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Protecting the Rights of Children: International Norms and Domestic Opportunities

Concept Note¹

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The special protection of children under international law, and the recognition of their particularly vulnerable position, is a principle that has been widely recognized since the early 20th Century. In 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child.² This document articulated the foundational principles that were eventually embraced, elaborated upon, and codified in the 1948 Universal Declaration of Human Rights,³ the 1959 United Nations General Assembly Declaration of the Rights of the Child,⁴ the Convention on the Rights of the Child,⁵ and a series of other instruments that make special provision for the protection of the rights of children.

This Concept Note considers the international legal framework that protects the fundamental rights of children and the application of those protections in the United States. While this potentially applies to a broad spectrum of substantive areas, this Note will focus on that framework as illustrated through specific examples pulled from juvenile justice, immigration, and child labor law.

¹ This concept note – and much of the background research for the 2016 Samuel Dash Conference on Human Rights – was developed by HRI Research Assistant Zenande Booi (LLM’16), who is also a member of the 2015-2016 Human Rights Fact-Finding Project, in consultation with HRI Dash/Muse Fellow Patrick Griffith. Professors Andrew I. Schoenholtz and Wallace J. Mlyniec provided critical guidance and support throughout the process. The organizers are also especially grateful for the assistance of Meg Gardinier of the U.S. Campaign for the Ratification of the Convention on the Rights of the Child and the support of the students, faculty, staff, alumni, and friends of the Law Center that make the Samuel Dash Conference on Human Rights a success each year.

² Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

³ Article 25 of the UDHR provides that “motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

⁴ United Nations General Assembly Declaration of the Rights of the Child, (Nov. 20, 1959) G.A. Res. 1386(XIV) 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

⁵ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, 170-71, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, entered into force Sept. 2, 1990.

I. The Convention on the Rights of the Child

Although it built upon pre-existing sources of authority, the Convention on the Rights of the Child (Convention) was the first of its kind – a legally binding multilateral treaty specially dedicated to protecting the rights of children.⁶ It is considered the most comprehensive document setting out the rights and protections to which children are entitled.⁷ It is also the first legally binding international instrument to incorporate the full range of human rights, including civil, cultural, economic, political, and social rights.⁸ Having achieved near universal ratification, its reach is unprecedented.

The Convention also represents a major shift in the conception of children as “rights-bearing individuals.”⁹ No longer merely objects to which rights are applied, the Convention recognizes the role of children in the exercise of human rights.¹⁰ The Convention, unlike the Declarations that preceded it, gives this power to assert rights directly to the children – subject to parental guidance.¹¹ This important innovation was not without controversy and has been a source of resistance, both internationally and in the United States, from those who claim it provides too much autonomy to children.¹²

The rights protected in the Convention include a wide range of civil, political, economic, social, and cultural rights. However, the Committee on the Rights of the Child has identified Articles 2, 3, 6, and 12 as enshrining the four main principles that underpin the Convention and inform the implementation of its other provisions.¹³

- Article 2 requires states to respect and ensure the rights in the Convention to every child in their jurisdiction without discrimination of any kind.
- Article 3 obliges states to ensure that the best interests of the child are of primary consideration in all actions that concern him or her. To give effect to this obligation, all the relevant national organs and departments must act in the best interests of the child.
- Article 6 establishes a child’s right to life, survival, and development. The right to development means not only physical health and development, but also

⁶ NEVENA VUČKOVIĆ ŠAHOVIĆ ET AL., *THE RIGHTS OF THE CHILD IN INTERNATIONAL LAW* 41 (Stampfli Publishers 2012).

⁷ *Id.* at 48.

⁸ *Protecting children’s rights*, UNICEF, http://www.unicef.org/crc/index_protecting.html (last visited Mar. 25, 2016).

⁹ Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 185, 187-190 (2006) (discussing the role of the United States in the drafting of the Convention on the Rights of the Child). See also, OLGA CVEJIĆ JANČIĆ, *THE RIGHTS OF THE CHILD IN A CHANGING WORLD: 25 YEARS AFTER THE UN CONVENTION ON THE RIGHTS OF THE CHILD* 18 (Katharina Boele-Woelki & Diego P. Fernández Arroyo eds., Springer 2016).

¹⁰ Cohen *supra* note 9 at 187-90.

¹¹ *Id.*

¹² E. Douglas Clark, *Introducing the CRC, NO CRC FOR THE USA*, <http://www.nocrc.org/> (last visited Apr. 2, 2016) (discussing why the United States should not ratify the Convention); and CHILD RIGHTS CAMPAIGN *Questions Parents Ask*, <http://childrightscampaign.org/the-facts/questions-parents-ask> (last accessed Apr. 2, 2016) (discussing relationship of parents and children in the exercise of rights in the Convention).

¹³ Comm. on the Rights of the Child [CRC Comm.] *Gen. Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)* U.N. Doc CRC/GC/2003/5 (Nov. 27, 2003), http://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html.

- mental, emotional, social, cognitive, and cultural development.
- Article 12 recognizes the importance of the child's participation and input in matters concerning himself or herself – codifying children as “rights-bearing individuals” under the Convention.¹⁴

These foundational principles that support the Convention as a whole also reinforce other rights protected in the document. For example, the child’s right to participation under Article 12 means that states must ensure that the child is entitled to form and able to express views on matters that affect him or her – thereby buttressing the right to freedom of expression protected under Article 13 of the Convention. Similarly, this form of empowerment works to ensure that the child can participate in determining what is in his or her best interest.¹⁵

The Convention as a whole includes 41 substantive provisions that deal with the general obligations of states and the specific rights to which children are entitled. These include: the right to be free from physical or mental harm and neglect, including sexual abuse or exploitation (Articles 19 and 34); the right to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development (Article 27); the right to education on the basis of equal opportunity (Article 28); the right to be free from economic exploitation and from work that may interfere with the child's education or be harmful to his or her health or well-being (Article 32); and the right to be protected from torture or other cruel, inhumane, or degrading treatment (Article 37).

