I. Introduction

Migration is a common element of the human condition. Thus, it is natural that the international community would construct legal protections recognizing the rights of people in migration through the creation of treaties such as the 1951 Refugee Convention and its 1967 Protocol, as well as the International Convention for the Protection of the Rights of All Migrant Workers and Their Families. When combined with the myriad treaties that were subsequently ratified across the globe to recognize and protect children’s rights in the late 20th and early 21st centuries, including but not limited to the United Nations Convention on the Rights of the Child and its three optional protocols, one would expect that the rights of migrating children and other children in the context of international migration would be well established by 2020. However, current events make clear that despite the near-global recognition of children’s rights on paper, and the legal commitment almost 200 States to protect, respect, and fulfill those rights, thousands of children in migration experience flagrant violations of their rights on a daily basis ranging from forced separation from family, detention, erroneous classification as adults, and denial of educational, social, legal, and cultural rights. Violations of the rights of children on the move
often call for cross-border remedies, such as when a child whose rights were violated in an arrival country is deported to their home country or when a child who has the right to enter a country for the purpose of claiming asylum is denied access and suffers harm as a result.

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

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

The Study Group has already begun the drafting of a final report that examines each of these areas. The Study Group’s work for the remainder of 2020 will have a particular focus on gaps in protection and enforcement and possible solutions. Based on its discussions and work done to date on the draft report, the Study Group anticipates that its report could be the basis for a book-length treatment of the subject and that it will recommend that the Study Group become an ILA Committee in 2021 to work toward that objective, as well as to develop an online “toolbox” to be accessed and utilized by children whose rights have been violated while migrating, as well as their advocates.

In the meanwhile, the ILA’s 2020 Biennial Conference will be a useful opportunity to receive feedback on the Study Group’s initial research and conclusions, help sharpen its proposals for change, and identify next steps. This mid-term report is intended to provide a summary overview of the Study Group’s research and analysis to date.

II. Challenges Children in Migration Face

Children who migrate experience a host of barriers and other challenges in accessing the care and protection they are entitled to as children and the specific measures of protection they require because they are far from their homes and, in many cases, their families and caregivers.
Arbitrary Age Assessment Practices

One challenge is the difficulty of establishing their status as a child, a threshold requirement in most countries to access the specialized care and protection to which children are entitled. In some countries, childhood status is declaratory—that is, a person’s stated age is valid in the absence of serious reasons for doubt, in line with international standards.¹ For instance, the UN special rapporteur on the human rights of migrants noted in a 2020 report that Bosnia and Herzegovina accepts age on a declaratory basis.² Similarly, by law, French authorities are required to do the same.³ Unfortunately, in practice, unaccompanied migrant children in France routinely are subject to age assessments even when they provide passports, birth certificates, or other identity documents. The French Defender of Rights (a national ombudsperson appointed by the President of the Republic), medical bodies, and groups working with children in migration have documented the use of summary and otherwise arbitrary age assessment procedures across the country.⁴

Other countries also challenge children with regard to age assessment. For example, in the United Kingdom, immigration officers are allowed to assess children as adults based on their appearance in some circumstances.⁵ Like France, some countries conduct age assessments even when children have identity documents. Under the Belgian Guardianship Law, the Federal Guardianship Service within the Ministry of Justice, which is responsible for designating guardians for unaccompanied minors, decides whether or not a person has attained the age of majority. If the Guardianship Service or the asylum and migration authorities have reasonable doubts as to the age of the person concerned, the Guardianship Service immediately orders a medical (skeletal and dental age) examination by a doctor.⁶ Such practices are especially concerning since medical examinations have been determined to be unreliable as a means of

¹ See, e.g., U.N. Comm. on Migrant Workers & U.N. Comm. on the Rights of the Child, Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child) on the General Principles Regarding the Human Rights of Children in the Context of International Migration, ¶ 32, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).
³ Civil Code, art. 388 (Fr.).
establishing chronological age.\textsuperscript{7} The UN Committee on the Rights of the Child has observed that Belgium’s age assessment procedures are “intrusive and unreliable.”\textsuperscript{8}

