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## Developing the Substantive Best Interests of Child Migrants: A Call for Action

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# Symposium: Children and Immigration: A Lost Generation?

## DEVELOPING THE SUBSTANTIVE BEST INTERESTS OF CHILD MIGRANTS: A CALL FOR ACTION

Andrew I. Schoenholtz\*

This Article attempts to accomplish two goals. First, it provides an overview of what is known and unknown about international child migrants. While this Conference will focus to some degree on child migrants in the United States, this Article shows how significant this phenomenon is around the world. Therefore, this Article provides data and points out the research gaps surrounding this issue.

Equally significant is the lack of legal and policy tools available for governments to respond well and in accordance with the Convention on the Rights of the Child (“CRC”) to the children themselves. First, informed by social science research, this Article briefly sets out the grounds for treating children as unique. This will lay the foundation for policy makers to think about child migrants as children first and above all. Second, this Article then looks at norms and practices that recognize the uniqueness of children and child migrants in particular. Finally, this Article suggests examples of how we—scholars, practitioners, policy makers, and adjudicators—might begin to develop better tools to address what sets child migrants apart.

### I. BRIEF OVERVIEW OF INTERNATIONAL CHILD MIGRATION

First, this Article takes a close look at what is a complex phenomenon. All who work with and study child migrants will be better able to respond to them if we know more about which children migrate, how many, from where, to where, the degree of South to South and South to North movement, and other demographic information about them. The data reported herein is the best currently available. It

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is, however, limited and imperfect because governments vary considerably in their interest and capacity to collect this information. In addition, the data that does exist often is not disaggregated to provide a portrait of many particular child migrant situations.<sup>1</sup>

The United Nations estimates that there are thirty-three million international migrants under twenty years old (while the CRC concerns those under the age of eighteen, the data is presented differently).<sup>2</sup> That is about fifteen percent of the total international migrant population, even though that age group constitutes about thirty-six percent of the world's population.<sup>3</sup> Children have a lower propensity to migrate than adults.<sup>4</sup> That said, thirty-three million is a substantial number if thought of in terms of the population size of countries—it is greater than the size of some 160 countries around the globe. In addition, this aggregate number does not include the children of international migrants who are born in destination countries and share the immigration experience with their families.

Developing countries host a higher proportion of these thirty-three million: twenty million or sixty percent in developing countries and thirteen million or forty percent in developed (nineteen or younger).<sup>5</sup> Moreover, child migrants constitute a greater percentage of all migrants in the developing world than in the developed world. This is particularly so in certain regions, such as Africa, and even more so within sub-regions, such as West and Central Africa.<sup>6</sup> With respect to regions, the largest group of child migrants is in Asia (thirteen million).<sup>7</sup>

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<sup>1</sup> See EUROPEAN MIGRATION NETWORK, POLICIES ON RECEPTION, RETURN AND INTEGRATION ARRANGEMENTS FOR, AND NUMBERS OF, UNACCOMPANIED MINORS—AN EU COMPARATIVE STUDY 8 (2010), available at <http://emn.intrasoft-intl.com/Downloads/download.do?sessionId=723E64478610A93807B65977FBCE280A?fileID=1229> [hereinafter EMN STUDY] (explaining that “the availability of comprehensive data” on child migrants, at both national and comparative levels, has been “[a] recurring difficulty” and is often limited to “those unaccompanied minors who lodge an application for asylum.”) (emphasis omitted).

<sup>2</sup> U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIVISION, POPULATION FACTS 2, No. 2010/6 (Nov. 2010), available at [http://www.un.org/esa/population/publications/popfacts/popfacts\\_2010-6.pdf](http://www.un.org/esa/population/publications/popfacts/popfacts_2010-6.pdf) [hereinafter POPULATION FACTS].

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* at 1 (“In 2010, 72% of all international migrants [were] aged 20 to 64.”).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> See RHEA SAAB ET AL., CHILDREN, ADOLESCENTS AND MIGRATION: PARTNERING TO DEVELOP EVIDENCE AND BUILD DIALOGUE (2010), available at [http://www.unicef.org/socialpolicy/index\\_54014.html](http://www.unicef.org/socialpolicy/index_54014.html) (“The percentage of migrants under the age of [twenty] in developing countries is [eighteen] per cent. In contrast, the percentage in developed countries is [eleven] per cent. Migrants under the age of [twenty] constitute the largest group in Africa (24%), followed by the Caribbean, Central and South America (18%), and Asia (16%).”).

<sup>7</sup> POPULATION FACTS, *supra* note 2, at 4.

The oldest children make up the largest single group of child migrants overall and a much larger group in the developed world. The youngest children are more than twice as concentrated in the developing world.<sup>8</sup> Boys migrate to other developing countries in greater numbers than girls. In contrast, boys and girls migrate at similar levels to developed countries.<sup>9</sup>

The United Nations High Commissioner for Refugees (“UNHCR”) also collects and analyzes statistics regarding children of concern. UNHCR reports that about forty-four percent of the 10.5 million refugees of concern to UNHCR are under the age of eighteen, and girls constitute forty-nine percent of that group. Three-quarters of the entire refugee population reside in countries neighboring their own, so it comes as no surprise that developing countries host four-fifths of these refugees.

In 2010, 850,000 people filed asylum applications with either UNHCR offices or governments. Children constituted thirty-one percent of these asylum seekers. Unaccompanied and separated children (“UASC”) reportedly filed more than 15,500 asylum applications in sixty-nine countries, but that number may not be terribly accurate. Most UASC applicants came from Afghanistan and Somalia, and about two-thirds were boys. Of course, this number of unaccompanied and separated children does not include all those who did not come to the government’s attention. While observing that reliable data is not available on the number of stateless children around the globe, UNHCR reports that there are an estimated twelve million. UNHCR goes on to say that fifty-five percent of the stateless are children.<sup>10</sup>

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<sup>8</sup> SAAB ET AL., *supra* note 6. United Nations Children’s Fund (“UNICEF”) reported that: Among the migrants under [twenty] years of age, the group of [fifteen] to [nineteen] years is by far the largest group, accounting for some [thirty-three] per cent of all young migrants. The age group [ten] to [fourteen] represents around [twenty-seven] per cent of the total migrant population under [twenty] years of age, followed by the age groups [five] to [nine] (23%) and 0 to 4 (17%).

*Id.* The oldest group (fifteen to nineteen) constitutes forty percent of all international child migrants in the developed world, in contrast to twenty-eight percent in the developing world; the youngest group (four and under) make up only eleven percent of all international child migrants in the developed world, in contrast to twenty-three percent in the developing world. *Id.*

<sup>9</sup> See UNICEF, CHILDREN, ADOLESCENTS, AND MIGRATION: FILLING THE EVIDENCE GAP 3 (June 2010), available at [http://www.unicef.org/socialpolicy/files/UNICEF\\_Data\\_on\\_migrant\\_children\\_and\\_adolescents\\_Handout\\_version\\_Update\\_June\\_2010.pdf](http://www.unicef.org/socialpolicy/files/UNICEF_Data_on_migrant_children_and_adolescents_Handout_version_Update_June_2010.pdf) (reporting that for migrants under the age of twenty, there are 100 male migrants for every eighty female migrants in developing countries, versus ninety-eight males for every 100 females in developed countries).

