

Progressive Development, Children’s Rights and the ILC Draft Articles on the Expulsion of Aliens

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INTRODUCTION: WHAT IS THE ROLE OF THE ILC IN PRODUCING DRAFT ARTICLES?

When it was created in 1947 the UN General Assembly charged the International Law Commission with “encouraging the progressive development of international law and its codification.”² The Statute of the ILC expands upon the meaning of this dual mandate.³ Article 15 explains the intended purpose of each element of the mandate. It explains that the phrase “progressive development of international law” refers to “the preparation of draft conventions on subjects which have not yet been *regulated by international law* or in regard to which the law has not yet been *sufficiently developed* in the practice of States.” “Codification of international law”, by contrast, is said to mean “the more precise formulation and systematization of rules of international law in fields where *there has already been extensive State practice, precedent and doctrine*” (emphasis added).

These explanations are puzzling. The first Commission role is, it seems, to fill lacunae in international law to assist in the “development” of State practice. The second Commission role is to improve the rigor or precision of international law rules where there already is extensive State practice and law. Progressive development in one context seems to entail the creation of new international law to regulate de facto State conduct. In the other context, progressive development seems to entail consolidation (clarification and systematization) of existing precedent and doctrine.

This dual mandate gives rise to ambiguity about how we should construe “progressive development.” Does it mean that it is the role of the ILC to reform the scope and impact of international law by incorporating forward-looking changes in practice and national or regional doctrine? Other commentators refer to several candidates for such incorporation. They include the addition of sexual orientation persecution to the grounds for prohibiting expulsion,⁴ the inclusion of threats to not only life, but freedom in the grounds for prohibiting expulsion of non refugee aliens,⁵ and rejection of an expansion of the state’s exclusionary powers to include threats to public order?⁶ If this is the correct interpretation of the ILC’s mandate, then it is

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² U.N. Charter art. 13(1).

³ Statute of the International Law Commission adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, as amended by Resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, available at <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/statute/statute.pdf&lang=EF>

⁴ See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session [hereinafter “ILC Draft Articles”], Draft Article 23(1), U.N. Doc. A/69/10, 59 (2014); Won Kidane, *Missed Opportunities in the International Law Commission’s Final Draft Articles on the Expulsion of Aliens*, at 6, <http://harvardhrj.com/>.

⁵ See Gerald Neuman, *Human Rights and the International Law Commission’s Draft Articles on the Expulsion of Aliens*, at 4, <http://harvardhrj.com/>.

⁶ See Kidane, *supra* note 4, at 6.

appropriate (as Kidane argues) to evaluate the success of the Draft Articles according to a metric of seized or missed opportunities, and to bemoan adoption of “lowest common denominator” formulations that simply drive consensus.⁷ An alternative approach construes “progressive development” as meaning that it is the role of the ILC to strengthen existing treaty law and treaty bodies by moving gradually to incorporate widely accepted doctrine from multilateral contexts. This interpretation endorses an approach that avoids expansive reach into soft law or inappropriate “intrusion” upon treaty bodies’ mandates. If this is how the ILC mandate should be understood, then it is appropriate (as Forteau suggests) to evaluate the success of the Draft Articles according to a metric of cautious incrementalism⁸.

These different approaches to the work of the ILC reflect contrasting takes on acknowledgement of the non-existence of a zero sum calculus in construing “progressive.” From one perspective this must be accepted—human rights gains for individual migrants or deportees can be considered in direct tension with economic or security enhancement for States.⁹ From another, this is unacceptable – progressive means more respectful of the human rights of potentially vulnerable individuals directly affected by the norms¹⁰.

