean peers in a public health care centre, regardless of the migratory status of their parents or guardians[9].
5. **access to the protection network for women victims of family violence, immigrants, refugee seekers and refugees.** Its purpose is to facilitate access of immigrant women, asylum seekers and refugees residing in Chile to the protection network for victims of intra-family violence[10].
6. **access to the child protection network.** Its purpose is to facilitate timely admission to the social child protection network for children of migrant or refugee families whose rights have been undermined, or children of individuals in conflict with the law, regardless of the migration status of the children[11].

The Ministry of the Interior and Public Security has also ordered the relevant authorities:

a) to waive fines on children and adolescents who have infringed migratory regulations;

b) to reduce the costs of migration paperwork;

c) to abstain from penalising foreign children and adolescents for violation of migration laws based on the commitments undertaken by Chile in connection with the protection of human rights, in particular with the provisions of the Convention on the Rights of the Child, and of migration laws, competent authorities have been instructed;

d) to regularise the migratory status of minors and individuals who have entered the country illegally, taking into consideration their family relations which Chileans; and

e) to regularize the entrance and permanence in the country of foreign citizens who are victims of people trafficking. Statistics show that regularisation of cases has increased threefold during the period 2010- 2014.

[2] It should be noted that the current national legislation is outdated and does not adjust to international, particularly Inter American, guidelines. Currently, the regulations on foreigners and immigrants is mainly contained in Decree 1094 dated July 19th 1975, passed during the military government. Available at [online] http://www.leychile.cl/Navegar?idNorma=6483&idVersion=2011-04-08&buscar=1094> [Accessed on: September 16, 2016] with its regulatory order. Also, in Supreme Decree n° 597 dated November 24, 1984. Available in [online]< http://www.leychile.cl/Navegar?idNorma=14516&r=1> [Accessed on: September 16, 2016].

[3] Instructions on national migration policy by President Michelle Bachelet Jeria, dated September 2, 2008.

[4] Several universities have created specialized offices for the protection of migrants with respect to access to justice, particularly migratory and family and labor matters. Examples are the Universities Diego Portales and Alberto Hurtado. At the same time, the government has opened the International Law Bureau under the framework of the Legal Aid Corporation to represent immigrants in nationality claim actions and protection orders in cases of expulsion or departure from the country. The Jesuit Service for Migrants has played a significant role. See Web site: http://www.sjmchile.org/

[5] On March 21, 2005, Chile ratified the International Convention on the protection of the rights of all migrant workers on their families adopted by the United Nations General Assembly in its session 45/158 of December 18th, 1990.

[6] Regular Order ORD-A-14 Nº 3.229, June 2008, Ministry of Health.

[7] Decree N° 6.232, May 2003, Department of Immigration Matters; Decree N° 07/1008(1531), August 2005, Ministry of Education.

[8] Special Resolution N° 6.677, November 2007

[9] Special resolution Nº 1.914, March 2008

[10] Special resolution N° 80.388, December 2009.

[11] Special resolution N° 10.654, December 2009

In 2014, the National Agency for Minors (SENAME), the DEA, and the Ministry of the Interior entered into an agreement under which a protocol on requests for acknowledgement of the refugee status of children and adolescents was approved. The document describes the different situations that children and adolescents may face at the time of applying for refugee status, and the steps to be followed to guarantee due protection of their rights by applying specialised attention. The protocol stresses collaboration and joint action to speed up migratory regulations, and SENAME has undertaken responsibility for making social evaluations of unaccompanied children and adolescents who apply for resident visas in Chile.

The Ministry of Social Welfare created the Migration and Social Inclusion Unit in 2014 with the purpose of supporting migratory policies in areas such as:

a) social protection;
b) links with civil society representing the migrant community;
c) data collection, characterizations and studies on the migrant community and individuals;
d) design, elaboration and coordination of specific programs for the migrant community, and
e) creation of intersectoral coordination on all migration matters among the Ministry and relevant agencies.

In order to guarantee access to education of all migrant children and adolescents under the framework of the principle of non-discrimination as provided by our Political Constitution[12] and the General Education Law, the following measures have been adopted:

a) regularising the residence status of every migrant child and adolescent enrolled in an official educational institution.
b) guaranteeing access of migrant children to pre-school education.

Growing immigration, including refugees, has exposed certain gaps that were not appreciated before. While there has been progress, since there are no migrant children excluded from education in Chile, a need is perceived for school programmes aimed at promoting diversity, including other cultures and providing a broader vision of history, thus making sure that prejudices, stigmatization and nationalistic views are overcome.

The role of the judiciary

It should be noted that the Chilean Judiciary has played a significant role in the promotion of human rights of migrants and refugees as can be appreciated from national case law and as evidenced in numerous judicial decisions in this area, particularly with respect to the situation of immigrants with administrative procedures based on the discretion of the authorities.

In fact, the Supreme Court has jurisdictional oversight of expulsion and other administrative measures adopted by the Ministry of the Interior. In the case of foreigners with illegal status this is by means of protection orders, regulating the entrance of foreigners into the country, and, in other cases, by reviewing procedures that were deemed arbitrary in relation to migrants or refugees. In this respect, superior courts in Chile, which comprise the Courts of Appeal, the Supreme Court and the Constitutional Court, have made partial amendments, improving on older legislation that is still in effect and that gives broad discretion to the police and administrative agencies. This has been achieved in part by means of protection orders (*habeas corpus*) or by quashing on the grounds of unconstitutionality.

Below, and by way of illustration, we cite Case Number 5832-2013, a decision of the Supreme Court of Justice of Chile dated 09/02/2013, in the case of Peruvian citizen C.E.F.T., expelled from Chile by a decision by DEM. The defendant had entered Chile illegally and obtained a temporary residence permit, but did not apply for renewal and in the interim committed certain crimes.

The petitioner appealed to the High Court, which ruled as follows:

> "7. That the previous considerations lead to the conclusion that the measure adopted by the administrative authorities against Peruvian citizen C.F.E.T. is disproportionate and is not in conformity with the principles on which it is grounded since it is not possible to prove that the citizen has committed any of the illegal actions that led to the measure adopted, which, given its punitive nature must be construed in a strict manner. Further, the status of irregular residence of the petitioner in the national territory and the practice of street selling that are invoked as grounds for the decision under appeal do not appear to be infringements that undermine the national interest to be protected by the authority. Their consequences have been clearly established in national legislation and are of a lesser scope than is alleged in this case, being actions that merely pursue the aim of finding better conditions of life in a way that does not involve continuing criminal behaviour.
>
> "This leads to the conclusion that the decision which is the subject of appeal is not proportionate to the nature, severity and scope of the alleged act. This constitutes sufficient grounds to revoke that decision"[13].

[12] Political Constitution of the Republic 1980, Article 19: The Constitution guarantees all persons: number 3; equal protection by the law in the exercise of their rights.

[13] See Articles 13, 15, 17 and 64 of Decree 1094 of 1975 on the competence of the Ministry of Interior and its powers regarding expulsion and departure from the country

Another case that has led to a judicial debate is the situation of children born in Chile of persons in an irregular migratory situation.

The Political Constitution of Chile provides as a general rule that Chilean nationality is acquired by virtue of the principle of *ius solis*. However, it provides an exception with respect to foreign individuals who are in Chile working for their respective governments or the children of foreign citizens in transit who have the right to opt for Chilean nationality at 21 years of age. Also, by virtue of the Aliens Act, these individuals have the right to obtain a residence visa in the country, which gives them the right to interact with the public services and be holders of rights and benefits on an equal footing to all Chilean citizens.

The right to be registered at birth is closely related to the exercise of many other fundamental rights, such as the right to health and access to education. In this way, until August 2014, the administrative interpretation was that anyone who had the migratory status of:

- a tourist or member of a crew and were in an irregular migratory condition; or
- aliens who had entered Chile in an irregular manner; or
- those who were the subject of an administrative action of expulsion from the country

was an *alien in transit*, because it was considered that such an individual had no intention of residing in the national territory. This meant that a large number of children and adolescents of parents with an irregular migratory status had no access to Chilean nationality, which in turn meant that they were stateless.

The Supreme Court of Justice, aware of some of these cases, established principles to define the notion of *alien in transit*, appealing to the natural and obvious meaning of those words and setting the basis for the application of different criteria by the Public Administration. The Ministry of the Interior and Public Security, through DEM, has stated that an *alien in transit* is "an individual who is in transit in Chile, without an intention of residing". This excludes the irregular migratory status of the parents of a child born in Chilean territory from being a relevant factor in determining the right of the child or adolescent to be granted Chilean nationality.

On 14 August 2014 the Director of Immigration Matters set out the basis for decision when registering the birth of a child born within the national territory in a memorandum[14] to the National Director of the Vital Statistics Registry. On 20 March 2015, the restrictive interpretation of the notion of a child born to an *alien in transit* provided in Article 10.1 of the Political Constitution of the Republic was published in the Official Gazette, which led to a broad public communication campaign promoting the right of children registered as children of *aliens in transit* to apply for status rectification. Bills seeking a definitive approach to this matter have been filed with the National Congress, but have yet to be enacted.

The Supreme Court has made decisions under which the stability of the mother, regardless of her migration status, is to be taken as the most important factor in granting Chilean nationality to a child. This is illustrated by decision 5482-2013, of 26 November 2013, dealing with a Peruvian woman who entered Chile through a non-authorised border crossing in 2009 with her two children and whose third pregnancy was supervised in a hospital in the capital city.

The woman declared that she had made several unsuccessful attempts to regularize her migration situation. Finally, her child, whose initials are D.E.P.R., was registered at birth as a *child of alien in transit*, and thus as a stateless person, consequently having no access to government benefits. The Supreme Court responded to the nationality claim as follows:

> "**Sixth**: That, as provided by Articles 58 and 59 of the Civil Code, it is possible to distinguish in Chile between a resident and a person in transit when the residence at a certain address is accompanied by the actual or presumptive determination to stay. It is helpful to note on this point that Article 64 of the same document--different from the situation described in the previous text--provides that the determination to stay and settle in a certain place can be determined, among other factors, by the fact of accepting employment and "other similar circumstances".
>
> **"Seventh:** That the interest shown over a long period by DEPR's mother to stay in the country is considered proven by this Supreme Court and, as provided by Article 12 of the Constitution, all background information leads to the conclusion that the woman has remained within the national territory with the intention of staying, so that the status of alien in transit does not apply. Under these circumstances, DEPR does not come within Article 10 of the Political Constitution of Chile, for which reason the claim must be accepted.
>
> **"Eight:** That, finally, it is also relevant to invoke international Human Rights legislation on this matter. To this effect, Article 20 of the American Convention on Human Rights, Pact of San José de Costa Rica, provides that every person has the right to a nationality, that every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality and that no one shall be arbitrarily deprived of his nationality or the right to change it.
>
> "As can be appreciated, nationality is an essential right of human beings, an attribute

[14] Memorandum 27601

of personality that cannot be denied without good reason. Moreover, if the authority that denies such a right has not pursued the course of expulsion, this implies, in the case of the State of Chile, acceptance of the permanence of the mother of the child whose Chilean nationality has been rejected beyond the timeframe considered to determine the status of "in transit".

Conclusion

In spite of the efforts made by different governmental agencies, the actions that have been implemented with respect to migration in Chile during the last 20 years reveal that there are remaining challenges, such as updating our legislation, one of the oldest in Latin America (dating back from 1975), viewing it not as merely dealing with admission or expulsion from the country, but also applying a human rights perspective.

Although the Judiciary has played a significant role in closing the rights gap as has been described above, migration in Chile has made evident the need to have standardised regulations that can be accessible to all, as well as greater clarity in terms of migratory policies instead of specific and individual answers to urgent matters. These have had a negative impact on vulnerable individuals, such as pregnant women and minors and adolescents with an irregular migratory status.

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The Dark Side of the Moon – Horrors of Illegal Immigration

Anil Malhotra

Anil Malhotra

The Issue

In the Malta boat tragedy in 1996, 289 South Asians including about 170 youth from the Punjab who were seeking illegal foreign passage found a watery grave in the Ionian Sea. The tragedy was repeated recently when about 20 Punjab residents heading to the USA reportedly drowned near the Panama – Colombian coast, when a vessel ferrying the illegal immigrants capsized. A survivor brought back the unfortunate tale of woe. Sad but true, merchants of death run thriving rackets of human smuggling in the Punjab without fear or abandon, trapping gullible youth with dollar dreams. Innocent citizens are duped daily and this organised crime perpetuates horror and misery flourishing by the day with impunity and utter disregard for law.

Problems galore

Smuggled migrants are vulnerable to exploitation. Their lives are put at risk. The victims have suffocated in containers on ships at sea, perished in deserts, drowned in oceans or have been herded as forced labour into slave camps. Smugglers of human beings conduct their activities brazenly with no regard for the safety of life. Survivors tell harrowing tales of their ordeal. Forced to sit in body waste, deprived of food and water, they have watched those around them die, thrown overboard and perished on road sides. Those apprehended, languish in foreign jails, with no hope of return. Smuggling of illegal immigrants generates high net worth profits at the hands of mafias who fuel corruption and ignite organised crime. Such movement of people is a deadly business, which like terrorist strikes, has to be now combated with grave urgency.

Attempts using the law

Punjab was the first state to enact the Punjab Human Smuggling Act, 2012 which was rechristened as the Punjab Travels Professional Regulation Act, 2012. It seeks to provide a mandatory registration and licensing regime for any and every category of persons conducting any activity akin to a travel agent that involves arranging, managing or conducting affairs related to sending people abroad. It debars agents operating without a license. Violation entails penalties. Punishment up to seven years of imprisonment is prescribed and compensation is payable by an agent to an aggrieved person upon adjudication. Cheating as defined in criminal law is applicable. Regardless, the malady thrives as agents choose not to register. Unscrupulous fly by night operators take advantage, trading in death hoodwinking gullible youth to go to foreign pastures and who never reach their El Dorado. Those trapped are obliterated, never to return and condemned to die.

No controlling law

Prevention is better than cure. Here, no law made by Parliament provides either. The Emigration Act, 1983, authorises a Protector General of Emigrants to authorise emigration clearance to Indian immigrants, to prevent exploitation at hands of recruiting agents who duck mandatory registration and licensing by claiming that they do not conduct recruitment. In stark reality, recruitment agents exploit Indian workers by unfair contracts on false promises, never to be caught being registered under no law. The Punjab law is avoided by claiming that agents are consultants requiring no registration under the State law. It is free trading with no check or control.

Possible solutions

The dire need is in enacting a new Central all India umbrella legislation comprehensively targeting all categories of agents, consultants, recruitment representatives and all concerned with sending persons overseas.

The urge for illegal migration cannot be curbed. The need for migration needs to be channelled and the need for sustainable solutions ought to be explored. Legalized, managed, integrated and organised migration must be the aim. Migration by legal means must be publicized.

The suggested solutions possible are a comprehensive approach on migration, setting out legal migration opportunities, selective migration, migration profiling, regularization of over stay; but not amnesty, short-term visas or comprehensive policy determination by categorization of classes of visas.

