

31 May 2018

Summary

The issues addressed by this third party intervention are in particular the State's jurisdiction under the Convention on the Rights of the Child (CRC article 2.1), access to the territory and *non-refoulement* (CRC articles 3.1, 6, 20, 37), specific safeguards for children (CRC articles 3.1, 12 and 22) and collective expulsions (CRC articles 3.1, 20 and 22). The intervention analyses the legal principles and jurisprudence related to scope and content of States Parties' obligations, without reference to the particular facts of the case before the Committee.

A State has jurisdiction over children who are subject to its authority or effective control on or at its land border, whether within or outside its territory. When a State Party exercises its jurisdiction over a child, its responsibility is engaged and it is required to comply with its international obligations of human rights protection, including under the Convention on the Rights of the Child (CRC), particularly as regards the assessment of the best interests of the child and the child's right to be heard. Where a State Party is an EU Member State, it is additionally obliged to ensure the respect of the child's best interests, protection and care necessary for the child's well-being as well as the other child-specific guarantees under EU law.

Children who are subject to the authority or effective control of a State on or at its land border must be granted access to the territory as a prerequisite to the initial assessment process and further afforded the opportunity to meaningfully raise objections to their transfer, as the principle of *non-refoulement* and the prohibition on collective expulsions require. The prohibition of *refoulement* on certain grounds is of an absolute nature in international human rights law and entails positive duties on the part of States, including to grant children the possibility to present the reasons against their return, to ensure their access to legal assistance and to a guardian, and to perform an individualized assessment to verify and evaluate the risk of *refoulement*.

The prohibition of collective expulsion requires a thorough and rigorous assessment, including the examination of the particular circumstances of those forming part of the group of non-nationals concerned by the measure. This obligation also entails their effective identification and registration as well as information about, and access to applicable protection procedures and remedies where relevant. These safeguards apply whenever the individuals concerned fall within State Parties' jurisdiction, including in circumstances when jurisdiction is exercised extraterritorially and irrespective of their migration status.

When children are involved, the prohibition of collective expulsion additionally requires compliance with child-specific rights and corresponding tailored procedural safeguards. Collective expulsion entails a violation of the primary obligation to assess the best interest of the child in each individual case, which must be carried out prior to any decision to return or refuse entry or any other decision affecting children and must be adequately reflected in this decision.

1. Jurisdiction (CRC article 2.1)

The CRC under article 2(1) provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction (...)." This Committee made clear in its General Comment No. 22:

*"The obligations of States parties under the Conventions apply to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders. Those obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms. The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory."*¹

It is well established under international human rights law generally, and particularly in universal and regional human rights treaties, that the jurisdiction of the State, with regard to its obligations to respect, protect and fulfil human rights, extends beyond its geographical territory. This principle has been affirmed repeatedly by the International Court of Justice. For instance, in respect of the jurisdictional reach of the Convention on the Elimination of all Forms of Racial Discrimination, the Court emphasized that "there is no restriction of a general nature in CERD relating to its territorial application [...]. [T]he Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to actions of a State party when it acts beyond its territory."²

¹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and Committee on the Rights of the Child (CRC), Joint General Comment No. 3 and No. 22 on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3-CRC/C/GC/22, para 12.

² See provisional measures in judgment of 15 October 2008, International Court of Justice (ICJ), Case of *Georgia v. Russian Federation*, No. 35/2008, para 109. This principle is reaffirmed similar jurisprudence by the ICJ in respect of other international human rights treaties. See, for example, judgment of 19 December 2005, ICJ, Case of *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, I.C.J. Reports 2005, p. 168, and judgment of 9 July 2004, ICJ, Advisory Opinion in the Case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I. C. J. Reports 2004, p. 136, para. 109.

The Human Rights Committee, describing the scope of jurisdiction under the International Covenant on Civil and Political Rights (ICCPR) has noted that pursuant to ICCPR article 2.1, “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”³

According to the Committee Against Torture, “[t]he concept of ‘any territory under its jurisdiction’... must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of the State party.”⁴

The jurisprudence of the European Court of Human Rights (ECtHR), interpreting a Member State’s obligations as a Party to the European Convention on Human Rights (ECHR), affirms that as a general rule, individuals who are present on a State’s territory, lawfully or otherwise, fall within that State’s jurisdiction.⁵ It also sets out the circumstances under which the scope of the ECHR may reach beyond the territory of a State Party.⁶ The Court has emphasized that jurisdiction “may extend to acts of its authorities which produce effects outside its own territory”⁷ and a “State’s responsibility may [...] be engaged on account of acts which have sufficiently proximate repercussion of rights guaranteed by the Convention, even if those repercussion occur outside its jurisdiction”.⁸ Jurisdiction is exercised over any territory over which a State Party to the Convention claims sovereignty or exercises functional sovereignty⁹ and/ or any individuals over whom it exercises authority or effective control regardless of whether the individuals are located outside of the State’s territory.¹⁰ Situations where States have been found to exercise their jurisdiction extraterritorially include people being intercepted on the high seas,¹¹ arriving by sea at a port,¹² or on board an aircraft refused permission to land.¹³ Furthermore, people who are subject to checkpoint controls outside the territory of the State Party are within its jurisdiction.¹⁴

The Court further established that where the State authorities take action “the effect of which is to prevent non-nationals from reaching the borders of the State or even to push them back to another State”, such conduct “constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question.”¹⁵ Construing obligations in this manner is necessary in order to avoid depriving the Convention rights of effectiveness¹⁶ and applies irrespective of the border control methods employed by the State Party. It, therefore, follows that the question of entry to a State’s territory is not decisive when assessing whether a State is exercising or has exercised its jurisdiction.