In Spain, the UN Committee on the Rights of the Child has found that the failure to consider proffered identity documents violates children’s right to an identity and leads to other rights violations.\textsuperscript{9} The Spanish Supreme Court has also found that it is inappropriate for authorities to disregard identity documents of a person who initially entered Spain claiming to be an adult, since children may claim to be adults in order to work or to be able to travel to the mainland from their entry points in Ceuta and Melilla, Spanish enclaves accessible by land from Morocco.\textsuperscript{10}

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

Within the European Union, some Member States rely on age assessments conducted in other Member States, even when the age assessments undertaken elsewhere are known to systematically overstate age. These differences “have resulted in discordant decisions on the age of the individuals and disruptions in the provision of care and protection” to unaccompanied migrant children.\textsuperscript{11} To address such concerns, UNHCR and UNICEF have called for harmonised age assessment across Europe,\textsuperscript{12} as have legal scholars in a report commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs.\textsuperscript{13}

In the United States, age assessments may be conducted at any point between apprehension to release from custody.\textsuperscript{14} Without clear evidence indicating that a person is either an adult or


\textsuperscript{8} UN Comm. on the Rights of the Child, Concluding Observations: Belgium, ¶ 41(a), U.N. Doc. CRC/C/BEL/CO/5-6 (Feb. 28, 2019).


\textsuperscript{10} Casación e Infracción Procesal núm. 2629/2019, Sentencia núm. 307/2020 (Tribunal Supremo, Sala de lo Civil, June 16, 2020), at 15 (Spain).


\textsuperscript{12} Id. at 9-12.


\textsuperscript{14} Dep’t of Homeland Security, Office of Inspector General, Age Determination Practices for Unaccompanied Alien Children in ICE Custody 4 (Nov. 2009) (highlighting three typical scenarios when age-related assessments and
juvenile, the apprehending officer may take additional measures to determine an individual’s age. While there is no exact procedure for establishing a person’s age, age determinations are generally informed by agency guidelines and the “reasonable person” standard articulated in the Flores Settlement Agreement, which states that, “if a reasonable person would conclude that an alien detained by immigration officials is an adult, despite his or her claim to be a minor, the individual shall be treated as an adult.”\textsuperscript{15} Officials may rely on documentary evidence including birth certificates and school enrollment papers to establish age when it is in dispute.\textsuperscript{16} Child migrants who do not have documentation may be assessed by physical, dental, and psychological examination.\textsuperscript{17} These methods of assessment produce unreliable results that often lead to individuals being inappropriately assigned to adult or juvenile facilities.\textsuperscript{18} Misclassification denies children their identity and rights as a child under the UN Convention on the Rights of the Child.

\textit{Inadequate Reception Conditions and Other Deficiencies in Protection}

Once status is established to the satisfaction of authorities in the country of arrival, many children in migration are subjected to inadequate housing, uneven access to health information and services, separation from family members and caregivers, and discriminatory denial of education. They may also face barriers in access to asylum, other international protection, and possible avenues for status available under domestic law.

In recent years, the UN Committee on the Rights of the Child and other international authorities have found inadequate reception conditions for unaccompanied children and families with children migrating into Belgium, Bosnia and Herzegovina, Greece, Hungary, Italy, Portugal, and Spain, among other countries.\textsuperscript{19} With respect to Norway, the Committee observed that variations
determinations are made, including: (1) at the initial apprehension for the purposes of determining appropriate placement; (2) when an individual already detained in an adult facility claims to be a juvenile; (3) when an individual at a juvenile facility is suspected of being an adult).


\textsuperscript{17}Id. at 326.