<sup>10</sup> UNHCR, GLOBAL TRENDS 2010 28, 35 (2011), available at <http://www.unhcr.org/4dfa11499.html>.

There do not appear to be reliable statistics on the number of trafficked children who cross international borders. The major problems involve the importance for trafficking rings to hide the phenomenon, the difficulty for victims of identifying themselves to authorities, and the lack of government commitment to data collection.<sup>11</sup>

Most governments have inadequate data regarding the children of unauthorized or irregular adults. Researchers at Oxford University's Centre on Migration Policy and Society ("COMPAS") have recently initiated analyses of United Kingdom data. Dr. Jeffrey Passel, the leading demographer on this issue, has long reported on the number of unauthorized children in the United States. In the most recent publication that he and colleagues produced at the Pew Hispanic Center, Dr. Passel reports that about one million unauthorized child migrants live with at least one unauthorized immigrant parent.<sup>12</sup> The report also estimates that 4.5 million children born in the United States and thus citizens here also live with at least one unauthorized immigrant parent.<sup>13</sup> Almost half of all unauthorized adults are parents of children under age eighteen. At least nine million people are in mixed-status families, which include at least one unauthorized adult and at least one child born in the United States.<sup>14</sup>

Demographers and other researchers focusing on this population in other parts of the world might benefit from working with Dr. Passel and his colleagues in determining whether worthwhile methodologies can be created to estimate this population of concern and track relevant trends. Equally worthwhile would be the creation of a panel of experts to develop data standards and collection systems around the globe.

## II. WHY DO CHILDREN CROSS BORDERS?

International migrants, including children, often cross borders for more than one reason. In discussing independent child migrants, Professor Bhabha, one of the leading authorities in this area, has provided us with four major types of causes: opportunities, physical survival, family reunification, and exploitation.<sup>15</sup> These types cover both

<sup>11</sup> See INTERNATIONAL ORGANIZATION FOR MIGRATION, IOM GLOBAL HUMAN TRAFFICKING DATABASE, [http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ct/iom\\_ctm\\_database.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ct/iom_ctm_database.pdf) (last visited May 20, 2012).

<sup>12</sup> Paul Taylor et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW HISPANIC CNTR. (Dec. 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/?src=prc-headline>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Jacqueline Bhabha, *Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework 2* (UNICEF Innocenti Research Centre, Discussion Paper

independent child migrants who cross borders separately from their parents, as well as those who migrate internationally with their families.

Economic opportunities may motivate children in a variety of circumstances. Children migrate to help address family livelihood problems and to pay back or support parents. Many come from societies where the cultural norm about labor starts and compulsory education ends at an earlier age (e.g., thirteen) than in the developed world. Such factors may combine with the labor market reality that it is easier to work for wages abroad than in their country of origin. Some parents send their children abroad as a matter of economic relief from the financial burden of raising a child and the opportunity for the child to send home remittances.<sup>16</sup> However, children also migrate for a plethora of other reasons. Some children migrate for better educational opportunities. With respect to physical survival, many children cross borders to seek a haven from conflict, persecution, violence, or abuse. Others migrate internationally to join or accompany one or two parents or other close relatives. Finally, children are exploited by traffickers, and for some, that includes cross-border movements.

Researchers who study why children migrate have identified agency as a major issue. They argue strongly that to understand this complex phenomenon all of those involved with child migrants should approach these children as beings who are to different degrees knowing, understanding, judging, and deciding. Some children, for example those classified as trafficking victims, see themselves as adults who value work over education, balk over curfews and chores in their foster homes, and identify as labor migrants.<sup>17</sup> Many children do not equate labor migration with victimhood where families, not large criminal networks, are involved.<sup>18</sup> Some of these children migrate to help their families survive during times of family crises, such as illness that prevents adults from earning a livelihood.<sup>19</sup> Dr. Elzbieta Gozdziaik learned this by interviewing trafficked children.<sup>20</sup> We need considerably more research that enables the voice of the child to be heard so that: (1) practitioners, advocates, policy makers and adjudicators better understand why

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IDP No. 2008-02, 2008), available at [http://www.unicef-irc.org/publications/pdf/idp\\_2008\\_02.pdf](http://www.unicef-irc.org/publications/pdf/idp_2008_02.pdf).

<sup>16</sup> ELZBIETA GOZDZIAIK, *In the Best Interest of the Child: Perceptions, Responses, and Challenges in Providing Assistance to Trafficked Children in the United States*, in CHILDREN AND MIGRATION: AT THE CROSSROADS OF RESILIENCY AND VULNERABILITY 166 (Marisa O. Ensor & Elzbieta Gozdziaik eds., 2010).

<sup>17</sup> *Id.* at 170.

<sup>18</sup> *Id.* at 175.

<sup>19</sup> *Id.* at 171.

<sup>20</sup> *Id.* at 166.

children cross borders and what their best interests are; and (2) so that governments can develop the best responses to their situations.

It would also be worthwhile to understand the connections between international child migration and certain cultural practices of internal migration that affect children in some societies. Child fosterage, for example, is particularly common in Africa. Researchers, such as Uche C. Isiugo-Abanihe, found a high incidence of the phenomenon in Ghana, Sierra Leone, Liberia, and Nigeria and learned that:

[Child fostering] could have some impact, directly or indirectly, on the fertility decisions of both natural and foster parents, mainly because it serves to reallocate the resources available for raising children within the society. Furthermore, child fostering could enhance female labor force participation by freeing mothers' time for work outside the home. It could also affect the entry of children into the labor force as well as family composition and household size.<sup>21</sup>

Child circulation occurs especially in Latin America and involves informal arrangements in which children are sent by their parents to live in other households. Jessaca Linaweaver's research on child circulation among indigenous Andean children in Peru shows this to be a pragmatic practice for impoverished Peruvians who cannot care for their children or who have a childless elder who wants company or whose children can gain skills in this manner. Linaweaver argues that the Peruvian government does not understand this practice, considers it abandonment, and misinterprets it in the context of legal adoptions.<sup>22</sup>

This research on internal migration informs us that international child migration is not such an unusual phenomenon. At the same time, this research considers whether these cultural practices place children in vulnerable situations. Finally, as research on both internal and international child migration develops, connections between the two may help us better understand why and how children move within and outside their societies.

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<sup>21</sup> Uche C. Isiugo-Abanihe, *Prevalence and Determinants of Child Fosterage in West Africa: Relevance to Demography* (University of Pennsylvania, African Demography Working Paper Series, Paper No. 12, 1984), available at, [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1011&context=psc\\_african\\_demography](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1011&context=psc_african_demography).

<sup>22</sup> See generally JESSACA B. LEINAWEAVER, *THE CIRCULATION OF CHILDREN: KINSHIP, ADOPTION AND MORALITY IN ANDEAN PERU* (Duke University Press 2008).



### III. WHAT DO WE KNOW ABOUT HOW CHILD MIGRANTS FARE IN HOST COUNTRIES?

Children find themselves in very different circumstances in terms of their legal status in host countries. Some arrive and reside lawfully, while others do not. Some are born to parents in the new land where they may or may not be considered citizens of that country. In fact, some of those may be stateless.