Similarly, under other regional human rights systems, jurisdiction may also reach beyond State’s territory. Pursuant to obligations under the American Convention on Human Rights, “jurisdiction [...] [is] a notion linked to authority and effective control, and not merely to territorial boundaries.”¹⁷ Likewise, pursuant to obligations under the African Charter on Human and Peoples Rights “circumstances may obtain in which a State assumes obligations beyond its territorial jurisdiction such as [...] [when] the State exercises control or authority over an individual.”¹⁸

A further relevant aspect of jurisdiction as concerns the CRC is the obligation of States Parties to realize Convention rights through international cooperation. As the Committee underscored in its General Comment No. 16: “States have obligations to engage in international cooperation for the realization of children’s rights beyond their territorial boundaries. The preamble and the provisions of the Convention consistently refer to the “importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries”. General comment No. 5 emphasizes that “implementation of the Convention is a cooperative exercise for the States of the world”. As such, the full realization of children’s rights under the Convention is in part a function of how States interact.” This also entails the obligation to duly consider the impact of such cooperation agreements on children’s rights.¹⁹ This Committee has demonstrated its concern about cooperation agreements focused on restricting migration that negatively impact children’s’ rights.²⁰

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children sets out, among its premises, the need to ensure the protection of children in international situations and the importance of international co-operation for the protection of children, taking into account the standards of the UNCRC.

³ Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

⁴ Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, para. 7.

⁵ *Louizidou v. Turkey (Preliminary Objections)*, ECtHR, Application No. 15318/89, Judgment of 23 March 1995, para. 62; *Issa and Others v. Turkey*, Application No. 31821/96, Judgment of 16 November 2004, para 71; *Al-Skeini and Others v. the United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, para. 131; and *Hirsi Jamaa and Others v. Italy*, ECtHR, Application No. 27765/09, Judgment of 23 February 2012, para. 73.

⁶ *Pad v. Turkey*, ECtHR, Application No. 60167/00, Judgment of 28 June 2007, para. 53.

⁷ *Al-Skeini and others v. the United Kingdom*, ECtHR, Application No. 55721/07, Judgment of 7 July 2011, para. 133.

⁸ *Ilascu and others v. Moldova and Russia*, ECtHR, Application No. 48787/99, Judgment of 8 July 2004, para. 317.

⁹ *Al-Skeini and Others v. the United Kingdom*, *op. cit.*, para. 149.

¹⁰ *Issa v. Turkey*, ECtHR, Application No. 31821/96, Judgment of 16 November 2005, para. 72; *Öcalan v. Turkey* (GC), ECtHR, Application No. 46221/99, Judgment of 12 May 2005), para. 91.

¹¹ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, paras. 78 and 180.

¹² *Sharifi and Others v. Italy and Greece*, ECtHR, Application No. 16643/09, Judgment of 21 October 2014.

¹³ *East African Asians (British protected persons) v. the United Kingdom*, ECtHR, Application Nos. 4715/70, 4783/71 and 4827/71, Judgment of 6 March 1978.

¹⁴ *Ibid.*

¹⁵ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 180.

¹⁶ *Sharifi and Others v. Italy and Greece*, *op. cit.*, para 210.

¹⁷ *Petition Report No. 38/99 of 11 March 1999*, Inter-American Commission on Human Rights (IACHR), Victor Saldano v. Argentina, para. 19.

¹⁸ *Mohammed Abdullah Saleh Al-Asad v. Republic of Djibouti*, African Commission on Human and Peoples’ Rights (ACHR), Communication 383/10, 55th Ordinary Session, May 2014.

¹⁹ CMW and CRC, Joint General Comment No. 3 and No. 22, *op. cit.*, para. 50.

²⁰ *Ibid.*

The interveners submit that a State has jurisdiction over children who are subject to the authority or effective control of the State on or at its land border, whether within or outside its territory. When a State Party exercises its jurisdiction over a child, its responsibility is engaged and it is required to comply with obligations under the Convention on the Rights of the Child (CRC), including as regards the assessment of the best interests of the child. Those obligations cannot be arbitrarily and unilaterally curtailed by migration control mechanisms, thus they equally apply to those children who come under a State's jurisdiction while attempting to enter its territory.