\textsuperscript{18}R. Mishori, \textit{The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights}, 6 CHILDREN 85 (2019); see also Vincenzo De Sanctis et al., \textit{Pros and Cons for the Medical Age Assessments in Unaccompanied Minors: A Mini-Review}, 87 ACTA BIOMED 121 (2016).

in living conditions among reception centers and differential treatment between unaccompanied children age 15 or older as compared with younger children impeded the country’s efforts to integrate refugee children.\textsuperscript{20}

Asylum and immigration procedures may not afford children adequate safeguards, including the appointment of a guardian, and may not take children’s best interests into account as a primary consideration. For instance, in Austria, child welfare and protection authorities are not immediately brought in when unaccompanied children over age 14 are identified, and children receive guardians only after the child is assigned to a reception facility.\textsuperscript{21} Belgium, Malta, and the United Kingdom among other countries, have similar shortcomings in guardianship procedures for unaccompanied children.\textsuperscript{22} Denmark and the United Kingdom do not adequately assess and take into account children’s best interests in deciding asylum immigration cases.\textsuperscript{23}

These issues are not limited to Europe. For example, in Australia, the best interests of the child are not a primary consideration in asylum processes, and there is no independent guardianship entity for unaccompanied children. Legislation allows for the summary return of vessels, including those containing children, even when passengers may be in need of international protection.\textsuperscript{24} Argentina continued to implement a Decree of Necessity and Emergency issued in 2017 even after a court found it unconstitutional. The decree has potentially negative impacts for family unity and the best interests of children in migration, the Committee on the Rights of the Child has observed.\textsuperscript{25} And children on the move experience significant barriers in access to education in Jordan, Lebanon, and Turkey, among other countries.\textsuperscript{26}

\begin{thebibliography}{9}
\bibitem{Austria} Comm. on the Rights of the Child, Concluding Observations: Norway, ¶ 31, U.N. Doc. CRC/C/NOR/CO/5-6 (July 4, 2018).
\bibitem{Austria2} Comm. on the Rights of the Child, Concluding Observations: Austria, ¶ 39, U.N. Doc. CRC/C/AUT/CO/5-6 (Mar. 6, 2020).
\bibitem{Belgium} Comm. on the Rights of the Child, Concluding Observations: Belgium, ¶ 41(b); Comm. on the Rights of the Child, Concluding Observations: Malta, ¶ 41(b), U.N. Doc. CRC/C/MLT/CO/3-6 (June 26, 2019); Comm. on the Rights of the Child, Concluding Observations: United Kingdom, ¶ 76(b), U.N. Doc. CRC/C/GBR/CO/5 (July 12, 2016).
\bibitem{Australia} Comm. on the Rights of the Child, Concluding Observations: Australia, ¶¶ 44(a), (c)-(e), U.N. Doc. CRC/C/AUS/CO/5-6 (Nov. 1, 2019).
\bibitem{Jordan} HUMAN RIGHTS WATCH, “I WANT TO CONTINUE TO STUDY”: BARRIERS TO SECONDARY EDUCATION FOR SYRIAN REFUGEE CHILDREN IN JORDAN (2020); HUMAN RIGHTS WATCH, “WE’RE AFRAID FOR THEIR FUTURE”: BARRIERS TO EDUCATION FOR SYRIAN REFUGEE CHILDREN IN JORDAN (2016);
\end{thebibliography}
Immigration and asylum law in the United States has not historically afforded protections to children in migration based on their minor status. Due to gaps in the legal framework, migrant children do not have meaningful procedural or substantive due process rights. The United States is not bound by any best interests of the child standard for migrant children, thus immigration officials are not required to make decisions on the basis of that principle. Advocates have raised numerous concerns about the conditions in which immigrant children are initially received and detained. For example, reception and detention centers are notoriously under-resourced and largely unable to meet the health and education needs of the children they serve. Further, inadequate screening of children at reception and failure to provide legal counsel has resulted in children being inappropriately returned to their countries of origin. The American Civil Liberties Union has also received complaints within the United States of children being denied medical care, strip-searched, and shackled and/or restrained by border officials. There are also widespread reports of verbal and physical abuse of children by immigration officials.


