

SAFEGUARDING CHILDREN'S RIGHTS IN IMMIGRATION LAW

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Safeguarding Children's Rights in Immigration Law

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PREFACE

Children on the Move are Children in the First Place

Ton LIEFAARD*

1. 30 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD

With the adoption of the UN Convention on the Rights of the Child (UNCRC), on 20 November 1989, and its almost universal ratification 30 years later, the international community sends out a clear message to the world, which has fundamentally challenged – and continues to challenge – the way children are looked at in legal systems across the globe: each child must, first and foremost, be recognised as a human being with human rights and fundamental freedoms. This message has had far-reaching implications for domestic legal systems and the way children are treated, in theory and practice. It has resulted in the development of new legislation or the adjustment of existing law and practices, also under the influence of an emerging body of case law, internationally and nationally.¹ A growing number of studies, more general and specific ones, confirm that the UNCRC and related international and regional standards have had a significant impact on legislation, jurisprudence and policy at the domestic level.² The UNCRC has also generated additional standard-setting in different regions in the world, which has contributed to the development of a comprehensive, multi-level, dynamic and also complex legal framework.³

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¹ Karin Arts, 'Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges' (2014) 61 *Netherlands International Law Review* 267; Ton Liefwaard and Julia Sloth-Nielsen (eds.), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017).

² See e.g. Laura Lundy, Ursula Kilkelly and Bronagh Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' (2013) 21 *International Journal of Children's Rights* 442.

³ Ursula Kilkelly and Ton Liefwaard, 'International Children's Rights: Reflections on a Complex, Dynamic, and Relatively Young Area of Law' in Ursula Kilkelly and Ton Liefwaard (eds.), *International Human Rights of Children* (Springer 2019).

Over the past 30 years, there have been serious efforts made to further develop and tailor the children's rights framework to *specific contexts* in which children live and develop, such as child protection, juvenile justice, health & biomedicine and migration; to *specific themes*, including violence against children, sexual exploitation and trafficking of children, children in armed conflict and children and digital technologies; and to *specific groups of children*, including children in conflict with the law, children as victims and witnesses and children in alternative care. As part of these efforts, the UNCRC's core notions have been upheld and elaborated upon. This is particularly true for the principle that the best interests of the child have to be a primary consideration '[i]n all actions concerning children' (Art. 3(1) UNCRC), which in the view of the UN Committee on the Rights of the Child means that these interests have 'high priority'⁴ and assumes an unconditional respect for children's rights and freedoms as a baseline.⁵ Other fundamental notions are the right of the child to be recognised as a member of her or his family and to be cared for by her or his parents (see the UNCRC Preamble, arts. 7, 9 and 18 UNCRC), respect for children's evolving capacities and emerging autonomy (Art. 5 UNCRC) and the right to be heard (Art. 12 UNCRC), which has developed into broader concepts such as participation and child-friendly justice.⁶ A more recent development revolves around children's access to justice, which, fuelled, among others, by the adoption and entry into force of the Third Optional Protocol to the UNCRC on a communication procedure, underscores the importance of children's access to effective remedies in case of rights violations, without which children's rights have little meaning.⁷ Access to justice for children can also be seen as a means to develop more just, inclusive and sustainable societies, also in light of the 2030 Sustainable Development Goals, in which children are taken seriously as actors and citizens.

Yet, persistent challenges remain,⁸ one of which revolves around the (lack of) recognition that 'each child' (Art. 2(1) UNCRC) must be acknowledged as rights

⁴ UN Committee on the Rights of the Child, 'General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) UN Doc CRC/C/GC/14, para. 39.

⁵ Michael Freeman, 'Article 3. The Best Interests of the Child' in André Alen and others (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Nijhoff Publishers 2007).

⁶ See e.g. Aoife Daly and Stephanie Rap, 'Children's Participation in the Justice System' in Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children* (Springer 2019).

⁷ Ton Liefaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 *International Journal of Children's Rights* 195; UN Committee on the Rights of the Child, 'General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' (2003) UN Doc CRC/GC/2003/5.