In the last decade, researchers and governments have learned more about some of these child migrants. There is now greater attention being paid to unaccompanied and separated children, but according to the Vera Institute of Justice, there is still a “lack of systematic research on the migration of unaccompanied children” in the United States.<sup>23</sup> Over the last decade or so, researchers have focused somewhat more on survivors of trafficking. Still, identifying these child migrants has proven to be particularly difficult. We know least about the children who accompany or join their parents and have no legal immigration or residence status. Here is how the Platform for International Cooperation on Undocumented Migrants (“PICUM”) describes what is known about how many children live without official permission in Europe:

Virtually no statistics exist for these minors in Europe, and official data and even estimates in this regard are only approximate. While it is estimated that there may be from 5.5 to [eight] million undocumented migrants in Europe, there are no reliable figures and not even estimates of the number of undocumented children in Europe.<sup>24</sup>

Professor Bhabha warns us that this group of migrant children may be the most vulnerable today in that they have very limited access to basic social services, such as education, health care, and child protection systems.<sup>25</sup>

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<sup>23</sup> OLGA BYRNE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW iii (Vera Institute of Justice, 2008), available at <http://www.vera.org/download?file=1775/UAC%2Bliterature%2Breview%2BFINAL.pdf>.

<sup>24</sup> PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS, UNDOCUMENTED CHILDREN IN EUROPE: INVISIBLE VICTIMS OF IMMIGRATION RESTRICTIONS 7 (2008) (footnote omitted), available at [http://picum.org/picum.org/uploads/file\\_/Undocumented\\_Children\\_in\\_Europe\\_EN.pdf](http://picum.org/picum.org/uploads/file_/Undocumented_Children_in_Europe_EN.pdf).

<sup>25</sup> Jacqueline Bhabha, *Informal Summary of Discussions at the OHCHR Consultation on “Protecting the Rights of the Child in the Context of Migration”* 7 (May 25, 2010), <http://www2.ohchr.org/english/issues/migration/consultation/index.htm>.



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Treatment of unauthorized children differs considerably among governments. Argentina, a southern destination country, passed a 2004 law that recognizes the right to education and health care for unauthorized migrant children. Uruguay adopted a similar law in 2008. The evidence to date, however, supports Professor Bhabha's concern. According to United Nation's Development Programme's ("UNDP's") 2009 Human Development Report, one-third of developed countries sampled, including Singapore and Sweden, did not allow access to education for children with irregular status and one-half of developing countries sampled, including India and Egypt, did not permit such access.<sup>26</sup>

Establishing a legal identity has presented particular difficulties for children. Many are born in countries where they do not qualify for citizenship. Irregular migrants face difficulties in obtaining birth registration for their children. Children without identification documents have generally been excluded from formal schooling. The lack of access to education presents additional stresses for children in addition to the already significant stress of migration to a new and very different culture. Reports indicate that "migrant children who do not connect in some meaningful way with peers, family or school are at an increased risk of suicide, substance abuse, school failure, drop-out, health problems and criminal activity."<sup>27</sup>

Researchers at the Institute for the Study of International Migration at Georgetown are conducting a comparative study with colleagues at COMPAS to deepen our understanding with regards to these unauthorized children in the United States and the United Kingdom. The research focuses on the experiences and everyday lives of undocumented children in these countries to explore services and resources available to them in relation to health, education, and employment and to cast light on the challenges facing the communities in which they reside. The study examines the ways in which, in the experiences of undocumented children, the lack of legal status intersects with race, ethnicity, gender, religion, poverty, housing, and residential segregation, as well as the challenges faced by service providers in relation to this group of children.

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<sup>26</sup> Victor Abramovich, et al., *The Rights of Children, Youth and Women in the Context of Migration* 37 (UNICEF Social and Economic Policy Working Paper, 2011), available at [http://www.unicef.org/socialpolicy/index\\_58377.html](http://www.unicef.org/socialpolicy/index_58377.html).

<sup>27</sup> GLOBAL MIGRATION GRP., INTERNATIONAL MIGRATION AND HUMAN RIGHTS 52 (2008), available at [http://www.globalmigrationgroup.org/uploads/documents/Int\\_Migration\\_Human\\_Rights.pdf](http://www.globalmigrationgroup.org/uploads/documents/Int_Migration_Human_Rights.pdf).

Still, we have a long way to go in order to understand the phenomenon of child migration globally. Most child migrants are in the developing world, where governments have fewer resources to gather basic information. More research efforts are needed to learn how child migrants are faring in the South. In short, while researchers have begun to make headway with regards to better understanding child migrants, there is a great deal more to do by social scientists and law researchers to provide all the stakeholders in this field with the information needed to develop the most appropriate laws, policies, and programs for child migrants.

#### IV. WHAT MAKES CHILDREN UNIQUE?

Why should we pay special attention to children who cross international borders? The main reason concerns the ways in which they are distinct as human beings. They are developing beings, both cognitively and biologically, in contrast with adults. All children share common developmental milestones, such as learning to think abstractly, understanding others' perspectives, and undergoing puberty. Cognitive development includes the capacity to be self-reflective, to think in and use language in more advanced ways, to make decisions, and to develop a sense of identity.

As the historian, Paula Fass, reminds us:

Childhood is at once a universal experience, and one of the most culturally specific. Every society must have and raise children to survive, and each seeks to protect them in some fashion. Each culture defines and divides childhood as a stage of development differently, while devising unique means to express its views of what children are like....<sup>28</sup>

Psychologists have long studied how, why, and when children develop. Piaget argued that "children's development takes place as a series of discrete stages, each associated with an approximate age range: sensory motor (birth to 18 months), pre-operational (18 months to 7 years), concrete operational (7 to 11 years), and formal thinking (11 years and older)."<sup>29</sup> Most of the research on which conventional theories are

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<sup>28</sup> Paula Fass, *Children and Globalization*, 36 J. SOC. HIST. 963, 964 (2003).

<sup>29</sup> *Id.*

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based originates in European and North American contexts and reflects presumptions about childhood in those societies.<sup>30</sup>

There is much debate around particular stages of development, of course. But there is general agreement that children are evolving beings. Islamic law, for example, recognizes three stages of childhood, particularly relating to the use of discretion as well as puberty.<sup>31</sup>

Developmental studies draw upon biology, neuroscience, linguistics, psychology, sociology, and anthropology, among other areas, to explain the processes by which humans develop from infancy. Today perhaps the prevailing theory is rooted in the understanding that biology, environment, and cultural context interact to shape a child's development. We know "that children do not acquire competencies merely as a consequence of age, but rather through experience, culture and levels of parental support and expectation. . . ."<sup>32</sup> The expectations placed on children differ according to the economic, social, and cultural environment in which they are living.<sup>33</sup> Multiple forces interact with a child's individual attributes to shape her physical, cognitive, social, emotional, and moral maturation.

V. HOW IS THIS UNIQUE NATURE OF THE CHILD AS A DEVELOPING BEING REFLECTED IN THE NORMS ESTABLISHED BY THE INTERNATIONAL COMMUNITY?

