

THE CLARION



The IHRC Journal of Human Rights

from the editors

Children are among the most vulnerable members of our society. They are used as soldiers, subjected to abuse and trafficking, forgotten and left-behind in education and health care, sent to foreign countries to forge a better life. While there have been many advancements and protections built into the international order, children are still treated fundamentally differently when it comes to basic protections of the law.

The articles in this issue primarily address how children are being protected through the law, while identifying some of the continuing failures of the various systems. Though the international community may try, there is no way to protect every child from the evils of man. War, famine, poverty, technology, and disasters all contribute to the plight of children. While these articles show that we are not powerless to protect children through the law, they lay bare that we can do much more.

At the same time, children are being forced to accept greater responsibility and to take on an inordinate role in their own protection. Recent articles in the United States discussed how migrant children represent themselves against U.S. government attorneys in removal proceedings. Without legal background, education or capacity, these children are called upon to participate in a life-altering process. While we must believe that the system provides judges and advocates who are sensitive to these issues and who are truly looking out for the best interests of each child, this is not a given. Certainly, the example being set by the United States would be difficult to implement in most countries, developed or otherwise, which may lead to greater problems as countries deal with exceptionally large numbers of migrants and refugees.

Like other vulnerable persons, children suffer from a lack of voice. To give children and others this voice, the IHRC is prioritizing the protection of vulnerable persons as one of its main themes for the coming year. This issue of The Clarion is designed to start this conversation and to serve as the first step in advancing this programmatic priority. We encourage you to share this issue as far and wide as possible, to encourage discussions and innovations, and to participate in The Clarion and the work of the committee over the coming year.

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REDUCING THE NUMBER OF CHILDREN THAT GO MISSING AS A RESULT OF MIGRATION AND REFUGEE FLOWS AND PUTTING IN PLACE THE MEANS TO FIND THEM

Professor Jeremy Sarkin*

The issue of missing children: those who cannot be found as a result of conflict, migration, human rights violations,¹ trafficking, organized crime, disasters, etc., is a matter of profound concern, but a matter that is not really on the international agenda. The topic has recently come to international attention, after it was discovered that thousands of migrating children have gone missing after they arrived in Europe. This reality has not taken sufficient account of the fact that tens of thousands of children possibly go missing en route to Europe. However, it is important to note that the issue of people going missing is not an issue exclusive to migration: children go missing for a variety of reasons. Many children go missing voluntarily, (in the United States, for example, 700,000 people go missing every year and over half of the 85,000 people missing at any one time are under the age of twenty-one)² as a result of problems that they have, often at home, but then most of the time this remains a domestic problem, as most of these children do not cross international borders. It is the involuntary cases of children going missing that can have international consequences, when they are trafficked, if they are abducted and used as child soldiers, or taken for other criminal purposes. The numbers of missing persons every year is staggering. Millions of persons have gone missing for a variety of reasons relating to wars, disasters, enforced

disappearances, human trafficking, and organized crime, just to name a few. The world still does not have the legal frameworks or processes to successfully locate these people.

This article, however, focuses on children who go missing as a result of migration and refugee flows, an issue that has only recently been recognized, although it is a problem that has existed for a long time. This issue has garnered some international attention because there are now processes to begin tracking and collecting data on migrants, and to some extent, those who go missing. However, structures for collecting data on missing migrants have been provided only for parts of Europe. Until recently, this was not the case in any country or part of the world. It is likely the massive increase in the flow of refugees and migrants into Europe, which is the impetus behind the greater attention being focused on this issue. However, this is not solely a European problem and the issue of missing people is not only an issue concerning migration. In a range of issues, and in all places around the globe, steps need to be taken to deal with the extensive problems that exist concerning missing people.

As far as people going missing in Europe is concerned, the refugee and migration crisis saw more than 1.4 million people navigate their way to Europe in 2015. At least 3,770 people drowned in the Mediterranean that year trying to reach Europe. In fact, the International Organization for Migration (IOM) conservatively estimates that at least 60,000 migrants/refugees died on migration routes between 1996 and 2016.³ This number is recognized by the IOM as a conservative estimate. This is because there is either no data, or the data is incomplete. The number of people who died or went missing (some of whom died or who are somewhere, often against

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¹ J Sarkin, "Putting in Place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances Around the World" 38 (2013) South African Yearbook of International Law 20-48.

² J Sarkin, "The Need to Deal with All Missing Persons Including Those Missing As a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (including Enforced Disappearances) in International and Domestic Law and Processes" in 2015(1) Inter-American and European Human Rights Journal 112-142.

³ Brian, T. and Laczko, F. 2016. "Introduction: Migrant deaths around the world in 2015. In *Fatal Journeys Vol 2: Identification and Tracing of Dead and Missing Migrants*. International Organization for Migration, Geneva.

their will) is actually far higher. While the numbers of people known to have died is high, a great deal of uncertainty exists about how many people go missing while migrating. People go missing on the migration route for numerous reasons, including crime and ill health. Many people who go missing are not reported as missing for a variety of reasons, including the fact that they have left their countries of origin and their families do not know that they are missing. Often, even if their families want to report them as missing, they have nowhere to make such a report. In many countries, the police are loath to take such reports believing that such people have migrated and will eventually turn up somewhere. However, often, family members do not report a loved one as missing as they do not want to bring attention to the person missing's circumstances. Many, however, believe that it is pointless to make such a missing person report, even if they believe it is possible, since they are convinced that the authorities are not likely to act to find the person.

The numbers of missing are very high, but how high is only a matter of speculation. It is difficult to come to any definite determinations of what the real numbers are for many reasons. Because the people going missing are travelling in secret, and little is known about them, and their circumstances, this makes the problem less visible. While some bodies may be found, often they cannot be identified, as many migrants and refugees often do not carry documentation. However, IOM notes that "[c]ountless bodies are never found, countless missing persons are never reported; fatal journeys lost from all record."⁴ Because data is so lacking, the IOM in 2013 established the Missing Migrants Project. It is designed to track deaths around the world during migration and, it maintains a publicly accessible online database. While aiming to be as comprehensive as possible, data, particularly in some regions, are severely lacking and figures contained in the database are minimum numbers and far from complete for some regions.

⁴ Fatal Journeys, Volume Two: Identification of Dead and Missing Migrants, International Organization for Migration, *available at* https://publications.iom.int/system/files/fataljourneys_vol2.pdf

⁵ Unicef, *Danger Every Step of the Way*, released today, 14 June 2016

How many children go missing is specifically unknown. However, children do not only go missing while migrating into Europe but they have gone missing once they have arrived in Europe. Again the numbers are enormous. What is known is that about 406, 000 children travelled to Europe in 2015. The United Nations Children's Fund (UNICEF) estimates that nearly 100,000 unaccompanied children, or children separated from their families, sought asylum in Europe in 2015. However, these numbers will be larger in 2016. Already, ninety percent of refugee and migrant children landing in Europe through Italy in 2016 are unaccompanied.⁵ Since children travelling unaccompanied are extremely vulnerable to kidnapping and other forms of child abduction, the number of children successfully completing their travels is unknown. They are often sexually abused and exploited because of their dependency on smugglers. They face detention, rape and other sexual violations, forced labor, forced prostitution, assaults and other violations, or even death. In this regard, the Organization for Security and Cooperation in Europe (OSCE), has noted that: "Unaccompanied minors from regions of conflict are by far the most vulnerable population; those without parental care that have either been sent by their families to get into Europe first and then get the family over, or have fled with other family members."⁶ What is known is that at least 15,000 children went missing subsequent to their arrival in Europe in 2015.⁷ In April 2016 the German Minister of the Interior admitted that almost 6,000 refugee children were reported missing in 2015 in Germany alone.⁸ He conceded that the number of missing children that had been reported to be missing might be underestimated. Most of these children come from Syria, Afghanistan, Eritrea, Morocco, and Algeria. It is believed that human traffickers and other criminals are preying upon these children. It is also believed that 5,000 children had disappeared in Italy and

⁶ <https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>

⁷ <https://www.unodc.org/unodc/en/press/releases/2016/February/unodc-chief-describes-risk-of-10-000-missing-migrant-children-as-unacceptable.html> [2016, June 20].

⁸ <http://www.thelocal.de/20160411/nearly-6000-refugee-children-missing-in-germany>

1,000 were unaccounted for in Sweden.⁹ The exact number of children who go missing after they arrive in Europe remains unknown “because rudimentary and overwhelmed registration systems mean Europe does not have a clear picture of the number of children arriving on its shores, or close tracking of their onward route.”¹⁰ However, fear remains a major problem. Migrants fear registration, they fear becoming known, they fear the consequences of being visible, preferring to blend into their new surroundings. This has massive consequences for them as crime reporting by them remains low, and when children or others go missing relatives often prefer to think that the person has gone somewhere voluntarily. Thus, migrants’ fears have huge implications for their safety and the possibility for them to get assistance when they need it. UNICEF has in this regard, noted that: “The thing is, they are invisible, that’s the very reason why [they are vulnerable] – if children aren’t counted, they don’t count.”¹¹ Vulnerability is such a problem that a number of members of the European Parliament warned their governments that young refugees were so unprotected that they were “in danger of falling victim to pan-European bands of criminals who could exploit them for prostitution, slavery, or trafficking in drugs or human organs.”

Part of the problem is that the supposed need for secrecy by those doing the migration undermines their ability to be secure and safe. Much more needs to be done to change those perceptions. Part of the problem can be addressed by making migrants feel more welcomed, and that their needs will be addressed without a focus on their undocumented status or other issues relating to their migrant status. Much more needs to be done to protect migrant children not only on the migration route to Europe, but also those that have arrived in Europe and are still at risk. However, this is far from being only a European problem. To begin to deal with the problem, it is crucial that migrants and refugees are

assured that they would not be caught and deported to their countries of origin but that both transition and receiving countries will provide them with security. Officials in various state agencies, particularly those who provide protection and assistance, need to be more forthcoming and more hospitable to those in need. At present, a climate of fear leads to apprehension by those who may seek state assistance. In addition, asylum processes are stretched to breaking points, are complex, and take a long time for those seeking asylum. Children who ought to be provided shelter are kept in detention because of a lack of places of safety for them. Children are often separated from their families for long periods of time. These problems ensure that many unaccompanied children avoid registration or run away.¹² This increases their vulnerability. Thus, often when migrant or refugee children need assistance they do not seek such help, out of fear of the ramifications of such a course of action. However, their avoidance of the system increases their vulnerability and the risk of them going missing.