⁸ See e.g. Karin Arts, 'Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges' (2014) 61 *Netherlands International Law Review* 267.

holder under the international human rights framework and that states should not unlawfully or arbitrarily limit the legal protection children are entitled to under international law. In this regard, it must be acknowledged that many children suffer from this lack of recognition. One could think of girls, children living in street situations, children deprived of liberty, children with (mental) disabilities, children belonging to indigenous communities, among many others. These children belong to the most stigmatised groups of children in societies across the globe, and they may be subjected to rights violations, because of their low status or lack of visibility in society, including the lack of protection against violence and exploitation, international protection, statelessness, denial of access to basic services, education and health care, and unlawful or arbitrary deprivation of liberty. Children on the move constitute such a group as well and also run the risk of being disregarded and denied adequate rights protection, despite the wealth of international instruments targeted at this protection, at the costs of their right to be regarded as children with human rights in the first place.⁹

2. CHILDREN ON THE MOVE

Today, millions of children are on the move worldwide and, although this is not a new phenomenon, its scale is without precedent.¹⁰ Children are fleeing conflicts and wars. They move with or without their parents to attain a better future. Throughout the migration process, children find themselves in a particularly vulnerable position. Children may find themselves and their family without lawful residence in the state they reside in. As a result of unlawful

⁹ See UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, 'Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (2017) UN Doc CMW/C/GC/3-CRC/C/GC/22; UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, 'Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23; see also UN Committee on the Rights of the Child, 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (2005) UN Doc CRC/GC/2005/6; see also the various contributions in this book.

¹⁰ Ciara Smyth, 'Migration, Refugees, and Children's Rights' in Ursula Kilkelly and Ton Liefwaard (eds.), *International Human Rights of Children* (Springer 2019), 422 with reference to UNICEF, *Uprooted: The growing crisis for refugee and migrant children* (UNICEF 2016); UNHCR, *Global Trends: Forced Displacement in 2018* (UNHCR 2018).

residence, children are often deprived of or restricted in their liberty.¹¹ Unaccompanied or separated children, who are dependent on (legal) guardians, are vulnerable to human trafficking and exploitation; sometimes even with involvement of their family.¹² Another significant issue relating to the legal protection of children in immigration law is the prevention of statelessness and the protection of the human rights of stateless children.¹³ Recent data of the United Nations High Commissioner for Refugees (UNHCR) suggest that in 2018 111,000 unaccompanied and separated child refugees were reported and that around 27,600 unaccompanied and separated children sought asylum on an individual basis.¹⁴ The UNHCR warns, however, that these numbers are likely to be significant underestimates. Children formed about half of the refugee population in 2018. In its 2016 report on refugee and migrant children, UNICEF reported that '[a]round the world, almost 50 million children have migrated across borders or been forcibly displaced', again a conservative estimate;¹⁵ 28 million boys and girls have fled from violence and insecurity. As UNICEF points out '[t]he story of child migrants and refugees is a global story, not one confined to a single region.'¹⁶

Despite the proliferation of children's rights worldwide and the growing acceptance of the idea of children's entitlement to special protection, also within immigration law, the focus of migration control often lies heavily on safety and security, often at the cost of adequate human rights protection and the best interests of the child serving as a primary consideration for governments, policy makers and judiciaries.¹⁷ Given the significant numbers of migrant or refugee

¹¹ See e.g. Human Rights Watch, 'Children at Risk in US Border Jails: Congress Should End Abusive Conditions' (Human Rights Watch, 20 June 2019) <<http://www.hrw.org/news/2019/06/20/children-risk-us-border-jails>>.

¹² UN Committee on the Rights of the Child, 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (2005) UN Doc CRC/GC/2005/6.

¹³ See e.g. UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, 'Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23, para. 20ff and 23ff.

¹⁴ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR 2018).

¹⁵ UNICEF, *Uprooted: The growing crisis for refugee and migrant children* (UNICEF 2016).

¹⁶ *Ibid.*, para. 6.

¹⁷ UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, 'Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (2017) UN Doc CMW/C/GC/3-CRC/C/GC/22.

children globally and the particular vulnerability of children on the move, this can be considered as seriously problematic.

3. ACADEMIA AND CHILDREN'S RIGHTS IN THE CONTEXT OF MIGRATION

The realities and tensions inherently related to the position of children in immigration has fuelled the development of specific policy documents, standards and case law around the protection of children who are migrating with or without their parents. In Europe, for example, the Council of Europe as well as the European Union have developed special action plans, resolutions, recommendations, communications and strategies around the protection of refugee and migrant children.¹⁸ Regional human rights tribunals and domestic courts are increasingly asked to decide on migration-related matters affecting children.¹⁹ Internationally, the position of migrant children has become the subject of many communications under the Third Optional Protocol to the UNCRC and the first views that have been adopted by the CRC Committee deal with migration-related issues, including the first case which dealt with the deportation of a girl from Denmark to Somalia, where she would face an alleged risk of being forcefully subjected to female genital mutilation.²⁰ In addition, a growing body of jurisprudence at the international, regional and national level can be identified. In addition, there is a growing body of research on specific elements of asylum and immigration proceedings, including on the exploration of the meaning of children's rights in the context of these proceedings, conducted by academics, international and national governmental and non-governmental organisations and monitoring mechanisms.²¹