The CRC is built on this understanding of the child's development. Article 5 conceives of this as the "evolving capacities of the child," focusing on children's developing competencies as well as their attendant abilities to make informed choices and take responsibility for decisions affecting their lives.<sup>34</sup> In keeping with their capacity, children's

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<sup>30</sup> GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD* 9 (UNICEF, Innocenti Research Centre 2009), available at <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

<sup>31</sup> See Daniel O'Donnell, *The Right of Children to Be Heard: Children's Right to Have Their Views Taken into Account and to Participate in Legal and Administrative Proceedings* 34 (UNICEF, Innocenti Research Centre, Working Paper No. IWP-2009-04, 2009) ("Islamic law recognizes three stages of childhood. As in canon law, it views children under the age of seven as lacking discretion; the age of discretion begins at seven years of age and ends at puberty; and the third stage begins at puberty and ends at full adulthood.") (citation omitted).

<sup>32</sup> LANSDOWN, *supra* note 30, at x.

<sup>33</sup> See *id.* at 12 ("Increasingly, developmental psychologists are applying a theoretical framework in which child development is understood as a cultural process and childhood is understood as a product of specific economic, social and cultural processes.") (citation omitted).

<sup>34</sup> United Nations Convention on the Rights of the Child, G.A. Res. 44/25, art. 5, U.N. Doc. A/RES/44/25 (Nov. 20, 1990) [hereinafter CRC].

participation in decisions that affect them is both a right and a building block in developing a sense of efficacy and self-worth. This concept is couched in the caregiver's obligation to respect the child's evolving capacities. In other words, the more the child knows, experiences and understands, the more parents, legal guardians or other persons legally responsible for the child must limit their directions and guidance. "[A]s the child develops, her or his level of dependence recedes in direct proportion with the inverse growth of their level of autonomy."<sup>35</sup> The CRC incorporates notions of both dependence and agency.<sup>36</sup>

Article 6, regarding the child's inherent right to life, obliges governments to "ensure to the maximum extent possible the survival and development of the child."<sup>37</sup> The UN Committee on the Rights of the Child—the body of experts established by the CRC to monitor state compliance—expects States Parties to interpret "'development' in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development."<sup>38</sup>

The most well known and important international and domestic legal concept governing the rights of the child—the best interests of the child—recognizes this evolving being concept by ensuring that the voice of the child is heard, the child as a thoughtful and emotional being is understood, and particular developmental and survival needs are addressed. The CRC requires governments to apply the best interests of the child in a manner that honors this unique evolving nature.

#### VI. HOW DOES THIS UNIQUE NATURE OF THE CHILD AND THE NORMS DEVELOPED AROUND THAT UNDERSTANDING APPLY TO THE SITUATION OF CHILD MIGRANTS?

Adopted by the UN General Assembly in 1989 and swiftly entered into force in 1990, the CRC itself explicitly applies to child migrants. Article 2 obliges governments to respect the rights of children without

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<sup>35</sup> See Jean Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation* 5 (Institut International des Droits de L'enfant, Working Report, 2010), available at [http://www.childsrights.org/html/documents/wr/wr\\_best\\_interest\\_child09.pdf](http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf).

<sup>36</sup> See CRC, *supra* note 34. According to the current chair of the UN Committee on the Rights of the Child, Jean Zermatten, the CRC recognizes the child as a developing being in need of different degrees and levels of guidance, protection, and participation at different stages of her life. Zermatten, *supra* note 35, at 4-5. He argues that pursuant to Article 5, "direction and guidance should be given to the child to compensate for her/his lack of knowledge, experience and understanding and be restricted according to the evolving capacities of that child." *Id.*

<sup>37</sup> CRC, *supra* note 34, at art. 6.

<sup>38</sup> Zermatten, *supra* note 35, at 4.

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discrimination on the basis of nationality—that of the child or her parents—and ensure that the child is protected from any punishment on that basis as well:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.<sup>39</sup>

The CRC rights thus apply to both citizen and non-citizen children. In addition to the non-discrimination provision, the CRC includes two articles that refer to child migrants in particular ways. Article 22 requires governments to ensure that child asylum seekers and refugees, whether unaccompanied or accompanied, receive protection and assistance to enjoy the rights set forth in the CRC and other international human rights instruments. Article 29 obliges governments to ensure that the education of the child is directed at “[t]he development of respect . . . for the national values of the country in which the child is living” as well as for “the country from which he or she may originate.”<sup>40</sup>

The CRC is the most ratified treaty in history. All but two governments (Somalia and the United States) ratified this instrument, and both Somalia and the United States are signatories.<sup>41</sup> That means that while Somalia and the United States are not legally bound by the CRC itself, they are obliged to refrain from acts that would undermine or defeat its objectives.

VII. HOW HAS THE UNITED STATES RECOGNIZED THE UNIQUE NATURE OF THE CHILD IN ITS LAWS AFFECTING CHILD MIGRANTS?

For over a century now, states in the United States have established legal regimes protecting the welfare of children through the best

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<sup>39</sup> CRC, *supra* note 34, at art. 2.

<sup>40</sup> *Id.* at art. 29(1)(c).

<sup>41</sup> *Convention on the Rights of the Child – Frequently Asked Questions*, UNICEF (Feb. 10, 2006), [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html).

interests of the child principle. Such state laws generally apply to the welfare of all children in their jurisdiction, including non-citizens.<sup>42</sup>

Two federal governmental agencies have spoken to the uniqueness of non-citizen children during the last two decades. Following the leads of Canada's Immigration and Refugee Board in 1996 and the UN High Commissioner on Refugees in 1997, the Immigration and Naturalization Service ("INS") issued guidelines to asylum officers in 1998 to provide "child-sensitive interview procedures and analysis."<sup>43</sup> Aimed particularly at unaccompanied children, the INS Guidelines for Children's Asylum Claims uses the "best interests of the child principle" to establish significant procedural and evidentiary approaches to the adjudication of protection claims.<sup>44</sup> Aimed at making the adjudication process "child friendly," the procedures include allowing the child to be accompanied at the interview by a trusted adult and applying child-sensitive interviewing techniques.<sup>45</sup> The guidelines caution officers to be sensitive to the child's age and development with respect to the ability to know, remember, and describe events relevant to the claim.<sup>46</sup> The guidance specifically instructs officers to "evaluate the child's words from a child's point of view" – to put themselves to the extent possible into the developmental situation of the child.<sup>47</sup> Because the child's demeanor may be affected by their experiences with officials abroad as well as their age, development, and culture, officers are instructed to be extra careful with respect to credibility determinations.<sup>48</sup> Additionally, the guidelines create specialized officer training on child refugee issues.<sup>49</sup>

While the INS guidelines explicitly state that the best interests of the child principle does not replace or alter the U.S. legal definition of a refugee, the guidelines encourage awareness of ways in which the unique situation of children matters in the application of the substantive

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<sup>42</sup> See Leslye Orloff et al., *Immigration Status and Family Court Jurisdiction*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 6* (2004), available at [http://www.legalmomentum.org/assets/pdfs/www6\\_5\\_immigration\\_status\\_and\\_family\\_court\\_jurisdiction.pdf](http://www.legalmomentum.org/assets/pdfs/www6_5_immigration_status_and_family_court_jurisdiction.pdf) ("[N]either the PKPA, state statutes, nor case law make the immigration status of any party a relevant factor to any jurisdictional decision of child custody cases.").