Much therefore needs to change. The police need to specifically focus on the needs of migrants and refugees and purposefully reach out to these communities. Doing so will help to build bridges and reduce the tensions that exist. This is especially needed amongst the more vulnerable in such groups, especially women and children.¹³ Particularly, when they are alone or unaccompanied. For this to happen the police and other state officials need to be sensitized and trained to be more accommodating. Much more also ought to be done to make the migration process easier and safer. A human rights approach demands that more needs to be done to provide shelter and other basic necessities to those who are migrating. This is especially true for children, particularly when they are unaccompanied or separated from their families. More checks ought

⁹ <https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>

¹⁰ <https://www.theguardian.com/world/2016/apr/12/almost-6000-refugee-children-missing-last-year-germany>

¹¹ <https://www.theguardian.com/world/2016/apr/12/almost-6000-refugee-children-missing-last-year-germany>

¹² UNICEF, Danger every step of the way A harrowing journey to Europe for refugee and migrant children

¹³ On the vulnerability of migrants trying to get to the USA to criminals, see P. Villegas, “Stowaways Are Stranded in Mexico by Train Ban”, NY Times, 10 May 2014,

www.nytimes.com/2014/05/11/world/americas/stowaways-are-stranded-in-mexico-by-train-ban.html?hp&_r=0.

to be made to prevent trafficking of children, and to prevent children from being easy victims of crime. There are many issues that need to be tackled to prevent more children from going missing. Crucially, much more needs to be done to set up processes to help those who go missing and their families. More needs to be done to be able to identify those people whose bodies are found. According to UNICEF, there are 65 million children on the move at present.¹⁴ Despite this, and the problems concerning missing children, the only reference to them in UNICEF's 2016 *Annual Report on the State of the World's Children 2016* was a reference to the still missing Chibok girls of Nigeria. Much more attention needs to be focused by many more agencies on the problem. The world is in greater turmoil than in recent years. More children and their families will want to relocate and will be vulnerable while doing so. More needs to be done to ensure that they do not go missing, and if they do there are mechanisms in place to look for them. More needs to be done at the international level to establish laws, mechanisms and processes to deal with missing persons in general, and to ensure that data is collected and information coordinated.



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¹⁴ http://www.unicef.org/media/media_90760.html



THE CLARION: FUTURE THEMES AND DEADLINES

The Clarion is pleased to announce the following themes for Volume 2 (ABA Year 2016-2017):

Volume 2, Issue 2: Human Rights in the United States (End 2016)

- Deadline for submission of abstract: October 7, 2016
- Articles & Publication Agreements due: October 21, 2016
- Tentative Publication Date: October 31, 2016

Volume 2, Issue 3: The Human Right to Water (Early 2017)

- Deadline for submission of abstract: January 12, 2017
- Articles and Publication Agreements due: January 30, 2017
- Tentative Publication Date: March 1, 2017

Volume 2, Issue 4: Disabilities and Human Rights (Spring 2017)

- Deadline for submission of abstract (provisional): March 16, 2017

Volume 2, Issue 5: Human Rights Focus: Africa (Early Summer 2017)

- Deadlines for submission of abstract (provisional): May 1, 2017

If you are interested in writing an article on one or more of these themes, please email the Publications Vice-Chairs and IHRCpubs@gmail.com by the listed deadline. Please share these topics and any calls for submissions with friends, colleagues, students, and others—even those outside of the legal field. The Clarion seeks diverse voices and opinions that elucidate human rights issues from a variety of angles. Publications Vice-Chairs will also be soliciting submissions, and would appreciate any recommendations for potential authors, particularly from countries underrepresented in the ABA.

Submission of an abstract and acceptance of an article proposal does not guarantee publication. Publication is subject to quality, content and space requirements for each issue.



BUSINESS ENGAGEMENT WITH THE SUSTAINABLE DEVELOPMENT GOALS: LET'S NOT REINVENT THE WHEEL WHEN IT COMES TO CHILD RIGHTS

Francis West*

In mid-July, the UN High-level Political Forum on Sustainable Development met for the first time to assess progress against the 169 targets of the ambitious Sustainable Development Goals (SDGs).¹⁵

The Forum marks the latest political gathering on these Global Goals, which took more than 3 years of international wrangling over goals, targets and indicators to negotiate. Throughout this process, a consensus endured that the skills, expertise and resources of the business community are crucial to the delivery of the SDGs, which include key child rights challenges such as ending abuse, exploitation, trafficking and all forms of violence against children. However, when it comes to articulating how businesses, and in particular global value chains, can be harnessed to achieve these goals, there is much less clarity on the most effective way forward. This much is obvious from a recent PWC survey, which found that while an impressive 71% of businesses

surveyed are planning how to respond to the SDGs, only a modest 13% have identified the tools needed to do so.¹⁶ This uncertainty around implementation represents the biggest opportunity to scale action on business and child rights since the UN Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the UN Human Rights Council in 2011.¹⁷

Equally, the SDGs pose a risk to progress on business and child rights. As Professor John Ruggie, the former UN Secretary-General's Special Representative for Business and Human Rights, has articulated, the sheer number of SDG targets could encourage an outmoded approach to corporate responsibility, where companies select less challenging actions and claim a significant contribution to the Goals.¹⁸ This is not to suggest that businesses should address all goals, but instead they should prioritize action according to the salience of the impacts of their business on people.¹⁹ The UNGPs enshrine this move away from the notion of 'materiality' common to traditional corporate sustainability processes, whereby impact on the business is the primary concern of environmental, social and governance risk assessments. Instead, the UNGPs' due diligence process of identifying, preventing, mitigating and accounting for impacts on human and child rights across business operations and supply chains should result in a tangible action

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¹⁵ United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, (25 September, 2015). Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E [Accessed 18/07/16]

¹⁶ PWC, *Make it your business: Engaging with the Sustainable Development Goals*, (2015). Available at https://www.pwc.com/gx/en/sustainability/SDG/SDG%20Research_FINAL.pdf [Accessed 14/07/16]

¹⁷ United Nations Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights* (16 June, 2011) Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [Accessed 18/07/16]

¹⁸ John Ruggie, Chair of Shift, Berthold Beitz Professor in Human Rights and International Affairs, Harvard Kennedy School, Former Special Representative of the UN Secretary-General on Business and Human Rights, *Letter to Global Commission on Business and Sustainable Development* (18 February, 2016). Available at <http://www.shiftproject.org/news/john-ruggie-sustainable-development-goals-and-un-guiding-principles> [Accessed 18/07/16]; For an example of consultancies continuing to urge businesses to prioritise SDG Goals that are strategic to their business rather than those on which the business has most impact see: <http://www.responsiblebusiness.com/blog/a-first-look-at-how-companies-are-responding-to-the-sdgs>

¹⁹ Richard Karmel, *How companies should report on the United Nations Guiding Principles* (25 November, 2014). Available at <http://www.richardkarmel.co.uk/how-companies-should-report-on-the-united-nations-guiding-principles-by-richard-karmel/> [Accessed 18/07/16]

plan for a business, which can then be cross-referenced with SDG targets.

This process may not always present a win-win scenario for a business, but it will deliver the greatest social impact. Take, for example, the case of a European-based tour operator providing ‘volunteer’ opportunities in orphanages in South East Asia. Unintentionally, the business may be adversely impacting on children’s rights. It has been estimated that up to 85% of children residing at orphanages in Nepal have at least one living parent. In some cases children are deliberately separated from their families and placed in orphanages so they can be used to attract fee-paying volunteers and donors.²⁰ What’s more, while orphanage volunteers are generally well-intentioned, they often do not realize that volunteering for short periods of time without appropriate skills and training could contribute to a repeated sense of abandonment felt by already vulnerable children. In addition, when background checks are not conducted on volunteers, children may be at risk of sexual abuse. Prohibiting this type of ‘voluntourism’ or significantly reducing the number of travelers participating in these activities would clearly reduce business. It would, however, be in the best interests of the children involved.

A child-rights-based approach to private sector engagement in the SDGs does not equate to a blanket rejection of a business case for the corporate contribution to the Goals and can be congruent with the popular assertion that ‘enlightened self-interest [amongst businesses] focused on the SDGs could generate tangible results.’²¹ However, some proponents of the ‘business case’ are guilty of reductionism when they focus on profit-seeking with

a social purpose as the silver bullet for the business contribution to the Goals. One prominent consultancy, advising clients on the SDGs, has posed the question, ‘Should we question the motives of business if their activity and ingenuity works to the benefit of society?’²² The answer of course is that not all activity does work in this way. An approach that relies on the traditional concept of materiality obscures the fact that there can be clear financial interests in overlooking child and human rights violations. This is evident from the ILO’s assessment that forced labor (including forced child labor) in the private economy generates US\$ 150 billion in illegal profits per year.²³

Recognizing that business can have both positive and negative impacts on child rights, both carrots and sticks are fundamental to effectively harnessing the power of the private sector for the SDGs. In some contexts, regulation will be needed to drive up standards amongst poor performers and ensure that there is a level playing field for those businesses acting in ‘enlightened self-interest’. Here again, the UNGPs pave the way with their emphasis on a ‘smart mix’ of mandatory and voluntary measures.²⁴

An innovative approach to public procurement would be foremost amongst the levers that Governments could employ in pursuit of SDG progress. The Committee on the Rights of the Child is clear that States should reflect the expectation on businesses to carry out due diligence in their own practices as buyers of goods and services.²⁵ The SDGs offer a further opportunity in this regard. Target 12.7 aims to ‘promote public procurement practices that are sustainable.’²⁶ Governments buy a huge amount of goods and services from business

²⁰ Unicef Nepal, *Orphanage Voluntourism In Nepal: What You Should Know*. Available at <http://unicef.org.np/blogs/2015/05/10/orphanage-voluntourism-in-nepal-what-you-should-know> [Accessed 18/07/16]

²¹ PWC, *Make it your business: Engaging with the Sustainable Development Goals*, (2015). Available at https://www.pwc.com/gx/en/sustainability/SDG/SDG%20Research_FINAL.pdf [Accessed 14/07/16]

²² PWC, *Make it your business: Engaging with the Sustainable Development Goals*, (2015). Available at https://www.pwc.com/gx/en/sustainability/SDG/SDG%20Research_FINAL.pdf [Accessed 14/07/16]

²³ ILO News, *ILO says forced labour generates annual profits of US\$ 150 billion* (20 May, 2014) Available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang--en/index.htm [Accessed 18/07/16]

²⁴ United Nations Office of the High Commissioner on Human Rights, *Guiding Principles*

²⁵ Committee on the Rights of the Child, *General Comment No. 16: On State obligations regarding the impact of the business sector on children's rights* (15 March, 2013). Available at http://www.unicef.org/csr/css/CRC_GC16_LAYOUT_ENGLISH.pdf [Accessed 18/07/16]

²⁶ UNGA, *Transforming our World*



and they could do much more to use this purchasing power to scale up socially responsible business practice. In the UK alone, £45 billion worth of contracts are awarded to private firms each year – around three per cent of the UK's GDP.²⁷ Directing this capital only towards companies that are undertaking effective human and child rights due diligence would realize Government's commitments under both UN Guiding Principle 6 and SDG target 12.7.