27 Levinson, supra note 15.
28 Id.
29 The “best interests” of the child is a fundamental principle in child welfare law and has become enshrined in international law. The actual best interests of a child must be determined case by case, but the United Nations Committee on the Rights of the Child has identified certain factors to consider in making the determination. They include: the views of the child, cultural factors, preserving the family relationship, the child’s care, protection, and safety, the right to health, and the child’s situation of vulnerability. UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the Rights of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para 1), CRC/C/GC/14, ¶¶ 46-79, http://www.refworld.org/docid/51a84b5e4.html; see also Bridgette A. Carr, Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure, 12 Yale Hum. RTS. & Dev. L.J. 120 (2009).
31 J. Podkul, Detention & Treatment of Unaccompanied Migrant Children at the U.S.-Mexico Border, Women’s Refugee Commission, Childhood, Migration, & Human Rights (February 2015).
32 See Kate M. Manuel, Cong. Research Serv., Aliens’ Right to Counsel in Removal Proceedings: In Brief (2016) (noting that the government has maintained that section 292 of the Immigration and Naturalization Service prohibits it from providing government-appointed legal counsel).
**Immigration Detention of Children and Other Coercive Practices**

Another practice that violates international norms and practices is the detention of children, with or without their families, solely for reasons relating to their or their parents’ migration status.\(^{35}\) At least 80 countries deprive children of liberty for migration purposes, in violation of international norms, as UN Independent Expert Manfred Nowak found in his 2019 *Global Study on Deprivation of Liberty of Children*. At least 330,000 children worldwide are deprived of liberty each year for reasons related to migration.\(^{36}\)

Although an increasing number of countries have forbidden in law or practice the detention of children for migration control, there is a disturbing trend in the opposite direction, as a growing number of countries use detention and other security-based approaches to undermine access to international protections, to improperly restrict or remove due process protections for the stated or implicit purpose of deterring irregular migration by others, and seemingly to punish children and adults who migrate irregularly. The use of security-based approaches is deeply troubling in many respects, not least because of the way that these measures affect—and in some instances target—children.

Among the most egregious examples, Australia forcibly transferred hundreds of families with children to the island nation of Nauru beginning in late 2012, where they were detained in abusive conditions. Recognized refugees and, after October 2015, most asylum seekers were allowed greater freedom of movement on the island, but forcible transfer, prolonged detention, and profound uncertainty about the future took a tremendous toll on their mental well-being.\(^{37}\) A 2016 study of children who had been held on Nauru described them as “amongst the most traumatised children the paediatricians have ever seen.”\(^{38}\) Legislation providing for mandatory detention, including of children, remains in force in Australia, and its policy of using regional processing countries has not been formally revoked.\(^{39}\)


\(^{36}\) MANFRED NOWAK, THE UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY 455, 465 (2019). The independent expert cautions that that number “is likely to be a significant under-estimation of the true figure, due to limitations regarding the quality, consistency and coverage of information around the world.” Id. at 465.


\(^{39}\) Comm. on the Rights of the Child, Concluding Observations: Australia, ¶¶ 44(b), (c).
Recently, United States federal officials confirmed their use of family detention to serve the government’s goal of deterring other families from immigrating to the United States.\(^40\) The practice of detaining children and families without making individualized findings that they pose a flight risk or danger to the community and without affording them an opportunity for independent judicial review is patently at odds with international and federal law.\(^41\) Such arbitrary detention is not only illegal on its own, but when it is imposed on an asylum seeker who is forcibly separated from their child, it also amounts to torture under United States and International law absent a finding that the parent is unfit.\(^42\)

Under the United States’ policy of deliberate family separation for the stated purpose of deterring future irregular migration, authorities separated more than 2,700 children from their parents between April and June 2018, only acknowledging that figure when compelled to do so in litigation.\(^43\) That number did not include separations beginning as early as late 2017, when the policy was piloted, nor does it include forced family separations since then.\(^44\) Although President Donald Trump issued an executive order on June 20, 2018, that he said ended his administration’s forcible family separation policy,\(^45\) children continued to be separated from parents well after that date\(^46\) and are still routinely separated from relatives other than parents.\(^47\)