A two-fold approach can be seen in the Indian context and from the perspective of India where managed migration is currently in its experimental stages. One set of ideology practices **promotion** whereas the other thinking is based on **regulation** of migration. Both follow an educative thought-oriented process. Active Government participation is a must for the effective resolution of managed migration at operational levels in both these approaches.

The first visualising **promotion** of migration envisages channelized migration programmes. These look to bi-lateral localised agreements to regularise immigration between sending and receiving countries. Government bureaus in the States of the Punjab and Haryana assist State residents to route immigration through Government channels with visa facilitation by Visa Facilitation Services so as to eliminate traffickers with their illegal operations.

The second looks at selective **regulation** of immigration by a system of checks and balances created and put into the system of migration.

However, a tightening visa regime will deter clandestine illegal operators only if it is coupled with awareness, aids, publicity and education, enabling prospective migrants to take a conscious decision themselves to migrate or not. In India today, with booming economic growth and increasing employments opportunities, it may be necessary to educate the youth about whether they need to migrate.

In this context, the role of the Ministry of External Affairs and State Governments supported by Foreign Missions is to launch an outreach campaign into villages in the Punjab where vans, banners, posters, newspapers and other publicity material in both the Hindi and Punjabi languages carrying the message of *Migration---the right way* would be extremely beneficial. This may be the second mode of helping all concerned to take a conscious individual decision on whether to migrate or not. This aids managed migration.

Further loss of human lives at the hands of merchants of death must stop.

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Child trafficking in West Africa—the problem and the law (Part A)

Hon. Justice Rosolu Bankole Thompson

I. Introduction

In a passionate plea for the ratification of the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, former Secretary- General of the United Nations, Kofi Annan poignantly observed that the trafficking of persons, particularly women and children, for forced and exploitative labour, including for sexual exploitation, is one of the most urgent violations of human rights that the United Nations now confronts, and that it is widespread and growing. He further noted that the fate of victims of human trafficking is both an affront to human dignity and a challenge to every State, every people, and every community.[1]

By parity of reasoning, it is the underlying theme of this Article that child trafficking is now a world epidemic. The case for its eradication is premised on this fourfold rationalization: (a) the practice is at variance with the values of modern civilization, (b) it is an act that, in familiar international law terminology, 'shocks the conscience of mankind,'(c) it is a gross violation of human rights, (d) It inhibits a child's natural growth processes into adulthood, physically, emotionally, and psychologically.

Predicated upon the foregoing reasoning, the present author examines from a critical perspective the national laws of some West African countries governing the phenomenon of child trafficking, focusing on the desirability of instituting a regional or an international judicial mechanism vested with authority to prosecute persons engaged in child trafficking and to compensate victims for the wrongs suffered. The Article is in two parts: A and B.

Part A incorporates an introduction in which the author presents the problem of child trafficking in the global context, followed by a summation of the issues arising from efforts to conceptualize and define human trafficking, in general, and child trafficking, in particular. The author then describes the international regulatory framework proscribing the practice. He concludes with an articulation of the case for the creation of an international or regional tribunal for the protection of the rights of children, vested with both criminal and civil jurisdictions.

It has been argued that the notion of globalization bears some nexus with human trafficking. The pith of the argument is that one cannot understand the causes and motivations for the practice of human trafficking without reference to globalization and that it is a key dynamic in the human trafficking equation. One rationalization is that despite the overall benefits derived from globalization in the conduct of human affairs yet, in the sphere of economic activities, it has indeed facilitated organized and transnational criminality. In an illuminating discourse, Daw asserts that there is a nexus between globalization of economic activities and globalization of organized criminality. She reasons that the development in the areas of transportation and communication has created enormous opportunities for human communication and development, which have in turn created new opportunities for organized crime. She observes that increases in the flow of information and commodities have created new opportunities for theft, smuggling, and other crimes and provided opportunities to gain enormous profit from the smuggling of migrants and trafficking in persons[2].

[1] United Nations Convention Against Transnational Organized Crime and The Protocols Thereto, United Nations Office on Drugs and Crime, Vienna; United Nations, New York, 2004, iv.

[2] Daw, Bianca "Child Trafficking [Problems and Solutions] 2008; See https://www.Academia.edu/2065674/Child_Trafficking_Problems–and–Solutions, 10

II. Meaning of Human Trafficking: Definitional Complexities

For the purposes of this Article, the term 'trafficking' as applied to human beings carries, inevitably, pejorative connotations. It raises complex semantic and definitional issues. Suffice it to say that the exact connotation of the term cannot be articulated with much clarity and precision since in its ordinary and legalistic senses, its impreciseness and lack of clarity have given rise to all kinds of artificial and subtle legal interpretations (a detailed examination of which is outside the scope of this Article). Further, defining the notion of 'trafficking of persons by the application of the 'commodities analogy' is linguistically problematical because it amounts to a devaluation of human dignity. Admittedly, this is due to the imperfections of language and the use of legal fictions to resolve juristic and doctrinal difficulties.

Despite this feature of complexity in defining the term 'child trafficking' for the purposes of criminal liability, it is instructive to note this representative sample of accepted legal meanings, culled from the extensive literature on the subject:

i. Child trafficking involves "the movement of children for the purpose of their exploitation.[3]

Ii .Child trafficking is about taking children out of their protective environment and preying on their vulnerability for the purpose of exploitation[4].

iii.Trafficking of children is a form of human trafficking and is defined as the" recruitment, transportation, transfer, harboring, and/ or receipt" of a child for the purpose of exploitation[5].

iv. Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring, or receipt of a person by means of threat, or use of force or other form of coercion, fraud, abduction, deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation;[6]

v. Trafficking is "the illicit and clandestine movements of persons across national borders, largely from developing countries, and some countries with economies in transition, with the end goal of forcing women and girls into sexually or economically aggressive and exploitative situations for profit of recruiters, traffickers and crime syndicates and other activities, for example, for forced domestic labour, false marriages, clandestine employment and false adoption."[7]

vi." A child has been trafficked if he/she has been moved within a country or across borders, whether by force or not, with the purpose of exploiting the child."[8]

vii. "Trafficking is among forms of slavery or practices similar to slavery.[9]

III.The International Regulatory Framework for the Proscription and Eradication of Child Trafficking

In tracing the development of the global normative scheme for the proscription and eradication of child trafficking, one can conveniently divide the major post 1947 international legal instruments on the subject into two layers, roughly chronologically and in terms of subject-matter. The first layer comprises of the Universal Declaration of Human Rights,1948, The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others,1949, and The Slavery Trade, and Institutions and Practices Similar to Slavery Convention,1956.The second encompasses the International Covenants on Civil and Political Rights,1966;The Convention on the Elimination of All forms of Discrimination against Women,1979;The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally,1986; The Convention on the Rights of the Child,1989; The Optional Protocol to the Convention on the Rights of the Child, 2000; The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, 2000;The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,2002; and the South Asia Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.[10]

It is evident that, in its contemporary context the existing global regulatory framework for combating child trafficking is quite comprehensive and elaborate. It is now necessary to examine some key features of the last eight conventions and protocols.

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3 www.unicef.org/.../SAF...pressrelease..notetrafficking-pdf UNICEF

4 www.ilo.org

5 https://en.wikipedia.org/wiki/TraffickingofchildrenWikipedia

6 UN Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children, 2000, Article

7 See UN General Assembly Resolution A/RES/49/166, 23 December 1994.

8 See UN Protocol op cit; see also ILO Worst Forms of Child Labour Convention , 2000.

9 See UN Protocol, op cit

10 See generally on this subject, Gallagher, Anne: "The International Law of Human Trafficking", Cambridge: Cambridge University Press, 2010 ; See also King , Lindsey: International Law and Human Trafficking, Topical Research Digest: Human Rights and Human Trafficking, www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf.

A.The Convention on the Elimination of All Forms of Discrimination against Women[11]

This Convention has a threefold normative thrust. The **first** is the definition of the concept of discrimination against women as

- "any discrimination, exclusion or restriction made on the basis of sex or has
- the effect or purpose of impairing or nullifying the recognition,
- enjoyment or exercise by women, irrespective of their marital status,
- on a basis of equality of men and women, of human rights and
- fundamental freedoms in the political, economic, social, cultural,
- civil or any other field."[12]

The **second** is the explicit commitment by States Parties to undertake a series of legislative measures to end discrimination against women in all forms to, wit:[13]

(a) To embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and women and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women.

The **third** thrust is its distinct emphasis on the enjoyment of all their human rights and fundamental freedoms by women on a level of equality with men as the normative and juristic basis of the Convention.[14] *A priori*, by accepting the obligations of the Convention, the States Parties are legally bound to take all appropriate measures to outlaw all forms of trafficking and exploitation of women, including minors. Hence, child trafficking is proscribed by the Convention.

B. The Declaration of Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally

The next relevant legal instrument is the Declaration of Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally.[15] Besides the substantive provisions relating to the protection and welfare of children, with special reference to foster placement and adoption, nationally and internationally, the Declaration requires States Parties to establish policies and enact laws for the prohibition of abduction and[16] of any other act for illicit placement of children. The clear implication of this obligation is that child trafficking is outlawed under the provisions of the Declaration.

C. The Convention on the Rights of the Child

The Convention on the Rights of the Child is also pre-eminent in its normative purport in so far as the eradication of child trafficking as a global ignominy is concerned.[17] Three key features of the said Convention are of direct relevance here. The first is the normative guarantee secured for every child in respect of freedom from abduction, trafficking or sale.[18] The second is that the Convention secures for every child the right to protection against all forms of sexual exploitation or abuse.[19] Thirdly, it grants to every child protection against torture and related ill-treatment.[20] Significantly, consistent with its objectives and purposes, States Parties agree to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention.[21] There is, likewise, on the part of States Parties, an undertaking that they will ensure that a child should not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.[22]

11 http://www.un.org/womenwatch/law/cedaw/text/convention.htm
12 Article 1.
13 Article 2.
14 Article 3.
15 http://www.un.org/documents/ga/res/41/a4lr085htm
16 Article 19
17 www.ohchr.org/en/professionalinterest/pagescrcaspx
18 Article 35.
19 Article 36.
20 Article 37.
21 Article 4.
22 Article 9.

Evidently, this is a recognition of the fact, as alluded to earlier in this Article, that the trafficking of children impairs them physically, socially, emotionally, mentally and psychologically; and stifles their growth into adulthood. The Convention also requires States Parties to undertake measures to combat the illicit transfer and non-return of children abroad.[23] Equally important is the Convention's imposition on States Parties of the responsibility to take all appropriate legislative, administrative, social and educational means to protect the child from all forms of physical or mental violence, injury or abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.[24]

D. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[25]

Next is the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography. Articles 34 and 35 of the Convention on the Rights of the Child stipulate that governments should protect children from all forms of sexual exploitation and abuse and take all measures possible to ensure that they are not abducted, sold, or trafficked. The Convention's Optional Protocol supplements the Convention by providing States Parties with detailed requirements to end sexual exploitation and abuse of children. It also protects children from being sold for non-sexual purposes, such as other forms of forced labour, illegal adoption and organ donation. Hence, its rationales are:

(i) the extension of the measures to be undertaken by States Parties to guarantee the protection of children from being victims of sale, prostitution, and pornography,[26]

(ii) global recognition of the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development,[27]

(iii) grave global concern at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography,[28]

(iv) deep global concern at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography,[29] and

(v) global recognition that a number of particularly vulnerable groups, including female children, are at greater risk of sexual exploitation and that female children are disproportionately represented among the sexually exploited.[30]

Of paramount importance is the obligation of States Parties to criminalize in their penal laws a wide variety of acts that can, within the established legal definitions of 'child trafficking' in the rudimentary vocabulary of the common law tradition of the criminal law, constitute actual or constructive trafficking of children, thereby obviating the possibility of injecting legal technicalities into this domain of the penal laws. These acts are:[31] (i) offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; c. Engagement of the child in forced labor; (ii) Improperly inducing consent, as an intermediary, for adoption of a child in violation of applicable international legal instruments on adoption; (iii) offering, obtaining, procuring or providing a child for prostitution, as defined in article 2. The Protocol also imposes an obligation on States Parties to criminalize the inchoate act of attempt to commit any of the aforementioned acts and complicity or participation in such acts; to provide appropriate penalties for the said acts, taking into account their gravity, and to take appropriate measures to establish liability of legal persons for the offences established under Article 3.[32]

E.The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children assumes much importance as a supplementary international legal instrument to the United Nations Convention Against Transnational Organized Crime.[33] The legal thrust of the Protocol is threefold. The first was the global awareness, at the level of the world body, that despite the existence of a variety of international legal instruments embodying rules and practical normative guidelines to combat the exploitation of persons, especially the most vulnerable, to wit, women and children, there was not then any universal legal instrument designed to address all aspects of trafficking in persons.[34] The second was the concern that in the absence of such a universal code persons vulnerable to trafficking will not be sufficiently protected.[35]

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[23] Article 11.
[24] Article 19(1).
[25] www.unicef.org/crc/index_30204html
[26] Preamble 1.
[27] Preamble 2.
[28] Preamble 3.
[29] Preamble 4.
[30] Preamble 5.
[31] Article 3(1).
[32] Article 3(2), (3), and (4).
[33] http://www.osce.org/odihr/19223?download=true
[34] Preamble 2.
[35] Preamble 3.

The third is the global conviction that supplementing the Convention Against Transnational Organized Crime with the instant legal instrument will be useful in preventing and combating the crime of trafficking in persons.[36]

Substantively, the Protocol defines exhaustively the crime of "trafficking in persons" as the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[37]The Protocol then proceeds to impose on States Parties the important obligation of criminalizing by legislative and other necessary measures the acts enumerated in the aforesaid Article 3(a), when committed intentionally.[38] Equally significantly, the Protocol enjoins States Parties to proscribe legislatively or otherwise: (a) attempts to commit any of the enumerated acts;[39] (b) the act of participating as an accomplice in any of the listed acts; [40] (c) the act of organizing or directing other persons to commit any of enumerated acts.[41]

F.SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

The South Asia Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution is[42], as evident from its title, a regional legal instrument. Its rationale is the recognition of the importance of establishing effective regional cooperation among the States Parties for preventing trafficking for prostitution and for investigation, detection, interdiction, prosecution and punishment for those responsible for such trafficking. It also emphasizes the need to strengthen cooperation in providing assistance, rehabilitation, and repatriation to victims of trafficking for prostitution.[43]

Substantively, the Convention begins with a definition of the crime of trafficking as the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.[44] According to the Convention, the person subject to trafficking refers to "women and children victimized or forced into prostitution by the trafficker by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage or any other unlawful means."[45] Significantly, under the Convention States Parties are required to take effective measures to ensure that trafficking in any form is an offence under their respective criminal law, and to make such offence punishable by appropriate penalties, taking into account the gravity of their nature.[46] The States Parties are also enjoined to hold criminally responsible" any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking.[47] A person who attempts to commit any of the acts listed in Article III (1) and (2) should be made criminally responsible.[48]

IV. The Pressing Need for A Regional or International Strategy

From the jurisprudential perspective, it is evident that the substantive and procedural penal provisions of the legal instruments constituting the international framework for the proscription of child trafficking reflect a commitment to the underlying concepts, doctrines, and principles fundamental to criminal liability in both the common law and civil law traditions.[49] Firstly, the said provisions proceed from the assumption that there should be no criminal liability for the acts criminalized without proof of the commission of the prohibited act and that it was done intentionally. This is one facet of the principle of legality recognized by common law jurisprudence and civil law jurisprudence. In effect, to establish criminal liability on the part of the offender, there must be, in familiar criminal law terminology, an *actus reus* and a *mens rea*. Both elements of crime are recognized in the common law and civil law systems.