The Oxford English Dictionary defines “progressive” as “happening or developing gradually or in stages; proceeding step by step.”¹¹ Though it includes a notion of forward (rather than backward or no) movement (proceeding) it does not encompass any normative or ethical standard. Proceeding is value neutral—one can move ahead towards a more accurate depiction of prevailing law, whether or not it enhances the protection of individual human rights. Accordingly, in what follows, I will refrain from evaluating the Draft Articles in terms of missed opportunities to enhance the rights or protections available to migrants facing expulsion. Rather I will review the Draft Articles from the perspective of “*extensive State practice, precedent and doctrine*” in relation to child migrants, a neglected but particularly vulnerable category. I will inquire whether the Draft Articles provide a satisfactory reflection of widely accepted practice and procedure for the treatment of minors facing expulsion.

CHILD MIGRANTS AND THE TENSION BETWEEN BEST INTERESTS AND STATE INTERESTS

The recent “crisis” in migration and refugee flows, epitomized by the dramatic large scale arrival in the US of Central Americans fleeing violence in the Northern Triangle, and by Middle Eastern and African distress migrants in Europe over the last 18 months has brought to public attention, like never before, the significant presence of children among the desperate crowds fleeing to safety and a better life. “Children” are construed here, in line with international law, as persons under the age of 18.¹² This category therefore includes both those who are accompanied by adults or other caretakers and those who are unaccompanied; it includes teenagers, babies and toddlers. In the first six months of 2014, the US Border Patrol reported a 90% spike just in the

⁷ See Kidane, *supra* note 4, at 3.

⁸ See Mathias Forteau, A New ‘Baxter Paradox’? Does the Work of the ILC on Matters Already Governed by Multilateral Treaties Necessarily Constitute a Dead End? Some Observations on the ILC Draft Articles on the Expulsion of Aliens, at 2-4, <http://harvardhrj.com/>.

⁹ See Forteau, *supra* note 8, at 13.

¹⁰ See Daniel Kanstroom, How “Different” is Expulsion/Deportation?: Reflections on the Draft Articles on the Expulsion of Aliens as compared to a Declaration on the Rights of Expelled and Deported Persons, at 4, <http://harvardhrj.com/>.

¹¹ *Definition of progressive in English*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/progressive (last visited May 23, 2016).

¹² U.N. Convention on the Rights of the Child [hereinafter “CRC”], art. 1, Nov. 1989, 1577 U.N.T.S. 3, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last visited May 23, 2016).

arrival of unaccompanied minors, a dramatic increase over arrivals for the previous year and the precursor to continuing high flows of Central American children to the US.¹³ According to Europol, 27% of the million arrivals in Europe during 2015 were minors; of these, Save the Children estimates at least 26,000 were unaccompanied.¹⁴ As the war in Syria spirals into a humanitarian disaster of untold proportions, as instability in Iraq and Libya deepen, and as the oppression by an authoritarian regime of Eritrean adolescent forced conscripts grows, the proportion of children among those fleeing seems to be rising.¹⁵ Over fifty-percent of the population of concern to UNHCR are children, the highest proportion in a decade.¹⁶ In February 2016, children were forty-one percent of refugees and migrants crossing the border between Greece and Macedonia.¹⁷ The hardships of forced migration, including perilous border crossings, exposed terrains and rough seas, and food, medical and shelter inadequacies, together with the additional serious risks of exposure to extreme temperatures, sickness, violence, exploitation and trafficking, bear particularly gravely on children. Babies born en route are at severe risk of hypothermia or pneumonia, toddlers and older children risk separation from their parents or other responsible adults in the crush to cross borders or board means of transportation, disabled and unaccompanied children are at additional risk of violence, abuse and trauma.¹⁸ This case encapsulates the particular vulnerability and challenge to states posed by unaccompanied child migrants:

17 year old Frank D. left Cameroon after his parents died to find a way to sustain himself. After a six-month journey traveling through Niger and Algeria, he reached Morocco. He tried to climb the fence around Melilla but cut himself on the razor-wire bordering Spanish territory and fell back onto the Moroccan side. Moroccan border guards arrested him. Frank said that the guards beat and injured him with wooden batons, even though the fall had stunned him and he was not resisting or trying to escape. The police took him to the hospital, where he remained for two days under medical care. He was then released on crutches, put on a bus, and taken to Oujda to be expelled across the Morocco-Algeria border. Frank said he was not allowed to see a lawyer, use the services of an interpreter, gain information regarding the deportation decision against him, or appeal the decision. The authorities failed to conduct an age determination or any family tracing for Frank, nor did they assign a guardian to represent his interests.¹⁹

Hardship is one element of risk. Death is another. Throughout 2015, children were not only among the crowds arriving on Europe's shores and proceeding through its (still barely open)

¹³ United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

¹⁴ 10,000 refugee children are missing, says Europol [hereinafter "10,000 refugee children"], THE GUARDIAN, Jan. 30, 2016, <http://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>.

¹⁵ IOM and UNICEF Data Brief: Migration of Children to Europe [hereinafter "IOM UNICEF Brief"], Nov. 30, 2015, <http://www.unhcr.org/5592a6c39.html> (last visited May 22, 2016).

¹⁶ IOM UNICEF Brief, *supra* note 15.

¹⁷ UNICEF Refugee and Migrant Crisis in Europe: Regional Humanitarian Situation Report # 9 [hereinafter "UNICEF Refugee Crisis Brief"], Mar. 15, 2016, <http://reliefweb.int/report/former-yugoslav-republic-macedonia/unicef-refugee-and-migrant-crisis-europe-regional-0> (last visited June 7, 2016).

¹⁸ UNICEF Refugee Crisis Brief, *supra* note 15.

¹⁹ *Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco* [hereinafter "Abused and Expelled"], HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco> (last visited May 23, 2016).

doors; at least one third of the estimated 3000 who drowned in the Mediterranean were children. According to the International Organization for Migration, two children have drowned every day since September 2015 as their families seek safety across the Eastern Mediterranean, with the number of child deaths growing.²⁰ The situation has not changed as of this writing.

One reason why there are such high risks and fatalities for contemporary distress child migrants is the unsatisfactory practice of states in catering to humanitarian need, in protecting fundamental human rights and in enforcing international legal obligations. Hundreds of thousands of children are losing or risking their lives because of brutal conflict and attendant failures in diplomacy, in local integration provision, in reception conditions, and in resettlement programs. They are also at risk because of egregious practices of exclusion and expulsion by states intent on protecting their territories from large migrant influxes and possible terrorist threats. What does current national, regional and international law mandate in terms of child migrant exclusion and expulsion?

THE STATE'S RIGHT TO EXPEL – INCLUDING CHILDREN?

The first principle articulated in the Draft Articles is the State's "right to expel an alien from its territory."²¹ Though the right is qualified because it is "without prejudice to other applicable rules"²² and subject to "pursuance of a decision reached in accordance with law,"²³ this bold articulation of the primacy of the State's right to expel is in some tension with prevailing human rights law. As Neuman notes, the "without prejudice" disclaimer does not make it unnecessary to examine how well the rule conforms to human rights standards, "and how much reliance would need to be placed on the savings clause to displace the articulated rules."²⁴ It is not just, as Kanstroom rightly remarks, that "it is a bit jarring from a modern human rights perspective to think of sovereign State power defined as a 'right.'"²⁵ The right itself cannot stand in this absolute articulation²⁶ without a head on clash with some established human rights standards. The distinctive vulnerability of children, particularly young, unaccompanied or disabled children, suggests a difficulty in asserting the simple principle of state expulsion right as an accurate reflection of current international law.²⁷ One of the most fundamental principles of international law is the non-discrimination principle, which prohibits all distinctions between

²⁰ *Young lives lost at sea as migrants cross the eastern Mediterranean*, THE STRAITS TIMES, (Feb. 19, 2016), <http://www.straitstimes.com/world/europe/young-lives-lost-at-sea-as-migrants-cross-the-eastern-mediterranean>.