Between January 2019 and March 2020, US immigration authorities sent most people who enter the United States by land from Mexico to Mexican border towns while their asylum cases are pending in US immigration courts, a process that can take a year or more.\(^48\) Mexican nationals

\(^{40}\) American Bar Ass’n, A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings (June 2015).
were not subject to the policy, known as “Remain in Mexico,” but were subject to “metering,”
the practice of allowing a limited number of asylum seekers to enter at border posts each day. The
practice of allowing a limited number of asylum seekers to enter at border posts each day.

Unaccompanied children were not in principle subject to the “Remain in Mexico” and
“metering” policies, but US immigration authorities at times denied entry to unaccompanied
children at border crossings. Meanwhile, Croatia has engaged in summary collective expulsions and pushbacks to Serbia and
Bosnia and Herzegovina, with border officials pummeling children and adults, kicking them, and
making them run gauntlets. Greece suspended access to asylum for irregular arrivals for one month beginning on March 1, 2020, several days after Turkey announced that it no longer will stop asylum seekers and
migrants from leaving Turkish territory to reach the European Union. People interdicted by the
Greek Coast Guard after that date were held on a ship docked at a Lesbos harbor, which held 451
people on March 10, including many children. And in February 2020, the European Union
agreed that warships enforcing the UN-mandated Libyan arms embargo would avoid areas of the
Mediterranean where they might have to respond to boats in distress carrying people in
migration.

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


In Mexico, for instance, where between 18,000 and 53,500 children have been held in immigration detention in each of the last five years (2015-2019), immigration officials have claimed that no children are apprehended and detained because the applicable legal provisions speak of children’s “rescue” and “lodging” in “migration stations.” While the General Law on the Rights of Children and Adolescents (2014) prohibits any deprivation of liberty for immigration purposes, “protection” grounds or lack of shelters or other alternative measures are mentioned for explaining the reason for detaining thousands of migrant and asylum seeking children and families every year.

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

Also in March 2020, the United States began summary deportations, with no due process, of those who enter irregularly, including unaccompanied children, purportedly as a disease control measure. Public health experts have described the order as premised on a “specious public health rationale,” and was “being used to target certain classes of noncitizens rather than to protect public health.” Between March 20 and the end of July 2020, US immigration authorities

conducted nearly 110,000 such summary expulsions, including several thousand unaccompanied children.\textsuperscript{60}  

Appropriate responses to the Covid-19 pandemic can include proportionate and necessary limitations for the protection of public health on freedom of assembly and other rights, but all too predictably, some states have weaponized public health justifications to enact repressive agendas.\textsuperscript{62}  Appeals to xenophobia and other animus commonly accompany these measures, reflecting a longstanding "association of immigrants with disease."	extsuperscript{63}  Moreover, some of the most far-reaching measures risk undermining sound public health policies.\textsuperscript{64}

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

The potential impact of the trauma that can be caused by these experiences on children is profound. For example, any period of detention may contribute to or exacerbate a number of pre-existing vulnerabilities often experienced by children in the context of immigration including previous violence or trauma experienced in their country of origin or during migration, disruption of the family unit and parental roles, and lack of basic needs being met.\textsuperscript{65} The longer the period of detention, the more likely it is to damage parents’ ability to provide emotional and physical support to their children, thereby causing children to take on age-inappropriate roles and emotional burdens.\textsuperscript{66}

For children who are forcibly separated from their parents, the traumatic effects are profound and lasting. Children who are separated abruptly from their parents experience a massive biological stress response. This includes elevated heart rate, activation of stress hormones, increased blood pressure, and mobilized inflammatory responses. These reactions are related to the fight-or-flight

\textsuperscript{63} Howard Merkel and Alexandra Minna Stern, \textit{The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society}, 80 MILBANK Q. 758 (2002).  
response, which is protective in an acute situation, but can have serious negative impacts if not resolved.\textsuperscript{67}