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[36] Preamble 5.

[37] Article 3(a).

[38] Article 5(1).

[39] Article 5(2).

[40] Article 5 (2).

[41] Article 5(2).

[42] http://evaw-global-database.unwomen.org/en/countries/asia/india/2002/south-asian-association-for-regional-cooperation

[43] Daw op cit

[44] Article I (3).

[45] Article I (3).

[46] Article III (1).

[47] Article III (2).

[48] Article III (3).

[49] For an exhaustive and illuminating exposition of the principles of criminal liability in the common law tradition, see Thompson, Bankole: The Criminal Law of Sierra Leone. Lanham: University Press of America, 1999. For an equally comprehensive and illuminating exposition of the application of the same principles in the domain of international criminal law, see Cassese, Antonio: International Criminal Law, 2nd edition. Oxford: Oxford University Press, 2008.

In the context of the major legal systems of the world, it is accurate to hold that there are general notions of *mens rea* common to those systems. These are (in order of decreasing degree of culpability): intention, awareness, failure to pay sufficient attention to or comply with certain generally accepted standards, and failure to respect generally accepted standards of conduct.[50] A second key feature of the provisions of the Conventions and Protocols is the criminalization of inchoate crimes. The reference to attempts to commit any of the proscribed acts is significant in this regard. In effect, it seems clear from these international legal instruments that such egregious criminal acts should be nipped in the bud before they reach the stage of consummation or execution.[51] By parity of reasoning, the Conventions and Protocols criminalize acts that constitute complicity in a variety of ways in the commission of the substantive crime, such as conspiring, counseling, procuring, and soliciting. Recognizably, these are basic concepts and principles common to the criminal laws of the major legal systems of the world.

The problem here is not one of incompatibility in jurisprudential theory between national laws and international law in respect of criminal or penal liability for the offence of child trafficking. It is, crucially, one of the effectiveness and enforceability of the domestic penal laws. As evident from the evaluation of the respective national laws of the selected West African countries covered in Part B, it is indisputable that the performance records of enforcement of their penal laws governing child trafficking are very unimpressive. The perception that the criminal justice systems of those countries, individually or collectively, are aggressively and robustly responding to the problem of child trafficking, or that they will do so in the foreseeable future is misconceived and mistaken.

Hence, there is a pressing need for some well-thought out and carefully designed regional or international mechanism as a practical component of the moral and legal authority of the United Nations Convention on the Rights of the Child. This is the focus of this section of this Part of the Article. Given the magnitude and complexity of the problem, nationally, regionally, and internationally, there could be no more opportune time for the international community to come to grips with this plague and scourge on humanity. By any reckoning, it cannot be denied that child trafficking 'shocks humanity's conscience', and makes a mockery of the global commitment to the preservation of human dignity. It rises to the level of a crime against humanity, recognized under international criminal law, and ought now to be perceived and treated as such for criminological and penal purposes.

I take this opportunity of expressing my gratitude to my daughter, Christiana Avril Thompson for serving as my Research Assistant for the subject of the Article. A similar sentiment of gratitude is owed to my other daughter, Lovetta Anita Thompson for assisting with editorial and formatting refinements.

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[50] See Cassese op cit.

[51] See Thompson op cit for this rationalization.

Development of a 'solution focused' youth justice system in New Zealand

District Judge
Tony J Fitzgerald*

This article provides a follow-up to Judge Fitzgerald's January 2016 *Chronicle* article, *Neuro-disabilities and Youth offending – New Zealand*. In this current article, changes implemented in the New Zealand youth justice system are described in relation to mainstreaming a multi-disciplinary 'solution-focused' approach that can facilitate therapeutic justice.

Introduction

When the Children, Young Persons and Their Families Act 1989 ("the Act") came into force in November that year, it introduced fundamental changes to the Youth Justice system in New Zealand. Two features stood out in particular. One, was not charging young people and bringing them to Court, if at all possible, and instead using police led, community based, alternative action. The other was using the Family Group Conference both as a diversionary mechanism to avoid charging young people, and also as the prime decision making mechanism for all cases where a young person was brought to Court and the charges were not denied, or subsequently proved. The Family Group Conference provided the opportunity for a restorative justice approach to be taken, although restorative justice theory was not contemplated at the time the legislation was passed.

Other features of the Act have taken time to be realised and implemented. Some provisions that were lying dormant have now been utilised and a fresh look has been taken at other provisions in response to challenges the Court has been facing.

As a result there have been some significant changes to the approaches the Court is taking. In particular, there has been increasing awareness of the range and complexity of issues underlying the offending of young people who come before the Court, which calls for new strategies and a more co-ordinated inter-agency approach.

As a result, some specialised courts have been established in recent years. Evolution of the approaches those courts have been taking now sees some mainstream Courts starting to operate, essentially, as solution-focused courts, involving a multi-disciplinary team of professionals from various agencies working together.

What we in New Zealand refer to as "solution-focused" Courts, and in the United States of America they call "problem-solving" Courts, have developed out of the Drug Courts that started in the United States in the late 1980s. Most of those key components that characterise such Courts are present now in all of the large, mainstream, Auckland Youth Courts, and some other Youth Courts around the country.[1] Arguably, only drug testing (component 5), and evaluation (component 8) are absent. The very first Drug Courts in the United States were only just starting at the time the Act came into force in New Zealand, meaning that the concept of a solution-focused approach was unlikely to have been known to the legislature at the time. However, from the time the Act came into force, its provisions have pointed toward the Court taking what we now call a solution-focused approach. These include a statutory requirement to work together co-operatively with other agencies engaged in providing services for young people and their families.[2]

Therefore, both the restorative justice theme emphasised in Family Group Conferencing and the solution-focused theme in the Act were innovative and insightful at the time the Act came into force. Both of those features have become important parts of the process in the Youth Court and, more recently, in the District Court in New Zealand too. Principal Youth Court Judge John Walker and his Advisory Group are clear that the proper direction for the Youth Court to take is to continue developing the solution-focused

[1] Douglas B Marlowe (eds) and Judge William G Meyer *The Drug Court Judicial Benchbook* (National Drug Court Institute, Alexandria, Virginia, United States of America, 2011) at 217. The key components are: 1, courts integrate treatment services with justice system case processing; 2 using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' due process rights; 3, eligible participants are identified early and promptly placed in the Court programme; 4 courts provide access to a continuum of treatment and rehabilitation services; 5, abstinence is monitored by frequent alcohol and other drug testing; 6, a coordinated strategy governs the court's responses to participants' compliance; 7, ongoing judicial interaction with each participant is essential; 8, monitoring and evaluation measure the achievement of programme goals and gauge effectiveness; 9, continuing interdisciplinary education promotes effective court planning, implementation, and operations; 10, forging partnerships among the courts, public agencies, and community-based organisations generates local support and enhances the courts' effectiveness.

[2] Section 4(g).

approach, so that it becomes the standard model in every Youth Court.

The Youth Court's place in the New Zealand Youth Justice System

The Act governs the New Zealand Youth Justice system, including the Youth Court, which is a specialist division of the District Court. In keeping with the specialised nature of the Court, the Act requires that Judges designated to work in it must be suitable, "…by virtue of their training, experience, personality and understanding of the significance and importance of different cultural perspectives and values."[3] Similar provisions apply to the appointment of youth advocates (i.e.; lawyers) to represent young people,[4] and lay advocates.[5] The establishment of Rangatahi and Pasifika Courts[6] was the catalyst for finally utilising the important role lay advocates have, but lay advocates are now key members of the team in the mainstream Court as well. The principal functions of a lay advocate are:[7]

- To ensure the Court is made aware of all cultural matters that are relevant to the proceedings; and
- To represent the interests of the child or young person's whanau (family or kin), hapu (clan or descendant group) and iwi (tribe) to the extent that those interests are not otherwise represented.

Other agencies involved in the Youth Justice system also provide specially trained and qualified personnel. For example, the police have a specialised Youth Aid Section which is focused entirely on youth offending. Similarly, the child protection agency ('Child Youth and Family') have dedicated youth justice social workers.

In the past four years the Ministry of Health has more than doubled the number of staff at the Regional Youth Forensic Services across the country, so there is now a forensic representative provided to every Youth Court in the country. This is a result of the Government allocating $NZ 33,000,000 for the development of youth forensic mental health and alcohol and other drug services in the 2011 budget.

The Ministry of Education now provides education officers to eight of the country's largest Youth Courts, and five Rangatahi Courts. The number of education officers will likely increase to cover all the main Youth Courts in the near future. In the meantime, seven other Courts receive written education reports about all of the young people appearing.

Beyond these agencies, there are also various non-governmental organisations that provide evidence-based therapeutic programmes specifically for young people and their families, such as Odyssey House, Youth Horizon's Trust and Youth Link.

Any analysis of the Court itself requires putting into context the place it occupies in the Youth Justice system. About 80% of young people[8] who offend are not charged or brought to Court. Instead they are dealt with in the community by the Police Youth Aid officers taking alternative action. That group of 80% commit about 20% of all offences. Most of them are often described as "desisters"[9] who are unlikely to progress to adult offending. Of the remaining 20% who are charged and brought to Court, a portion are also "desisters". The remainder (about 5 to 15%), are often referred to as "persisters".

"Persisters" tend to come from multi-problem backgrounds, with a large number of offending-related risk factors emerging at an early age.[10] To be before the Court, these young people are generally facing serious charges, and/or are repeat offenders, and present with a complex range of issues underlying their offending which the Court is required to ensure are addressed. It is this group that occupies much of the Court's time and the resources of all the agencies involved.

Common characteristics of this group include:

- Approximately 81% are male;
- 92% have been subjected to some form of emotional, physical and/or sexual abuse (compared to 7% in the general population);
- 81% experienced serious physical health problems, 53% psychological services and 21% hospitalised in psychiatric facilities;
- Up to 70-80% of young offenders have alcohol or other drug issues (mostly alcohol and cannabis);
- Up to 70% are estimated to not be engaged with school or even enrolled at a secondary school. Non-enrolment is the problem, rather than truancy.
- Many have some form of psychological

[3] Section 435.

[4] Section 323.

[5] Section 326.

[6] The Rangatahi and Pasifika Courts will be described in a future separate article. In brief, Rangatahi Courts are primarily designed to target and deal with Māori youth and Pasifika Courts deal with Pacific Islander youth, although all young offenders are eligible for entry, regardless of race, ethnicity or gender. These courts apply the same objects and principles in the Act as mainstream youth courts while implementing a culturally appropriate process and increasing respect for the Rule of Law.

[7] Section 327.

[8] References made here to "young people" and "youth offenders" includes those children who, since 1 October 2010, can be charged and brought before the Youth Court. A "young person" is aged fourteen to sixteen years inclusive. A child offender, so far as an appearance in the Youth Court is concerned, is a twelve or thirteen year old who is charged with an offence carrying a maximum penalty of at least fourteen years imprisonment, or ten years if he/she has previously offended (in a serious way). See section 272.

[9] Alison Cleland and Khylee Quince, *Youth Justice in Aoteroa New Zealand; Law, Policy and Critique* (Lexis Nexis, Wellington, 2014) at 48.

[10] Cleland and Quince, above n 9, at 49.

disorder, especially conduct disorder, and display little remorse or victim empathy, and many have a neuro-disability[11]

This emphasis on not charging young offenders, and using police organised alternative responses if at all possible, is one of two central pillars in the Act. The other is relying on the Family Group Conference, both as a diversionary mechanism to avoid charging, and as the prime decision making mechanism for all charges laid in Court that are not denied or subsequently proved. Clear principles also emphasise the importance of involving and strengthening the family and family group in all decision-making and interventions.

Legal framework for solution-focused Youth Courts

The Act contains objects, plus general and youth specific principles, which must guide the approach taken to the exercise of powers under it. Two particular themes are important in the context of how the Court operates and how the work should be scheduled. The first is the requirement to ensure that a young person's needs are acknowledged,[12] and the underlying causes of his/her offending, are addressed.[13]

The second is the emphasis on ensuring the timeliness of making decisions affecting a young person. A key principle of the Act is that such decisions should, wherever practicable, be made and implemented within a timeframe appropriate to the young person's sense of time.[14] Not only is this included as a general principle, it is an important theme throughout all of the youth justice provisions. For example, young people arrested or in custody must be brought before the *Youth* Court as soon as possible (emphasis added).[15]

There are strict time limits set for the convening and holding of Family Group Conferences.[16] Failure to comply with mandatory time frames for convening an intention to charge Family Group Conference[17] removes the Court's jurisdiction to deal with the case.[18] Failure to comply in the context of a Court directed Family Group Conference[19] might result in the charge being dismissed.[20]

If the time between the commission of an alleged offence and the hearing is delayed unnecessarily or unduly, a charge may be dismissed.[21] There are also strict time limits on a young person's detention in "secure care" in a youth justice residence.[22] This is, in effect, placing a young person in solitary confinement for a limited period of time when the risks of him or her absconding or causing physical, mental or emotional harm to themselves or others justify that.

The Court (and counsel) are required to explain the nature of the proceedings to the young person in a manner and in language that can be understood, and be satisfied he/she understands[23] and, where necessary and appropriate, encourage and assist the young person to participate in the proceedings to the degree appropriate to his/her age and level of maturity.[24] The general and specific youth justice principles also emphasise the need to involve and strengthen family in the process, decision-making and outcomes. This is another feature of the Act that sets the Youth Justice process apart from the adult system (where those who offend are assumed to be autonomous and individually responsible for their actions).

In accordance with these principles, discussions in the courtroom routinely include both immediate and wider family members.

The extent of the challenge these particular obligations pose for the Court has only started to become apparent in recent times with growing awareness about the prevalence of neuro-disabilities in youth offenders and the impact this has on their comprehension and communication skills.

These statutory requirements are reinforced by obligations we have under the United Nations Convention on the Rights of the Child,[25] which New Zealand ratified in March 1993, and the

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11 Nathan Hughes and others *Nobody made the connection*; *the prevalence of neurodisability in young people who offend* (Office of the Children's Commissioner for England, October 2012). I am grateful to Dr Russell Wills, the New Zealand Commissioner for Children, Dr John Crawshaw, the Director of Mental health Services and Dr Ian Lambie, Associate Professor of Psychology, Auckland University for their advice on this paper. See also *Chronicle* January 2016.