²¹ See ILC Draft Articles, Draft Article 3, *supra* note 4.

²² *Id.*

²³ See ILC Draft Articles, Draft Article 4, *supra* note 4.

²⁴ See Gerald Neuman, Human Rights and the International Law Commission's Draft Articles on the Expulsion of Aliens, at 1, <http://harvardhrj.com/>.

²⁵ Kanstroom, *supra* note 10, at 4.

²⁶ The only exclusion from the comprehensive scope of the Draft Articles applies to diplomats and other non-citizens governed by special rules of international law. See ILC Draft Articles, Draft Article 1.2, *supra* note 4. According to the Commentary, other non-citizens who enjoy special protection (such as children presumably) are only exempt in so far as they come within the "without prejudice" clauses. See text accompanying *infra* note 27.

²⁷ See the long-standing recognition of the special vulnerability of children following expulsion, by the Committee on the Rights of the Child; it suggested in 2005 that "States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities either as a combatant or through carrying out other military duties." U.N. Committee on the Rights of the Child, *General comment No. 6*, ¶ 28, U.N. Doc CRC/GC/2005/6 (Sept. 1, 2005).

people that are arbitrary, disproportionate, or unjustifiable.²⁸ Give this legal imperative to treat all humans as equal, the onus of justifying expulsion measures than can expose children to hardship or risks because of political or economic considerations rests on states. They need to demonstrate that their practice falls within the permissible exceptions to the non-discrimination principle.²⁹ When can expulsion of a migrant child be considered proportionate or justifiable?³⁰

The specific physical and psychological vulnerabilities of children, and the documented risks of migratory journeys for children,³¹ have to be factored into the evaluation of the reasonability of any expulsion proceedings, as a primary consideration.³² Generic human rights obligations particularly relevant to child migrants, including unaccompanied child migrants, mandate the protection of life³³ (strengthened by maritime law and specific regulations about rescue at sea), liberty and security,³⁴ and the freedom from torture, cruel or degrading treatment, or punishment.³⁵ These fundamental obligations implicate state responsibility for children stranded trying to cross a border through arduous or land mined terrain, or injured as a result of dangerous transportation (asphyxiation in containers or lorry trunks), or in distress at sea. Procedures that create insuperable hurdles for children seeking to leave their own countries (and not covered by national security, public order, public health or morals or rights or freedoms of others),³⁶ that subject them to summary removal from their countries of birth or residence,³⁷ and that implement return at borders without individualized proceedings (razor wire fences, interdiction, failure to patrol dangerous seas) fall foul of these provisions, as do arbitrary or abusive detention practices³⁸ and other deprivations of liberty.³⁹ In the absence of effective

²⁸ International Covenant on Civil and Political Rights [hereinafter “ICCPR”] art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 177.

²⁹ ICCPR art. 13, *supra* note 28.

³⁰ For a concise account of the circumstances in which non-citizens can be expelled in conformity with international human rights law, see Office of the U.N. High Comm’r for Human Rights, Discussion Paper, *Expulsions of aliens in international human rights law* [hereinafter “OHCHR Discussion Paper”], (Sept. 2006), <http://www.unhcr.org/4bf6813a9.html>.

³¹ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (Princeton: Princeton UP 2014)

³² CRC art. 3, *supra* note 12.

³³ ICCPR art. 6, *supra* note 28; CRC art. 6, *supra* note 12.

³⁴ ICCPR art. 9, *supra* note 28.

³⁵ ICCPR art. 7, *supra* note 28; CRC art. 37, *supra* note 12.

³⁶ ICCPR art. 12(2), 12(3), *supra* note 28.