A wide range of adverse childhood experiences (ACEs) have been shown to affect multiple biological systems with lifelong consequences.\textsuperscript{68} Persistent inflammation can lead to greater likelihood of heart disease, obesity, diabetes, later dementia, and other chronic impairments later in life.\textsuperscript{69} Persistent elevation of stress hormones disrupts developing brain architecture that affects memory, attention, and behavior regulation, leading to problems in learning and long-term emotional well-being.\textsuperscript{70} Brain circuits especially susceptible to stress during early childhood are involved in detecting and responding to threats as well as later regulation of the stress response. Brain regions affected by adversity during the pre-pubertal and teenage years are involved in emotional regulation, impulse control, and other executive functions. These kinds of disruptions in brain development have lifelong impacts on the ability to respond to and recover from stress, and often lead to a host of stress-related diseases in adulthood.\textsuperscript{71}

Moreover, extensive neurobiological research demonstrates that significant trauma can disrupt the architecture and function of the developing brain as well as other biological systems (for example, immune, metabolic, and cardiovascular) beginning in infancy and extending through adolescence.\textsuperscript{72} While research on the neurobiology of detention affecting arriving children explicitly is limited, there is extensive evidence that circumstances that trigger persistent fear and anxiety can produce “toxic stress” responses with negative impacts on child development and learning.\textsuperscript{73}

In the migration context, it is important to underscore both the mitigating effects of responsive caregiving for children facing adversity and the “psychological unavailability” of a physically present parent or other familiar caregiver whose ability to provide nurturing care is severely compromised by her own traumatized condition. Stated simply, the psychological trauma of detention, family separation, or other disruption to care and protection affects both adults and


\textsuperscript{69} Id.


\textsuperscript{72} Michael D. De Bellis & Abigail Zisk, \textit{The Biological Effects of Childhood Trauma}, 23 CHILD & ADOLESCENT PSYCH. CLINICS OF NORTH AMERICA 185 (2014).

children—and a depressed or highly anxious caregiver may be too impaired to protect the child from a toxic stress response.74

It is critical to understand that migration practices can have long-term effects not only on children’s physical health, but also on their mental health. Consider the anecdotal evidence that adverse age assessments and, more generally, the routine use of age assessments have an adverse impact on mental health. For instance, a psychologist working in Paris with Médecins sans Frontières (Doctors without Borders) commented that the experience of receiving a negative age assessment deeply affected the migrant children she saw: “They associate the denial of recognition of their age with what they said [about their lives], as if what they told the official about their experiences was false. It’s seen as a denigration or as an erasure.”75

IV. Guiding Principles and Overview of the Rights of Children in Migration

As with all actions concerning children, state practices with respect to children in migration should be guided by the overarching principles of non-discrimination; the best interests of the child; the right to life, survival, and development; and the right of the child to express their views on all matters affecting them.76

To give effect to the principle of non-discrimination, states should “conduct a robust gender analysis of the specific impacts of migration policies and programmes on children of all genders”77 and should “put special emphasis on the policies and related regulations about the prevention of discriminatory practices towards migrant and refugee children with disabilities,”78 among other measures.

Children’s right to have their best interests taken as “a primary consideration”79 in all actions that concern them “means that the child’s interests have high priority and are not just one of several considerations.”80 In the context of migration-related procedures, implementation of the best-interests principle means that states should “conduct systematically best-interests assessments

76 Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), ¶ 19.
77 Id. ¶ 24.
78 Id. ¶ 25.
79 Convention on the Rights of the Child art. 3(1).
80 Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), ¶ 28; Comm. on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration, ¶ 39, U.N. Doc. CRC/C/GC/14 (2013).
and determination procedures as part of, or to inform, migration-related and other decisions that affect migrant children. In particular, decisions to return a child to their country of origin or last residence should include “a robust individual assessment and determination of the best-interests of the child,” among other due process safeguards, and “should ensure, inter alia, that the child, upon return, will be safe and provided with proper care and enjoyment of rights.” In combination, the best interests principle and the principle of non-refoulement mean that “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child.”