A. The United States and the Convention

The United States is currently the only member of the United Nations that has not ratified the Convention.¹⁶ The United States signed the Convention under President Clinton in 1995;¹⁷ however, as of yet, the Convention has not been sent to Senate for advice and consent – which is a required step for ratification.¹⁸ Until recently, the United States was in the company of South Sudan, a state that has existed for about five years,¹⁹ and Somalia, whose central government has struggled to operate in the face of violent conflict and crushing poverty.²⁰

The fact that the United State has not ratified the Convention stands in stark contrast to the significant role that it played in guiding the development of the agreement. For example, it was largely due to efforts by the United States that the final draft of the Convention contained almost twice the number of substantive provisions than early

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Convention on the Rights of the Child Depository Notifications, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 2, 2016).

¹⁷ *Id.*

¹⁸ Article II § 2 of the United States Constitution provides that the President has the power to make treaties with the consent and advice of a two-thirds majority of the Senate.

¹⁹ South Sudan ratified the Convention on Jan. 23, 2015. See, Convention on the Rights of the Child Depository Notifications, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 2, 2016).

²⁰ *Somalia: The Centre Holds, But Only Just* THE ECONOMIST, May 11, 2013, <http://www.economist.com/news/middle-east-and-africa/21577437-new-government-mogadishu-has-yet-prove-its-mettle-centre-holds>. Somalia ratified the Convention on Oct. 1, 2015. See, Convention on the Rights of the Child Depository Notifications, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 2, 2016).

drafts.²¹ In fact, the critical recognition of children as the subjects, rather than the objects, of fundamental rights was due in part to the delegation's efforts.²² In addition to introducing protections, the United States also sought to limit some protections – for example by blocking efforts to raise the minimum age for engaging in armed conflicts from fifteen to eighteen.²³

Although President Obama acknowledged during the 2008 presidential campaign that non-ratification was “embarrassing,” the Administration has not yet sent the treaty to the Senate.²⁴ Meanwhile, advocates on both sides have continued to debate ratification. Opposition to ratification, led by groups such as No CRC for USA!, has focused mainly on the protection of sovereignty and the perceived effect that obligations arising under the Convention would have on parental rights.²⁵ The Campaign for the U.S. Ratification of the Convention on the Rights of the Child, by contrast, has emphasized that the Convention reinforces the central role of parents and families and has called on President Obama to send the agreement to the Senate for advice and consent.²⁶ Such efforts in support of ratification have been largely echoed by the international community.²⁷

B. Other International Instruments Protecting the Rights of Children

There are a number of other international instruments that also specifically provide for the protection of children's rights. They include:

- The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (ratified by the United States in 2002),²⁸

²¹ Cohen *supra* note 9.

²² *Id.*

²³ *Id.* The author also refers to the role the United States played in initiating several substantive provisions, including Article 10 (family unification); Article 13 (freedom of expression); Article 19 (protection from abuse); and Article 25 (review of placement).

²⁴ President Obama made this remark at a time when Somalia was the only other UN Member State that had not yet ratified the Convention. Since then, Somalia and the newly created South Sudan have both ratified the Convention. Specifically, President Obama noted “It's embarrassing to find ourselves in the company of Somalia, a lawless land. I will review [the Convention] and other treaties and ensure that the United States resumes its global leadership in human rights.” Walden University Presidential Youth Debate 2008, *Question 12: Human Rights*, YOUTHDEBATE2008 (Oct. 20, 2008), <http://www.youthdebate2008.org/video/question-12/#content>.

²⁵ E. Douglas Clark, *Introducing the CRC*, NO CRC FOR USA!, <http://www.nocrc.org/> (last visited Apr. 2, 2016) (discussing reasons the United States should not ratify the Convention).

²⁶ CHILD RIGHTS CAMPAIGN, <http://childrightscampaign.org/take-action/ask-the-president/petition?view=form> (last visited Apr. 2, 2016). For an in-depth discussion of the arguments for and against ratification, see Howard Davidson, *Does the UN Convention on the Rights of Children Make a Difference?*, 22 Mich. St. Int'l L. Rev. 497 (2013).

²⁷ For example, when Somalia ratified the Convention in 2015, UN Secretary General Ban Ki-Moon took the opportunity to “[encourage] the United States, the only State yet to ratify the Convention, to join the global movement and help the world reach the objective of universal ratification.” Press Release, Secretary General, Secretary General Welcomes Somalia's Ratification of the Child Rights Convention, U.N. Press Release SG/17181 (Oct. 2, 2015). The Carnegie Council for Ethics in International Affairs has also joined in the call for the U.S. to finally ratify the Convention after signing it over 20 years ago. Cara Collins, *It's Time for the United States to Ratify the Convention on the Rights of the Child*, THE CARNEGIE COUNCIL FOR ETHICS IN INTERNATIONAL AFFAIRS (Jul. 7, 2014), https://www.carnegiecouncil.org/publications/ethics_online/0095.