³⁷ As of 2014, Lebanon started expelling locally born children of migrant workers, sometimes with as little as forty-eight hours to leave the country after notification. A Ghanaian woman had to send her 10 year old Lebanon-born son to Ghana after the security authorities refused to renew his residence permit, though he was enrolled in school. See Lebanon: Migrant Workers’ Children Expelled, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2014/09/02/lebanon-migrant-workers-children-expelled> (last visited May 23, 2016).

³⁸ In the US, the average stay in a “shelter” is forty-five days in addition to the initial seventy-two-hour processing period. It is not unusual for children to be separated from their families for months, and occasionally even years. See NICOLE JOHNSON, DETERRENCE, DETENTION, & DEPORTATION: CHILD MIGRANTS IN THE UNITED STATES & THE EUROPEAN UNION, HEINRICH BOLL SIFTUNG (Aug. 2015).

³⁹ CRC art. 6, 12, 19, 22, 27(1), 27(3), 37, 39, *supra* note 12. An egregious example of such practices is provided by Thailand’s treatment of Rohingya child refugees. Thailand is not a signatory to the 1951 Refugee Convention or the 1967 Protocol. Thailand treats all Rohingya migrants as illegal migrants, and detains many in detention centers and closed “shelters.” Children are routinely held with unrelated adults. While in detention, they have no access to education. As of 2013, Thailand tightened its child migrant detention policy to exclude all boys over twelve from shelters and to uniformly detain them in adult detention centers. Anyone entering Thailand without valid documentation, including children, is subject to deportation. See *The Stateless Rohingya in Thailand*, CENTER FOR MIGRATION STUDIES, Jul.16, 2014, <http://cmsny.org/the-stateless-rohingya-in-thailand/> (last visited May 23, 2016).

access to guardianship and competent legal representation, the ability of a child to challenge expulsion proceedings must be called into question. The Committee on the Rights of the Child has drawn specific attention to the peculiar vulnerability of unaccompanied or separated child migrants and has explicitly commented on the “multifaceted challenges faced by States and other actors in ensuring that such children are able to access and enjoy their rights irrespective of the nationality, immigration status or statelessness.”⁴⁰

Apart from the measures mentioned, the very strong protection afforded to children with respect to both aspects of family unity is relevant to any generalized power to expel. The Draft Articles recite the obligation to respect the right to family life,⁴¹ but it is worth noting what this obligation entails where children are concerned. The CRC notes, first, that state parties have a mandatory obligation not to separate a child from his or her parents against their will, unless this is for the child’s best interests.⁴² The Convention also requires states to affirm the strong right to family reunification in a “positive, humane and expeditious manner”⁴³. Without guaranteed access to guardianship and representation, states have no ability to affirm these rights during expulsion (let alone expedited removal) proceedings.

UNDERSTANDING THE BEST INTERESTS PRINCIPLE IN THE CONTEXT OF MIGRATING CHILDREN

Even more overarching than the family unity obligations established by the CRC is the best interests principle, according to which the best interests of a child must be a primary consideration informing implementation of all measures concerning the child. This obligation again is recognized by the Draft Articles. Article 15 explicitly notes that “in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration”, reproducing the language of CRC Art. 3(1). But, in practice, what is entailed by the requirement to make the best interests of the child a primary consideration?

There is considerable consensus among experts that, in the migration context, the requirement entails two separate but related sets of actions for meaningful realization. The first is a best interests *assessment* to establish which international protection or immigration procedure is in the child’s best interests. The second is a best interests *determination* to ascertain a durable solution for the child that addresses his or her care and protection needs⁴⁴. So correct application of this fundamental principle presupposes several essential safeguards as conditions precedent to an expulsion decision, including provision of a duly trained representative or guardian, and access to competent legal counsel and linguistically compatible interpretation⁴⁵. In

⁴⁰ Comm. on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (2005). The peculiar vulnerability of child migrants is highlighted by the fact that currently over 10,000 refugee children are “lost” in Europe.

⁴¹ ILC Draft Articles, Draft Article 18, *supra* note 4.