The scale of the challenge implied by the SDGs is profound. It is estimated that over 600 million new jobs need to be created by 2030, just to keep pace with the growth of the global working-age population.²⁸ However, conditions must also improve for the 780 million women and men who are working but not earning enough to lift themselves and their families out of USD 2 a-day poverty.²⁹ When workers don't earn a living wage – enough to cover their own basic needs and that of their families – the consequences for children can be devastating. They may miss out on education, medical treatment or nutritious meals and, in some cases, undertake unsuitable work in order to support family income. That means businesses and Governments must engage with the challenge of wages in supply chains – an issue that unlocks numerous other child-related SDG targets from nutrition to health – in a much more collaborative and committed way than before.

In instances where a Government's failure to realize its responsibility as a duty-bearer for human rights means that companies cannot act unilaterally, collaborative advocacy with competitors can enhance social impact. A good example of this is when H&M and other major retailers lobbied the Cambodian government to raise wages in the garment sector.³⁰ Much has been made of the need for cross sector partnerships (the creation of which

hits various targets under Goal 17) in the SDGs. Perhaps partnerships advocating for regulation to raise standards around some of the most intractable rights issues in global supply chains suggest that businesses have a role in shaping the enabling environment for the better.

It is difficult to overstate the importance that these two processes – the UN Guiding Principles and the Sustainable Development Goals – succeed. As businesses start to consider their approach to the marketing-friendly SDGs, existing standards such as the UN Guiding Principles should remain the entry point. It is worth remembering that while there are 17 SDGs that took 3 years to establish, there are 31 Guiding Principles that took 6 years to agree. This hard work and consensus about the role of business in delivering social value needs to be harnessed in the Global Goals for either process to succeed.



²⁷ UK Government Office for Science, *What role does Government procurement play in manufacturing in the UK and internationally and how might this change in the future?* (October 2013) Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283898/ep24-government-procurement-manufacturing.pdf [Accessed 18/07/16]

²⁸ Stephen Pursey, Director, ILO Multilateral Cooperation Department, *Opening Remarks at the GMG-OECD Side Event to the Third International Conference on Financing for Development* (14 July, 2015) Available at

http://www.ilo.org/global/topics/sdg-2030/3-fdd/WCMS_383362/lang--en/index.htm [Accessed 18/07/16]

²⁹ Stephen Pursey, *Opening Remarks*.

³⁰ Miles Brignall, 'Fashion retailers agree to raise minimum wage in Cambodia', *The Guardian* (21 September 2014) Available at <https://www.theguardian.com/business/2014/sep/21/fashion-retailers-offer-raise-minimum-wage-cambodia> [Accessed 18/07/15]

CHILDREN AS VICTIMS AND PARTICIPANTS IN INTERNATIONAL JUSTICE

Stephen Cody*

International Criminal Court (ICC) Chief Prosecutor Fatou Bensouda is tasked with the investigation of grave international crimes. This means she is duty-bound where the court has jurisdiction to track down and prosecute those most responsible for atrocities—war crimes, crimes against humanity, and genocide—when national courts are unable or unwilling to do so. It’s a challenging job, complicated by burgeoning caseloads and meager budget growth.

Bensouda must also navigate the gale-force political winds of international justice. Diplomats and donors demand streamlined investigations and prosecutions, improved monitoring and evaluation, and greater administrative efficiency. At the same time, communities affected by mass violence cry out for far-reaching prosecutions, robust outreach, expansive victim services, and swift reparations. In this stormy environment, one might expect Bensouda single-mindedly pursue legal accountability and retributive justice. But to her credit, she has opted instead to embrace the court’s reparative mandate and place new emphasis on the care and support of vulnerable victims, especially children.

In November 2016, Bensouda’s Office of the Prosecutor is set to release a Policy on Children, which will for the first time establish a regulatory framework for engaging children in ICC investigations and prosecutions. Spearheaded by senior staff in the ICC’s Office of the Prosecutor and Georgia Law Professor Diane Marie Amman, who Bensouda appointed as Special Adviser on Children, the document will address the distinct needs of children in international criminal trials. More

specifically, the policy will advocate a “child-sensitive approach” and recognize children as dynamic individuals who, depending on context, may be both naive and savvy, beneficiaries and agents, defenseless and indomitable.

Historically, international institutions have too often treated children in post-conflict settings as passive bodies in need of protection, not as active participants in social reconstruction. During the Nuremberg trials and the Tokyo international military tribunals, for example, crimes against children were grouped with other crimes against civilians. Trials at the *ad hoc* tribunals for Rwanda or the former Yugoslavia also largely failed to acknowledge the unique challenges of children. International law recognizes the need to create special protections for children,³¹ and the Convention on the Rights of the Child (CRC)³² requires signatories to safeguard children’s civil, political, economic, social and cultural rights. However, international criminal law has only recently begun to grapple with difficult questions about child consent, justice for children, and the psychosocial impact of atrocity-crime prosecutions. The new ICC Policy on Children advances core principles expressed in the Convention on the Rights of the Child. These include the right to have the child’s best interests taken into account and the child’s right to express views and have them considered. The policy also accepts the added responsibility to shelter children from further harm. It will mark a transition from a unitary focus on children who bear arms to those who suffer the effects of violence. It might also trigger more debate on what constitutes culturally appropriate or gender sensitive care for child participants.

International criminal justice depends on children. They serve as vital informants at the investigation phase and can even appear as key witnesses during trials. They need special protection. ICC Chief Prosecutor Bensouda’s agenda to

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in the International Criminal Court. Cody has interviewed more than 300 victim participants at the International Criminal Court, including many child soldiers.

³¹ See Stuart Beresford, “Child Witnesses and the International Criminal Justice System” 3(3) *Journal of International Criminal Justice*, 726-732 (2005).

³² See the Convention on the Rights of the Child, Article 2-3.

recognize the rights of children in international criminal justice and construct a framework for their protection and participation warrants acknowledgement and holds promise for the future. Challenges lie ahead, but the ICC Policy on Children begins to transform children from trial spectators to meaningful participants in international criminal proceedings.



CHILDREN'S RIGHTS IN A DIGITAL WORLD

Patrick Geary**†

Across the globe, more children in more places are spending more time, in more ways, online. In the United States alone,

70% of children up to the age of eight already use the Internet on a daily basis³³, and similar figures from Europe show that up to 78% of toddlers in some countries are connected.³⁴ Nearly three-quarters of children in South Africa have access to the Internet at home or school³⁵, and it is now estimated that one of every three Internet users in the developing world is a child aged under 18.³⁶ Children increasingly go online to watch, listen, read, study, communicate and socialize³⁷, and many will learn how to play an online game before they learn how to tie their shoes.³⁸ Indeed, for better or for worse, it has become apparent that technology and the Internet are forever changing how children grow and develop as rights-holders.

While digital media have the potential to impact all aspects of children's lives, the policy debate thus far has been largely centered on the threats that children face online. Such a focus is essential, as children have a recognized international right to be protected from all forms of violence.³⁹ This right applies equally offline and online⁴⁰, and it

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† Any opinions expressed in this article are those of the author and editor and do not necessarily reflect the policies or views of UNICEF. The author wishes to thank Carly Nyst for her insight and sound research contributions.

³³ Gutnick AL et al. (2011) *Always Connected: The New Digital Media Habits of Young Children*. New York: The Joan Ganz Cooney Center at Sesame Workshop. Available

at <http://www.joanganzcooneycenter.org/publication/always-connected-the-new-digital-media-habits-of-young-children> [accessed 17 January 2016].

³⁴ Holloway D et al. (2013) *Zero to Eight. Young Children and their Internet Use*. London: LSE. Available at http://eprints.lse.ac.uk/52630/1/Zero_to_eight.pdf [accessed 17 January 2016]

³⁵ Popovac M and Leoschut L (2012) *Cyber bullying in South Africa: Impact and responses*. Centre for Justice and Crime Prevention Issue Paper No. 13. Available at

<http://www.lse.ac.uk/media@lse/research/Research-Projects/Researching-Childrens-Rights/pdf/Issue-Paper-13---Cyberbullying-in-SA---Impact-and-Responses.pdf> [accessed 17 January 2016].

³⁶ See, e.g., Livingstone S et al. (2015) *One in Three: Internet Governance and Children's Rights*. Global Commission on Internet Governance Paper Series, No. 22. Available at

<https://www.cigionline.org/publications/one-three-internet-governance-and-childrens-rights> [accessed 16 January 2016].

³⁷ EU Kids Online (2014) *EU Kids Online: Findings, Methods, Recommendations*. London: LSE. Available at <http://eprints.lse.ac.uk/60512/> [accessed 17 January 2016].

³⁸ Rachel Post, *Friend or Foe? The rise of online advertising aimed at kids*, *Guardian* (Feb. 28, 2014) <https://www.theguardian.com/sustainable-business/digital-online-advertising-children-privacy>

³⁹ UN Convention on the Rights of the Child, Art. 19 ("States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse...").

⁴⁰ See UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion: "Digital media and children's rights", available at

is our shared societal responsibility to ensure that children can use the Internet safely. This includes protecting children from harm at the hands of adults, which manifests in its worst forms as sexual abuse and exploitation, and teaching children the importance of digital citizenship to combat peer-to-peer violence like cyberbullying.