²⁸ Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in

- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (ratified by the United States in 2002),²⁹
- The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ratified by the United States in 1999),³⁰
- The International Covenant on Civil and Political Rights (ratified by the United States in 1992),³¹
- The International Covenant on Economic, Social and Cultural Rights (signed by the United States in 1977, but not ratified),³²
- The Convention and Protocol Relating to the Status of Refugees (acceded to by the United States in 1968),³³
- The Convention Concerning Minimum Age for Admission to Employment,³⁴
- The United Nations Standard Minimum Rules for the Administration of

Armed Conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002 (which notes “the harmful and widespread impact of armed conflict on children, and condemns their being targeted in such situations). For updated status of ratification of UN treaties, see *Multilateral Treaties Deposited with the Secretary-General*, United Nations Treaty Service, <https://treaties.un.org/pages/ParticipationStatus.aspx> (last visited Apr. 5, 2016).

²⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force January 18, 2002 (which addresses the problem of sex trafficking, one among many purposes for which children are bought and sold, including, in addition, forced labor, adoption, participation in armed conflicts, marriage, and organ trade.) The U.S. became party to both Protocols to the Convention in 2002 but it did so with a number of declarations and with the understanding that it assumed no obligations in terms of the Convention itself. For the U.S.’ reservations and understandings see, Convention on the Rights of the Child Depository Notifications, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 2, 2016).

³⁰ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S.161, entered into force Nov. 19, 2000. [hereinafter the Elimination of Child Labor Convention]. The Elimination of Child Labor Convention prohibits the worst forms of child labor, as an international and national priority, and is considered complementary to the Minimum Age Convention. For updated status of ILO treaties, see the NORMLEX database, <http://www.ilo.org/dyn/normlex/en> (last visited Apr. 5, 2016).

³¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 54, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR].

³² International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 10 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 51, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. [hereinafter ICESCR]. The ICESCR has provisions that specifically refer to the rights of children, particularly in the context of the protection of the family unit.

³³ Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, art. 22, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened July 28, 1951 under General Assembly resolution 429 (V), entered into force Apr. 22, 1954. [hereinafter the Refugee Convention]. Under the Refugee Convention, children are able to have a well-founded fear of persecution and they are to be treated the same as nationals in primary education, and to be treated at least as favorably as non-refugee aliens in secondary education.

³⁴ International Labour Organization, Convention Concerning Minimum Age for Admission to Employment, (ILO No. C138) entered into force Jun. 19, 1976. [hereinafter Minimum Age Convention]. The Minimum Age Convention establishes a general instrument on the subject of the minimum age of employment. Each State Party is to pursue a national policy designed to ensure the abolition of child labor and progressively raise the minimum age for admission to employment to a level consistent with the fullest physical and mental development of children. *Id.* at art. 1.

- Juvenile Justice (also known as the Beijing Rules),³⁵ and
- The Rules for the Protection of Juveniles Deprived of Their Liberty (also known as the Havana Rules).³⁶

Each of these sources, and especially the Convention on the Rights of the Child, provide an international framework for understanding the fundamental rights of children. These international standards also interact with a set of domestic laws and practices that sometimes embrace – but often diverge from – the universal standard.

II. Children’s Rights and Continued Challenges in the United States

As a result of the ratification question, there has been considerable attention paid to how United States complies (or not) with international standards generally and the requirements of the Convention on the Rights of the Child specifically. Both academic and popular sources have focused on a range of issues relating to sovereignty, federalism, and a number of substantive areas of domestic law, including juvenile justice, immigration, and labor standards.³⁷ For example, in the juvenile justice context, there has been detailed analysis of how the Convention’s due process provisions under articles 37 and 40 would be more protective than current law in the United States – particularly relating to issues such as the possibility of life sentences for some juvenile defendants, prosecuting children in adult courts, and the conditions of confinement for some juvenile offenders.³⁸

How these sometimes conflicting international and domestic standards are used by children’s rights advocates has received relatively less attention. The 2016 Samuel Dash Conference on Human Rights will provide an opportunity for advocates to explore how international standards can be leveraged through litigation, policy advocacy, and human rights fact-finding to protect children across a broad range of areas. To help facilitate that discussion, the below provides a brief background on some of the relevant standards governing immigration, juvenile justice, and child labor.

³⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

³⁶ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”), G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

³⁷ For a detailed analysis of the impact that ratification would have across a variety of areas of U.S. law, including sovereignty, federalism, due process rights for children, the right to health, protections for refugee children, child labor standards, and a host of other issues, see JONATHAN TODRES ET AL., *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* (Jonathan Todres, Mark E. Wojcik, & Chris R. Revas eds., Transnational Publishers, Inc., 2006). See contra Michael P. Farris, *Nannies in Blue Berets: Understanding the United Nations Convention on the Rights of the Child: A Legal Analysis*, 1 REGENT J.L. & PUB. POL’Y 89 (2010). For popular discussion, see Karen Attiah, *Why Won’t the U.S. Ratify the U.N.’s Children’s Rights Treaty*, WASHINGTON POST (Nov. 21, 2014); see contra Patrick F. Fagan, *How U.N. Conventions On Women’s and Children’s Rights Undermine Family, Religion, and Sovereignty*, THE HERITAGE FOUNDATION BACKGROUNDER (Feb. 5, 2001), <http://www.heritage.org/research/reports/2001/02/how-un-conventions-on-womens>.

³⁸ Wallace J. Mlyniec, *The Implications of Articles 37 and 40 of the Convention on the Rights of the Child for U.S. Juvenile Justice and U.S. Ratification of the Convention*, 89 CHILD WELFARE 103, 107-117 (2010) (discussing, *inter alia*, the interaction of the Convention with U.S. domestic law in juvenile matters relating to prosecuting children as adults, life without parole and the condition of confinement.).