12 Section 4 lists the objects of the Act which includes at 4(f): Ensuring that where children or young persons commit offences: (i) They are held accountable, and encouraged to accept responsibility for their behaviour; and (ii) They are dealt with in a way that acknowledges their needs and will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.

13 Section 208 sets out the Youth Justice Principles. Section 208(fa) provides that [the Court] be guided by the principle that: 'Any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the…offending'.

14 Section 5(f).

15 Section 237. This section predates, but echoes, the requirement in s 23(3) NZ Bill of Rights Act 1990, for a person arrested to be brought, as soon as possible, before a Court or competent tribunal.

16 Section 249.

17 Section 247(b).

18 *H v Police* [1999] NZFLR 966.

19 Section 247(d).

20 *Police v V* [2006] NZFLR 1057.

21 Section 322.

22 Section 370.

23 Section 10.

24 Section 11.

25 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

Beijing Rules,[26] which both emphasise a young person's right to due process, to not be detained pending trial except as a matter of last resort, and then only for the shortest possible period of time,[27] and to having their cases determined without delay.[28]

Given what we know about the overrepresentation of Maori in the Court, and the large number of young people appearing in the Court who have neuro-disabilities, the following are relevant and need to be considered too: the United Nations Declaration on the Rights of Indigenous People,[29] ("the Indigenous People's Declaration") with accession to the Declaration by New Zealand in April 2010; and the UN Convention on the Rights of Persons with Disabilities,[30] ("the Convention for People with Disabilities"), ratified by New Zealand on 30 March 2007. Given the prevalence of neuro-disabilities and what we now know about the associated communication disorders, effective and practical steps must be taken to comply with these obligations.

Over the past thirteen years the Youth Court, particularly in Auckland, has been attempting to respond to these legal challenges in various ways:

- the Christchurch Youth Drug Court commenced in 2002;
- the Intensive Monitoring Group in Auckland in 2007,
- the first Kooti Rangatahi in Gisborne in 2008,
- the first Pasifika Court in Auckland in 2010,
- crossover lists in all of the large Courts in metropolitan Auckland since 2012[31], and
- developments to the mainstream Youth Court which have seen it evolve in recent years into, essentially, a solution-focussed Court.

The Intensive Monitoring Group provided the basis for the multi-disciplinary approach that is now implemented in the mainstream solution-focussed Youth Court, and is described in the following section.

The Intensive Monitoring Group and subsequent reforms to the mainstream Youth Court

The Intensive Monitoring Group operated in Auckland from 2007 to 2014 to accommodate young people at moderate to high risk of re-offending, who also had moderate to severe mental health concerns and/or alcohol or other drug dependency. The approach adopted was a significant departure from the conventional, mainstream process. First, a pre-court meeting of the team of professionals, and second, the young people came to court for appointments later in the day.

An initial evaluation was carried out in 2007 and 2008.[32] Of the 85 young people assessed for the study, 43 (50.5%) met the criteria of moderate to severe mental health concerns and/or alcohol or other drug dependency, 39 (90.5%) of whom received a formal mental health diagnosis.[33] Results of the evaluation found that the reduction in risk of reoffending for young people in the Intensive Monitoring Group was 38%, compared to a 14% decrease in the overall risk in the control group.[34]

The Intensive Monitoring Group no longer operates as a separate, stand alone court because, in effect, the process has increasingly been adopted by the mainstream Youth Court with the aim being that all Youth Courts will operate in that way in future. A separate pre-court professionals meeting is no longer required in Auckland (and many of the country's larger Youth Courts) because representatives from the five main Government agencies are all now present in the courtroom on normal, mainstream court days. Representatives are present from the Ministry of Justice New Zealand, Police, Ministry of Social Development (Child Youth and Family), Ministry of Health, and Ministry of Education. This is the standard model that is expected to soon be operating in all Youth Courts throughout the country.

Furniture is now arranged to form a "horse-shoe" shape in all courts where it is physically possible to do so. Seated in the "horse-shoe" are family and/or others supporting a young person who is either standing or seated, as the Judge directs. Representatives from the government agencies, the various professionals and sometimes representatives from service providers are present too.

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26 United Nations Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33 (1985).

27 UNCROC, art 37(b).

28 UNCROC art 40.2(b)(3).

29 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, LXI A/RES/61/295 (2007).

30 United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008.

31 Crossover lists provide for the co-ordination of proceedings for young people before the Youth Court who also have care and protection status. These lists are not a separate Court, but rather part of the Court's core business, with the cases scheduled together at a given time to enable the co-ordination. Youth Court Judges who are also Family Court Judges preside over these lists so that appropriate orders and directions can be made in relation to both the youth justice and the care and protection proceedings.

32 Nicholas Mooney "Predicting offending within the New Zealand Youth Justice system: evaluating measures of risk, need and psychopathy" (PHD Thesis, Massey University, 2010).

33 These diagnoses included conduct disorder, oppositional defiant disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, mood disorders, substance abuse and substance dependant disorders.

34 Young people with the same profile, from other Courts, dealt with by other disposition options.

This multi-disciplinary, co-ordinated inter-agency approach is consistent with the object of the Act, which provides for "encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children, young persons and their families and family groups".[35]

Scheduling and time allocation in the Youth Court and future directions

Having regard to the issues set out in this paper, careful thought is now being given to such things as the way the work is scheduled in Court and the amount of time allocated for cases. This is important so that young people can be brought before a Youth Court Judge as soon as possible following arrest and it takes into account the serious, complex and specialised nature of the work the Youth Court does. Scheduling and time allocated require careful consideration to that the Court can meet all its statutory and other obligations regarding:

- Adherence to appropriate time frames;
- Dealing with young people in custody, in all respects, including the regular reviews in Court of young people who are in custody and attending at the residences to hear the secure care applications; and
- Communicating appropriately with all young people who come before the Court, keeping in mind what we now know about the high percentage of those young people who have communication disorders and other neuro-disabilities.
- Furthermore, scheduling and time allocation is necessary to ensure the Youth Court has the ability:
- To consult with all members of the solution-focussed court teams who are present;
- To cope with the volatility in workflows including the arrests and transfers in from other Courts;
- To find adequate time, within appropriate time frames, to hear and determine the complex substantive work;
- To case manage some of the more complex cases to ensure more timely determination of proceedings that often concern the most vulnerable of the young people who come before the Court; and
- To deal with the work in the Court closest to where the young person and his or her family are based.

The Rangatahi and Pasifika Courts, as well as the crossover lists and previous Intensive Monitoring Group, all aim for 30-minute appointments. Allocating 30 minutes is the result of finding out from experience what time is needed to deal with the work properly. The evaluations obtained in relation to those Courts also indicate the positive benefits of taking the time needed to do the work properly. As well, time is required to address the full professional team present, the initial appearances by young people, and the appearance following a Family Group Conference when there is a Family Group Conference plan to consider. At those appearances, adequate time is needed in order to:

- Engage properly with the young person, and his or her immediate and wider family;
- Hear from the youth advocate, lay advocate, prosecutor, education officer and forensic representative; and
- Attend to writing up the file and completing the basic administrative requirements.

Sufficient time is also needed for reading, preparation and reserve time for complex cases, and the flexibility required in hearings to accommodate the needs of vulnerable young people for whom extra time, explanations and breaks are required.

Importantly, work is underway to establish best practice standards and processes for the delivery of forensic services across all of the courts in the country. This includes work on the screening tools and processes used, and the scope and timeliness of reports.

Better ways to identify young people with communication impairments and learning disabilities and to accommodate their needs are also being introduced. That includes a review of the way information is communicated to young people by modifying the forms and language used, and modifying Court processes. Arrangements are also being made for the appointment of suitable qualified professionals to act as communication assistants for those young people who need such help so as to participate properly in youth justice processes, including during police interviews, Family Group Conferences and Court appearances.

District Judge Tony J Fitzgerald* sits in the District Court, Auckland, New Zealand

[35] Section 4(g).

Socio-Legal Defence Centres: A Model to Realise Children's Rights

Anna D. Tomasi

Anna Tomasi

I. Introduction

"For rights to have meaning, effective remedies must be available to redress violations." [1]

Defence for Children International (DCI) is an international non-governmental organization that has been promoting and protecting children's rights at the global, regional and local levels since 1979 (International Year of the Child). DCI was initially involved in the drafting of the United Nations Convention on the Rights of the Child (UNCRC) and went on to gain United Nations Economic and Social Council (ECOSOC) special consultative status in 1993, providing the organization with various capacities within different UN agencies. DCI currently has over 45 National Sections worldwide (in Africa, the Middle East, Asia-Oceania, America and Europe).

While engaging in several child rights domains (such as violence against children, children affected by armed conflicts, child trafficking, children on the move), the overarching thematic focus of the DCI Movement is Justice for Children. DCI has grown to become the "go-to" NGO for leadership, experience and technical expertise on Justice for Children through its persistent work over the last three decades. This work includes the drafting of the UN Minimum Rules for the Administration of Juvenile Justice (1985), the follow-up to the UNCRC's General Comment No.10 on Juvenile Justice (2007), and leading and coordinating the campaign for a UN Global Study on Children Deprived of Liberty[2]..

Through its National Sections worldwide, DCI has found that Socio-Legal Defence Centres (SLDCs) are effective in providing children with the opportunity to effectively access justice and obtain remedies. SLDCs pro-actively promote, and reactively protect, the human rights of the child as codified in the UNCRC, particularly its fundamental principles: non-discrimination; best interests of the child; right to life, survival and development; and child participation.

In this article, DCI presents a general model of SLDCs that is drawn from the many SLDCs it operates through its National Sections working at country level. This model can be applied to different cultural contexts worldwide.

II. Approaches of the Socio-Legal Defence Centres (SLDC)

The work of SLDCs consists in actively offering children direct access to justice and corresponding quality social-legal support. This includes information provision, referrals to other service providers, and legal advice and representation - including in court. A SLDC is a place where children (individuals under 18 years of age), as well as adults, who are confronted with children's rights violations can walk in the door to a welcoming environment to report child rights violations (or threats thereto) and be assured of professional and child-focused assistance. SLDCs act as an important reference point for the national judicial system, as adequate legal and social services are often lacking in many countries.

SLDCs ensure that children take a leading role in their own lives and act not merely as passive subjects of decisions concerning themselves. In such a way, SLDCs put into action the inclusionary and best-interests principles of the UNCRC[3]. Defining the best interests of the child remains subjective because with each child the variables depend on internal (physical and psychological) and external factors (lifestyle and personal family circumstances). SLDCs provide a holistic framework to help ensure that the best interests of the child are taken into account by decision-making bodies and authorities. Deciding the best interests of the child involves a process of evaluating and balancing elements with the support of the SLDC multidisciplinary team and direct child participation.

The multidisciplinary SLDC team try to build the necessary trust relationship in order to help the child enact his/her rights. There may be an issue when the child does not want to participate. It must be noted that the child's participation is voluntary. Accessibility is also a concern, as children in vulnerable situations will encounter difficulties in approaching SLDCs. It is therefore necessary that the Centres take a proactive approach in reaching out to marginalized groups and rural areas.

1 United Nations Convention on the Rights of the Child (UNCRC), General Comment No.5 on General measures of implementation of the Convention on the Rights of the Child (2003)

2 See: https://childrendeprivedoflibertyinfo

3 United Nations Convention on the Rights of the Child (UNCRC), articles 3 and 12

The inclusionary, or participatory principle, involves considering the child as an active subject and rights-holder, and not merely an indirect recipient. The level of participation is determined according to the child's capacities. Article 12 of the UNCRC states the right of the child to 'express views freely in all matters'. This right to be heard entails the obligation to listen, which the SLDC model ensures, along with facilitating the child's active and adequate participation, which ultimately leads to further empowerment and ownership of his/her rights.

Individual level – Case Advocacy

At an individual level, on a case-to-case basis, the SLDC informs the child (victim, alleged perpetrator, or witness) of his/her human rights and ensures that these can be effectively exercised by providing relevant assistance. A SLDC provides legal assistance through a lawyer or paralegal, who is a specialist in the rights of the child, free of charge (the professional being paid by the legal aid system). In this way, children actively participate in decisions concerning them, both amicably and legally, and are informed about all aspects of their situation (the legal procedure, the role and the function of the various actors involved in the legal proceedings, and so on). The child can then make informed choices and say how he/she would like to be defended, becoming the empowered in his/her own defence (for example, whether to plead guilty or not guilty).

SLDCs also go beyond legal support to ensure a holistic child-centered approach, by including professionals from different disciplines (e.g., social, educational, psychological). This means SLDCs follow a 'child-in-context' approach with case management. The multidisciplinary team at the SLDC is crucial for gaining holistic knowledge of the child and applying the best interests and inclusionary principles, to build a just case and empower the child. As far as possible, a SLDC guarantees parents' involvement so that they can fulfil their responsibility to protect and educate their child[4].

Collective level – Social Advocacy

At the collective level of social advocacy, the SLDC builds a 'child-friendly' society that provides protection and possibilities of empowerment for children, along with a system of national laws and services that respects and protects children's rights. The SLDC encourages structural social changes by promoting the adoption of laws, policies and practices that are specific to the rights of children and that uphold international laws and standards. Through advocacy based on their practice, SLDCs formulate proposals and build capacity for improving the situation of children in their social environment, appealing to authorities when children's rights are not fully respected. SLDCs strengthen the capacity of authorities to implement basic human rights for the benefit of all children. Through leading cases and landmark decisions, SLDCs contest child-rights violations, obliging authorities to fulfil their obligations, creating important precedents and gradually improving the overall situation of children.

SLDCs are often the first to identify systematic violations of children's rights, raising public awareness and seeking to counter such violations. They conduct inquiries, publish reports, pursue strategic court cases, provide advocacy services, and lobby for the necessary changes to laws and policies. SLDCs also contribute to reporting systems within the framework of various international human rights mechanisms that monitor the implementation of children's rights, such as the United Nations Committee on the Rights of the Child, the Human Rights Council and its Universal Periodic Review, and other human rights mechanisms at the regional level.

Therefore, as a centralized and child-focused service, SLDCs are in the best position to inform and educate government and the general public (children and adults alike) about children's rights. SLDCs lobby for the general amelioration of policies, laws and practices inherent to child protection, identify violations (policy advocacy), and lobby for non-existent services and entities that are required (systematic advocacy).

III. Formative Elements

SLDCs run by DCI National Sections around the world have common characteristics. Based on their common characteristics, we can extrapolate formative elements that can be used to compose SLDCs tailored to each specific domestic context.

SLDCs are run by DCI National Sections, which are local grassroots non-governmental organizations, and are thus independent entities. Ideally, SLDCs should be provided legal status (e.g. through a Memorandum of Understanding agreed on between different ministerial offices), as these Centres often end up coordinating and acting as a referral system for child protection within the country. DCI National Sections are usually decentralized, and as such SLDCs manage to reach rural zones and provide accessibility to the more marginalized groups (for instance, children not enrolled in school).