An exclusively protectionist approach, however, risks overlooking the bigger picture about how children exercise their rights in a digital world. As protection-based responses like website blocking and online filtering have clear and direct impacts on how children use the Internet, it becomes more important to understand and explore children's full range of rights as active users of information and communications technology. Adopting a broader perspective reveals apparent tensions between child protection and children's participation in digital life, and this article seeks to expand the discussion through exploring three particularly relevant themes in greater detail: (i) Privacy and data protection, (ii) Freedom of expression and access to information, and (iii) Non-discrimination and education.

Privacy and data protection

While children enjoy an established right to privacy under international law⁴¹, the implications of children's privacy in a digital context have yet to be fully appreciated. In some ways, the Internet promises children increased privacy through independent access to technology. Online services offer a chance to connect with peers outside strict adult supervision and present an opportunity to research and ask questions without fear or embarrassment. At the same time, going online puts children's privacy at greater risk of intrusion given the extent of digital tracking and supervision. Government authorities may be monitoring children's communications and browsing behavior;

http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf.

⁴¹ UN Convention on the Rights of the Child, Article 16 ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.")

⁴² UN Convention on the Rights of the Child, Articles 13 ("1. The child shall have the right to freedom of expression; this right shall include freedom to seek,

businesses may be collecting children's data for advertising and other commercial purposes; and parents may be publicly sharing children's images and information through their own social media networks.

There are in many cases valid reasons for interfering with children's online activities. The right to privacy is not absolute, and it may well not be in children's best interests to have unfettered, unsupervised access to the Internet from an early age. Yet the same measures taken to prevent online abuse and exploitation, where not carefully crafted, may encourage greater surveillance of the Internet, incentivize the wider collection and retention of data, grant authorities sweeping access to personal information, and place unrealistic expectations on parents and educators to police children's online behavior. These intrusions must be carefully balanced against children's expectations of privacy; in line with their evolving capacities, children should be granted greater autonomy and control over their behavior online as they mature into responsible digital citizens.

Freedom of expression and access to information

Freedom of expression and the right to information form the cornerstone of children's civil rights⁴², and as search engines replace school libraries and conversations move from classrooms to chat rooms, children are becoming increasingly reliant on technology to form and share their views. The Internet gives children nearly immediate access to voluminous quantities of richly informative content, and provides children with linkages to expansive digital platforms where they can make their voices heard the world over. With the growing array of opportunities that digital media present for civic engagement, going online can offer children a uniquely participatory pathway to empowerment.

receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."), 17("States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.").



Alongside children's free expression and pursuit of information exists a responsibility to protect children from harmful content and behavior. Questions arise, however, as to both the definition and nature of "harmful" information and the acceptability of limits to children's online speech. Parents, public institutions and internet service providers might all rightfully seek to prevent children from accessing violent or sexually explicit material, but overly broad blocking and filtering mechanisms can intentionally or inadvertently deny children a crucial means to educate themselves about sexual health, gender and sexual orientation. Beyond restricting access, closely monitoring children's behavior online and strictly policing digital forums for discussion also threaten to chill children's open, honest communication. While it is sensible to minimize children's exposure to damaging material and wise to guide children towards expressing their opinions in healthy, productive ways, protective measures need be no more restrictive than required to achieve their stated objective.

Non-discrimination and education

It is critical to explore how children use technology and the Internet, but a more fundamental question is whether children are able to go online in the first place. Children's rights may represent universal values in a digital world, but access to technology and the Internet remains far from global. Estimates indicate that less than half of the earth's population is online⁴³, and there is little available information about how children fare within this cohort.⁴⁴ Even in industrialized countries, where technology can be an implicit or even explicit requirement for schooling, children in less privileged communities are less likely to be online.⁴⁵ Barriers to Internet access are increasingly barriers to education, and the emerging digital divide can deepen structural inequalities that threaten to leave the planet's poorest and most vulnerable children further behind.

There have been numerous efforts, both public and private, to expand children's access to technology and the Internet. Many have focused on particular geographies or demographics, and some have offered free access to media and educational services. While providing children with greater online capabilities remains a laudable goal, this should be done with a holistic appreciation for children's rights. Efforts should be expended to make technology and the Internet affordable and accessible for all children regardless of their location, and special attention should be devoted to ensure that children at greater risk of becoming vulnerable or marginalized as a result of gender, disability or other status share in this access without discrimination. Equally, it must be remembered that beyond the availability of technology and the Internet, children, parents and educators must also be imparted with the digital skills necessary to enjoy the full benefits of online access in a responsible manner.

Conclusion

As children enter a fast-moving, ever more digital world, it may seem difficult if not impossible to fully comprehend how they can grow, develop and thrive online. As this article makes clear, there are not always easy, straightforward answers. The underlying tenets of children's rights, however, remain the same. It may at times seem that the imperative to protect children from online violence runs counter to the obligation to empower children as digital rights-holders, yet both remain indispensable elements of a well-considered approach. It is hoped that as technology continues to advance and evolve, so to does our understanding of children's rights in a digital world.



⁴³ ITU, *ICT Facts and Figures – the World in 2015*, available at <http://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>.

⁴⁴ Jasmina Byrne, *Why we need more research on children's use of the internet*, UNICEF, 13 August 2015, available at <https://blogs.unicef.org/blog/why-we-need-more-research-on-childrens-use-of-the-internet/>.

⁴⁵ See, e.g., Donald F. Roberts and Ulla G. Foehr, "Trends in Media Use", in Jeanne Brooks-Gunn and Elisabeth Donahue (eds), *The Future of Children: Children and Electronic Media*, Volume 18, Number 1, Spring 2008. Summary available at https://www.princeton.edu/futureofchildren/publications/highlights/18_01_highlights_07.pdf

RECOGNITION OF THE ROMA CHILD

Yvonne O'Sullivan & Miranda Wolford*

For most mothers, giving birth to their child is a joyous, momentous occasion. For Rita Prigmore's mother, it was one of immense relief, yet tremendous anxiety. Why? The only reason that Rita and her twin sister were allowed to be born was so that the Nazi could utilize them for inhumane scientific research projects.⁴⁶ Yet, for members of a Roma community, this was considered a stroke of enormous luck.

Many Roma mothers had been forcibly sterilized in the midst of the Nazi occupation, with this barbaric practice continuing for decades later, just one of the many fear-inducing tactics used in an attempt to wipe out the Roma population in Europe.⁴⁷ Other methods of genocide included forced abortions, gas chamber killings, starvation, forced labor in unlivable conditions, lethal injections, and firing squads. Horror stories of Nazi medical experiments gone awry and bus loads of Romani people being gassed plagued Roma communities, engraining this violence into their historical identity forever.⁴⁸

In a conservative estimate by leading historians on this deplorable campaign against the Roma, 25% of the entire Roma population in Europe, roughly 220,000 people, was slaughtered by Nazi forces.⁴⁹ By any working definition of the word, this

targeted killing spree of Romani communities was an egregious genocide.

Yet, this time of immense fear and suffering for the Roma minority was not officially recognized by the European Parliament until April 15, 2015, when they declared that "a European day should be dedicated to commemorating the victims of the genocide of the Roma during World War II."⁵⁰ The public's attention surrounding the Holocaust and World War II paid little to no attention to the suffering of the Roma.

For over fifty years, the discriminatory practices and prejudices that had manifested themselves in the merciless killing of nearly a quarter million people had gone unaddressed by the ruling body of justice and governance in Europe. Official recognition of this genocide was a critical first step, but further progress must be made to ensure that history does not repeat itself with the younger Roma generations.

In a modern context, Roma children are still the subjects of discrimination, the root causes of which were never adequately addressed from the genocide. If the discrimination that progressed to outright genocide is not prevented against, how can Roma children be protected from future acts of ethnically-charged violence?

Beyond mere recognition, educational measures must be implemented by governing bodies of European nations to counteract the discriminatory practices against Roma currently in place in society. Both non-Roma and Roma youth must not only be taught about the Roma genocide, but have an active

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⁴⁶ Zafeiri, Antonia. "Two Survivors of the Roma Genocide Share Their Stories." Open Society Foundations. Open Society Foundations, 6 Aug. 2014. Web. 20 Aug. 2016.

⁴⁷ Case of V.C. v. Slovakia. European Court of Human Rights. 8 Feb. 2012. HUDOC. Web. 20 Aug. 2016.

⁴⁸ "Roma Victims of the Holocaust: Roma in Auschwitz." The Jewish Library. American-Israeli Cooperative Enterprise, n.d. Web. 20 Aug. 2016.

⁴⁹ "Genocide of European Roma (Gypsies), 1939-1945." Holocaust Encyclopedia. United States Holocaust Memorial Museum, 2 July 2016. Web. 20 Aug. 2016.

⁵⁰ "Recognition." Roma Genocide Remembrance Initiative. TernYpe International Roma Youth Network, n.d. Web. 20 Aug. 2016.

understanding of the contributing factors to prevent further prejudice and conflict.

In recent years, international and European organizations and institutions such as the World Bank, United Nations Development Programme, and the European Commission have shined a light on the particular vulnerability of Roma youth, citing disproportionate poverty rates, hunger, poor health care, and educational inequalities as reasoning.⁵¹ From a strictly legal perspective, the treatment of Roma youth in many parts of Europe directly violates human rights law, something that has been widely criticized by several human rights watch groups.

In the Convention on the Rights of the Child, officially put forth by the United Nations in 1990, Article Two specifically states that no child should face discrimination, “irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁵² However, Roma children face widespread discrimination in schools because of the persistent prejudices present in society, even among teachers, including such practices as placement of Roma children in special needs classes and segregation from the mainstream schools, which leads to Roma only schools, poor attendance and in effect lower graduation rates. In Bulgaria in 1989, nearly 120,000 Roma youth were receiving an education, but by 1998, that number had dropped to a mere 50,000, despite an increasing Roma youth population. The right of Romani youth to go to school without encountering direct or indirect discrimination is being blatantly violated, permanently inhibiting the educational opportunities they receive.