A. Immigration and the Best Interests of the Child

The fundamental rights of children are particularly salient in the context of international migration. In the United States, recent years have witnessed a considerable increase of children and families fleeing violence and poverty in Central America. As a result, public awareness about the children entering the United States across the southern border has also increased.³⁹ Although there has been a decline in overall migration across the southern border, Customs and Border Patrol has apprehended a significant number of Central American child migrants along the United States-Mexico border in each successive year between 2009 and 2016.⁴⁰ Such patterns are mirrored around the world, where migrants are increasingly forced to flee conflict and violence.⁴¹

In the United States, the response to increased immigration by Central American families and children has been a controversial policy of deterrence and detention. Efforts by the Mexican government to detain migrants at its own southern border with Guatemala have been welcomed by the United States.⁴² At the same time, researchers have documented the perils of border externalization efforts – where international human rights obligations continue to apply.⁴³ The 2015 Human Rights Institute Fact-Finding Project documented the challenges that Central American children face in Mexican custody.⁴⁴ In *The Cost of Stemming the Tide: How Immigration Enforcement Practices Limit Migrant Children's Access to International Protection*, the students identified long periods of detention under circumstances that fall below the baseline

³⁹ The influx of unaccompanied children received heightened attention due, in large part, to this stark increase and the subsequent policy choices of the Obama administration and political discourse of other politicians. See generally, Press Release, White House, Presidential Memorandum – Response to the Influx of Unaccompanied Alien Children Across the Southwest Border (June 2, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr>; Josh Gerstein & Seung Min Kim, Obama Administration Kicks Off Family Deportation Raids, POLITICO (Jan. 4, 2016, 5:04 PM), <http://www.politico.com/story/2016/01/obama-family-deportation-raids-217329>. See also, Haeyoun Park, Children at the Border, N.Y. Times (Oct. 21, 2014), http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0; Rising Child Migration to the United States, Migration Pol’y Inst., <http://www.migrationpolicy.org/programs/us-immigration-policy-program/rising-child-migration-united-states> (last visited Oct. 19, 2015); US: Surge in Detention of Child Migrants, Human Rights Watch (June 25, 2014), <https://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants>.

⁴⁰ Karen Musalo, Lisa Frydman & Pablo Cernadas, Ctr. for Gend. & Refugee Studies, UC Hastings Coll. & Justice & Human Rights Ctr., Nat’l U. of Lanús, *Childhood and Migration in North and Central America* 47 (2015).

⁴¹ Press Release, United Nations High Commissioner for Refugees, UNHCR report confirms worldwide rise in forced displacement in the first half of 2015, UNHCR Press Release (Dec. 18, 2016).

⁴² Press Release, White House, Remarks by President Obama and President Peña Nieto after Bilateral Meeting, (Jan. 6, 2015), <http://www.whitehouse.gov/the-press-office/2015/01/06/remarks-presidentobama-and-president-pe-nieto-after-bilateral-meeting>.

⁴³ The plan included measures such as increased border security, and advertisements broadcast in Central America urging parents not to send their children to the United States. Secretary Johnson has given support to and expressed the U.S. government’s appreciation of the Mexican government’s steps taken to restricting the flow of illegal immigrants, particularly unaccompanied minors, bound for the U.S. The Obama administration has continued to signal an increased interest in helping Mexico fortify its southern border. Georgetown Law Human Rights Institute Fact-Finding Project, *THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN’S ACCESS TO INTERNATIONAL PROTECTION* 14-15 (Georgetown Law Human Rights Institute, 2015).

⁴⁴ See, Georgetown Law Human Rights Institute Fact-Finding Project *id.* and Human Rights Watch, *CLOSED DOORS: MEXICO’S FAILURE TO PROTECT CENTRAL AMERICAN REFUGEE AND MIGRANT CHILDREN* (Human Rights Watch 2016).

“best interests of the child standard” and without adequate screening for international protection needs.⁴⁵ Other studies have documented similar challenges when children and families are detained in the United States.⁴⁶

Whether held in custody, released pending immigration proceedings, or living in the United States without regular immigration status, children are protected by a network of basic human rights entitlements – including the right to education and the application of the best interests of the child standard.

i. The Right to Education for Immigrant Children

The right to an education is clearly established under international law. In addition to finding recognition under the Universal Declaration of Human Rights and a series of other international and regional instruments, the right to education is clearly protected under the Convention on the Rights of the Child.⁴⁷ Under the Convention, states are obligated to provide a free and compulsory primary education. In addition to requiring

⁴⁵ Georgetown Law Human Rights Institute Fact-Finding Project *supra* note 43 at 25.

⁴⁶ The US Commission on Civil Rights investigated the state of civil rights in immigration detention facilities. This resulted in a report that criticized immigration enforcement officials for routinely violating detained immigrants’ rights and recommended the immediate release of families from the detention centers. Amongst other things, it found that certain ICE-operated centers were not complying with recently updated detention standards that are “intended to promote humane treatment of detainees;” by holding many of the detainees for longer than is prescribed by federal law, Homeland Security officials were not respecting their civil and due process rights; officials also were found not to sufficiently protect detainees from sexual assault and abuse. United States Commission on Civil Rights, *WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT DETENTION FACILITIES*, (United States Commission on Civil Rights, 2015).