<sup>43</sup> Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, U.S. Dep't of Just., Immigration and Naturalization Serv., to Asylum Officers, Guidelines for Children's Asylum Claims 2 (Dec. 10, 1998), available at <http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>.

<sup>44</sup> *Id.* (internal quotations marks omitted).

<sup>45</sup> *Id.* at 5–12.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *Id.* at 13–15.

<sup>49</sup> *Id.* at 5.

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law.<sup>50</sup> “The harm a child fears or has suffered,” for example, “may be relatively less than that of an adult and still qualify as persecution.”<sup>51</sup>

Why did the United States issue these special guidelines for child applicants? The guidelines speak directly to this. “Increasing the understanding of and sensitivity to children’s issues will improve U.S. asylum adjudications.”<sup>52</sup> The U.S. Department of Justice (“DOJ”) also recognized the evolving capacity of children in its 2004 and 2007 guidelines to immigration judges in cases involving unaccompanied children.

When the respondent is a child, the immigration judge faces fundamental challenges in adjudicating the case: does the respondent understand the nature of the proceeding, can the respondent effectively present evidence about the case, and is there anyone who can properly advocate for the respondent’s interests? Issues of age, development, experience and self-determination impact how a court deals with a child respondent.<sup>53</sup>

While aimed primarily at unaccompanied children, the DOJ guidelines address children who are respondents as well as witnesses, and recognize that even with respect to children, one size does not fit all:

Every immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom. However, it is equally true that all such cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager.

While these guidelines are written for cases involving unaccompanied alien children, some provisions will apply in other cases where children are accompanied by

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<sup>50</sup> *Id.* at 18 (internal quotation marks omitted).

<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> Memorandum from U.S. Dep’t of Just., Exec. Office for Immigration Review, Office of the Chief Immigration Judge, Interim Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 2 (May 22, 2007) (modifying Memorandum 04-07, 2004).



a parent or guardian or where children testify as witnesses.<sup>54</sup>

The guidelines suggest numerous ways for judges to make the hearing one where the voice of the child will be heard: pre-hearing visits to sit in different parts of the courtroom, including the judge's bench and the witness stand; letting the child sit next to an adult or friend while testifying; dispensing with the judge's robe; ensuring age-appropriate questions, tone and translations; and providing for more frequent breaks to alleviate stress and minimize fatigue.<sup>55</sup> The DOJ guidelines specifically advise judges to make proper credibility assessments:

Judges should recognize that children, especially young children, usually will not be able to present testimony with the same degree of precision as adults. Do not assume that inconsistencies are proof of dishonesty, and recognize that a child's testimony may be limited not only by his or her ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.<sup>56</sup>

Judges should be mindful that children are highly suggestible and their testimony could be influenced by their desire to please judges or other adults.<sup>57</sup>

Immigration authorities in other countries have developed significant procedural applications of the best interests of the child principle. Some governments assign guardian ad litem and/or attorneys to assist a child preparing for an immigration interview or hearing, potentially the most meaningful ways of enabling the voice of the child to be heard and her best interests understood. This occurs in several European Union countries more commonly when an unaccompanied child seeks asylum.<sup>58</sup>

Hopefully, in the future we will come to understand how well these various procedures have resulted in the voice of the child coming through in immigration and asylum adjudications while respecting a child's agency. This, too, is an area that merits more attention from researchers.

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<sup>54</sup> *Id.* at 3-4.

<sup>55</sup> *Id.* at 4-7.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 9.

<sup>58</sup> EMN STUDY, *supra* note 1, at 53.

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VIII. HOW HAVE GOVERNMENTS AND THE INTERNATIONAL COMMUNITY  
CREATED AND APPLIED NORMS RECOGNIZING THE UNIQUE NATURE OF  
CHILDREN WITH RESPECT TO THE SUBSTANTIVE ASPECTS OF THE ADMISSION,  
RESIDENCE, AND REPATRIATION OF CHILD MIGRANTS?

While there has been worthwhile progress in governments applying the best interests of the child principle procedurally with respect to child migrants, we are at the very beginning of the substantive development of this key principle as it applies to international migration. We have evidence that governments are struggling in this area and need guidance simply from the practical point of view. This is so even with respect to the cohort of child migrants—who currently receive the most state attention on admission and return decisions—the unaccompanied and separated. Where such children do not have a supportive family base to return to, for example, many governments frequently allow them to remain but do not provide them with a legal status reflecting their uniqueness as children.<sup>59</sup> Governments have not yet developed the toolbox that will provide them with the flexible means of respecting the best interests principle.

This Article attempts to provoke thinking about such a toolbox by sketching out two examples of how the best interests principle can be applied substantively. First, it lays the groundwork by examining what the CRC says about best interests and highlights two organizations that are paving the way in giving substance to the best interests principle—UNHCR and the Young Center for Immigrant Children's Rights ("the Young Center"). UNHCR developed its best interests determination approach in connection with unaccompanied and separated refugee and asylum seeking children around the globe. The Young Center bases its best interests reports on UNHCR's Best Interest Determinations and does so with respect to unaccompanied child migrants in a myriad of circumstances, not only refugee and asylum seeking children.<sup>60</sup> While

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<sup>59</sup> *Id.* at 84; *Workshop on Unaccompanied Minors 2* (Intergovernmental Consultations on Migration, Asylum and Refugees, Chair's Summary, 2009), available at <http://www.docstoc.com/docs/101331699/Workshop-on-Unaccompanied-Minors> ("The volume of returns of unaccompanied minors is low compared with inflows in IGC Participating States, and the vast majority of implemented returns are voluntary, sometimes as part of a general or specific assisted voluntary return or reintegration programme. Some States have readmission agreements and cooperation with countries of origin/transit countries (e.g., France, Spain, the Netherlands and the United States).").

<sup>60</sup> See *Young Center Projects*, YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, <http://www.theyoungcenter.org/projects.shtml> (last visited Feb. 22, 2012). The Young Center regularly sees cases where children face long-term separation from their parents if deported or face return to countries where they have no one to care for them. In appropriate circumstances, the Center brings together a diverse group of experts, including

the following analysis only examines two examples of the many child migrant situations, it is imperative that the legal community starts thinking about how to make the substantive best interests meaningful to all such children addressed by the CRC.

Article 3(1) of the CRC states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>61</sup> Which interests is this treaty referring to? As Professor Alston suggests, we need to examine the rights set out in the CRC to answer that question.<sup>62</sup> The key rights focus on the child’s well-being, survival, development, and family.