Article Three of the Convention states that all actions taken by any party, private or public, on behalf of the child should be in the child's best interests.⁵³ Yet, all across Europe, mainly in countries such as Hungary⁵⁴, Slovakia⁵⁵, and the Czech Republic⁵⁶, the interests of Roma youth are systematically ignored in favor of the interests of non-Roma youth in school systems. It is claimed that non-Roma students and parents feel “uncomfortable” receiving an education alongside Roma students, so schools are continuously being segregated, with Roma youth being placed into separate classes and schools, receiving an inferior education as a result. The “best interests” of Roma youth are being distinctly neglected when healthy, promising students are actively being placed into schools for the disabled or mentally-ill.

Article Twenty-Eight, details the right of every child to education “and with a view to achieving this right progressively and on the basis of equal opportunity”.⁵⁷ The forms of discrimination against Roma children in school environments in Europe, treating them as inferior and in turn limiting their potential, is in direct conflict with the essence of what the right to education aims to achieve. Another dimension of the right to education is the State's duty to ensure children learn about historical events such as the Holocaust and the genocide of the Roma to help shape their understanding of peoples and the discrimination they have experienced in the past in the hope of preventing such atrocities in the future.

Arguably one of the most important provisions of the UN Convention on the Rights of the Child is Article Eight, which mandates that all public and private parties recognize and maintain the

⁵¹ Hammarberg, Thomas, comp. Human Rights of Roma and Travellers in Europe. Rep. Strasbourg: Council of Europe, 2012. Print.

⁵² United Nations. Office of the High Commissioner. Convention on the Rights of the Child. New York: United Nations, 1989. Convention on the Rights of the Child. United Nations. Web. 20 Aug. 2016.

⁵³ United Nations. Office of the High Commissioner. Convention on the Rights of the Child. New York: United Nations, 1989. Convention on the Rights of the Child. United Nations. Web. 20 Aug. 2016.

⁵⁴ Case of Horváth and Kiss v. Hungary. European Court of Human Rights. 29 Jan. 2013. HUDOC. Web. 20 Aug. 2016.

⁵⁵ "Slovak Court Rules Segregation of Roma in Schools Unlawful." Amnesty International. Amnesty International, 31 Oct. 2012. Web. 20 Aug. 2016.

⁵⁶ D.H. and Others v. The Czech Republic. European Court of Human Rights. 13 Nov. 2007. HUDOC. Web. 20 Aug. 2016.

⁵⁷ United Nations. Office of the High Commissioner. Convention on the Rights of the Child. New York: United Nations, 1989. Convention on the Rights of the Child. United Nations. Web. 20 Aug. 2016.

identity of the child.⁵⁸ One step that has been made in the right direction is the relatively recent, formal recognition of the Roma genocide by the European Parliament in 2015. Despite this formal recognition, educational programs on the Roma genocide are by no means widespread. The history of violence endured in the genocide is an integral part of Roma identity, making any attempt to deny or ignore the genocide tantamount to a denial of Roma identity. Article Eight may provide the key to preventing continued harm to Roma youth.

Now the question has arisen: how can educational efforts about the Roma genocide be targeted in order to prevent the discriminatory practices currently plaguing Romani youth? While education is certainly key, the approach must be holistic so that students can learn about the history of the Roma experience, including the atrocities of World War II, as well as how to prevent and fight against future genocides.

The Interim Director of the University of Minnesota's Center for Holocaust and Genocide Studies Ellen J. Kennedy points out that modern genocide education programs should not only teach about genocides but also how to tackle the root causes of prejudice and discriminatory opinions which may lead to such atrocities.⁵⁹

Therefore, governments and citizens must ensure that in the case of the Roma genocide, students must not only be taught about the discriminatory practices leading up to World War II and the genocide, but also how to counteract these racist and xenophobic practices today.

Eleven states in the United States have adopted programs teaching genocide recognition and prevention across secondary schools and higher institutions, as a part of The Genocide Education Project.⁶⁰ Lesson plans focus not only on the aftermath of genocide, but also on the specific steps

leading to acts of genocide, such as prejudice in the media and ignored discriminatory practices, as originally researched by Dr. Gregory H. Stanton's work "The Ten Stages of Genocide."⁶¹ Teachers have witnessed success in opening dialogues in the classroom to actually shift students' mindsets on how genocides originate, rather than merely teaching about them.

The International Holocaust Remembrance Alliance has set up a committee specifically to allocate resources and advocate for Roma genocide education, yet there are still no requirements for genocide education at the primary or secondary schooling levels in Europe. Online multilingual teaching materials, digital exhibitions, and Roma conference live-streams are available on their website, however with no official inclusion of this subject in school curricula in Europe today, these resources have a limited impact.⁶²

International human rights laws revolves around the notion that they are fair and accessible for every person, no matter their ethnicity, religion, sexual orientation, gender, political or economic standing, or any other distinguishing factor.⁶³ Yet, the rights of Roma children are still being overlooked, viewed as a lower level priority, across Europe today. Their rights as children, to education and to their identity are consistently violated in a systematic manner, continuing a pattern of prejudice and discrimination from the Roma genocide of World War II. In order to effectively eliminate these gross human rights violations, quality Roma genocide education must be mandated in European school systems, finally giving the widespread recognition to the Roma communities' decades-long struggle and enabling the next generation of Romani youth to truly flourish.



⁵⁸ United Nations. Office of the High Commissioner. Convention on the Rights of the Child. New York: United Nations, 1989. Convention on the Rights of the Child. United Nations. Web. 20 Aug. 2016.

⁵⁹ Kennedy, Ellen J. "Holocaust Education Should Strive to Prevent Future Genocides." Minnesota Public Radio News. Minnesota Public Radio News, 16 Apr. 2010. Web. 20 Aug. 2016.

⁶⁰ "Genocide Education Project." Genocide Education Project. N.p., n.d. Web. 20 Aug. 2016.

⁶¹ Stanton, Gregory H. "Ten Stages of Genocide." (2013): n. pag. Genocide Watch. The Genocide Education Project. Web. 20 Aug. 2016.

⁶² "Genocide of the Roma." International Holocaust Remembrance Alliance. International Holocaust Remembrance Alliance, n.d. Web. 20 Aug. 2016.

⁶³ United Nations. General Assembly. The International Bill of Human Rights. New York: United Nations, 1978. Print.



INCLUSIVE EDUCATION AS THE KEY TO NONDISCRIMINATION FOR CHILDREN WITH DISABILITIES

Carly Mara Toepke*

This article briefly describes how the right to inclusive education is a key contributor to equality and nondiscrimination for children with disabilities. It starts by giving a historical overview of the right to education as codified throughout international human rights instruments. It then expands on the concepts of both inclusive education and nondiscrimination. Finally, it ends with a picture of how both interact in the realization of the right to education.

Historical overview of the right to education

The right to education has evolved and become more comprehensive since 1948 through both nonbinding and binding law. The Universal Declaration on Human Rights (“UDHR”), which was the foundation of many human rights, provided that “everyone has a right to education.”⁶⁴ From there, the UNESCO Convention against Discrimination in Education prohibited discrimination in education which was defined as treating any student differently based solely on the ground that he or she belongs to a certain group.⁶⁵ The International Covenant on Economic, Social and Cultural Rights codified the right to education from the UDHR.⁶⁶ Then, the

Convention on the Rights of the Child (“CRC”) provided an even more detailed clarification that the right to education should help develop the student individually and as a person within their society.⁶⁷

The Salamanca Statement was the first international instrument to mention inclusive education when it provided that an inclusive education which accommodates all learners should be the education solution because it is the best way to combat discriminatory attitudes, create welcoming communities, build inclusive societies, and achieve education for all.⁶⁸ The CRC Committee clarified this right when it defined education using the Salamanca Statement, confirming that education should be inclusive.⁶⁹ Most recently, the Convention on the Rights of Persons with Disabilities (“CRPD”) created a framework for State Parties to realize an equal and nondiscriminatory right to education to children with disabilities.⁷⁰ The framework within the CRPD is inclusive education at all levels and is becoming the international law norm for the right to education.⁷¹

The concepts of inclusive education and nondiscrimination

Inclusive education

Inclusive education is an “approach and philosophy that underpins educational improvement” and seeks to address the learning needs of all.⁷² It is a process of “addressing and responding to diversity of needs of all learners by increasing participation [...] and reducing exclusion within and from education.”⁷³

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⁶⁴ Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71, Art. 26 (1948).

⁶⁵ UNESCO Convention against Discrimination in Education, Paris, Art. 1 (1960).

⁶⁶ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. G.A.O.R., 21st Sess., Supp. No. 16, at arts. 1, 3, 6, 15, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, Art. 13 (1976).

⁶⁷ United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. G.A.O.R. 44th Sess., Supp. No. 49 at 67, U.N. Doc. A/RES/44/49, Arts. 28, 29 (1990).

⁶⁸ Salamanca Statement and Framework for Action on Special Needs Education, UNESCO (1994).

⁶⁹ Comm. on the Rts. of the Child, General Comment No. 1, Article 29(1): The aims of education, CRC/GC/2001/1 para. 62(2001) [*hereinafter cited* CRC].

⁷⁰ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc. A/Res/61/106, 2515 U.N.T.S: 3 (2007) [*hereinafter cited* CRPD].

⁷¹ *Id.*, at Art. 24.

⁷² Peter Caton, *Inclusive Teaching for Children with Disabilities*, IDDC Paper, TEACHERS FOR ALL 10 (2013).

⁷³ UNESCO, *Overcoming Exclusion through Inclusive Approaches in Education: A Challenge and a Vision*, Conceptual Paper 4, 7 (2003).

Unlike segregated education which affirms a hierarchy of difference between learners and integrated education that uses accommodations to fit all learners into the mainstream model mold, inclusive education is individualized for the potential of each learner and their abilities. Before inclusive education was codified, the right to education was unable to be realized for all learners – namely for children with disabilities – because equality in the right to education requires inclusion.

Nondiscrimination

Nondiscrimination is not only a separate human right, but it also runs through each individual right.⁷⁴ Nondiscrimination is a minimum core obligation to the right to education meaning that a State must realize this without exception.⁷⁵ Although the right to education is considered a progressively realizable human right, the right to be free from discrimination is considered a civil and political right which must be immediately realized.⁷⁶ Therefore, nondiscrimination is both a mandatory and immediately realizable element of the right to education that States must realize without exception. This includes not only creating nondiscriminatory inclusive education for all learners but also dismantling any existing discriminatory policies and practices that affect this right.