A SLDC team typically includes social workers and lawyers, although psychologists, educators, and other professionals can also be part of the team to ensure a more comprehensive approach. The multidisciplinary team is specifically trained in children's rights, juvenile justice and other legislation applicable to children, as well as child protection and welfare. Training is continuous and practices are shared with other professionals working in the same area.

In addition to legal advice, mediation and counselling, a referral pathway can be provided whereby children may be referred to other

[4] United Nations Convention on the Rights of the Child (UNCRC), Articles 3 and 5.

services, depending on their specific needs (health, education, and so on). It is crucial that there be effective coordination between all actors and that adequate action is taken, in order to ensure that the child and his/her rights are concretely protected, respected and fulfilled.

The SLDC registers all its cases and data received, thereby serving as an important monitoring, mapping and follow-up mechanism. The collected data evidence can then be used to influence State policies and inform government. In addition, the SLDC can carry out specific research into cases or trends at hand, serving as a think-tank system.

SLDCs also serve as a preventative entity: empowering children through the provision of information and education about their human rights is an important component of SLDC activities, as well as ensuring effective child participation. Children are welcome in these SLDCs regardless of whether their human rights have been violated or not. Awareness-raising on children's rights is a key part of SLDC activities. SLDCs can also operate as an "early detecting system", and act proactively toward impeding child rights violations.

IV. Potential Challenges

Funding can create a challenge, not only in the identification of donors but also ensuring that the governmental allocation of resources is channelled and adequate towards effective child protection. Ideally there should be a diversification of donors and tailored strategies to this end (e.g. "social responsibility" of the private sector). Sustainability of SLDCs can also be an issue, which is actually often more linked to political impediments than lack of funding.

Effective and comprehensive coordination can also be an obstacle. The SLDC has an important challenge in coordinating the full range of its activities at local and national levels: case advocacy, collective advocacy, monitoring, data collection, etc.. Furthermore, coordination is to be twofold: 1) external, towards an array of actors involved in child protection, when acting as a referral system or early detecting mechanism; 2) internal, between civil society organizations themselves. In its coordination role, the SLDC is to seek to build partnerships and increase remote outreach as much as possible in order to ensure a holistic approach to effective child protection.

The specialized training of the SLDC team (internal) and of professionals in the public child protection system at large (external) is to be ongoing. University and higher-level education curricula often lack important areas of instruction, so continuous and specialized training is key.

Social-cultural barriers can also present an obstacle along with informal justice systems, which can be used more than formal systems in certain countries.

Age determination of victims is also an issue that can be encountered by SLDCs, hence birth registration should be integrated into the outreach work of SLDCs.

Government is a key partner in providing effective child protection, and also an important influencer in the adequate allocation of State resources. However, dealings with the government can vary from country to country. In certain cases civil society is forced to take a more aggressive role of "watch dog", and in others a more positive role in complimenting the States' work.

V. Child-friendly Justice

SLDCs, through collective advocacy, seek to achieve structural changes within the justice system. All justice systems should have accessible child-friendly procedures that observe children's rights and provide children with information and legal assistance while guaranteeing their best interests and participation. SLDCs also advocate for systematic training in children's rights for professionals (such as judges, police officers, lawyers, civil servants and community leaders).

To this end, SLDCs make use of the Guidelines on Action for Children in the Justice system in Africa, which were developed in the context of the Global Conference on Child Justice held on 7-8 November 2011 in Kampala (Uganda) - organized by Defence for Children International and the African Child Policy Forum. The Guidelines aim to inform law reform to fully implement international child justice standards and coordinate actions by various role-players in formal and informal justice systems in Africa. The Guidelines have also been adopted by the African Committee of Experts on the Rights and Welfare of the Child of the African Union.

SLDCs also refer to the recently adopted Guidelines on Child-Friendly Justice of the Council of Europe for the establishment of justice systems responding to the specific needs of children, with a view to ensuring children's effective and adequate access to and treatment in justice. Such instruments encourage the creation of a justice system that works with and for children and that balances the work of SLDCs appropriately.

A child-friendly justice system guarantees child participation and ensures that children are consulted and heard in all proceedings involving or affecting them, and that their best interests are of primary consideration. Professionals involved are specifically trained on children's rights and cooperate closely to ensure multidisciplinary, appropriate assistance. Children's rights are to be secured without any form of discrimination and the rule of law principle is to fully apply to children, as it does to adults.

Elements of due process (legality, proportionality, presumption of innocence, fair trial, legal aid, access to independent and impartial complaint mechanisms, and so on) are to be guaranteed, and by no means minimized on the basis of the child's best interests. Information and advice on their rights, the justice system, measures available, and similar issues, are to be provided to children involved in the justice system. This includes all criminal, civil, administrative, and military systems. Confidentiality is to be guaranteed with regard to court records and documents containing personal or sensitive information about the child.

VI Conclusion

The guiding principles of the UNCRC include non-discrimination (art. 2); adherence to the best interests of the child (art. 3); the right to life, survival and development (art. 6); and the right to participate (art. 12). These principles represent the underlying requirements for any and all other human rights to be realized. To such an extent, SLDCs aim to realize the rights of the child in a concrete, effective manner.

The multidisciplinary and child-in-context approach of SLDCs is appropriate, considering the status of children as dependent and therefore vulnerable individuals in the process of developing their capacities. Another important aspect of the SLDC model is its independence from the State, which proves crucial when lobbying for systematic reform in social, legal and policy actions concerning children.

SLDCs are the bridge between child rights rhetoric and actual practice. This model should be widely endorsed at international level, particularly through the work of the United Nations Committee on the Rights of the Child.

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Youth Court Magistracy: challenges and opportunities--England & Wales

Fiona Abbott J.P. and Hannah Couchman

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The Magistrates' Association and the Youth Court Committee

The Magistrates' Association (MA) is a charity with approximately 16,000 members across England and Wales. The majority of our members are current magistrates, although we also have a number of active retired members and associate members (individuals who work both inside and outside the justice system and are interested in supporting the magistracy). We work to inform, consult with and support our members – but we also represent magistrates by promoting the role of the magistracy within the justice system as a whole.

Founded in 1921, the MA exists to promote the sound administration of the law. This means that we support magistrates in their role as specially selected and appointed volunteers sitting as judicial office holders. The MA support magistrates to deal with all matters fairly, effectively and in the interests of justice. In addition, the MA has a wider policy role, ensuring magistrates' views are heard in relation to possible implications from changes to law or policy. As judicial office holders, our members must apply the law of the land, but as a charity we are a useful resource for key decision makers to discuss the implementation of the law to ensure a fair, effective and accessible justice system for all.

In England and Wales, magistrates (collectively termed the 'magistracy') are members of the local community appointed by the Lord Chief Justice of England and Wales. Magistrates (also called Justices of the Peace and entitling the office-holder to the post-nominal letters 'JP') are unpaid and come from a wide range of backgrounds and occupations. The office of Justice of the Peace can trace its origins back to the 12th Century.

Magistrates hear the majority of adult criminal cases (about 95%), all but the most serious youth criminal cases and some family cases.

All criminal cases involving children aged 10 to 17 start in the Youth Court, a special sort of Magistrates' Court for children. It is less formal than adult courts and is designed to make it easier for children to understand what is happening and feel less intimidated by their surroundings. Children are called by their first names and the judge or magistrates will speak directly to the child and their parent or guardian, and may ask questions. For serious crimes, like murder or rape, the case starts in the Youth Court, where questions such as bail will be addressed but will be committed or sent to a Crown Court for trial by a judge and jury and sentencing where a sentence greater than two years detention is required.

The MA's Youth Court Committee (YCC) is made up of eleven experienced youth magistrates led by their Chair, Fiona Abbott JP. The YCC advises the MA Policy Board on matters relating to the youth justice system. The MA also has a Policy and Research Officer who specialises in youth matters, and part of their role is to support the work of the YCC in, for example, speaking at events and liaising with other relevant bodies, including the Ministry of Justice and Youth Justice Board. The youth justice system in England and Wales is separate and distinct from the adult justice system, with its own legal structures, aims and purposes. In sentencing children and young people, as stated in the publication 'Overarching

Principles - Sentencing Youths'[1], the Youth Court must have regard to the principal aim of the youth justice system - to prevent offending by children and young persons - **and** the welfare of the offender.

Through this work, the MA is better able to understand the particular challenges facing youth magistrates, who regularly deal with some of the most vulnerable children and young people in our society. This is vital in ensuring youth magistrates can take account of, and therefore respond to, the range of complex needs often present for this cohort.

Maintaining a high level of competency within a judicial voluntary role

Magistrates are highly trained, and those who seek to sit in the Youth Court must also undertake additional training relevant to the specific skills needed to deal with children and young people. The initial application process to become a magistrate involves an application form followed by two rigorous interviews. There is a mandatory requirement for applicants to have visited a Magistrates' Court to observe the proceedings at least once before submitting an application, and applicants also provide three references. Magistrates are typically recruited by a network of 47 local advisory committees, covering relevant geographical areas. When a new magistrate is recruited, the training process begins with initial training, which includes sitting in court with two other experienced magistrates. Each new magistrate has a specially trained mentor to guide them through their first months of sitting. There are then six formally-mentored sittings in the first 12 to 18 months, in which the new magistrate will review their learning progress and identify and discuss further training needs.

Over this first year, there will be further training, visits to penal institutions and observations to equip magistrates with the knowledge they will need to undertake their role. Every magistrate is also given a core workbook for further self-study, including valuable guidance and exercises on everything from asking effective questions to structured decision-making.

At the end of the first year, consolidation training builds on the learning from sittings and core training. This is designed to help magistrates plan for their ongoing development and prepare for their first appraisal, which takes place between 12 and 18 months after their appointment. Another specially trained magistrate appraiser will sit as part of the bench, observing the new magistrate role against a framework of competencies, which is publicly available.

If a new magistrate is successful in this process, they are deemed to be competent. However, magistrates continue training throughout their magisterial career. Appraisals take place every three years to ensure the magistrate maintains their competency in whichever jurisdiction they sit. Updated training on new legislation and procedures is delivered to magistrates as required and threshold training accompanies each development in a magistrates' role. Magistrates also participate in post-court reviews, seeking feedback on performance from colleagues, including their legal adviser. They note any identified learning needs and reflect on how these could be met, reporting the identified need to the justices' clerk or training manager.

It is only after magistrates have been deemed to be competent that they are able to apply to take on more specialised roles, including becoming a Chair, or sitting in Youth or Family Court. If magistrates are successful in applying to become a youth magistrate, they undergo additional training in the specialist skills needed for this distinct jurisdiction. The specific competencies required for youth magistrates are extensive, and build on those which exist for adult magistrates. These include the need to consider the welfare of young people appearing before the court, an awareness of the socio-psychological issues relevant to youth offending (e.g. patterns of youth crime and causes of offending and anti-social behaviour) and an understanding of the principal aims of the youth justice system (which are distinct from the adult system). Youth magistrates work within a youth justice system which aims to prevent offending and reoffending through effective early intervention, with an emphasis on reparation, restorative justice and reduced delays. Youth magistrates also need to have a full understanding of the aforementioned 'Overarching Principles - Sentencing Youths', as well as certain specific offence guidelines. Skilled use of such guidelines allows for a consistent approach which minimises the opportunity for unfairness and irrelevant factors being taken into account in decision-making, whilst ensuring there is sufficient flexibility and discretion to allow sentencers to respond to the individual circumstances of the young person. Sentencing youths is designed to be a flexible process, aiming to foster a sense of responsibility for others and promote re-integration rather than to punish. This approach contributes to promoting and maintaining confidence in the judicial process.

Local branches of the MA provide 'contextual and awareness training' sessions, which often focus on issues of local importance. The MA also works to promote quality training nationally – the MA's Training Committee works to ensure that magistrates' training is continually improved, ensuring that magistrates are as effective as possible in their role.

[1] Sentencing Council. 2009. *Overarching Principles-Sentencing Youths.* Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/web_overarching_principles_sentencing_youths.pdf [Accessed January 2017]

The Training Committee recently worked with the Judicial College (the organisation responsible for training all of the judiciary in England and Wales) to develop interactive training on youth communication skills, including videos of mock court cases which invite magistrates to identify examples of good practice and areas for improvement. The training reflects the particular vulnerabilities relevant to children and young people, including communication issues, as well as indicating possible responses to specific vulnerabilities such as speech and language difficulties. It also invites magistrates to consider how to handle these issues sensitively, and in a way which fulfils the aims of the Youth Court in providing a less formal environment.

Working with vulnerable young people and the Youth Court process

Over the last ten years, there has been a concerted effort by all those involved in the youth justice system to promote early intervention and diversion from court for children. The police and youth offending services have rightly sought to deal informally with minor offending by children. This has successfully led to a dramatic reduction in the number of young people entering the youth justice system, as well the number of those under 18 years old detained in custody.[2] As children are increasingly diverted from the youth justice system, those who do appear before the Youth Court are more likely to have complex and serious needs. Youth magistrates face the challenge of imposing a sentence which can help a child address those needs, providing an opportunity for rehabilitation. Youth magistrates are well aware of the importance of addressing the underlying issues which can lead to criminality as early as possible to ensure that a child gets the best possible chance to turn their life around. Youth magistrates will be mindful of the recommendations of the Youth Offending Teams, which involve multi-agency working to respond to the specific background of a young person, supporting positive improvements in education, welfare and health which can all help rehabilitation.

The particular needs and vulnerabilities of children must be borne in mind as we enter a phase of digitisation in the court system. For example, the use of video link technology has the potential for serious repercussions in cases where the defendant is a child. The MA is part of the Ministry of Justice's working group concerning video link technology, and has worked hard to resist a "digital by default" position in the Youth Courts.

The MA recognises the vulnerability and particular communication needs of children, including those related to speech and language, and takes the position that children should always appear in person unless there are exceptional circumstances. In such circumstances, all relevant parties should agree that it is in the child's best interests to appear via video link, and the judicial office holder should retain ultimate discretion as to this decision. This emphasises the important role youth magistrates play in weighing the information brought before the court and making an informed decision which is in the best interests of the child.

Addressing issues raised about the Youth Court

As mentioned above, the primary principles underlying the youth justice system are the welfare and rehabilitation of the child, with the best interests of the child always of paramount importance. One way in which the child's best interests are safeguarded is by ensuring that Youth Court hearings are private. Unlike in the adult Magistrates' Court, members of the public are not permitted to observe cases in the Youth Court, and there are significant press restrictions. One consequence of this is that understanding of how the youth justice system works, and the distinct structures and processes in place, can be limited outside of those who work in the system. Furthermore, as judicial office holders, magistrates are rightly restricted in what they can say in the press or other media about their work. As such, it can be difficult for youth magistrates to publically comment on important issues relating to youth justice or even rebut incorrect assumptions about the work that they do. One role of the MA is to ensure that the public and other important stakeholders are educated about the magistracy, and the particular work of Youth Courts. In the rest of this article, we are taking the opportunity to highlight some of the main challenges currently facing the youth justice system, and how the MA are responding to those challenges.