⁴² CRC art. 9, *supra* note 12.

⁴³ CRC art. 10(1), *supra* note 12.

⁴⁴ Comm. on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. CRC/C/GC/14(2013). *See also* Office of the U.N. High Comm’r for Human Rights, UNICEF & OHCHR, Judicial Implementation of Article 3 of the CRC in Europe: The case of migrant children including unaccompanied children, Regional Office for Europe(Jun. 2012).

⁴⁵ Comm. on the Rights of the Child, General Comment No. 6, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin”, CRC/GC/2005/6 (Sept. 1, 2005). *See e.g.*, the practice of Morocco in denying access to information or legal representation to child migrants facing expulsion, and the practice of Spain in expelling unaccompanied children without due process, in Abused and Expelled, *supra* note 19.

their absence egregious violations of applicable international law principles are inevitable⁴⁶ and as a result the expulsion would not be “in pursuance of a decision reached in accordance with law”, as required by Draft Article 4. In light of these considerations, it is questionable whether states do indeed have a right, as a matter of general international law, to expel alien children particularly unaccompanied children from their territory.

Even more problematic is the minimally protective formulation of forcible expulsion safety requirements set out in Draft Article 21(2): “In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, *as far as possible*, the safe transportation to the State of destination of the alien”....Forcible expulsion that admits the possibility of unsafe transportation or reception for the child (rape, beatings, incarceration on arrival, sexual exploitation, refusal of entry⁴⁷) is not compatible with the Art. 3 requirements relating to best interests. Neither is forcible expulsion justified by the benefits of family reunification without adequate consideration of whether of whether such reunification is the most appropriate solution of is in the child’s best interests⁴⁸.

Awareness of the extreme risks for child survival and safety that can flow from expulsion have led several EU member states including Italy, Spain, Bulgaria and Hungary to prohibit the refusal of entry to unaccompanied child migrants irrespective of immigration status.⁴⁹

Numerous international measures and guidelines have stressed the particular unsuitability of detention for children, either as a reception option after entry or pending expulsion or removal⁵⁰. Given this recognition, it is questionable whether detention of a non citizen child could ever comply with the Draft Article 19(1)(a) requirement that the detention not be “punitive in nature”. Two key measures promulgated as part of the Common European Asylum System, the Reception Conditions Directive⁵¹ and the Returns Directive⁵², unlike the Draft Articles, explicitly stress the importance of ensuring that best interests considerations are primary when detention of migrant children is under consideration. Both Directives stipulate that children can only be detained “as a measure of last resort” and “for the shortest period of time” when other

⁴⁶ See, e.g., *Mubilanzila Mayka & Kaniki Mitunga v Belgium*, Application no. 13178/03, 12 October 2006 – the “Tabitha Case”); and *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, 23 February 2012.

⁴⁷ The situation of unaccompanied Afghan migrant children in Europe illustrates the egregious risks to which expelling States expose children in violation of Article 3 obligations. In 2010, the UK and other EU countries including the Netherlands and the Scandinavian countries, commenced forced expulsion of Afghan children to Kabul. See 10,000 Refugee Children, *supra* note 14. Afghanistan meanwhile refuses to accept Afghan children who are forcibly expelled. See *Afghanistan refuses forced expulsions*, MYNEWSDESK, Feb. 24, 2015, <http://www.mynewsdesk.com/se/pressreleases/afghanistan-refuses-forced-expulsions-1121210>.

⁴⁸ SIMONE TROLLER, IN THE MIGRATION TRAP: UNACCOMPANIED MINOR CHILDREN IN EUROPE, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2010/country-chapters/europe/central-asia-0>.

⁴⁹ *Reference Document on Unaccompanied Children*, CONNECT, EUR. COMM’N, http://www.connectproject.eu/PDF/CONNECT-EU_Reference.pdf (last visited June 6, 2016).