Inclusive education as the key to nondiscrimination

Although the right to be free from discrimination in human rights realization has risen to the level of customary international law and is included in multiple international human rights treaties, many children face barriers to the realization of the right to education.⁷⁷ Children with disabilities have the right to enjoy their human rights on an equal basis without discrimination;⁷⁸ however, discrimination against children with disabilities continues to be pervasive in many formal educational systems.⁷⁹ This discrimination can destroy the ability of the child to enjoy the right to education.

Discrimination in the context of education includes treating any student in a way which separates him or her from other students and impacts his or her ability to participate in and receive education.⁸⁰ This includes depriving a person or a group from access to education,⁸¹ limiting a person or group to an inferior education,⁸² establishing or maintaining separate educational systems for certain groups,⁸³ inflicting on any person or group conditions which are against their dignity,⁸⁴ or denying reasonable accommodations or support for education.⁸⁵

Therefore, if a child is discriminated against on the basis of disability when trying to access his or her right to education, the State is in violation of its legal obligation not to discriminate. Equality and

⁷⁴ CRPD, *supra* note 8, at Art. 5; CRC, *supra* note 5, at Art. 2.

⁷⁵ Maria Green, *What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062, 1072 (2001), *citing* Comm. on Econ., Soc. & Cultural Rts, General Comment No. 3, The nature of States parties' obligations, U.N. Doc. E/1991/23, E/C.12/1990/8 para. 10 (1990).

⁷⁶ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407 / [1980] ATS 23 / 6 ILM 368, Art. 26 (1967).

⁷⁷ Ravi Malhotra & Robin F. Hansen, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education*, 29 *Windsor Y.B. Access Just.* 73, 80, 103 (2011); World Health Organization, *World report on disability* 205 (WHO Press, 2011).

⁷⁸ Comm. on the Rts. of the Child, General Comment No. 1, *supra* note 7, at para 62.

⁷⁹ *Id.*, at para. 10.

⁸⁰ UNESCO Education Convention, *supra* note 3, at Art. 1.

⁸¹ *Id.*, at Art. 1(a).

⁸² *Id.*, at Art. 1(b).

⁸³ *Id.*, at Art. 1(c). Article 2 of the Convention against Discrimination in Education elaborates that separate educational systems are allowed if the separate systems offer equivalent access to education with teachers of the same qualifications, quality school premises and equipment, and equivalent courses.

⁸⁴ *Id.*, at Art. 1(d).

⁸⁵ CRPD, *supra* note 8, at Art. 2, 5 (3); Concluding Observations of the Comm. on the Rts. of Persons with Disabilities, Hung., U.N.Doc. CRPD/C/HUN/CO/1 para. 41(2012); Concluding Observations of Comm. on the Rts. of Persons with Disabilities, Spain, U.N.Doc. CRPD/C/ESP/CO/1 para. 44 (2011).

non-discrimination in education can only be truly achieved through inclusive education. Even though not every State is party to international legal instruments which have codified inclusive education, all States should aim to be in compliance with the emerging international law norms. Nondiscrimination is one such solidified law norm that must be realized, and inclusive education for all learners is the way to accomplish it in realizing the right to education.



CHILD SOLDIERING IN MYANMAR: THE URGENCY TO IMPROVE LOCAL REMEDIES

Raman Maroz*

Plight of Child Soldiers in Myanmar⁸⁶

Until recently, Myanmar has been known as a country with the highest number of underage soldiers in the world.⁸⁷ In the most critical periods, the

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⁸⁶ Also commonly known as Burma. The military government changed the name of the country from Burma to Myanmar in 1989 in order to underscore its unity. See Haley Elizabeth Chafin, *Stolen Innocence: The United Nations' Battle against the Forced Recruitment and Use of Child Soldiers in Myanmar*, 43 GA. J. INT'L & COMP. L. 185, 187 (2014).

⁸⁷ *Child Soldiers Global Report 2008*, COALITION TO STOP THE USE OF CHILD SOLDIERS 5 (2008), https://www.hrw.org/legacy/pub/2008/children/Child_Soldiers_Global_Report_Summary.pdf.

⁸⁸ "My gun was as tall as me." *Child Soldiers in Burma*, HUMAN RIGHTS WATCH 187 (2002), <https://www.hrw.org/legacy/reports/2002/burma/Burma0902.pdf>.

⁸⁹ See Rep. of the Secretary-General on children and armed conflict, U.N. Doc. A/70/836–S/2016/360, ¶¶ 108–109 (Apr. 20, 2016) [hereinafter 2016 Secretary-General Rep.].

Myanmar regular army (Tatmadaw) contained up to 70,000 children, while various ethnic military groups enlisted 6,000–7,000 underage soldiers.⁸⁸ In response to international pressure, the government of Myanmar undertook a range of important measures, which helped to release hundreds of child soldiers.⁸⁹ Nevertheless, recruitment and military use of children in this Southeast Asian country continue to be widely practiced.⁹⁰

In Myanmar, child soldiering affects both boys and girls.⁹¹ The targeted age for enlistment varies typically between 14 and 17 years, though in numerous cases children have been recruited at younger age, even at 10 years old.⁹² Typically recruitment of children is performed either by military staff seeking career growth or by civilian brokers, who purchase and sell children for monetary reasons.⁹³ In many cases, they threaten boys and girls with imprisonment for having no identity documents and thereby force them to enlist in the army as an alternative.⁹⁴ Because of minimal security features, identity cards are also widely falsified in order to circumvent legal prescriptions.⁹⁵ Other recruitment tactics include false promises to provide children with jobs and education, direct abduction, delegation by village authorities, and lottery system.⁹⁶

⁹⁰ See Rep. of the Special Rapporteur on the situation of human rights in Myanmar, U.N. Doc. A/HRC/31/71, ¶¶ 52, 61 (Mar. 18, 2016) [hereinafter 2016 Special Rapporteur on Myanmar Rep.].

⁹¹ Rep. of the Secretary-General on children and armed conflict in Myanmar, U.N. Doc. S/2013/258, ¶¶ 20–27 (May 1, 2013).

⁹² *Id.* ¶¶ 11, 20.

⁹³ See *Under the radar: Ongoing recruitment and use of children by the Myanmar army*, CHILD SOLDIERS INTERNATIONAL 11 (Jan. 2015), <http://www.child-soldiers.org/Handlers/Download.ashx?IDMF=f0f4081a-7674-40b3-b633-9b60e7bf787e> [hereinafter 2015 CSI Rep.].

⁹⁴ See "Untold Miseries." *Wartime Abuses and Forced Displacement in Burma's Kachin State*, HUMAN RIGHTS WATCH (Mar. 20, 2012), <https://www.hrw.org/report/2012/03/20/untold-miseries/wartime-abuses-and-forced-displacement-burmas-kachin-state> [hereinafter 2012 HRW Rep.].

⁹⁵ See 2015 CSI Rep. at 18–19.

⁹⁶ See *CRC Shadow Report Burma. The plight of children under military rule in Burma*, U.N. COMM. ON THE RIGHTS OF THE CHILD 33 (2011) <http://www2.ohchr.org/english/bodies/crc/docs/ngos/My>

In both State and non-State armed forces children are exposed to different types of risks. Underage soldiers have been systematically maimed and killed because of regular crossfires between the Tatmadaw and ethnic armed groups, rocket attacks, and use of landmines.⁹⁷ In addition, recruited children often face particularly harsh conditions of service, which include regular beatings, severe punishments, lack of food, salary confiscations, and incitements to suicide.⁹⁸

Prohibition of Child Soldiering under International Law

Both recruitment and military use of children are unequivocally prohibited by international law. In the area of international humanitarian law, child soldiering is outlawed by provisions of two Additional Protocols of 1977 to the Geneva Conventions of 1949.⁹⁹ Over time, prohibition of recruiting and using underage soldiers in hostilities has also crystalized into a rule of customary international humanitarian law.¹⁰⁰ Instruments of international criminal law, including the Rome Statute, establish individual criminal responsibility for recruitment and military use of children.¹⁰¹ Child soldiering is also prohibited by such human rights treaties as the Convention on the Rights of the

Child¹⁰² and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,¹⁰³ as well as by several conventions adopted within the International Labour Organization (ILO).¹⁰⁴

Ineffectiveness of Myanmar Local Remedies

A closer examination of the situation of child soldiering in Myanmar reveals that its government could achieve some positive results primarily due to international mechanisms and technical assistance. In particular, through the ILO forced labor complaint mechanism approximately 50 children are discharged from the military every year.¹⁰⁵ The U.N. Country Force on Myanmar has secured the release of more than 700 children since the adoption of Joint Action Plan in June 2012.¹⁰⁶ The Myanmar Committee for the Prevention of Military Recruitment of Underage Children, which has discharged around 580 children, has received almost all its cases from the ILO, UNICEF or local NGOs.¹⁰⁷ The Committee itself has dealt directly only with one complaint.¹⁰⁸

At the same time, national procedures against recruitment and military use of children have proved to be ineffective in many respects. Currently, the Myanmar Penal Code does not recognize the crime

anmar_CRFB_CRC.pdf [hereinafter 2011 CRC Shadow Rep.].

⁹⁷ See, e.g., Rep. of the Secretary-General on children and armed conflict, A/68/878-S/2014/339, ¶ 110 (May 15, 2014).

⁹⁸ See 2012 HRW Rep.; Rep. of the Secretary-General on children and armed conflict, U.N. Doc. A/69/926-S/2015/409, ¶ 136 (June 5, 2015).

⁹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 77(2), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), June 8, 1977, 1125 U.N.T.S. 609.

¹⁰⁰ See Jean-Marie Henckaerts et al. (Int'l Comm. of the Red Cross), *Treatment of Civilians and Persons Hors de Combat*, in 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 299, 482-488 (2005).

¹⁰¹ Rome Statute of the International Criminal Court arts. 8(2)(b)(xxvi), 8(2)(e)(vii), July 17, 1998, 2187 U.N.T.S. 3; Agreement between the United Nations and the

Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute) art. 4(c), Jan. 16, 2002, 2178 U.N.T.S. 137.

¹⁰² Convention on the Rights of the Child arts. 38(2-3), Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁰³ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict arts. 1-4, May 25, 2000, 2173 U.N.T.S. 222.

¹⁰⁴ Convention (No. 29) concerning forced or compulsory labour, as modified by the Final Articles Revision Convention, 1946 art. 11(1), June 28, 1930, 39 U.N.T.S. 55; Convention (No. 182) concerning the prohibition and immediate action for the elimination of the worst forms of child labour art. 3(a), June 17, 1999, 2133 U.N.T.S. 161.