This book, which brings together a selection of scientific papers presented at the conference 'Safeguarding Children's Rights in Immigration Law', organised by the Institute of Immigration Law and the Department of Child Law at Leiden

¹⁸ See e.g. Council of Europe, *Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019)* (Council of Europe 2017); Council of Europe, *Council of Europe Strategy for the Rights of the Child (2016–2021)* (Council of Europe 2016); European Commission, 'Communication from the Commission to the European Parliament and the Council: The protection of children in migration' COM(2017) 211 final; and the many resolutions and recommendations of the Parliamentary Assembly of the Council of Europe on this matter.

¹⁹ See the different contributions to this book.

²⁰ See Julia Sloth-Nielsen, 'Case Note 2018/1. Communication 3/2016: I.A.M. on behalf of K.Y.M. v Denmark' [2018] *Leiden Children's Rights Observatory*; Mark Klaassen and Peter Rodrigues, 'The Committee on the Rights of the Child on Female Genital Mutilation and Non-Refoulement' [2018] *Leiden Law Blog*.

²¹ See e.g. Ciara Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1; UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR 2018); and the contributions in this book.

University in November 2018, reflects the growing concern for children in immigration. It also shows the diversity of issues related to immigration and children, including family reunification, detention, participation, human trafficking and the rights of siblings in the context of migration, as well as the significance of regional legal systems and infrastructures for the protection of children in migration. While this book includes many contributions from Europe, it is important to point to the developments in other parts of the world, including Africa, South and South-East Asia and the Americas.²² It is furthermore apparent that much of the scholarship around migration and children focuses on detention.²³ This could be explained by a genuine concern, around the world, of civil society organisations, international and domestic monitoring mechanisms, academia and also intergovernmental agencies about the widespread use of deprivation of liberty of children, and families, in reception, transit, relocation or other migration-related centres. It is fair to say that on this particular matter efforts are made to push for a higher standard than the one laid down in Article 37(b) UNCRC and proclaiming, as suggested by the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families that ‘child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice.’²⁴ As pointed out in scientific literature,²⁵ this position is not yet supported by international law, but as argued by the committees in their joint general comment

‘the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration

²² See e.g. Bina D’Costa, ‘Of Responsibilities, Protection, and Rights: Children’s Lives in Conflict Zones’ (2018) 10 *Global Responsibility to Protect* 261; UNHCR, *Children on the Run* (UNHCR 2014).

²³ See also the various contributions on this.

²⁴ UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, ‘Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return’ (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23, para. 12; cf earlier UN Committee on the Rights of the Child, ‘General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ (2005) UN Doc CRC/GC/2005/6, para. 61; see further Ton Liefaard, ‘Deprivation of Liberty of Children’ in Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children* (Springer 2019) and Ciara Smyth, ‘Migration, Refugees, and Children’s Rights’ in Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children* (Springer 2019).

²⁵ Ton Liefaard, ‘Deprivation of Liberty of Children’ in Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children* (Springer 2019) and Ciara Smyth, ‘Migration, Refugees, and Children’s Rights’ in Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children* (Springer 2019); FRA, *European legal and policy framework on immigration detention of children* (European Union Agency for Fundamental Rights 2017) 30–31.

proceedings as it would conflict with the principle of the best interests of the child and the right to development'.²⁶

It remains to be seen how this will develop in the near future, also in light of the findings of the United Nations Global Study on Children Deprived of Liberty, which after its publication in November 2019, is likely to further shape the global agenda on this matter and may push for a higher children's rights standard, specifically in the context of immigration.²⁷

4. FINAL REMARKS: CHILDREN ON THE MOVE ARE CHILDREN IN THE FIRST PLACE

One cannot be sure about what the next 30 years of children's rights will bring for children, in general and specifically for children on the move. It can be assumed, however, that children will not stop migrating and that their position therefore requires continuous attention. It can also be assumed that scholarship, on children's rights and on migration (law), has an important role to play in assessing the theoretical and practical meaning of international and regional instruments safeguarding children's human rights and fundamental freedoms and underscoring that *all* children ought to be recognised as children in the first place. The comprehensive, multi-layered, dynamic and complex framework of international law requires academics' constant focus. This book, which includes contributions of different generations of scholars and is also meant for the education of future researchers and professionals, aims to make a contribution in this regard.

²⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, 'Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23, para. 10.

²⁷ Manfred Nowak, *The United Nations Global Study on Children Deprived of Liberty*, Omnibook 2019; UN GA A/74/136, 11 July 2019; see also Ciara Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1.

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