Overrepresentation of Black, Asian and Minority Ethnic children in custody

One such challenge facing all of us within the youth justice system relates to the overrepresentation of Black, Asian and Minority Ethnic (BAME) children in custody. In January 2016, the Prime Minister asked the Rt Hon. David Lammy MP to lead an independent review, sponsored by the Ministry of Justice, to investigate the treatment and outcomes of BAME individuals within the Criminal Justice System in England and Wales, including young people. The recently released emerging findings show that BAME offenders are more likely to go to prison for certain types of crime.

[2] Ministry of Justice. 2015. *Youth Justice Statistics 20133/*2014. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399379/youth-justice-annual-stats-13-14.pdf [Accessed January 2017]

There is, of course, a good deal of research still to do–looking at the effect of earlier disproportionality on subsequent stages in the system, controlling for the seriousness of the offence, case complexity, prior offending and the like .. However, the MA is keen to engage with this fundamental issue, which goes to the heart of the aims and objectives inherent to a fair and equitable youth justice system. Recently, we have been encouraging open and honest dialogue on unconscious bias - studies show that people can be consciously committed to equality, and deliberately work to behave without prejudice, yet still possess hidden negative prejudices or stereotypes. Unconscious bias is a regrettable feature in the criminal justice system as a whole, and the MA look to work together with other relevant organisations to raise awareness of this issue, promote proactive engagement and share ideas and good practice to combat it.

The MA are also aware of discussions around a number of complex socio-economic and political factors that are arguably vital considerations as part of a comprehensive discussion of disproportionality. Rob Berkeley, director of the Runnymede Trust, notes that "the debate about racism in our criminal justice system needs to include a way of addressing the broader structural inequalities that delineate the opportunity structure for crime".[3] As he points out, "inequalities in education, employment, health, housing and voice form a backdrop to the way in which 'race' influences criminal justice. If we are to change the pattern of racial inequalities in criminal justice, we also have to be alive to the broader patterns of inequality (racial, gender and class-based) in which they are situated, and build the necessary coalitions and partnerships that it will take to address them".[4]

Looking to sentencing decisions in particular, the MA share concerns with regards to the number of custodial sentences received by children from BAME groups as compared to white children, and we welcome discussion as to resolving these disproportional figures. One way this can be done is to look at training needs. All magistrates receive initial training on identifying and combatting unconscious bias, but the MA is looking at whether continuing sessions could be beneficial for all magistrates. Magistrates, as with all judicial office holders, must apply the law fairly and objectively regardless of the ethnicity of the person who appears before them. An important part of the training magistrates receive focuses on encouraging an understanding of the social context in which a magistrate operates. This, of course, includes awareness of diversity issues. Magistrates are also specifically trained in unbiased decision making, and querying one's own unconscious bias.

The Judicial College maintains an Equal Treatment Bench Book to assist judicial office holders in dealing fairly with those who appear before them, along with a workbook. These resources focus on diversity frameworks, understanding the difference between stereotyping and discrimination and how this can be questioned and challenged (and what to do if your challenges are ignored), using appropriate language, receiving feedback, the need for background understanding and the use and misuse of background knowledge, minority groups, minority ethnic communities and social exclusion. Magistrates are trained in identifying who can be disadvantaged - and in what ways - during the court process, what different approaches and facilities are available to the court to address and minimise this disadvantage, the way in which language can create barriers to understanding and the way in which the court room layout can inhibit the participation of those involved in the proceedings.

Ultimately, the court can only deal with the cases brought before it. Magistrates make decisions based on the individual, and the individual offence, that comes before them, relying on accurate and full information being provided by the police, Crown Prosecution Service and Youth Offending Team. In accordance with the separation of powers, it is not for the court to take a view on whether a case should have been prosecuted or what charges should have been brought. As such, it is for magistrates to focus on the part of the criminal justice system over which they have control, this being ensuring a fair court process and pronouncing appropriate and effective sentences. Whilst all magistrates receive some training on unconscious bias, we have also been working with Black Training and Enterprise Group (BTEG) to discuss specific additional training and promoting this as something all magistrates should be aware of and working to actively address.

Judicial diversity

Linked with the challenge of BAME disproportionality is the issue of diversity within the judiciary itself. The MA appreciates that a lack of diversity within the judiciary could be suggested to undermine the public's confidence in the courts. Magistrates themselves represent the most diverse section of the judiciary, with 10% of magistrates coming from BAME communities (14% of the national population of England and Wales are members of BAME communities[5]). It is

[3] Runnymede Perspectives. 2012. *Criminal Justice v. Racial Justice: Minority ethnic overrepresentation in the criminal justice system.* Runnymede Trust. Available at: http://www.runnymedetrust.org/uploads/publications/pdfs/CriminalJusticeVRacialJustice-2012.pdf [Accessed January 2017]

[4] Ibid.

[5] Office for National Statistics. 2011 [latest data]. *Ethnicity and National Identity in England and Wales: 2011*. Available at:

also worth noting that, in England and Wales, magistrates handle the vast majority of cases in the criminal justice system, including youth matters. Of course, the ethnic diversity of those working in the youth justice system should not have any bearing on the outcomes for BAME offenders, but it is recognised that there is an issue of perception about how procedurally fair a process is, which has been shown to correlate to confidence in the process itself. Ensuring all parties perceive the process as fair can, however, be separated from the diversity of the particular bench hearing a case, and the MA is keen to promote all the other ways to ensure positive perceptions of procedurally fair decision makers. For example, we can work to ensure confidence in the independence of decision makers by illustrating unbiased decisions by presenting a clear explanation of decisions to all relevant parties.

In terms of encouraging further diversity within the magistracy in the future, consultation with MA members suggests raising awareness of magistrates, their duties and their contribution to society has a significant role to play.

The MA runs the long-standing and highly successful Magistrates in the Community (MIC) project visiting community groups, schools, and many more to promote and explain the magistracy. This project is funded by the MA, and, as such, our members, which makes it challenging to expand its reach but we appreciate how valuable it is to use MIC to target groups currently under-represented in the magistracy; thus ensuring greater awareness of the work of magistrates and the vital role they play within their community.

Conclusion

It is a time of change and opportunity for youth justice in England and Wales. For example, the recently released Taylor Review of the youth justice system[6] makes recommendations for extensive reform of the youth justice system covering devolution, courts, sentencing and custody. The MA will work to consult and support our members as the youth justice system continues to develop, always working in the interests of justice to promote the key aims of preventing further offending and putting the welfare of the child at the centre of sentencing.

Fiona Abbott JP, Chairman of the Youth Court Committee, Magistrates' Association, England and Wales

Hannah Couchman, Policy and Research Officer (Youth and Family Courts) Magistrates' Association, England and Wales

https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandnationalidentityinenglandandwales/2012-12-11#ethnicity-in-england-and-wales [Accessed January 2017]

[6] Taylor, Charlie. 2016. *Review of the Youth Justice System.* Ministry of Justice. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577103/youth-justice-review-final-report.pdf [Accessed January 2017]

v i v e r e--protecting people whose lives are endangered by unacceptable discrimination

Bernard Boeton

' *Direct action to restore the right of life to victims of unacceptable discrimination (…..) to listen, to act quickly, to heed any cry for help, in whatever form it takes, from the most ordinary of reasons to the most violent. Bring the world back to respect basic, universal truths where any just cause is at stake. ' (Charter of Vivere)*

Campaign to abolish the death penalty and life imprisonment of children[1]

The definition of a child within the international judicial community relates to the child's age (less than 18 years old), to the physical and mental development, and to the ability to express and defend him/herself. Article 37 of the *Convention on the rights of the child* (1989), which has been ratified by all countries of the world (except the USA), stipulates that:

"States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; "(…).

Thus, both the death penalty and life imprisonment for children (at the time of committing the offence) are illegitimate. There can be no justification - cultural, religious or otherwise - which over-rides the conventions and instruments that have been internationally ratified by the States themselves. The death penalty carried out on children is a felony. *Vivere* is committed, as far as is possible given its limited means, to support and liaise closely with existing campaigns and coalitions already working for the abolition of the death penalty and life imprisonment in general, by providing expertise and knowledge on all matters relating to children and juvenile justice.

Vivere will also collaborate with all parties concerned, in particular specialized organizations such as CRIN (2) and other reliable sources, and will act with this knowledge and input for the abolition of the death penalty and life imprisonment of children.

Facts and figures

The death penalty is still enforced on children in at least 13 countries[2].1 Some of these countries do not carry out the death penalty, but others do - despite having signed up to the pertinent international instruments. They often legitimize this by citing the predominance of cultural, traditional or religious practices over civil law. Life imprisonment is a sentence that is regularly prescribed by law and/or carried out in more than 70 countries. This is therefore something that cannot be considered as rare or exceptional. 'Life' can mean that there is no chance of being freed ('*without parole*'), but it can also mean that there is no set length to the period of detention. Whatever the case, it means that children can be locked up for life.

Aims and objectives

The death penalty and life imprisonment of children (with or without parole) - and the possibility of these sentences being carried out - must be explicitly prohibited in the juvenile justice systems of each of the afore-mentioned countries by the end of 2022. In addition to this, the necessary mechanisms to ensure that the law is upheld must be set up and secured in the law.

Until such time, *Vivere* demands that there be a moratorium, with immediate effect, not only on the implementation of the death penalty or sentencing to life imprisonment of any child who has already been convicted, but also on these same sentences for all juveniles waiting for trial. These sentences must be commuted to lesser punishments, which allow for the child's re-integration into the community and fundamental right to life, survival and development. This is with compliance of Article 6 of the *Convention on the Rights of the Child*, whereby: "*1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."*

Vivere will listen to civil society actors in each of the concerned countries, taking each specific case and circumstance into consideration and work closely with them to ensure that the campaign's goals are achieved in the most effective and safest way, even taking matters into the international arena, if necessary.

[1] Child : less than 18 years old on the date the offence was committed

[2] Brunei Darussalam, Iran, Lao's People's Democratic Republic, Malaysia, Maldives, Nigeria, Pakistan, Qatar, Saudi Arabia, Somalia, Tonga, United Arab Emirates, Yemen Reference Child Rights International Network (CRIN) : www.crin.org (Click "Inhuman sentencing of children")

This campaign aims to bring justice to the young people in the world who are facing anachronistic and illegal punishments. It has been initiated by a small group of volunteers, based in Switzerland, with professional experience in children's rights and in juvenile justice issues. *Vivere* has no political or religious bias. No support is too small in this struggle against the officially sanctioned death penalty or life imprisonment of children, be it legal help, social networking skills, translations, etc. In addition to this, *Vivere* is actively looking for funds to cover the first year of the operation's budget, estimated at CHF 8 000 - (Euros 7 200 .-).

For any further information, please visit *Vivere*'s website www.vivere.ch/en

Contact Mike Hoffman, founder and coordinator of Vivere: contact@vivere.ch

Vivere 7 av. d'Yverdon C.H.1004 Lausanne (Switzerland) www.vivere.ch

Human Rights reward with special mention, Republic of France, 2007

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Annual Report of the Special Representative of the Secretary General on Violence against Children

Judge Patricia Klentak*

High Time to Stop Violence Against Children

2016 | *The Countdown to 2030 has started!*
UN Study on Violence Against Children +10

The Special Representative of the Secretary General on Violence against Children, Marta Santos Pais, has presented her 2016 annual report to the General Assembly of the United Nations. The report builds on the 2030 Agenda for Sustainable Development and its target to end all forms of violence against children. The annual report provides an overview of major initiatives and developments to sustain and scale up efforts to safeguard children´s freedom from violence. The following text is an extract of the 'Key Recommendations' and 'Looking Ahead' conclusions from the report. The full report is available at: http://srsg.violenceagainstchildren.org/category/document-type/srsg-reports

Key recommendations

The report has highlighted significant recommendations on deprivation of liberty of children as a measure of last resort and on national monitoring mechanisms for places of detention of children. These recommendations came out of a conference organized by the Special Representative and UNICEF to address violence against children in criminal justice and migration detention systems.

As a measure of last resort, it was recommend that deprivation of liberty should never be used as a response to a non-existent or weak national child protection system. When in exceptional circumstances children are lawfully deprived of liberty, their right to challenge the legality of the deprivation of their liberty before a court and to a prompt decision about that action should be respected. The length of their placement must be clearly determined at the time of the decision, and non-custodial alternatives should be strengthened at all stages of the proceedings, including through restorative justice approaches.

Moreover, restriction of a child's right to liberty can never be used as a justification for restricting other rights, such as the right to physical and mental integrity, access to justice and due process, protection from discrimination and enjoyment of the rights to education, health or adequate food.

To be effective, national monitoring mechanisms for places of detention need to have the following:

(a) A legal mandate safeguarding autonomy and independence: either under the administration or as external institutions, monitoring mechanisms must be established by law and enjoy autonomy and functional, organizational and financial independence, including in the appointment of their members and financial viability. This is fundamental if the monitoring mechanisms are to pursue their mandate without interference, including on the part of penitentiary authorities overseeing the administration of centres of deprivation of liberty;

(b) Extensive powers to safeguard children's protection and safety: monitoring mechanisms must have clear roles and responsibilities and broad powers defined by law. These include the right to gain access to any place of deprivation of liberty, including through unannounced visits; the right to access any needed information, to request reports before, during and after the inspection and to receive a prompt response; the right to receive complaints directly from children; and the authority to make public the results of their inspections and recommendations, while preventing the public disclosure of information that may place a child at risk. These mechanisms should be provided with sufficient resources to develop their functions with high-quality standards;

(c) A clear human rights mandate to prevent and address any act of torture and other form of violence, as well as to protect the rights of children deprived of liberty, including to good-quality education, adequate physical and mental health and access to due process and to legal safeguards to participate in proceedings;
(d) Age-, gender-and child-sensitive complaints mechanisms to inform their work: easy and safe access by children deprived of liberty to counselling, complaints and reporting systems and to inspection and monitoring mechanisms is crucial. These mechanisms should take children's views and experiences into consideration both to identify and pursue incidents of violence through administrative and criminal investigations and to establish the accountability of perpetrators, and seek children's opinions on the organizational and structural dimensions of detention centres, the quality of programmes and of staff, and the safeguarding of children's rights, which otherwise may go unnoticed;
(e) Access to sound data and standardized qualitative and quantitative monitoring tools, which are essential to inform a precise and objective monitoring system for places of detention, to guide strategic legal and policy reforms and the strengthening of a child-sensitive juvenile justice system, and to safeguard the rights of children deprived of liberty. Qualitative data may include surveys, interviews with children and staff, and individual assessments and recommendations issued from the inspection. Quantitative data include disaggregated information on the number of children deprived of liberty, including on the basis of gender, age and ethnic and national origin, the institutions where they are placed and the reasons for and duration of the deprivation of their liberty, and the types of crimes for which they are considered responsible and the sanctions imposed, as well as information on daily routines, food and disciplinary registries and rehabilitation and reintegration programmes, and on resource allocation and security measures, such as fire safety protocols. This information should be based on standardized templates and indicators to enable the identification of concerns and monitoring of progress within and between centres of deprivation of liberty.