¹⁰⁵ *Update on the operation of the complaint mechanism in Myanmar*, INT'L LABOUR ORGANIZATION ¶ 7 (2013) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_222546.pdf.

¹⁰⁶ 2016 Special Rapporteur on Myanmar Rep. ¶ 61.

¹⁰⁷ 2015 CSI Rep. at 11, 20.

¹⁰⁸ *Id.*

of child soldiering, but simply outlaws compulsory labor.¹⁰⁹ According to the practice of Myanmar courts, compulsory labor is usually punished by fines or reprimands, which is overtly disproportionate to the gravity of the crime of child soldiering.¹¹⁰

Another obstacle to justice lies in the existence of military courts serving as a shield from responsibility for the regular army.¹¹¹ Furthermore, even when military courts proceed to administer justice for enlisting and exploiting children in hostilities, actual sanctions are primarily imposed on low-ranking members of the Tatmadaw and rarely reach senior personnel.¹¹² Paradoxically, the level of impunity is even higher with respect to civilian brokers. In particular, it is reported that in 2015 only one civilian broker was brought to justice.¹¹³ Crimes of falsification of identity documents equally remain almost absolutely unpunished.¹¹⁴ In addition to serious impediments to the right to justice, no independent steps have been taken by Myanmar authorities to ensure the right to truth, while rehabilitation policies for victims of child soldiering are generally characterized as poor and insufficient.¹¹⁵

Accordingly, the Myanmar experience shows that reliance solely on foreign assistance may not guarantee comprehensive resolution of internal problems. Child soldiering will persist as long as the government fails to establish a reliable system of delivering identity documents. Nevertheless, in addition to making it easier for children abducted into military service to be identified, the government must introduce appropriate sanctions against perpetrators of this heinous crime against children and enforce those sanctions by effective judicial mechanisms reformed in line with the principle of separation of powers and respect for the rule of law. Given the gravity of the issue, urgent action from the Myanmar authorities is required.



¹⁰⁹ THE PENAL CODE OF MYANMAR ¶ 374, May 1, 1861 (Myan.), translation at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61342/99602/F965183773/MMR61342%20English.pdf>.

¹¹⁰ See 2011 CRC Shadow Rep. at 35-36.

¹¹¹ CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR ¶ 20(b), May 29, 2008 (Myan.), translation at

INTERNATIONAL HUMAN RIGHTS COMMITTEE 2016-2017 Programmatic Priorities

The International Human Rights Committee is committed to serving as the leading voice on human rights issues in the American Bar Association. While the IHRC addresses emerging human rights issues and situations and will continue to do so, the IHRC has identified four primary areas of programmatic priority for the coming year. These areas will serve to drive committee work, programming and policy throughout the year, while still allowing for members to actively suggest and work on other topics through the Vice-Chairs.

The priorities for 2016-2017 are:

-Environmental Justice and Protection.

-The Protection of Vulnerable Persons, including disabled persons, children and minorities.

-The Protection of Lawyers and Judges.

-The Revitalization of the Human Trafficking Subcommittee (HTSC), with a focus on involuntary servitude.

Through focused efforts on these issues, the IHRC leadership hopes to drive collective ABA efforts and make a significant impact around the world.

We welcome program ideas associated with these topics as well as member involvement in any of the programs or projects over the course of the coming year.



<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79572/85698/F1127243646/MMR79572.pdf>.

¹¹² See 2015 CSI Rep. at 23.

¹¹³ 2016 Secretary-General Rep. ¶¶ 101-102.

¹¹⁴ See 2015 CSI Rep. at 11.

¹¹⁵ *Id.* at 21.

WHEN SURROGACY FAILS: REDRESS FOR ABANDONED CHILDREN FOUND IN INTERNATIONAL CHILD RIGHTS LAWS

Tschika McBean*

World events that shock our moral compass are opportunities to pause, reflect and create new laws, revise existing ones or explore all available laws, to ensure the loopholes that allowed the indiscretion to fester, can be sealed. In 2014, a “Tai Surrogacy Scandal,”¹¹⁶ erupted when an Australian couple, David and Wendy Farnell, allegedly abandoned their infant son in Thailand with the Thai surrogate, Pattharamon Chanbua, after learning that the baby suffered from Down syndrome.¹¹⁷ What made the issue more noteworthy, was that the parents were allowed to return to Australia with the child’s twin sister.¹¹⁸ Consequently, the Australian couple denied the allegations, stating that the surrogate mother, refused to part with the baby boy.¹¹⁹ Thereafter, the Australian courts, concluded that the Australian

parents were not in violation of any child rights laws pertaining to the infant left in Thailand and their parental rights to their daughter were preserved.¹²⁰ However, the Thai surrogate, maintained that the baby boy was abandoned by his Australian parents, who had requested that she terminate the pregnancy after learning of the child’s condition.¹²¹ After this incident gained international attention, Thailand banned¹²² commercial surrogacy transactions with foreigners and created the *Protection of Children Born from Assisted Reproductive Technologies Act*.¹²³ In response to this event, but more precisely, with the practice of international surrogacy becoming common, many questions arose within the legal community, cogitating the role of international law in addressing this issue; specifically what legal framework would be most suited to address a similar situation. Was it a contractual issue?¹²⁴ Does the matter require review under domestic child abuse and maltreatment laws?¹²⁵ Was it a violation of

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¹¹⁶ The Tai people are distinct from the Thai people. While “Tai” is a cultural and ethnic designation, “Thai” is a reference to citizens of Thailand.

¹¹⁷ Hilary Whiteman, *Surrogate mom vows to take care of ill twin 'abandoned' by parents* CNN (Aug. 11, 2015) <http://www.cnn.com/2014/08/04/world/asia/thailand-australia-surrogacy/>

¹¹⁸ Michael Safi, *Baby Gammy's twin can stay with Australian couple despite father's child sex offences*, THE GUARDIAN (April 16, 2016 23.06 EDT) <https://www.theguardian.com/lifeandstyle/2016/apr/14/baby-gammys-twin-sister-stays-with-western-australian-couple-court-orders> (find court record)

¹¹⁹ *Thailand stops couples leaving with surrogate babies*, BBC NEWS (Aug. 15, 2014) <http://www.bbc.com/news/world-asia-28811779>

¹²⁰ *Farnell & Anor and Chanbua* [2016] FCWA 17 (Austl.) available at http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/judgments/full-court-judgments/judgment-results?query=pipah&meta=%2Fau&mask_path=au%2F

<https://www.washingtonpost.com/news/worldviews/wp/2015/02/20/a-shocking-scandal-led-thailand-to-ban-commercial-surrogacy-for-hire/>

¹²¹ BBC NEWS, *supra* note 3

¹²² Abby Phillip, *A shocking scandal led Thailand to ban surrogacy for hire*, THE WASHINGTON POST (Feb. 20, 2015)

<https://www.washingtonpost.com/news/worldviews/wp/2015/02/20/a-shocking-scandal-led-thailand-to-ban-commercial-surrogacy-for-hire/>

¹²³ Sayuri Umeda, *Thailand: New Surrogacy Law*, LIBRARY OF CONGRESS (April 6, 2015)

<http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/>; see also Protection of Children Born from Assisted Reproductive Technologies Act, http://www.senate.go.th/bill/bk_data/73-3.pdf (Original text of Document)

¹²⁴ Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014), available at <http://scholarship.law.wm.edu/wmjowl/vol20/iss2/6>

¹²⁵ See AUSTL. INST. OF FAMILY STUDIES, *What is Child Abuse and Neglect Family Community Australia*, CHILD FAMILY CMTY. AUSTL. -RESOURCE SHEET (Sept. 2015)

<https://aifs.gov.au/cfca/publications/what-child-abuse-and-neglect>; see also *Farnell & Anor and Chanbua* [2016] FCWA 17 (Austl.)

International Commercial laws,¹²⁶ as it relates to the international transfer of Assisted Reproductive Technology? Or, was it a confirmation that the practice of international surrogacy should be prohibited all together?¹²⁷ Conversely, if one ponders redress for this issue under International Child Rights Laws (hereinafter ICRL), its resolution is apparent. This article addresses the legal ramifications associated with failed international surrogacy arrangements, specifically, what measures should be taken if parents in developed nations, abandon their children born to surrogate women in developing nations.

For many potential victims of child abandonment involving international surrogacy arrangements, utilizing ICRL, is a viable option, when domestic laws are ineffective or unavailable to attach liability to parents from developed countries. Notably, all countries, except the United States of America, have ratified the Convention on the Rights of the Child (hereinafter Convention)¹²⁸. Therefore, all citizens from developing countries, whose laws may be in their infancy and do not provide remedies for abandoned children, can still access child rights laws at the international level. Moreover, the Vienna Convention on the Law of Treaties, which most States have signed and/or ratified, specify that all signatories of a treaty should, “refrain from acts which would defeat the object and purpose of a treaty. . .”¹²⁹ Therefore, in instances where a State has signed but has not yet ratified or implemented the

Convention, that State still carries an obligation to refrain from acts, that are in conflict with the purpose of the international instrument.¹³⁰

Furthermore, reviewing existing ICRL, one can determine that there are many exemplified laws and avenues available that can be utilized to regulate international surrogacy, in a manner that protects children, especially when they are rejected. International Child Rights Laws have already been confirmed as important tools that can be utilized to legitimize the claims of citizenship for children produced through international surrogacy arrangements.¹³¹ According to Art. 7 of the Convention, a “child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.”¹³² An abandoned child therefore has a right to the citizenship of the parent who provided the genetic material, as long as the child meets the immigration requirements of the genetic parent’s country. The United States of America, for example, requires the child to have some genetic and/or gestational relationship to the parent, in order to obtain citizenship.¹³³

Highlighting the “Tai Surrogacy Scandal,” both countries, Thailand and Australia, have ratified the Convention, on March 29, 2002 and December 17, 1990, respectively.¹³⁴ Moreover, on September 25, 2012,¹³⁵ Thailand ratified the Optional Protocol to the Convention on Communication Procedure

¹²⁶ See Casey Humbyrd, *Fair Trade International Surrogacy*, DEVELOPING WORLD BIOETHICS, Dec. 2009, at 111-118 (2009); see also Kristina Brugger, *International Law of the Gestational Surrogacy Debate*, 35 FORDHAM INT’L L. J. 666 (2012), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2438&context=ilj>