⁴⁷ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, 170-71, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, entered into force Sept. 2, 1990; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 30, U.N. GAOR, 45th Sess., Supp. No. 49, at 261, 266, U.N. Doc. A/RES/45/158 (1990), 2220 U.N.T.S. 3, entered into force July 1, 2003; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, arts. 10, 14, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, 195-96, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13, entered into force Sept. 3, 1981; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), arts. 13-14, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 51, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, 48, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969; Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, art. 22, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened July 28, 1951 under General Assembly resolution 429 (V), entered into force Apr. 22, 1954; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26, U.N. Doc. A/RES/217(III), at 71, 76 (Dec. 10, 1948); American Convention on Human Rights, O.A.S. Treaty Series No. 36, art. 26, 1144 U.N.T.S. 143, entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), 1144 U.N.T.S. 143; American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, art. 12, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

that primary, secondary, and higher education be “available”⁴⁸ and “accessible,”⁴⁹ the Convention prohibits discrimination – including on the basis of national or ethnic origin.⁵⁰ This prohibition on discrimination is reflected in other treaties that have been ratified by the United States, including the International Convention on the Elimination of All Forms of Racial Discrimination.⁵¹

Domestic law in the United States largely mirrors the international standards. Although the United States has not ratified the Convention on the Rights of the Child and education is primarily the responsibility of local governments, every state requires compulsory education until the age of at least 16, 17, or 18.⁵² Further, the Supreme Court has held that the 14th Amendment’s Equal Protection Clause prohibits states that provide free education from restricting enrolment to citizens and children with lawful immigration status. In *Plyler v. Doe*, the Court held that, “[i]n addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”⁵³

Despite the clear international and constitutional prohibitions on discrimination in the context of education, reports continue to emerge about barriers to education for undocumented immigrant children. For example, the 2016 Human Rights Institute Fact-Finding Report, *Ensuring Every Undocumented Student Succeeds: A Report on Access to Public Education for Undocumented Children*, documented a series of challenges for these children in attempting exercise their right to education, including:

- Difficulty satisfying rigid documentation requirements related to proof of

⁴⁸ The content of the right to education in the International Covenant on Economic Social and Cultural Rights has been considered by the Committee on Economic, Social and Cultural Rights, the same principles would be applicable in the context of the Convention. The Committee defined the availability of education, as the obligation to have functioning educational institutions and programs to be available in sufficient quantity. States must take financial and technical actions to ensure an education system of good quality is established and maintained. Whether this obligation has been complied with depends on the context of each State. Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 70 (2003).

⁴⁹ The Committee defined accessibility as having educational institutions and programs available to everyone, without discrimination. Accessibility has three interrelated characteristics: non-discrimination, physical accessibility, and economic accessibility. Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 70 (2003).

⁵⁰ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, 170-71, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, entered into force Sept. 2, 1990, Art. 2.

⁵¹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969. Article 1 prohibits discrimination on the basis of race, colour, descent, or national or ethnic origin. The U.S. ratified this Convention on Oct. 21, 1994, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en.

⁵² Educ. Comm’n of the States, *Compulsory School Age Requirements*, 1-3 (June 2010), <http://www.ecs.org/clearinghouse/86/62/8662.pdf>.

⁵³ *Plyler v. Doe*, 457 U.S. 202, 221-222 (1982).

residence or guardianship and the failure of some districts to overcome these hurdles through existing flexibilities in the law;

- Being discouraged from enrolling because of ancillary considerations, such as testing, grade placement, and prospects for graduation or being forcibly enrolled in alternative schools instead of the general public school system;
- Facing a lack of effective communication between schools and families; and
- The chilling impact that recent immigration enforcement actions have had on the community and the right to education.

ii. The Best Interests of the Child Standard and Immigration

The best interests of the child standard is a long-established norm of international law. It is expressly provided for in the 1959 Declaration on the Rights of the Child and is one of the four central principles of the Convention on the Rights of the Child. As such, it is both an over-arching concept that informs all other rights and a substantive rule that requires, as a primary consideration, the child's best interests in all actions impacting him or her.⁵⁴ Such actions include immigration matters.

The principle has also been part of American law since the late 1800s. Although it initially applied only in the context of custody determinations, it has developed to apply to a number of other fields beyond custody.⁵⁵ The standard of the best interests of the child continues to be a widely recognized standard for the treatment of children in the United States.⁵⁶

Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child. Best interests determinations are generally made by considering a number of factors that relate to the child's circumstances and the parent or caregiver's circumstances, with the child's ultimate safety and well-being the paramount concern.⁵⁷

The above echoes the best interests of the child standard as provided for in the Convention. The principle, in terms of the Convention, is considered to relate to the well-being of the child. This is to be determined by a number of considerations, including the age, the level of maturity of the child, the presence or absence of parents, and the child's environment and experiences.⁵⁸ The Convention requires that the best interests be the determining factor in adoption⁵⁹ and where the child is forcibly separated from his or her parents.⁶⁰ The Convention also requires that the best interests

⁵⁴*Supra* note 13.

⁵⁵ R. Brian Howe & Kathrine Covell, *Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap 16* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2013).

⁵⁶*Id.*

⁵⁷ *Determining the Best Interests of the Child*, CHILD WELFARE INFORMATION GATEWAY: CHILDREN'S BUREAU/ACYF, https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=GuidingPrinciplesofBestInterestsDeterminations (last visited Apr. 3, 2016).

⁵⁸ U.N. HIGH COMMISSIONER FOR REFUGEES, UNHCR GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD, 14-5 (U.N. High Commissioner for Refugees, 2008).

⁵⁹ Convention art. 21.

⁶⁰ Convention art. 9.

of the child be a primary, but not only, consideration for matters affecting the child.⁶¹

Despite the development and expansion of the standard, and the general acceptance that it should apply in all proceedings that affect a child, it is still not formally applied in immigration proceedings in the United States.⁶² Children in proceedings before an Immigration Court are required to meet the same procedural, evidentiary, and legal rules as adults⁶³ and there is no substantive best interests standard under the Immigration and Nationality Act.⁶⁴

Advocacy groups such as the Young Center for Immigrant Children's Rights, First Focus, and the Women's Refugee Commission have attempted to draw attention to this problem and its effect on the lives of immigrant children. Advocacy attempts have been, and continue to be, made to amend the Immigration and Nationality Act so that it reflects and complies with the international obligations by requiring the consideration of the best interests of the child in immigration removal proceedings.