Looking ahead

In recent years, the protection of children from violence has evolved from a largely neglected topic into an issue of global concern. Framed by international human rights standards and informed by the United Nations study on violence against children, at present there is strengthened commitment to ensuring children's safety and protection and a growing understanding of the ways in which children are exposed to violence. Significant efforts have been made to mobilize national support for prevention and response and to help to change attitudes and behaviour that condone violence against children.

The 2030 Agenda for Sustainable Development promotes an ambitious vision of a world of peaceful, just and inclusive societies that are free from fear and violence, and it includes the elimination of all forms of violence against children as a distinct priority. The beginning of the implementation of this new Agenda during the tenth anniversary of the United Nations study marks the start of the most important countdown: towards a world free from fear and from violence for all children, with no one left behind.

It is imperative to seize this historic opportunity to place the protection of children from violence at the heart of the policy agenda of every nation and turn children's vision of a world where fear and violence are part of the distant past into reality.

Transformation, talent and time are our watchwords: transformation, because to achieve lasting change, hope must replace despair and confidence replace distrust. By using technology we can amplify our capacity for action and connect those willing to work for change. The determination and leadership of States, institutions, communities and networks of millions of adults and children who stand ready to join efforts are crucial to this ambitious transformative process.

Talent must be placed at the service of our widely shared child rights values and of the violence-free society that we all aspire to build. In the countdown to 2030, everybody counts and everybody is needed to overcome the destructive impact of violence and social exclusion.

With regard to time, there can be no complacency: it is imperative to move with a deep sense of urgency. Investing in the prevention of violence, protecting children's lives and futures and saving nations' resources means time gained in the countdown to a brighter future. The opportunity for change is too important to let slip.

Guided by the human rights imperative of freeing children from violence, by the evidence gathered over recent years and by the historic opportunity offered by the 2030 Agenda to promote a quantum leap in prevention and response efforts, the Special Representative reaffirms her resolve to mobilize even greater support and action towards a world free from violence against children, in close collaboration with Member States and all other stakeholders, most especially children themselves.

Judge Patricia Klentak*, Buenos Aires,

VEILLARD-CYBULSKI AWARD 2016

"The Rangatahi Court background and operating protocols"

by Judge Heemi Taumaunu

1. Judge Heemi Taumaunu's pioneering work, "The Rangatahi Court: background and operating protocol", which led to the creation of the Rangatahi courts, is particularly interesting and innovative, based on the idea of a justice "by Maori for Maori".
2. The problem addressed is of very high importance. Since Maori young people were overwhelmingly disproportionately represented in the Youth Courts and detention facilities, the need for a different approach was clear. Judge Taumaunu has changed the experience of monitoring the mandatory Family Group Conferences for young Maori offenders.
3. The action of the Rangatahi courts has proven to be very effective and useful. An extensive evaluation has been carried out which endorses the effectiveness in terms of changing behaviour, not only of the young offender but also of their whanau and community. Incorporating Maori language, protocols and customs into the marae hearings have reflected the strengths of the Maori culture. Individual and cultural identities have been enhanced as well as the respect for the judicial process by the young person and his whanau. Moreover, more and more Maori communities request and support Rangatahi courts which have increased in number since Judge Taumaunu first drew up the protocols. They have been extended to Pasifiki courts too. This acceptance by the Maori community is a testament to the approval of it by the Maori people.
4. It is known that many countries struggle with the disproportionate numbers of ethnic minorities coming before their youth courts and their subsequent disproportionate numbers in detention. So the jury has given weight to an individual – Judge Taumaunu – who pursued an idea which was outside the usual proceedings for youth offending in his country. He introduced a system which has been found to work extremely well for Maori children and their families who become participants rather than outsiders in proceedings. The system has a future life and is being adopted elsewhere.
5. In sum, Judge Taumaunu showed leadership skills in devising and over several years pursuing, introducing and monitoring a refined aspect of the juvenile justice system that took into account the needs of Maori children to learn who they are and where they have come from so that they can change behaviour and realise their potential and respect and new understanding for cultural identity. It is a system that promotes dignity and the taking of responsibility for offending by the young person who is aided by his whanau (family) and community. The family and community gain in standing and dignity too. It is inclusive. It reflects child friendly justice guidelines of participation, dignity, best interests of the child, protection from discrimination and the rule of law.

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2016 Child 10 Award
received by
DCI-Sierra Leone's Abdul Manaff Kemokai
Socio-Legal Defence Centres

Account by DCI International Secretariat, Geneva: Mr. Alex Kamarotos (Executive Director), Ms. Anna D. Tomasi (Advocacy Coordinator) and Mr. Johan Vigne (Project Officer)

Abdul Manaff Kemokai, Executive Director of Defence for Children International (DCI) – Sierra Leone, has received the Child 10 Award 2016.[1] The Child 10 Award and Summit was launched by the Sophie Stenbeck Family Foundation and Reach for Change in order to recognise, support and connect bold leaders of grassroots organisations who work with innovative solutions to address urgent and pressing issues for children. This year's edition was dedicated to the issue of **"children on the run"**. The Award is given to just 10 remarkable individuals.[2]

The 2016 Child 10 Award Committee honoured Abdul Manaff Kemokai for the tremendous work conducted by DCI-Sierra Leone through its **Socio-Legal Defence Centres (SLDCs).** These Centres provide direct socio-legal assistance to children and ensure that they are given adequate protection and access to justice. DCI's socio-legal interventions follow a comprehensive child rights-based, age and gender-sensitive approach that allows the service to best respond to the specific needs of children, particularly those living in the streets and running away from their homes and from other situations of violence.

DCI notes that progress has been achieved in combating violence and exploitation of children in Sierra Leone. Violence against children is higher on the policy agenda, and advocacy efforts have a growing impact on improving adherence to international norms and standards on children's protection from violence. Challenges however still remain in Sierra Leone, with insufficient investment in violence prevention, uncoordinated policy interventions, unconsolidated and poorly-enforced legislation, scarce data and research on violence and exploitation, and limited recovery and reintegration services.

DCI – Sierra Leone has established six Socio-Legal Defence Centres across the different national districts. These Centres have become the go-to places for children on the run and children living in the streets, where they can freely talk about their issues and needs, and receive comprehensive assistance and protection. Abdul Manaff Kemokai said:

> It is not uncommon to see children exploited as domestic workers, while others end up in the streets. Many street children in Liberia, Sierra Leone and Guinea have become involved in criminal activities because their most basic needs cannot be satisfied. Many of them are arrested by police for loitering, or rounded up at police raids. But as far as the police is concerned, the punishment of street children continues to prevail over protection mechanisms to get them out of the streets. **They need help, and we need the whole situation to change: this is what we are here for**.

During the award ceremony, Mr. Kemokai said he was receiving the award on behalf of DCI – Sierra Leone, and dedicated it to all child survivors of exploitation, violence and abuse.

DCI - Sierra Leone is also actively involved in the fight against child trafficking, which particularly affects children on the run. In 2015 alone, DCI-Sierra Leone facilitated the reintegration of 322 child victims of internal and cross-border trafficking, including the case of three Sierra Leonean children that had been trafficked to Liberia and then Mauritania. Together with DCI - Liberia, DCI - Sierra Leone provided direct legal aid and representation to the three child victims and ensured their repatriation and reintegration.

Moreover, since 2014, DCI - Sierra Leone has led concerted civil society efforts and has worked closely with government representatives of member States of the Mano River Union (MRU) – Côte d'Ivoire, Guinea, Liberia and Sierra Leone - to establish a sub-regional child protection policy, particularly focusing on children on the move. The third MRU convening took place from 23-26 November 2016 in Sierra Leone. This third MRU convening builds on the workshops conducted with immigration and police officials, and local community members in June and July 2016.[3]

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[1] For more information about the Child 10 awards and Reach for Change see: http://reachforchange.org/en/about/child10

[2] The nine other child rights activists awarded the prize were: Josefa Condori Quispe (CAITH, Peru), Anta Mbow (Empire des Enfants, Senegal), Martine Umulisa (Kaami Arts, Rwanda), Christopher & David Mikkelsen (REFUNITE, Denmark), Debbie Beadle (ECPAT UK Youth Programme, UK), Eve Saosarin (M'Lop Tapang, Cambodia), Delphine Moralis (Missing Children Europe, Belgium), Nyakwesi Mujaya (Makini, Tanzania) and Margaretha Ubels and Ishmael Hammond (Special Attention Project, Ghana).

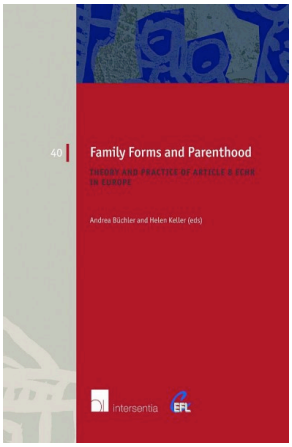
[3] See Defence for Children International takes effective measures to combat child trafficking in West Africa, http://www.defenceforchildren.org/defence-children-international-takes-effective-measures-combat-child-trafficking-west-africa/

Book review by Judge Katarzyna Kościów-Kowalczyk* Poland

'Family Forms and Parenthood. Theory and Practise of Article 8 ECHR in Europe',

Edited by Andrea Büchler and Helen Keller, Intersentia, Cambridge-Antwerp-Portland, 2016 – The Book Review. book | published | 1st edition
March 2016 | ISBN 9781780683409 | xxiv + 546 pp.

Judge Katarzyna Kościów-Kowalczyk*



This book shows not only to legal professionals but also to lay people unconnected with any field of law the difficult tasks that face the European Court of Human Rights (ECtHR). The book considers the way in which Article 8 is used by the Court to protect the privacy and family life of Europeans, so it touches on only a small range of cases in the Court, but at the same time it emphasises that being the guardian of that article is a huge responsibility and a really hard job. I was amazed at how in only a few words the editors: Andrea Büchler and Helen Keller, outlined the ECtHR's wisdom and attention to detail, treating every single case individually and considering every aspect of it, such as the background of the situation, the people involved and even how article 8 is viewed in different European countries. Although one might think that every article of the European Convention on Human Rights should apply to all the parties to the Convention in the same way, the book demonstrates that protecting individuals' family and private life is more complex and that article 8 is understood differently in different European countries.

Protecting family and private life is a very important part of creating a healthy society. I know that in many cases the rights to family life and to privacy collide and we judges have to decide which is the more important, taking into consideration every aspect of the individual case. That's why with great interest and curiosity I started my reading of the book.

I was really interested in how article 8 is understood and interpreted not only by the ECtHR but also by different countries with their own laws, culture and history. In a very clear and transparent way, Andrea Büchler and Helen Keller explain very complicated cases of the Court, always explaining its decisions with very understandable arguments, helping us, readers, to understand the complexity of Article 8 itself. The book engages the interest of and encourages reflection by every reader, mostly because of the many examples that it provides of cases which, at first glance, seem similar but under the authors' scrutiny suddenly start to differ in so many aspects.

The authors try to avoid difficult, legal vocabulary that can only be understood by professionals. Instead they use clear, easy to read, not over-long sentences that will not lead to either incomprehension or boredom for the ordinary, lay reader. And in my opinion that is the biggest advantage of the book: it can be read easily by people who would like to understand the law, and at the same time by those who already understand it very well and wish to expand their knowledge.

The editors start with an overall explanation of article 8 and its importance in the everyday life of all Europeans. In the first section of the book they briefly explain how almost every case before the Court revolves around either the right to privacy or to a family life. After that, in a very useful chapter *The right to respect for private and family life*, which illuminates the entire book, Andrea Büchler writes about every aspect that article 8 bears upon.

Using a great many real life examples, she writes about parenthood, adoption, reproductive medicine, partnership, marriage, step parenthood and foster parenthood, in the light of article 8 and the laws of different European countries. That introduces the second part, called *National Reports*, the most important part of the book. Each chapter, written by different specialists from eleven European countries (Austria, Croatia, England and Wales, Germany, Greece, Hungary, the Netherlands, Poland, Spain, Sweden, and Switzerland), contains a description of that country's law in the light of article 8. Supporting every thesis with examples of different cases, the authors explain how article 8 is understood by their countries' authorities, how it is affected by each country's culture or history and how the decisions of the ECtHR help each country to reflect article 8 in their national law.

The book ends with chapter III *Conclusions*, containing a synthesis by the editors. They write about the importance of respecting the individual's right to family and private life every day, and they show how the understanding of article 8 has changed even within the ECtHR itself.

I enjoyed reading this book. It gave me an understanding of how differently the article can be understood, given different countries' history, cultural backgrounds and societies. Especially worth recommending are those parts of the book which analyze the situations of same sex couples and children conceived with the use of reproductive medicine and their right to family and private life. It amazed me how much the way of treating these two types of families has changed over relatively recent years. It showed me that the ECtHR has always considered every individual case very carefully, reflecting on each of its aspects. That is very comforting. It shows us that Europe is evolving and developing in the right way and that we as individuals are treated by the ECtHR with great care and understanding.

The book is for everybody, and every European citizen in the 47 countries of the Council of Europe should actually read it with great care and attention. I am a family judge and this book has broadened my own horizons considerably. Since we are all part of Europe, we should learn about its institutions as much as we can, especially if we have the chance to read such an important book as this. I recommend it to all Europeans.

Katarzyna Kościów-Kowalczyk*, Family and Juvenile Judge of the District Court in Jawor, Poland, Vice President Polish Association of Family Judges

Children's Rights Judgments-- A new method of bringing children's rights to bear on judicial decision-making

Professor Helen Stalford

The United Kingdom boasts a strong tradition of world-leading, multidisciplinary research into childhood and children's rights. Much of this work has evolved in a legal context, mobilised in part by the UK's ratification in 1991 of the 1989 UN Convention on the Rights of the Child. Theories and methods of children's rights have been in development since long before then, however, with some of the first detailed attempts to conceptualise children as rights-bearers appearing in the 18th century.[1] In more recent years, and certainly in the last 30-40 years, theoretical analyses of children's rights have been complemented by a vast and rich body of empirical research exploring how children confront and, indeed, are confronted by decisions affecting them. The emergence of a new discourse on 'Child Friendly Justice'[2] reflects long-standing calls for a more sensitive and informed approach, procedurally and substantively, to legal cases involving children. Judges, of course, are in the optimum position to influence both the process and the outcomes for children involved in court proceedings, and there are many inspiring examples of delicately reasoned, profoundly sensitive judgments, particularly from the higher courts of appeal which benefit from collegial decision-making and an experienced judiciary.