Article 3(2) requires governments “to ensure the child such protection and care as is necessary for his or her well-being.”<sup>63</sup> Pursuant to Article 6(2) in connection with the child’s inherent right to life, governments must “ensure to the maximum extent possible the survival and development of the child.”<sup>64</sup>

In accordance with Article 9(1), States Parties must “ensure that a child shall not be separated from his or her parents against their will, except . . . when such separation is necessary for the best interests of the

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child welfare and immigration ones, to investigate and consider the best interests of a child. The Center also arranges for a social worker to conduct an international home study when there are significant concerns about the child’s safety upon repatriation. In cases in which children return to their home country either because they want to go home or because they are being deported, the Young Center has begun to identify community resources for such children and ensure that a responsible adult will be available to meet the child. The views of the child as well as the views of family members and others close to the child are appropriately paramount.

<sup>61</sup> CRC, *supra* note 34, at art. 3(1).

<sup>62</sup> Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS*, 11-12 (Philip Alston ed., Oxford University Press (1994)).

<sup>63</sup> CRC, *supra* note 34, at art. 3.

<sup>64</sup> See Bridgette Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 *YALE HUM. RTS. & DEV. L.J.* 120, 126 (2009) (basing her priorities on the *ABA Standards for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996)). Best interests also include the child welfare law concept of “permanency,” which is closely related to the well-being, survival and development of the child. *Id.* As Professor Carr has pointed out, “permanency” may be understood to be somewhat parallel to the refugee law concept of a durable solution. *Id.* The idea, of course, is that the child’s well-being, development and survival are best enabled through a permanent resolution of care and, in this context, legal status. *Id.* The best interests approach prioritizes the child’s safety, permanency, and well-being. These priorities for children are similar to protection and durable solutions for refugees. *Id.* The child cannot be placed in an unsafe situation. *Id.* Nor can the child be placed in a series of temporary situations. *Id.* For the child’s well-being and development, the child needs and must be provided a safe and permanent migration “placement.” *Id.*

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child.”<sup>65</sup> Both UNHCR and the Young Center follow the core principle set out in the CRC and domestic child welfare law that the interests of the child are generally best met when the child remains with his or her family. A decision to separate a child from her parents against her will should only be taken when the child is or is likely to be exposed to serious harm, abuse, or neglect that cannot be addressed through less intrusive measures than separation.<sup>66</sup> The importance of family unity, of course, derives from the position of the family in human rights law as the natural and fundamental unit of society.<sup>67</sup>

Other provisions of the CRC elaborate on the well-being, survival, and development rights of the child. Article 27 focuses on the child’s right to a standard of living adequate for her “physical, mental, spiritual, moral and social development.”<sup>68</sup> Article 28 sets out the contours of the child’s right to education.<sup>69</sup> Article 24 speaks to the child’s right to the highest attainable standard of health and access to health care facilities.<sup>70</sup>

As UNHCR observes in the Guidelines on Determining the Best Interests of the Child, several provisions address the child’s safety:

Articles 19, 34, 35, 36, 37 and 38 of the CRC relate specifically to protecting the safety of children, including protection from physical and mental violence, abuse, neglect, sexual exploitation, harmful traditional practices, trafficking and abduction, child labour and protection from threats posed by armed conflict to children’s lives, such as underage recruitment.<sup>71</sup>

Based on these CRC protections from serious harm, UNHCR underscores the priority of safety: If “the child is exposed or is likely to be exposed to [such] violations of fundamental human rights . . . this would normally outweigh any other factor.”<sup>72</sup>

Let us examine two different types of child migrant situations and see how these substantive understandings of the best interest principle

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<sup>65</sup> See CRC, *supra* note 34, at art. 9(1).

<sup>66</sup> See *id.*

<sup>67</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 16(3), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 23(1), U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>68</sup> CRC, *supra* note 34, at art. 27.

<sup>69</sup> *Id.* at art. 28.

<sup>70</sup> *Id.* at art. 24.

<sup>71</sup> UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child* at 69 (May 2008), available at <http://www.unhcr.org/refworld/docid/48480c342.html>.

<sup>72</sup> *Id.* at 70.

might apply. Safety comes up as an important issue in a number of circumstances. Now, consider a situation where safety and family unity are in tension. If family members are in the country of origin, the question is whether returning the child to the family is outweighed by harms or other serious adverse consequences as a result of return to that country. The CRC speaks clearly to this: A child should not be returned to family in the country of origin where there is a “reasonable risk” that return would result in the violation of the child’s fundamental human rights.<sup>73</sup> Where the risk of harm is more indiscriminate (e.g., generalized violence), then it must be “balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.”<sup>74</sup> “Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations[]” in this context.<sup>75</sup>

Briefly, let us focus on conflict. Where can adjudicators and practitioners look for a definition so they know the type of situation in the country of return? The Geneva Conventions distinguish “conflict” from situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. . . .”<sup>76</sup> According to the International Committee on the Red Cross (“ICRC”), the most common form of contemporary non-international armed conflict requires the following: (1) the parties may involve both the government and non-state actors, or just the latter; (2) any non-governmental group must possess organized armed forces under a command structure and have the capacity to sustain military operations; and (3) “the hostilities must reach a minimum level of intensity.”<sup>77</sup> To demonstrate this minimum level, ICRC uses the example of “when the government is obliged to use military force against insurgents, instead of mere police forces.”<sup>78</sup>

<sup>73</sup> Comm. on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, Rep. on its 39th Sess., May 17–June 3, 2005, ¶¶ 82, 84, U.N. Doc. CRC/GC/2005/6 (Sep. 1, 2005) [hereinafter General Comment No. 6].

<sup>74</sup> *Id.* ¶ 82.

<sup>75</sup> *Id.* ¶ 86.

<sup>76</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, available at <http://www2.ohchr.org/english/law/protocol2.htm>.

<sup>77</sup> *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 3 (Int’l Comm. of the Red Cross, Opinion Paper, 2008), available at [http://www.qualification-directive.eu/images/web/Module\\_3/Article\\_15c/Documentation/ICRC\\_Opinion\\_paper\\_Armed\\_conflict\\_2008.pdf](http://www.qualification-directive.eu/images/web/Module_3/Article_15c/Documentation/ICRC_Opinion_paper_Armed_conflict_2008.pdf).

<sup>78</sup> *Id.* (footnote omitted).

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What do we know about the safety issues children face in armed conflict? In her UN reports on the impact of armed conflict on children, Graca Machel detailed the special vulnerabilities of children during conflict. She reported that two million children were killed in the 1990s due to armed conflict, six million were injured or disabled, more than one million were orphaned, twenty million were displaced within and outside their countries, and 300,000 were recruited as combatants or abducted to serve as sexual slaves.<sup>79</sup> Each month, she reported, some eight hundred children were killed or maimed by landmines.<sup>80</sup> In her ten-year review, Machel reports that the impact of war on children is more brutal than ever.<sup>81</sup>

Given that armed conflict presents a reasonable risk that a child's right to life and survival will be violated, there is a very good argument that the CRC establishes a presumption that children should not be returned to conflict. The Committee declares that governments cannot return a child to a situation where there is a real risk of underage recruitment (including recruitment for sexual services) "or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties."<sup>82</sup> That is an important non-refoulement standard. Here, the Committee focuses on the additional safety risks during conflict associated with forced military-related services. As the Machel reports demonstrated, the risk to one's safety during armed conflict itself actually affects children beyond those forced to serve one of the armed groups. Is there not a presumption of non-return for them as well?