B. Juvenile Justice and the Prohibition on Cruel and Unusual Punishment

As noted above, the United States was an active participant in the early stages of the Convention. Further, while the United States opposed some of the Convention's sentencing provisions – especially its ban on the juvenile death penalty⁶⁵ – representatives from the United States actively supported due process protections for juveniles similar to those outlined for adults under the International Covenant on Civil and Political Rights, as was already required under domestic law in the United States.⁶⁶ As a result, existing domestic law influenced the trajectory of international standards.

Despite this link, the invocation of the Convention domestically has sparked a robust debate. The reference to international standards by the United States Supreme Court in two important 8th Amendment cases involving children led to considerable attention

⁶¹ Convention art. 3.

⁶² JENNIFER NAGDA & MARIA WOLTJEN, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS IN BIG IDEAS: PIONEERING CHANGE – INNOVATIVE IDEAS FOR CHILDREN AND FAMILIES, 106 (First Focus: making Children & Families the Focus, 2015).

⁶³ THE YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, *The Challenge*, <http://theyoungcenter.org/learn/the-challenge/> (last visited Apr. 2, 2016).

⁶⁴ THE YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, *Policy Advocacy: Best Interests of the Child Standard*, <http://theyoungcenter.org/learn/policy-advocacy/> (last visited Apr. 2, 2016); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Immigration and Nationality Act*, <https://www.uscis.gov/laws/immigration-and-nationality-act> (last visited Apr. 7, 2016).

⁶⁵ The United States repeatedly objected to the Convention's ban on the juvenile death penalty, but noted that it would not block consensus on the provision "provided that the United States maintained its right to make a reservation on this point." THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE 'TRAVAUX PREPARATOIRES,' 465, 487 (Sharon Detrick ed., Martinus Nijhoff Publishers 1992).

⁶⁶ The Supreme Court in *In re Gault* had held that juveniles in delinquency proceedings were to receive the same procedural rights, such as the right to the assistance of counsel, as adults in criminal proceedings. *In re Gault*, 387 U.S. 1 (1967). In the process of negotiating article 37, the United States' representative affirmed her delegation's understanding that the article covered "both adult criminal proceedings or juvenile justice proceedings when a child has committed what would be a criminal offense if committed by an adult." THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE 'TRAVAUX PREPARATOIRES,' 461 (Sharon Detrick ed., Martinus Nijhoff Publishers 1992).

regarding the role of international law in the sentencing of juvenile offenders. While the Court's more recent cases involving children and the constitutional prohibition on cruel and unusual punishment have not specifically referenced international sources, the Court has continued to embrace the notion that "youth matters."⁶⁷ Similarly, the unique position of children has been central to efforts by advocates to end the use of juvenile solitary confinement.

i. The Supreme Court and International Law

In rejecting the death penalty for juvenile offenders, the Supreme Court in *Roper v. Simmons* supplemented its analysis of the "evolving standards of decency" in the United States by specifically referencing international practice and the Convention's prohibition on the practice.⁶⁸ The Court also highlighted other international instruments, including the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child.⁶⁹ The Court emphasized that the United States stood alone in sanctioning the imposition of the death penalty in such cases. The Court also noted that the prohibition internationally rested "in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."⁷⁰

Later, in *Graham v. Florida*, the Court again referred to a global consensus after striking down the sentence of life in prison without the possibility of parole for juveniles convicted of non-homicide offences.⁷¹ After concluding that the constitutional ban on cruel and unusual punishment bars such sentences, the Court once again pointed to additional support for its conclusion in the international arena. Although the Court acknowledged that the international consensus was not dispositive, it also emphasized that it was "not irrelevant" and that it provided the Court with "respected and significant confirmation for [its] own conclusions."⁷²

The Court has not continued to expressly cite international standards in subsequent juvenile justice cases, perhaps in response to especially strong criticism from some members of the Court.⁷³ The majority has, however, continued to expand protections for children under the 8th Amendment. In *Miller v. Alabama*, Court held that mandatory sentences of life in prison without the possibility of parole for juvenile offenders violated the 8th Amendment,⁷⁴ and in *Montgomery v. Louisiana* it held that its decision

⁶⁷ In rejecting mandatory sentences of life in prison without the possibility of parole for juvenile offenders, the court has noted that "*Roper* [*v. Simmons*] and *Graham* [*v. Florida*] establish that children are constitutionally different from adults for the purposes of sentencing..." and that "[m]ost fundamentally, *Graham* insists that *youth matters* in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller v. Alabama*, 132 S. Ct. 2455, 2464-2465 (2012) (emphasis added).

⁶⁸ *Roper v. Simmons*, 543 U.S. 551, 276 (2005)

⁶⁹ *Id.*

⁷⁰ *Id.* at 578.

⁷¹ *Graham v. Florida*, 560 U.S. 48, 80 (2010).

⁷² *Id.* at 80-81.

⁷³ *Roper v. Simmons*, 543 U.S. 551, 623 (2005) (Justice Scalia dissenting with the Chief Justice and Justice Thomas joining, discussing the impropriety of considering treaties not ratified by the United States).