¹²⁷ Xinran “Cara” Tang, *Setting Norms: Protections for Surrogates in International Commercial Surrogacy* 25.1 MINN. J. INT’L L. 193 (2016) available at <http://minnjil.org/wp-content/uploads/2016/05/6-Tang-macro-FINAL.pdf>

¹²⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>

¹²⁹ Vienna Convention on the Law of Treaties, art.18, May 23, 1969, 1155 U.N.T.S. 331, available at <http://www.unhcr.org/refworld/docid/3ae6b3a10.html>

¹³⁰ *Id*

¹³¹ Xinran “Cara” Tang, *supra* note 11, at 208-209

¹³² Convention, *supra* note 12, at art. 7 (2)

¹³³ U.S. DEP’T STATE, BUREAU OF CONSUMER AFFAIRS, *Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad*,

<https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html> (last visited July 11, 2016)

¹³⁴ U.N.T.S., *Status of Convention on the Rights of the Child*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited July 9, 2016)

¹³⁵ *Id.*

(hereinafter Optional Protocol),¹³⁶ which made international law accessible to Tai citizens via the Committee on the Rights of the Child (hereinafter CRC), when national remedies fail to address violations of child rights and all national remedies have been exhausted.¹³⁷ Merely utilizing the Convention coupled with the reinforcing nature of the Optional Protocol, an abandoned child would have a right to vindicate violations of child rights, based on the State's obligation under international law. For developed countries, such as, Australia, although not a party or signatory of the Optional Protocol, there still remains an obligation to submit quinquennial reports to the CRC, outlining their progress on child rights issues and progress in implementing the Convention into their domestic legal systems.¹³⁸ Moreover, Art. 23 of the Convention places responsibility on States to ensure "that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."¹³⁹ It follows that, in cases, such as, the "Tai Surrogacy Scandal," after obtaining citizenship, there is still an onus on the parents, to be enforced by the State, to ensure that the disabled child, has access to medical and any necessary treatment. The implementation of legal confiscatory methods, such as, wage garnishment of the parents in the developed world, in order to satisfy this obligation under ICRL, could achieve this purpose.

¹³⁶ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Dec. 11, 2011, G.A. Res. 66/138, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx>

¹³⁷ *Id.* at art. 7(8)

¹³⁸ COMM. ON THE RIGHTS OF THE CHILD, *Monitoring Children's Rights*, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (last visited July 11, 2016)

¹³⁹ Convention, *supra* note 12, at art. 23

¹⁴⁰ See e.g., The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Nov. 15, 1965, 35 I.L.M. 1391, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70; The Hague Convention on the Protection of Children and

In conclusion, though the call to ensure children are protected from violations of ICRL in international surrogacy arrangements is complex, ICRL can still be effective in protecting children produced through these arrangements. Moreover, utilizing a combination of international instruments¹⁴⁰ aimed at preserving children's rights, the practice of international surrogacy would be fortified.



CHILDREN IN HUMANITARIAN CRISES: WHAT BUSINESS CAN DO: THE DEVELOPMENT OF UNICEF AND UN GLOBAL COMPACT (UNGC) GUIDANCE

Michela Cocchi*

Introduction

The frequency and intensity of disasters are increasing, while conflicts are becoming more complex and, in many cases, cutting across borders and regions. In 2016, 76 million people – including 43 million children – living in 63 countries are requiring assistance in humanitarian crises¹⁴¹ to protect them from malnutrition, disease and

Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=69

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¹⁴¹ According to UNICEF and UN Global Compact (UNGC) "Children in Humanitarian Crises: What Business Can Do" Draft Guidance for public consultation launched on 2016, June 8th, a humanitarian crisis is an event or series of events that represents a critical threat to the health, safety, security or well-being of a community or other large group of people, usually over a wide area and where affected populations cannot withstand the negative consequences by themselves. Armed conflicts,

interrupted education, and to help protect them from violence, abuse and exploitation.

In these situations, particular attention must be given to ensure that children's rights are upheld and safeguarded, as systems to protect children often fail, aggravating child rights violations and leaving children without options to seek help, protection and remedies.¹⁴²

Highlighting the impact of humanitarian crises on children and business

Children under 18 years of age account for almost one third of the world's population. It is inevitable that businesses, whether small or large, will interact with and have an effect on the lives of children, both directly and indirectly. Children are key stakeholders of business—as consumers, family members of employees, young workers, and as future employees and business leaders. At the same time, children are key members of the communities and environments in which businesses operate.¹⁴³ Unfortunately, children make up nearly half of the world's displaced people and, today, they now represent more than half of all refugees.

Children who are denied education, health care, nutrition and protection today are also denied a full opportunity to contribute to building sustainable prosperity, peace and stability in their societies. This is of critical importance as countries and the global community begin the vital work of delivering on the promises of the Sustainable Development Goals (SDGs).

Today, the humanitarian system is stretched to the limit, and never before has it been as urgent for all actors to come together to look for people-driven, values-based approaches where public policies are met by responsible business operations,

epidemics, famine, natural disasters and man-made disasters all lead to a humanitarian crisis. Regardless of the type of disaster, survivors are left in urgent need of life-saving assistance.

¹⁴² In addition to the International Bill of Rights and the core human rights treaties, there are other universal instruments relating to human rights of the child. A non-exhaustive selection is listed below: Convention on the Rights of the Child (CRC); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution

and child pornography (CRC-OPSC); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OPAC); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

new business models, social and other investments, innovation and technology.

On one hand, governments, with support from partners, have the primary responsibility for humanitarian planning and assistance, on the other hand, governments, the United Nations, civil society and intergovernmental organizations are calling for more support from the private sector to complement existing efforts.

Within such a framework, the United Nations Children's Fund (UNICEF) and the UN Global Compact (UNGC) are collaborating on the development of guidance for businesses to protect and support children's rights and well-being before, during and after humanitarian crises. A draft of the guidance was launched on June 8, 2016 for public commentary and businesses and other stakeholders were invited to provide feedback by responding to a questionnaire. Public participation was expected to end on July 8, 2016 with the final document to be released in September 2016.¹⁴⁴

Business operations and children in the context of humanitarian crises

All businesses have the responsibility to respect human rights, including those of children. This is true, whether the businesses are operating in peace time or during a humanitarian crisis. Nevertheless, it is important to note that during crises, children are especially vulnerable to and are at an increased risk of being abused and exploited. Hence, it is critical that legal and social mechanisms be put in place to protect them and safeguard their rights.

The 2012 UNICEF, UNGC and Save the Children Children's Rights and Business Principles provide a framework for avoiding, mitigating and

and child pornography (CRC-OPSC); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OPAC); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

¹⁴³ See Introduction to 2012 UNICEF, UN Global Compact (UNGC), and Save the Children "Children's Rights and Business Principles".

¹⁴⁴ See <https://www.unglobalcompact.org/take-action/action/>

remediating any harm caused to children in their operations.

There is ample guidance to help business ensure their activities and supply chains do not have a negative impact on children and their families.¹⁴⁵ Beyond this, there is much more that business is doing and can do.

Illustrating ways in which business can take action to reduce hazards concerning children during humanitarian crises: beyond private sector

Business activities, operations and relationships touch on children's lives in new and unexpected ways. Children's rights do not implement themselves, and many businesses will be unable, unprepared or even unwilling to meet their obligations, calling to action all stakeholders, being important to acknowledge the roles that they play in ensuring respect and building support for children's rights in the private sector.

Most notable among these stakeholders are government, media, consumers and children. Governments control the legal and regulatory environment in which businesses operate; media provide a platform for public awareness and accountability; consumers have the power to create a marketplace that values children's rights; children can at times be the strongest champions of their rights. Each actor should consider how interactions with each other can enhance and complement their advocacy efforts.¹⁴⁶

Providing examples and inspire further action to advance children's rights

Companies with operations or supply chains inside and outside countries that are facing humanitarian crises can take action individually or in partnership with others to support children and families who are at risk of, affected by or recovering from humanitarian crises.

The report of the United Nations Secretary-General for the World Humanitarian Summit¹⁴⁷ stresses that it is now time to move "from delivering aid to ending need," and outlines an agenda for action, which includes five core responsibilities¹⁴⁸ for collective action by governments, local communities, the private sector, international organizations and aid providers, to end crises and suffering. These include providing political leadership to prevent and end conflicts, upholding the norms that safeguard humanity, leaving no one behind, changing people's lives from delivering aid to ending need, and investing in humanity.

Conclusion

Traditionally, support from business and other actors has been significant during responses to sudden onset emergencies. While such support continues to be critical, globally there is a call for new approaches to respond to humanitarian crises that are more sustainable and make more effective use of local capabilities.

Unless the root causes of humanitarian crises are fully and properly addressed, it will be difficult to deliver on the promises of the Sustainable Development Goals and the commitment to leave no one behind.

In dealing with humanitarian crises, greater emphasis needs to be placed on prevention, mitigation and preparedness for response, as well as the life-saving response.

Coordination across sectors, in communities and districts and country-wide is essential for building resilience. It is therefore critical to break the barriers between the humanitarian response and development.



¹⁴⁵ Among others see Child Labour Platform (CLP) "Good Practice Notes With recommendations for companies", implemented by the Sustainable Trade Initiative (IDH), November 2014.

¹⁴⁶ 2013 Save the Children "How to use the Children's Rights and Business Principles: a Guide for Civil Society Organizations".

¹⁴⁷ See <https://www.whsummit.org>.

¹⁴⁸ The United Nations Secretary-General's Agenda for Humanity.

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IN MEMORIAM

The IHRC is deeply saddened to report the torture and murder of Willie Kimani, a human rights defender and lawyer in Kenya. Willie was murdered in June along with his client, who had been pursuing a case against police in Kenya, and their driver. As of publication, at least five people have been charged in connection with this heinous crime, four of them police officers. Willie was a young legal advocate, having graduated from law school only five years ago, and had worked with various justice and human rights organizations in his short career. The loss of Willie at such a critical juncture in Kenya's history has spurred many activists and international organizations to call for investigations into a culture of extrajudicial killings in Kenya. This loss will be profoundly felt, and we remember Willie's commitment to justice as we mourn his killing.

