

# Foreword: the plight of the migrant child

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The situation of children displaced by armed conflict and other disasters is rightly a matter of great concern to the international community. In July 2017, I reported on the situation in Myanmar following a 12-day visit as Special Rapporteur on Human Rights in that country. In the five months following my visit, no less than 604,000 Rohingyas were forced to flee Myanmar into Bangladesh.<sup>1</sup> More than half of these refugees were children who in no time were facing starvation and death from disease and injury in conditions that can only be described as appalling.<sup>2</sup>

As the contributors to this volume attest, the sheer number of children on the move, both alone and with family members, is without precedent. The tragedy unfolding in Bangladesh finds parallels in the outflow of refugees from Syria, Yemen, Iraq and Afghanistan. Children continue to flee violence in unprecedented numbers from Central American states into the United States. The hardships children endure in displacement are all too predictable. Even where they seek safety in wealthy countries, however, escape from misery and even persecution cannot be assured. In even the most developed of the world's countries, migrant and refugee children remain in immigration detention; they are selected arbitrarily for transfer to other countries for 'processing'; they are denied access to basic social supports and to the education that is so critical to their wellbeing and human development.

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<sup>1</sup> My report is available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21900&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21900&LangID=E). See Report from International Organization for Migration, Inter Sector Coordination Group, available at <https://reliefweb.int/report/bangladesh/iscg-situation-update-rohingya-refugee-crisis-cox-sbazar-24-oct-2017>.

<sup>2</sup> See M. Berak 'Bangladesh is now home to almost 1 million Rohingya refugees', *Washington Post*, 25 October 2017, available at [www.washingtonpost.com/news/worldviews/wp/2017/10/25/bangladesh-is-now-home-to-almost-1-million-rohingya-refugees/?utm\\_term=.533727373b37](http://www.washingtonpost.com/news/worldviews/wp/2017/10/25/bangladesh-is-now-home-to-almost-1-million-rohingya-refugees/?utm_term=.533727373b37); and UNICEF Child Alert, *Outcast and Desperate: Rohingya Children Face a Perilous Future* (October 2017), available at [www.unicef.org/publications/files/UNICEF\\_Rohingya\\_refugee\\_children\\_2017.pdf](http://www.unicef.org/publications/files/UNICEF_Rohingya_refugee_children_2017.pdf).

The dire situation facing so many child migrants stands in curious contrast to the steps that have been taken to create legal protections for children under international law – and, in consequence, under many domestic legal systems. Ten years in the making, the 1989 United Nations Convention on the Rights of the Child (CRC) will come of age on 2 September 2018.<sup>3</sup> The CRC is the distillation of many different legal systems and cultural traditions, underpinned by universally agreed, non-negotiable, norms and standards. It is founded on respect for the dignity and worth of each and every individual, regardless of race, colour, gender, language, religion, ability, social or ethnic origin. The CRC is the only human rights instrument with almost universal ratification.<sup>4</sup> All but one country globally (the United States) have committed to promote, protect and uphold the rights of all children. Until 2006, when the Convention on the Rights of Persons with Disabilities (CRPD)<sup>5</sup> was adopted, the CRC was also the only international human rights instrument that provided legal effect to the promotion and protection of the rights of children with disabilities.<sup>6</sup> As Crock and Martin attest in this volume,<sup>7</sup> the CRC and the CRPD share a similar structure and focus in the way that they operate to truly universalize the concept of human rights for children everywhere. The truly global reach of this book, with contributors from every major continent, illustrates well the impact that the UN human rights systems have had on law and increasingly practice relevant to protecting migrant children.

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<sup>3</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC). The following account of the CRC and the operation of the CRC Committee is drawn in part from Y.H. Lee, 'Creating New Futures for All Children: The Promise of International Human Rights Law' (2013) 20 *Australian Journal of International Law* 3.

<sup>4</sup> See the current list of the status of Ratification, Reservations and Declarations, available at United Nations Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>5</sup> Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, (2008) 2515 UNTS 3 (entered into force 3 May 2008) (CRPD); Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, (2007) 46 ILM 443 (entered into force 3 May 2008). The texts of both instruments are available at [www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx).

<sup>6</sup> CRC, Arts 2 and 23, address the rights of children with disabilities. Article 2 establishes that disability should not be grounds for discrimination and recognizes disability as a 'human rights' issue. In addition, Art. 23 explicitly addresses children with disabilities.

<sup>7</sup> See Mary Crock and Hannah Martin, Chapter 4.

The CRC is underpinned by four general principles: Non-discrimination (Article 2); best interests of the child (Article 3); life, survival and development (Article 6); and respect for the views of the child (Article 12). All rights are indivisible and interdependent, providing for a holistic approach and avoiding hierarchy of rights. The CRC made a very significant departure from most other human rights instruments, declarations and strategies with respect to children. It established the view that children, both girls and boys, from birth to 18 years of age, are not simply the property of their parents, caregivers or the state. They are citizens, rights holders and social agents with the rights to participate and be heard in the shaping of their own development and destiny, according to their age and level of maturity. The Convention recognized that childhood is a transient state and that children are always changing and must be considered according to their 'evolving capacities' (Article 5).