⁷⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

in *Miller* was to have retroactive effect.⁷⁵ Although not reliant on international standards, the Court's decision in *Miller* cites the earlier line of cases for the proposition that children are "constitutionally different" from adults. Thus, while the Court has moved away from explicit references to international standards, its jurisprudence continues to move the United States closer to international practice – though current practices in some areas continue to fall short of the Convention's requirements.⁷⁶

ii. Solitary Confinement

The practice of holding children in solitary confinement has also become an increasingly salient issue in the United States, and both litigation and policy efforts have striven to challenge a practice that is understood to be inconsistent with international standards. The Convention provides that children should be protected from torture and other forms of cruel, inhuman, or degrading punishment.⁷⁷ In its General Comment relating to rights of children in juvenile justice, the Committee on the Rights of the Child stated that the use of solitary confinement violates Article 37 of the Convention.⁷⁸ The U.N. Guidelines for the Prevention of Juvenile Delinquency⁷⁹ similarly state that punitive solitary confinement of children is a form of cruel, inhuman, or degrading treatment.⁸⁰ The U.N. Rules for the Protection of Juveniles Deprived of their Liberty also prohibit the use of solitary confinement as a form of punishment against children.⁸¹

On January 25, 2016, President Obama announced a ban on the practice of holding juveniles in solitary confinement in federal prisons, stating that:

Research suggests that solitary confinement has the potential to lead to devastating, lasting psychological consequences. It has been linked to depression, alienation, withdrawal, a reduced ability to interact with others and the potential for violent behavior. Some studies indicate that it can worsen existing mental illnesses and even trigger new ones.⁸²

The ban follows an announcement made by President Obama in July 2015 at the

⁷⁵ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

⁷⁶ For example, although the Court in *Miller* rejected mandatory sentences of life in prison without the possibility of parole, the majority acknowledged that it left in place the possibility of that a juvenile convicted of a homicide offence could be subjected to that sentence if the decision took into account the "how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). Such sentences are likely a violation of the Convention. See Wallace J. Mlyniec, *The implications of Articles 37 and 40 of the Convention on the Rights of the Child for U.S. Juvenile Justice and U.S. Ratification of the Convention*, 89 *Child Welfare* 103, 113 (2010).

⁷⁷ Convention art. 34.

⁷⁸ U.N. Comm. on the Rights of the Child, 44th Sess., General Comment No. 10, Children's rights in juvenile justice, U.N. Doc. CRC/C/GC/10 (2007).

⁷⁹ U.N. Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, Annex, 45 U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49, at 201 (Dec. 14, 1990).

⁸⁰ *Id.* at 201.

⁸¹ U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, Annex, 45 U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49, ¶ 67 (Dec. 14, 1990).

⁸² Michael D. Shear, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons* (Jan. 25, 2016) http://www.nytimes.com/2016/01/26/us/politics/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons.html?_r=0.

NAACP National Convention that he had commissioned a report from Attorney General Loretta Lynch to conduct a review of the overuse of solitary confinement across American prisons.⁸³

This development comes on the heels of advocacy efforts by groups such as Human Rights Watch, various branches of the American Civil Liberties Union, the American Friends Service Committee, and the Campaign for Youth Justice. All of these leading organizations have raised awareness around the issue of the excessive use of solitary confinement, particularly for juvenile offenders, and its harmful and long term effects.⁸⁴

The increasing discourse around the reform of the American justice system has also led to action prohibiting the use of solitary confinement for juvenile offenders, in line with the evolution of death penalty legislation and jurisprudence relating to children.⁸⁵ Recently, New York City officials agreed to a plan that would eliminate the use of solitary confinement for all inmates 21 years old and younger. This was an expansion of a policy that had been previously adopted in the Rikers Island facility that prohibited the use of solitary confinement for 16 and 17 year-olds.⁸⁶

Similarly, officials in New York and Illinois have agreed to curb the use of solitary confinement for children in response to litigation by advocacy groups. In December 2012, the NYCLU launched litigation against the excessive use of solitary confinement in New York state prisons.⁸⁷ This resulted in an agreement, announced in February 2014, which would require the New York to implement a set of changes to its use of solitary and other forms of extreme isolation in state prisons. The agreement would bar certain vulnerable populations from isolated confinement, and set firm guidelines and maximum durations for isolating others.⁸⁸

In May 2015, a federal court in Illinois approved a new departmental policy on the solitary confinement of juvenile offenders by the Illinois Department of Juvenile Justice, which was adopted in response to litigation by the Illinois ACLU in *RJ v. Jones*.⁸⁹ This new policy effectively banned the use of solitary confinement against juvenile offenders in Illinois.⁹⁰

⁸³ US DEPARTMENT OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 1 (U.S. Department of Justice, 2016) available at: <https://www.justice.gov/dag/file/815551/download>.

⁸⁴ See e.g. Amy Fettig, *Obama! There is No Time To Lose, End Solitary Confinement Once and For All*, American Civil Liberties Union (Oct. 1, 2015), <https://www.aclu.org/blog/speak-freely/obama-there-no-time-lose-lets-end-solitary-confinement-once-and-all>.

⁸⁵ Laura Rovner, *Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, Issue and Brief, Sept. 2015, available at https://www.acslaw.org/sites/default/files/Dignity_and_the_Eighth_Amendment_2.pdf.

⁸⁶ Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates for 21 and Younger*, N.Y. TIMES, Jan. 13, 2015, <http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html>.

⁸⁷ *NYCLU Lawsuit Challenges New York State's Use of Solitary Confinement*, New York Civil Liberties Union, (Dec. 6, 2012), <http://www.nyclu.org/news/nyclu-lawsuit-challenges-new-york-states-use-of-solitary-confinement>.

⁸⁸ *Peoples v. Fischer*, No 11-CV-2694 (U.S.D.C. S. Dist. of N. Y. 2014) (stipulation of stay with conditions).