⁵⁰ CRC art. 37(b), *supra* note 12. See also Comm. on the Rights of the Child, General Comment No. 10, U.N. Doc CRC/C/GC 10, paras 78-89 (2007), <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>; Human Rights Comm., Int’l Covenant on Civ. & Pol. Rights, General Comment No. 35, U.N. Doc CCPR/C/GC/35, para 18 (2014).

⁵¹ Council Directive 2013/33/EU, O.J. (L 180/96) [hereinafter “Reception Conditions Directive (recast)”], *available at*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF> (last visited June 6, 2016).

⁵² Council Directive 2008/115/EC, O.J. (L348/98) [hereinafter “Return Directive”].

less coercive alternatives are not effectively available. According to the Directives, where families are detained they should be provided with separate accommodation, and unaccompanied children should only be detained in exceptional circumstances, released as soon as possible and never be placed in prison⁵³. It is not clear that Draft Article 19(3) is compatible with the notion of detention as an exceptional circumstance for unaccompanied children, even if the child is in some sense responsible for his or her non removability – eg if the child has destroyed identity documents or other proof of nationality. The Returns Directive requires Member States, “as far as possible” to provide unaccompanied minors facing removal with accommodation in institutions that take account of their needs⁵⁴. The Directive also addresses the circumstances to which *any* unaccompanied child will be returned: member states are required to ensure that there will be a family member, a nominated guardian, or, a minimal requirement, “adequate reception facilities in the State of return”⁵⁵. These provisions apply without exception, irrespective of security or other considerations. The Draft Articles do not insist on compliance with these fundamental child rights protections. As other commentators have noted, Article 23 in particular articulates a standard that falls short of established norms prohibiting refoulement. Not only are threats to an individual’s “freedom” not included in the list of prohibited circumstances, but no mention is made (Article 23 (2)) of the international law norm prohibiting death penalty application to persons convicted of committing capital crimes as children⁵⁶, whether or not a state applies the death penalty to adults.

SAVING CLAUSES AND CHILDREN’S RIGHTS

The Draft Articles make repeated reference to human rights principles and to the fact that the revised rules proposed in the articles are advanced “without prejudice to states’ human rights”. However, explicit reference to the distinctive needs of children is very limited. Draft Article 15 stipulates that vulnerable persons, including children, who are subject to expulsion “shall be considered as such and treated and protected with due regard to their vulnerabilities”. This generic clause does little to ensure the detailed attention to children’s distinctive needs and vulnerabilities that the past 20 years of litigation and advocacy have highlighted. Moreover, the explicit reference to consideration of the child’s best interests is only for “children who are subject to expulsion” (Art.15(2)), whereas CRC Art. 3 applies much more broadly, “to all actions concerning children”, which could include expulsion of their parents or other immediate relatives⁵⁷. Given the almost universal ratification of the CRC (far more extensive than the ratification of the 1951 Refugee Convention for example) and the significant and growing numbers of children including unaccompanied children affected by migration, it is perhaps surprising that the ILC did not pay more explicit and detailed attention to this aspect of

⁵³ Reception Directive Art.11, *supra* note 51; Return Directive, art.17(1), *supra* note 52.

⁵⁴ Return Directive, art. 17(4), *supra* note 52. In practice many member states violate these obligations persistently, with Greece being the most egregious offender., *See* ECtHR - Rahimi v. Greece, App. No. 8687/08 (May 7, 2011).

⁵⁵ Return Directive, art.10, *supra* note 52.

⁵⁶ CRC art. 37(a), *supra* note 12.

⁵⁷ *See also* CRC art. 9(4), *supra* note 12; *Winata v. Australia*, U.N. Doc CCPR/C/72/D/930/2000, para.7.1 (Jul. 21, 2001); Human Rights Committee, General Comment 6, U.N. Doc. HRI/GEN/1/Rev.1, para.27 (Sept. 1, 2005).

applicable international human rights law.