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

Children have the right to seek and receive asylum, including for child-specific forms of persecution, and the right to due process and access to justice in any migration procedures. These procedures should result in sustainable and durable solutions and should respect the child’s right to family life.

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

81 Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), ¶ 31.
82 Id. ¶ 33.
84 Id. ¶ 41.
85 Id. ¶ 44.
86 Id. ¶ 46.
87 Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), ¶ 14.
88 Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), ¶ 32.
89 Id. ¶ 14; Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), ¶¶ 15-17, 19.
90 Joint General Comment No. 3 (Comm. on Migrant Workers) and No. 22 (Comm. on the Rights of the Child), ¶ 32(j) & n.9.
91 Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child), ¶¶ 28-34.
V. Overview of Cross-Border Enforcement Mechanisms and Remedies for Violations of the Rights of Children in Migration

International and regional human rights treaties provide for oversight of compliance with treaty obligations and in some instances offer opportunities for the adjudication of individual claims for violations of these obligations. Regional and sub-regional tribunals in Africa, the Americas, and Europe and Central Asia also adjudicate individual claims and may order interim or precautionary measures, award monetary damages, and in some cases make other orders to remedy human rights violations. In addition, the International Criminal Court prosecutes the most serious crimes under international law and has twice issued convictions for the war crime of enlisting and conscripting children under age 15.92

Other international and regional accountability mechanisms include the UN Universal Periodic Review process, country visits and thematic reports by UN special rapporteurs, working groups and other independent experts, and similar reporting by regional experts such as the African Union rapporteur on refugees, asylum seekers, migrants, and internally displaced persons, the European Commissioner for Human Rights, the Organization of American States (OAS) rapporteur on the rights of children, and the OAS rapporteur on the rights of migrants.

Beyond these traditional human rights mechanisms, the 1996 Hague Child Protection Convention covers a wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children’s property. The convention excludes from its scope of decisions on asylum and other immigration statuses but does cover the “protection and representation of children who are applying for asylum or for a residence permit.”93 All EU Member States along with Albania, Armenia, Russia, Ukraine, Serbia, Montenegro, North Macedonia, and Switzerland are party to the convention. States parties in Latin America and the Caribbean include Barbados, Cuba, Ecuador, Dominican Republic, Guyana, Honduras, Nicaragua, Paraguay, and Uruguay. However, many States of origin, transit or destination of children in migration are not yet bound by the convention. Our Study Group may consider recommending the global ratification of this convention as an integral part of an effective global framework for the protection of children under civil law.

In addition, national courts are an important avenue for the vindication of the rights of migrant children.94 To cite only two recent examples, the South African courts have upheld the right to

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education for undocumented children and courts in the United States have upheld the right to family integrity in the migration context.

VI. Conclusion

At the conclusion of the first six months of the ILA Study Group on Cross-Border Violations of the Rights of Children in Migration, Enforcement Mechanisms, and Legal Remedies, we have recruited a core group of experts committed to identifying what resources are available to children in migration when their rights have been violated and determining how those resources can be improved and expanded. We have identified guiding principles and recognized common challenges children commonly face during the migration experience. We have also begun to identify and analyze the institutions, fora, and processes available to children on the move when they need to enforce their rights or seek remedies for human rights violations.

During the coming six months, we will continue with our work identifying gaps and shortcomings in the system and asking ourselves and others in the field how to adapt such systems and resources, or possibly create new ones, so that they are more centered around the child, recognizing the unique challenges and limitations children face, especially during the migration process that is so common in human history and experience.

We expect to submit a full report to the ILA Executive Committee in 2021 (the core of which is highlighted in this mid-term report) along with a recommendation that this work be continued under an ILA committee structure, with the goal of further developing the report into a book, as well as an online toolbox that children and advocates can use to help navigate a journey that is often more challenging and disorienting than the child’s original migration itself.

The larger ILA community’s input into and support of our study is welcome and appreciated.
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