That said, judicial diligence towards children's rights is by no means routine or consistent, and there is significant uncertainty, as one might expect in what are often complex cases involving children, as to how different aspects of children's rights and interests might be balanced against one another and, indeed, against the interests of others. Academics have tended to confront these inconsistencies and judicial shortcomings from the relatively privileged side-lines of detailed critical commentary, much of which is ultimately consigned to dusty academic archives. Few have actually attempted to demonstrate, on judges' own terms, observing judicial conventions, how judgements could have or should have looked had they been adjudicated in a way that is more faithful to what we understand to be a children's rights-based approach.

Children's Rights Judgments is a two-year project funded by the Arts and Humanities Research Council (AHRC)[3] and aims to do just that. The principal aim of the project, which started in January 2015, is to revisit existing legal judgments relating to children and consider how they might have been drafted if adjudicated from a children's rights perspective. It involves over 60 academics and legal practitioners redrafting nearly 30 judgments from a range of jurisdictions, including the UK, Canada, Pakistan, the US, South Africa, Belgium and the Netherlands. Some contributors are re-drafting judgements of the international courts too, including those of the International Criminal Court, the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice of the EU.

In adopting this method of judgment writing, we hoped to illustrate how our understanding and conceptualisations of children's rights, gleaned through our theoretical, doctrinal and empirical research as academics, could be brought to bear on judicial decision-making. We hope that this, in turn, will provide us with a more informed appreciation of the challenges and tensions facing judges which may inhibit their potential to engage more fully in children's rights-based decision making, and to expose opportunities for more creative and open correspondence with broader children's rights research, practice and theory.

[1] See for instance Thomas Spence's *The Rights of Infants*, published in 1796

[2] This is informed in no small part by the publication of the Council of Europe's guidelines on Child Friendly Justice, CM/Del/Dec(2010)1098/10.2abc-app6 17/11/2010, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice* (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

[3] AHRC is a non-departmental public body sponsored by the Department for Business, Energy and Industrial Strategy (BEIS)It is s governed by its Council, which is responsible for its overall strategic direction, and we are incorporated by Royal Charter. http://www.ahrc.ac.uk

Many of the judgments selected for rewriting attracted significant critical attention when they were originally passed down, including the conjoined twins case, the child 'headscarf' case of *Begum*, the Boris Johnson[4] 'lovechild' case of *AAA v Associated News*, the child immunisation case of *F v. F*, and the US juvenile death penalty case of *Roper v Simmons*. These and the other cases that feature in *Children's Rights Judgments* have been selected either because of the way in which they were reasoned, because their original outcome is regarded as antithetical to children's rights, or because the judgment fails to respond adequately to modern social, economic, legal, cultural and technological developments that impact upon children's lives. Some of the rewritten versions arrive at a different outcome to the original based on an alternative reasoning or different sources of children's rights. Others arrive at the same outcome as the original but via a different (sometimes subtle, other times radically different) reasoning.

Whilst *Children's Rights Judgments* is keen to push boundaries and challenge entrenched conventions in judgment writing, it is equally concerned to produce authentic alternatives that could pass muster as genuine originals. Thus a number of constraints have been imposed on the authors. First, each judgment has to adhere broadly to the format, style and tone of the court from which the case originally arose (this is a particular challenge for the re-writer of our oldest case concerning the trial of John Hudson from 1783!).

Second, consistent with the judicial function, authors are also confined to interpreting and applying the law as it stood at the time of the original and are prohibited from making radical changes to the law. Similarly, judgment-writers must be cognisant of evidence and fact-based limitations depending on the level at which they are adjudicating. In all cases, for practical purposes, we have imposed a 5,000-word limit on all of the re-written judgments. This has required some authors to focus on particular aspects of the original for rewriting and to be judicious in their editing of the factual background and legal context. That said, writers have been given significant scope for creativity in producing a persuasive 'cover version' of the original. Some have invented a fictitious appeal to a higher court or a new dissenting judgment. Some present the facts of the case from a different perspective to highlight from the outset the focus on the child's voice, interests and rights. A few have developed an additional, child friendly version of the judgment with a view to conveying the decision to the child or children affected by the decision.

Each judgment is accompanied by a short (3,000 word) commentary, written independently by a separate contributor. This provides essential background information about the original decision along with an explanation of why and how the re-written version represents a more children's rights-sensitive approach. Early drafts of the judgments and commentaries were developed through a series of workshops organised throughout the UK in 2015-2016 and involving discussion with leading judges, practitioners, academics and children's rights advocates, some of whom were involved in representing the parties and adjudicating on the original cases. These enabled participants to explore what it means to adopt a children's rights-based approach to decision-making and to examine both the opportunities and constraints on the judiciary in protecting children's rights. It also enabled participants to receive training and feedback from leading judges such as Sir Mark Hedley[5] and Lady Brenda Hale[6] on the art and craft of judgment writing.

All of the rewritten judgments and commentaries will be published in the summer of 2017 in a book entitled *'Children's Rights Judgments: From Academic Vision to New Practice'* (Oxford: Hart, edited by Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore). The book will be launched officially at the Supreme Court in London on 22nd September 2017.

We hope ultimately that the collection will be used to illustrate how the method of judgment writing can help us better understand and innovate in judicial decision-making and as a practical training tool for judges and other legal practitioners who have a commitment to bringing children's rights to bear more fully on the adjudicatory process. If you would like more information about the rewritten judgments, the contributors and our distinct approach to advancing the campaign for child friendly justice, please contact the project convenors: Professor Helen Stalford (stalford@liv.ac.uk) or Professor Kathryn Hollingsworth (kathryn.hollingsworth@newcastle.ac.uk). Further details of the cases and contributors are also available on the Children's Rights Judgments website at: https://www.liverpool.ac.uk/law/research/european-childrens-rights-unit/childrens-rights-judgments/

Helen Stalford is Professor of Law and Director of the European Children's Rights Unit, School of Law and Social Justice, University of Liverpool.

[4] Foreign Secretary, Foreign Office, UK

[5] FormerHigh Court Judge, England and Wales, Member 2016 panel reviewing Sharia law England and Wales

[6] Deputy President of the Supreme Court of the United Kingdom.

Treasurer's column — Anne-Catherine Hatt

Subscriptions 2017

I will soon send out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 50 for the year 2017 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

May I take this opportunity to remind you of the ways in which you may pay:

1. by going to the website of the IAYFJM—click on membership then subscribe to pay online, using PayPal. This is both the simplest and cheapest way to pay; any currency is acceptable. PayPal will do the conversion to GBP;
2. directly to the following bank accounts:

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If you need further guidance, please do not hesitate to email me.

It is, of course, always possible to pay in cash if you should meet any member of the Executive Committee.

Without your subscription it would not be possible to produce this publication.

Thank you very much in advance!

Anne-Catherine Hatt

Contact Corner — Dr Briony Horsfall

We receive many interesting e-mails with links to sites that you may like to visit and so we are including them in the Chronicle for you to follow through as you choose. Please feel free to let us have similar links for future editions.

From	Topic	Website link
Child Rights Connect	A global child rights network connecting the daily lives of children to the UN. Recent events: Committee on the Rights of the Child Day of General Discussion: "Children's Rights and the Environment", held 23rd September 2016: http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2016.aspx UNCRC General Comment No. 19 on Public Budgeting for the Realisation of Children's Rights (Art. 4), supported by the Child Rights Connect working group, launched 22nd September 2016: http://www.childrightsconnect.org/child-rights-issues/investmentinchildren/	http://www.childrightsconnect.org
CRIN The Child Rights Information Network	Global research, monitoring, policy and advocacy organization. Provide extensive resources and world-wide legal database. Periodic email newsletters (CRINmail) available in English, French, Spanish, Russian and Arabic. Sign up: https://www.crin.org/en/home/what-we-do/crinmail	https://www.crin.org
Defence for Children International	Global NGO, research and monitoring reports, practice tools, campaigns and child advocacy services. DCI are leading the NGO panel for the UN Global Study of Child Poverty: https://childrendeprivedofliberty.info	http://www.defenceforchildren.org
European Commission – Child Rights	Period round-up news email provided by the Commission Coordinator for the Rights of the Child, contact Margaret Tuite: EC-CHILD-RIGHTS@ec.europa.eu European e-justice portal – rights of the child: resources and training materials: Find it here	http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm
European Schoolnet	Network of 30 European Ministries of Education, based in Brussels, Belgium. Not-for-profit organisation, aims to bring innovation in teaching and learning to key stakeholders.	http://www.eun.org
IAYFJM	Website	http://www.aimjf.org/en/
IDE International Institute for the Rights of the Child	Offer training, awareness raising, publications, news and networking. Training includes Master of Advanced Studies in Child Rights, Interdisciplinary Master's Degree in Child Rights, specialist diplomas and certificates. Training opportunities in Switzerland as well as China, Southern Asia and West Africa.	http://www.childsrights.org/en/
IJJO International Juvenile Justice Observatory	Website: working towards a global juvenile justice without borders. 2018 International conference. Contact for newsletter, become a user or collaborator: oijj@oijj.org New report: Addressing Juvenile Justice Priorities in the Asia-Pacific Region (English version here)	http://www.oijj.org

Kausa Justa	Human rights blog and e-newsletter, based in Peru. Directed by Ronald Gamarra Herrera and a team of founding members. Part of the Institute Promoting Social Development (IPRODES), a non-profit civil organization dedicated to the promotion of Human Rights, Development and Democracy.	http://kausajusta.blogspot.com.au http://www.iprodesperu.org
OHCHR Office of the High Commissioner for Human Rights	Website for the United Nations Human Rights Office of the High Commissioner. Website offers news and events, publications, resources, issues, human rights by country, where OHCHR work, and human rights bodies.	http://www.ohchr.org
PRI Penal Reform International	PRI is an international non-governmental organisation working on penal and criminal justice reform worldwide. PRI has regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus. Reports and briefing resources published. Sign up to receive the PRI e-newsletter: e-newsletter	https://www.penalreform.org
Ratify OP3 CRC	International coalition campaign for the ratification of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC). Provide information about the ratification process, news and resources, including for children.	http://ratifyop3crc.org
TdH Terre des Hommes	Swiss child reflief agency, providing responses to child protection (exploitation, juvenile justice and migration), children's health and children in humanitarian crises. Current campaign for refugees "Let's keep all children safe and warm". Newsletter: https://www.tdh.ch/en/contact-us	https://www.tdh.ch/fr
UNICEF	Currently celebrating 70 years of service. 2016 'State of the World's Children Report: A fair chance for every child': https://www.unicef.org/publications/index_91711.html Forthcoming report January 2017: UNICEF Humanitarian Action for Children 2017: Overview	https://www.unicef.org
Vivere	Non-government organisation campaigning to abolish the death penalty and life imprisonment of children. Contact Mike Hoffman, founder and coordinator of Vivere: contact@vivere.ch	http://www.vivere.ch
American University - Washington College of Law	Academy on Human Rights and Humanitarian Law	https://www.wcl.american.edu/hracademy/

Meeting of the Council and General Committee & Extraordinary General Assembly, 22 October 2016, London

Magdalena Arczewska, Viviane Primeau, Imman Ali, Godfrey Allen, Avril Calder, Anne-Catherine Hatt, Marta Pascual, Gabriela Ureta, David Stucki, Andrea Santos Souza

Andréa Santos Souza, Avril Calder, Marta Pascual, Anne-Catherine Hatt, Viviane Primeau

Hervé Hamon, Elbio Ramos, Petra Guder, David Stucki, Patricia Klentak, Judge Okabe, Jan and Tomas Alva

Viviane Primeau, Godfrey Allen, Laurent Gebler, Gabriela Ureta, Alice Grunenwald, Anne Marie Trahan, Daniel Pical

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Petra Guder, Jean Trepanier, Magdalena Arczewska, Katarzyna Kościów-Kowalczyk, Joseph Moyersoen, Viviane Primeau, Theresia Höynck, Imman Ali, Avril Calder, Lord Ponsonby, Anne Catherine Hatt, Marta Pascual, Gabriela Ureta, David Stucki, Andrea Santos Souza, Daniel Pical, Alice Grunenwald, Hervé Hamon, Anne-Marie Trahan, Laurent Gebler

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Chronicle Chronique Crónica — Voice of the Association

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Association—English, French and Spanish. The aim of the Editorial Board has been to develop the Chronicle into a forum of debate amongst those concerned with child and family issues, in the area of civil law concerning children and families, throughout the world

The Chronicle is a great source of learning, informing us of how others deal with problems which are similar to our own, and is invaluable for the dissemination of information received from contributions world wide.

With the support of all members of the Association, a network of contributors from around the world who provide us with articles on a regular basis is being built up. Members are aware of research being undertaken in their own country into issues concerning children and families. Some are involved in the preparation of new legislation while others have contacts with colleagues in Universities who are willing to contribute articles.

A resource of articles has been built up for publication in forthcoming issues. Articles are not published in chronological order or in order of receipt. Priority tends to be given to articles arising from major IAYFJM conferences or seminars; an effort is made to present articles which give insights into how systems in various countries throughout the world deal with child and family issues; some issues of the Chronicle focus on particular themes so that articles dealing with that theme get priority; finally, articles which are longer than the recommended length and/or require extensive editing may be left to one side until an appropriate slot is found for them

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages—it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. 'Items of Interest', including news items, should be up to 800 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,
chronicle@aimjf.org

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From the American Bar Association

Dear Friends,

Please **save the date** for the **International Summit**

on the

Legal Rights of Street-Connected Children & Youth:

UN Comment from Paper to Practice.

This summit will build upon the work done at the International Summit on the Legal Needs of Street Youth held in London in June 2015.

The American Bar Association will sponsor this event along with partners from around the world.

INTERNATIONAL SUMMIT ON THE LEGAL RIGHTS OF

STREET-CONNECTED CHILDREN & YOUTH:

UN Comment from Paper to Practice

November 28-29, 2017

São Paulo, Brazil

Hosted *pro bono* at Baker McKenzie São Paulo

Building on the success of the first International Summit on the Legal Needs of Street Youth held in London in June of 2015, the American Bar Association will convene an even greater number of jurisdictions and advocates for street-connected children and youth from around the world to examine the mandate provided by the United Nations General Comment on Children in Street Situations (slated for release in April 2017). Bringing together street youth experts across the globe, this will only be the second-ever convening focused on the legal rights of street youth as a path to ensuring dignity and human rights for a population often forgotten or ignored.

The Summit Agenda will review the legal guarantees in the General Comment point-by point through panel and live, interactive discussion by leaders from around the world examining best practices and challenges in the face of the UN's General Comment and its renewed expectations of every signatory nation across the world. Those unable to participate in person will be invited to attend virtually if possible.

A unique outcome of the summit will be a vibrant exchange of information and best ideas across borders about how nations can implement the rights embedded in the UN's new international instrument. Second, and equally unique, the Summit will produce a first-ever publication of principles from the world's experts on street-connected children and youth that will foster the implementation of each of the legal issues in the UN's General Comment.

If you have ideas for organizations and individuals who should be invited to this invitation-only event, or if you have any questions about it, please e-mail Annette.Colman@Americanbar.org.

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