⁸⁹ *Jones v. Bishop*, No. 1:12-cv-7289 (U.S.D.C. for Ill. N.E. 2012) (consent decree).

⁹⁰ *Id.*

C. International Law and Child Labor

Another area the United States has come under fire for a lack of compliance with international law standards is in relation to the employment of children, particularly in the context of agriculture. International law does not prohibit the employment of children from all work because it recognizes the benefits of some work and the realities that children may need to assist in the financial support of their families.⁹¹ International law does, however, regulate the conditions under which children may work and does define standards aimed at protecting children from exploitation and other harmful consequences of child labor.⁹²

In relation to child labor, Article 32 of the Convention on the Rights of the Child recognizes that children have the right to be “protected from economic exploitation and performing work that is likely to be hazardous or interfere with the child’s education or be harmful to the child’s health or physical, mental, or social development.” States are required to take measures to give effect to this right, including providing for minimum age for employment and regulating hours and conditions of employment.⁹³ In giving effect to this right, States must consider other international instruments that deal with the employment of children.

The International Labour Organization (ILO) has a series of Conventions that deal with the age of children entering into employment and the conditions under which children should or should not be working. The Minimum Age Convention, for example, was a consolidation of various age restriction conventions relating to different industries.⁹⁴ It requires Member States to pursue a national policy designed to ensure the effective abolition child labor and to progressively raise the minimum age for employment.⁹⁵ The ILO Convention on the Worst Forms of Child Labour,⁹⁶ to which the United States is a party,⁹⁷ prohibits the employment of children in “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”⁹⁸ The United States is obliged to take immediate and effective steps to determine forms and conditions of child labor, including in the agricultural sector that would violate the treaty and eliminate them.⁹⁹ States are further required to prevent children from engaging in dangerous forms of labor, assist those already engaged in this labor, and identify and reach out to children at risk.¹⁰⁰

In general, children working the in agricultural sector in the United States are subject to fewer protections than children working in other sectors. The Fair Labor Act includes

⁹¹ HUMAN RIGHTS WATCH, TOBACCO’S HIDDEN CHILDREN: HAZARDOUS CHILD LABOR IN UNITED STATES TOBACCO FARMING 88 (Human Rights Watch, 2014).

⁹² *Id.*

⁹³ Convention art. 32(2).

⁹⁴ Minimum Age Convention pmb1.

⁹⁵ Minimum Age Convention art. 1.

⁹⁶ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 2133 U.N.T.S.161, entered into force Nov. 19, 2000. [hereinafter the Child Labour Convention].

⁹⁷ The U.S. ratified the Child Labor Convention on Dec. 2, 2016. See, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO (last visited Apr. 4, 2016)

⁹⁸ Child Labour Convention art 3.

⁹⁹ Child Labour Convention arts. 1, 4, 7.

¹⁰⁰ Child Labour Convention art 7.

specific exemptions for children that work in agriculture.¹⁰¹ Children in the sector may start working away from home as young as 12 years old with parental consent, may work under “hazardous conditions” starting at age 16 rather than age 18, and are not subject to some of the same limitations on working hours that apply to children in other industries.¹⁰²

The U.S. Fair Labor Act was criticized by the ILO’s Committee of Experts for allowing children aged 16 and above to work in the agricultural sector – an occupation found to be hazardous or detrimental to their health or well-being.¹⁰³ Attempts to align the treatment of children in agriculture and other sectors have never made it to vote in Congress; regulations proposed by the U.S. Department of Labor that would have updated the list of hazardous occupations in agriculture were withdrawn as a result of pressure from groups representing agricultural interests.¹⁰⁴

In its 2014 report, *Tobacco’s Hidden Children: Hazardous Child Labor in United States Tobacco Farming*, Human Rights Watch concluded that exposure to tobacco plants in tobacco cultivation, harvesting, and curing was hazardous child labor because of the health risks associated with the circumstances in which the work occurs.¹⁰⁵ In another report, *Teens of the Tobacco Fields: Child Labor in United States Tobacco Farming*, Human Rights Watch interviewed teenagers who worked on tobacco farms in North Carolina in the summer of 2015.¹⁰⁶ The report documents some of the issues still faced by children working in the tobacco industry, the disparities that still exist between international standards and domestic law in the United States, gaps in domestic protections, and some policy changes and actions on the part of tobacco industry actors aimed at protecting child workers on tobacco farms.¹⁰⁷

D. Conclusion

The purpose of this Concept Note is to provide a broad overview of the international legal framework protecting the fundamental rights of children – particularly as it relates to evolving domestic standards in the United States in the in the areas of immigration, juvenile justice, and child labor. It was developed to assist participants in engaging with the complex intersection of international and domestic law and the specific issues that the panelists will be elaborating upon during the 2016 Samuel Dash Conference on Human Rights.

¹⁰¹ 29 U.S.C.A § 213(c)(1-2).

¹⁰² For a detailed discussion of the Fair Labor Act and the exceptions for children in the agricultural industry, see HUMAN RIGHTS WATCH, *TEENS OF THE TOBACCO FIELDS: CHILD LABOR IN UNITED STATES TOBACCO FARMING* 50 (Human Rights Watch, 2015).

¹⁰³ ILO Comm. of Experts on the Application of Conventions and Recommendations, *Observation: Worst Form of Child Labour Convention, 1999 (No. 182) – United States (Ratification: 1999)*, adopted 2012, published 102nd ILC session 2013).

¹⁰⁴ *Supra* note 91 at 10

¹⁰⁵ *Supra* note 102 at 90

¹⁰⁶ *Supra* note 91 at 10.

¹⁰⁷ *Id* at 48-67.