Containing 42 substantive provisions for the guarantee and protection of economic, social, cultural, civil and political rights of children, the CRC has been supplemented by three Optional Protocols. The Optional Protocol on the involvement of children in armed conflict<sup>8</sup> raised the legal age of recruitment of children in armed conflict from 15 years to 18 years. The Optional Protocol on the sale of children, child prostitution and child pornography,<sup>9</sup> added further protection for children. Both Protocols were adopted in 2000 and entered into force in 2002. These two protocols significantly strengthened the rights of children to protection from the worst forms of human rights violations. As Tyler and Whitman show us in this book, they are of particular relevance to refugee children.<sup>10</sup>

The third Optional Protocol is close to my heart. When I was elected as the Chairperson of the CRC Committee in 2007, I made it my mission to complete the journey towards the full realization of children's rights. Working with the NGO Group for the CRC and the EU-GRULAC Group, a discussion of a communications procedure was reopened. The Chairperson of the CRC Committee reports to the Third Committee of the General Assembly each year. I brought this issue to the 63rd General Assembly for rigorous debate. A Human Rights Council Resolution<sup>11</sup>

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<sup>8</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature 25 May 2000, 2173 UNTS 222. See General Assembly Resolution A/RES/54/263.

<sup>9</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 2171 UNTS 227. See General Assembly Resolution A/RES/54/263.

<sup>10</sup> See Kasey Tyler and Shelly Whitman, Chapter 23.

<sup>11</sup> *Open-ended Working Group on an Optional Protocol to the Convention on the*

was later adopted to establish a working group to explore the possibility of elaborating an optional protocol to the CRC to provide a communications procedure. On 9 June 2011, the Third Optional Protocol to the CRC was accepted by consensus<sup>12</sup> and was adopted at the 66th General Assembly on 2 November 2011.<sup>13</sup> It entered into force on 14 April 2014 and by November 2017 had 51 signatories and 36 parties.<sup>14</sup>

As I wrote in 2013,<sup>15</sup> much was lost during negotiations, but we did achieve an instrument that provides children and/or their representative with the right to seek remedy for violations of their rights. Rights have no meaning if there are no timely and effective remedies available. The third Optional Protocol represented a significant step towards the full realization of children's rights, consistent with Article 12, the right of the child to be heard.

This Protocol was of special significance for the CRC Committee as it empowered the Committee to hear individual complaints in addition to performing the functions of reviewing the policies and practices of states parties to ensure compliance with the Convention's various provisions. Over time, I have watched with interest as the Committee has taken more and more interest in the particular challenges facing migrant children. Initiatives to improve respect for the rights and needs of refugee children include the adoption of a series of General Comments on children on the move, including General Comment No. 6, which is devoted to the particular challenges facing unaccompanied and separated migrant children.<sup>16</sup> The Committee has also conducted days of General Discussion on migrant children.<sup>17</sup>

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*Rights of the Child to Provide a Communications Procedure*, Human Rights Council Res., UN GAOR, 11th Sess., Agenda item 3, UN Doc. A/HRC/11/L.3 (12 June 2009).

<sup>12</sup> Optional Protocol to the Convention on the Rights of the Child, Human Rights Council Res., UN GAOR, 17th Sess., A/HRC//RES/17/18 (17 June 2011).

<sup>13</sup> Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, GA, UN GAOR, 3rd Comm., 66th Sess., Agenda item 64, UN Doc. A/C.3/66/L.66 (2 November 2011).

<sup>14</sup> See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en).

<sup>15</sup> See Lee, 'Creating New Futures for All Children', above n. 3.

<sup>16</sup> See CRC, Part II, especially Arts 42, 44 and 45; and UNCRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39th Sess., UN Doc. CRC/GC/2005/6 (1 September 2005).

<sup>17</sup> The UNCRC devoted its 2012 Day of General Discussion to the rights of all children in the context of international migration. The discussion took place on Friday, 28 September 2012. See [www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2012.aspx](http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2012.aspx) for links to the program, Background Paper and Report.

In commending this book to everyone, I would like to thank Lenni Benson, who is the founder and director of the Safe Passage Project, established to assist unaccompanied and separated migrant youth in New York, one of the top four locations for unaccompanied youth. This work is crucial in terms of navigating US migration and asylum laws, for our young people who have had to make a very difficult decision to migrate.

My deepest thanks go to my dear, long-time friend Mary Crock. Her dedication on the topic of migration and refugees is so profound and of great conviction. I will never forget the work she has done as an academic and as a practising lawyer to improve the law and practice for refugee children, including those with disabilities, in Australia and internationally. If there is any question surrounding issues for vulnerable migrants, Mary Crock and her work is where one should always start. Without a doubt, this book will serve as an important source for protecting migrant children.

*Yanghee Lee*<sup>18</sup>  
*Seoul, 6 December 2017*

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<sup>18</sup> UN Special Rapporteur on the situation of human rights in Myanmar, Former Chairperson of UN Committee on the Rights of the Child, Professor, Department of Child Psychology and Education, Sungkyunkwan University, Seoul.