How have governments responded to children fleeing conflict? If such children cross an international border in various parts of the developing world, many come under UNHCR's protection. For the smaller number who migrate to developed or developing countries that conduct refugee status or asylum determinations, protection depends on domestic and regional law. Many European governments offer subsidiary protection on a temporary basis to conflict refugees, including children, who access their asylum system. Under U.S. law, such protection is very limited to those already in the United States at the time

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<sup>79</sup> GRACA MACHEL, THE MACHEL REVIEW 1996-2000: A CRITICAL ANALYSIS OF PROGRESS MADE AND OBSTACLES ENCOUNTERED IN INCREASING PROTECTION FOR WAR-AFFECTED CHILDREN 7-8 (Government of Canada, 2000).

<sup>80</sup> *Id.*

<sup>81</sup> Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World, Executive Summary Of the Strategic Review Report to the General Assembly, A/62/228, available at [http://www.un.org/children/conflict/\\_documents/machel/Executive\\_summaryMachel07.pdf](http://www.un.org/children/conflict/_documents/machel/Executive_summaryMachel07.pdf) (last visited Apr. 25, 2012).

<sup>82</sup> General Comment No. 6, *supra* note 73, ¶ 28.



that their country of origin is officially designated by the Secretary of Homeland Security as unsafe for return due to conflict. Moreover, only Somalia, Sudan, and South Sudan are so designated as of February 2012.<sup>83</sup> This is a serious protection gap for all conflict refugees, including children. Pursuant to Articles 3 and 6 as discussed above, the CRC arguably establishes an obligation not to return in connection with the safety risk posed by conflict to children.

In what other ways are children vulnerable with respect to safety? Trafficking and re-trafficking has been recognized by the Committee on the Rights of the Child as a “threat to the fulfillment of their right to life, survival and development.”<sup>84</sup> The Committee advises that:

Children who are at risk of being re-trafficked should not be returned to their country of origin unless it is in their best interests and appropriate measures for their protection have been taken. States should consider complementary forms of protection for trafficked children when return is not in their best interests.<sup>85</sup>

Determining precisely when it is in the best interests of children who survive trafficking to be returned to their families at home is among the most difficult assessments that child advocates and other practitioners working with children make. As the Committee opined, however, when it is not in the best interests of child trafficking survivors to be returned, governments should provide protection in order to ensure the survival of the child. Various governments have tried to address this situation to some degree, but significant gaps still exist. For example, the T visa in the United States only applies to certain “severe” forms of trafficking. At least two types of gaps flow from this. First, according to the Committee, when it is in the best interests of the child, governments should refrain from returning a child who has survived trafficking where there is a risk of re-trafficking—no matter what degree of severity. Second, governments should recognize that, just as with persecution, children may experience trafficking differently than adults.

Safety issues, of course, need to be assessed with respect to the situation of the particular child. Children may be subject to serious safety risks with respect to everything from gang violence to abandonment. The best interests analysis will depend on the particular

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<sup>83</sup> See *Temporary Protected Status*, USCIS, <http://www.uscis.gov/portal/site/uscis/> (follow link to “Temporary Protected Status” under the “Humanitarian” list).

<sup>84</sup> General Comment No. 6, *supra* note 73, ¶ 52 (citing CRC art. 6).

<sup>85</sup> *Id.* ¶ 53.



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safety issues identified concerning the conditions of the place where the child might be returned. To ensure the child's survival in these specific situations, domestic immigration laws must now incorporate this fundamental CRC norm.

CRC's best interest principle applies substantively to a range of child migrant issues. Another example concerns how well-being and family unity interests arise for these children. Of course, these interests matter in a variety of situations. This Article examines one of the most challenging issues for governments, which frequently arises where the immigration control interest is high: the situation of children who have at least one parent who is irregular or unauthorized with respect to their immigration status. What substantive role do the best interests of the child play in this situation?

The United Kingdom's Supreme Court explored this issue in February 2011 in a case involving the removal of a Tanzanian mother of two British citizen children twelve and nine-years old. Pursuant to the CRC, the court determined that the best interests of the child are a primary consideration in determining the removability of a non-citizen parent.<sup>86</sup> Then the court analyzed how the best interests of the children applied in such a case. The court focused particularly on "whether it is reasonable to expect the child to live in another country,"<sup>87</sup> to do so, the court found as relevant the following criteria:

the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.<sup>88</sup>

The court found that the nationality of the children will be a particularly important factor in gauging the best interests of the children, even if citizenship will not operate as a "trump card" against the parent's removal.<sup>89</sup>

How did the court analyze these criteria in this case? The court noted that ZH's children were both British citizens by virtue of birth and

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<sup>86</sup> ZH (Tanzania) v. Sec'y of State for the Home Dep't, [2011] UKSC 4, ¶ 33 ("In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration.").

<sup>87</sup> *Id.* ¶ 29.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* ¶ 30.

descent, and that “they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here.”<sup>90</sup> As British citizens, the children “have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language.”<sup>91</sup> According to the supreme court:

It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community. . . . But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.<sup>92</sup>

The court weighed the best interests of the citizen children in the context of Article 8 of the European Convention on Human Rights regarding the right to respect for private and family life. The court observed that after making the best interests of the children a primary consideration, those interests can be “outweighed by the cumulative effect of other considerations” in the Article 8 proportionality assessment.<sup>93</sup> In this case, in fact, there were numerous factors that weighed against the mother—“the need to maintain firm and fair immigration control, coupled with the mother’s appalling immigration history and the precariousness of her position when family life was created.”<sup>94</sup> Nonetheless, as these citizen children would have had to leave the United Kingdom with their mother, based on a legal transgression for which they bore no responsibility, and move to a country in which they had never lived, the court determined that the best interests of the children overcame the immigration control interests of the United Kingdom.

The well-being of the children mattered most to the supreme court. It found the children’s British citizenship particularly weighty because of what it meant to the development of these children including: their

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<sup>90</sup> *Id.* ¶ 31.

<sup>91</sup> *Id.* ¶ 32.

<sup>92</sup> *Id.* ¶ 31.

<sup>93</sup> *Id.* ¶ 33.

<sup>94</sup> *Id.*

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access to the educational, social, linguistic, and cultural opportunities of the United Kingdom.<sup>95</sup> While no Lord argued that the children's citizenship trumped all other factors, Lord Hope opined that:

[I]t will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.<sup>96</sup>

Finally, Lord Kerr spoke to the significance of the best interests of the child as central to cases involving the removal of an unauthorized parent. While recognizing that it is not "a factor of limitless importance in the sense that it will prevail over all other considerations," Lord Kerr observed that it "must rank higher than any other" factor:

It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.<sup>97</sup>

The supreme court's approach to this issue is provided not as the last word on this matter, but as an example of how the best interests of the child can be fleshed out substantively in a variety of circumstances.<sup>98</sup> In

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<sup>95</sup> *Id.* ¶¶ 31-32.

<sup>96</sup> *Id.* ¶ 41.

<sup>97</sup> *Id.* ¶ 46.

<sup>98</sup> I take issue with Patrick Glen, who argues that the UK Supreme Court wrongly interpreted the best interests of the child principle in this case. Patrick J. Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings* 11, 14-15 (Georgetown Public Law and Legal Theory Research Paper No. 11-21, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1767086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767086). Mr. Glen opines that the court elevated the best interests of the child beyond that of "a primary consideration," particularly vis-a-vis the state's interests in removing a non-citizen parent who has no right

developing the law with respect to the best interests of the child in this case, the supreme court built on recent jurisprudence of the European Court of Human Rights where the UK Court notes “a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents’ and not of her own making.”<sup>99</sup> There appears to be an understanding developing in these judicial contexts of the child as a right-bearing individual whose substantive best interests must be analyzed and weighted appropriately.<sup>100</sup>

Beyond the tools provided by international law, those established under domestic immigration law in various countries deserve examination as possible ways to enable governments to respect the best interests of the child. While at some point it would be ideal for governments to establish a best interests of the child law that addresses the situation of child migrants, we might begin down that path with laws already established that can go some distance in filling this gap, particularly if we try to imagine how they might be applied to the myriad of child migrant circumstances.

One such example was noted by Professor Carr: when the child has the right to remain, but a parent faces removal, Canadian humanitarian and compassionate status (“H&C”) requires decision makers to consider the best interests of the child.<sup>101</sup> By that, the Canadians mean the benefit to the child of the parent’s non-removal as well as the hardship the child

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to remain. *Id.* Yet the court clearly differentiated between “a primary consideration” and “the primary consideration” or “the paramount consideration.” Most importantly, as discussed in the text above, the court considered the state’s interests in maintaining firm immigration control and considered what it termed the mother’s “appalling immigration history.” *ZH (Tanzania)*, [2011] UKSC 4, ¶ 33. In analyzing these competing interests, the court properly assessed several factors regarding the children’s level of integration in the UK and the length of absence from Tanzania, as well as the strength of the children’s relationship with the UK citizen father that would be severed if the children moved to Tanzania with the mother. *Id.* ¶ 17. The British citizenship mattered to the court, not in the way that Mr. Glen suggests is critical (the right to enter and remain), but with respect to all the social and economic rights UK citizenship entails – that is, precisely in connection with the development of the children. *Id.* Language, culture, and education all mattered in this particular case since the children had lived their entire lives in the UK and had no knowledge of life in Tanzania. *Id.* ¶¶ 31, 32. The court did not elevate the citizenship of the children to the status of a trump card, as Mr. Glen asserts. In this particular case, this factor mattered, together with other aspects of the children’s best interests. In sum, the court quite properly respected the rights of these children as independent, rights-bearing persons under the CRC.

<sup>99</sup> *ZH (Tanzania)*, [2011] UKSC 4, ¶¶ 17, 20.

<sup>100</sup> See Alston, *supra* note 62, at 9 (arguing that whenever other interests are to tip the balance away from a decision in the child’s best interests, the burden of proof will rest on those seeking to follow that approach to show that no other acceptable alternative exists).

<sup>101</sup> Carr, *supra* note 64, at 146–48.

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would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad.<sup>102</sup> As Citizen and Immigration Canada ("CIC") explains, the statute:

does not mean that the interests of the child outweigh all other factors in a case. While factors affecting children should be given substantial weight, the best interests of a child is only one of many important factors that officers need to consider when making an H&C or public policy decision that directly affects a child.<sup>103</sup>

This humanitarian status has the potential to affect a broad range of child migrants, as the statute defines "directly affected" to include Canadian or foreign-born children both in and outside of Canada.<sup>104</sup> In addition, the relationship to the child of the applicant for H&C status need not be that of parent where a grandparent, for example, is the primary caregiver for the child.

CIC states that factors relating to a child's emotional, social, cultural, and physical welfare—similar to those used by UNHCR, the Young Center, and the UK Supreme Court—should be taken into account. These factors include but are not limited to:

the age of the child;  
level of dependency between the child and the H&C applicant or the child and their sponsor;  
the degree of the child's establishment in Canada;  
the child's links to the country in relation to which the H&C assessment is being considered;  
the conditions of that country and the potential impact on the child;  
medical issues or special needs the child may have;  
the impact to the child's education; and

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<sup>102</sup> CITIZENSHIP AND IMMIGRATION CANADA, IP 5, IMMIGRANT APPLICATIONS IN CANADA MADE ON HUMANITARIAN AND COMPASSIONATE GROUNDS 13, sec. 5.12 (2011) [hereinafter IP5].

<sup>103</sup> *Id.* at 14, § 5.12. The Canadian Supreme Court declared that "decision-maker[s] should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them." *Baker v. Canada* (1999), 2 S.C.R. 817, ¶ 75 (Can.). The Federal Court of Canada observed "that it is not sufficient for an immigration officer to *merely* consider the best interests of the child in reaching a decision; the child's interests are also to be accorded *substantial* weight." *Wu v. Canada* (2001), F.C. 1274, ¶ 9 (Can.) (emphasis added).

<sup>104</sup> Carr, *supra* note 64, at 147-48.

matters related to the child's gender.<sup>105</sup>

H&C status determinations are totally discretionary—giving decision makers flexibility to approve of “deserving cases not anticipated” by other immigration legislation.<sup>106</sup> Professor Carr proposes that Congress adopt such a status to protect directly affected accompanied children in the United States.<sup>107</sup> This Canadian example is noted, not as a complete answer to the humanitarian gaps that exist for children, but as a way for all of us to imagine helpful domestic tools that will assist governments in ensuring that the best interests of the child are respected.

#### IX. CONCLUSION

While this Article has focused on filling gaps, it should not be assumed that all roads point to admission and residence for child migrants. That is not what the best interests of the child means for many child migrants. Return will be in the best interests of the child in many instances, and in that regard we need more practices like those being developed by the Young Center to ensure that repatriation takes place in a way that actually ensures the child's well-being and safety in a durable fashion. In all these cases, this can only occur if adjudicators, policy makers, practitioners, and researchers respect the agency of children and listen carefully to their voices.

This Article simply begins to sketch out examples of tools that will help develop the substance of the best interests principle. Practitioners and adjudicators have just recently started down this path with respect to a small cohort of child migrants. Most child migrants are not yet included, particularly those who have remained invisible. But the best interests principle applies to all children. Fleshing out the substantive meaning of the principle may put us in a better position to reach the large numbers of children who are irregular or unauthorized members of migrant families.

The path opened up by the CRC offers considerable promise. Governments have come together to recognize the child as a unique, independent, rights-bearing individual through this treaty. Our task now is to assist governments in making the best interests of the child principle meaningful both procedurally and substantively. For child migrants in their myriad circumstances, these legal tools will enable

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<sup>105</sup> IP 5, *supra* note 103, at 14, ¶ 5.12.

<sup>106</sup> Carr, *supra* note 64, at 147–48.

<sup>107</sup> *Id.* at 149–58.

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them to realize and develop their rights fully, and help policy makers, adjudicators, practitioners, and researchers respect their uniqueness as evolving beings. The Convention on the Rights of the Child is just now coming of age, and it is our duty to ensure that in developing the best interests substantively, the voice of the child migrant comes through loud and clear.