2. Access to the territory and non-refoulement in international and EU law

States generally have the authority to control the entry and presence of non-nationals in their territory.²¹ Nevertheless, this authority is not unlimited, and must be exercised in conformity with a State's international legal obligations, including the obligation to respect the principle of *non-refoulement*. This principle, which entails both negative and positive obligations on States, is a rule of customary international law²² and is explicitly provided for in a variety of international treaties and regional frameworks of human rights protection. *Refoulement* is prohibited by the 1951 Geneva Convention relating to the Status of Refugees (GC)²³ as far as refugees are concerned, and generally, under international human rights law, for example pursuant to the UN Convention Against Torture,²⁴ the International Covenant on Civil and Political Rights,²⁵ and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).²⁶

The principle of *non-refoulement* under international human rights law prohibits States from expelling, deporting, returning, or otherwise transferring an individual to another country when there are substantial grounds to believe that they are at real risk of being subject to a serious violation of human rights. Under refugee law this principle specifically prohibits return where an individual's life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The principle also applies equally to situations where individuals would be exposed to a real risk of onward removal to such a country (indirect or chain *refoulement*). The prohibition applies to all individuals, irrespective of nationality or status. Furthermore, it cannot merely be theoretical or illusory; States are required to put effective procedures in place to identify people within their jurisdiction who are entitled to benefit from this prohibition, including upon entry.

The UN Convention on the Rights of the Child (CRC)

Article 3.1 provides that "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

Article 6 reads:

1. *States Parties recognize that every child has the inherent right to life.*
2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

Article 20 sets out:

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
2. *States Parties shall in accordance with their national laws ensure alternative care for such a child.*
3. *Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*

Article 37 provides that: "(a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (...)*"

In any decision or action taken by State authorities concerning children, the best interests of the child must be a primary consideration.²⁷ The Committee on the Rights of the Child has affirmed that an assessment of what constitutes a child's best interest requires a clear and comprehensive assessment of the child's identity, including nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. It has emphasized that "allowing the child access to the territory is a prerequisite to this initial assessment process".²⁸ When a child is first detected by immigration authorities, child

²¹ *Riad and Idiab v. Belgium*, ECtHR, Application Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para. 94.

²² See: UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

²³ The 1951 Convention relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter the Refugee Convention); as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (the 1967 Protocol).

²⁴ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations Treaty Series vol. 1465, p. 85, article 3.

²⁵ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series vol. 999, p. 171; and Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13.

²⁶ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, United Nations Treaty Series, Treaty Series vol. 2716, p. 3, article 16.

²⁷ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series vol. 1577, p. 3, article 3.1.

²⁸ Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, UN Doc. CRC/GC/2005/6, para. 20. See also CMW and CRC, Joint General Comment No. 4 and General Comment No. 23 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/23, para 17.

protection or welfare officials should immediately be informed and be in charge of screening the child.²⁹ The Committee also identifies an obligation to appoint a competent guardian and, if needed, to provide legal assistance and representation.³⁰

In regard to the prohibition on torture or other cruel, inhuman or degrading treatment or punishment under article 37 (1), the Committee on the Rights of the Child further established in its General Comment no. 6 that “in affording proper treatment of unaccompanied or separated children, States must fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of CAT.”³¹ This Committee has further clarified that:

“in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.”³²

While upholding the broadly protective scope of *non-refoulement* under international law instruments, the Committee in the joint General Comment no. 3 of 2017³³ expressed concern at the practice adopted by some States of using a ‘narrow definition of the non-refoulement principle’ and restated explicitly that States “shall not reject a child at a border or return him or her’ to a country presenting substantial grounds leading to believe that there would be a risk of irreparable harm, as defined above.”³⁴ On a procedural level, respect for this principle requires States to ground any decision to return a child to his/her country of origin on “evidentiary considerations on a case-by-case basis and pursuant to a procedure with appropriate due process safeguards, including a robust individual assessment and determination of the best-interests of the child [ensuring], inter alia, that the child, upon return, will be safe and provided with proper care and enjoyment of rights.”³⁵

Other instruments of international human rights and refugee law

The legal obligations and underlying standards set by the CRC are supported by other international treaties which under principles of treaty law should at least be taken into account when interpreting obligations under the CRC.³⁶ Where the right which would be protected by *non-refoulement* is an absolute right, such as freedom from torture or other cruel, inhuman or degrading treatment or punishment or the arbitrary deprivation of the right to life, or a real risk of enforced disappearance,³⁷ the principle is equally absolute and is not subject to any exceptions, whether in law or in practice.³⁸ The Committee against Torture (CAT) has recently reiterated that the principle of *non-refoulement* has to be applied in any territory under the State’s jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to *any person*, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law.³⁹ The UN CAT also declared that States not only have obligations to respect *non-refoulement* obligations, but they also have to take positive protective measures. These include preventive measures such as ensuring that every case is examined individually, informing the individuals concerned of their rights and in a language they understand, providing them access to a lawyer, including free legal aid if necessary, ensuring the existence of an effective remedy against a removal order, and training all the authorities concerned on *non-refoulement* obligations.⁴⁰

The 1951 Geneva Convention and its complementary Protocol of 1967, which constitute the cornerstone for the protection of asylum seekers and refugees, address the prohibition of refoulement under Article 33, stipulating that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.” The UN High Commissioner for Refugees (UNHCR),⁴¹ who has been entrusted with the supervision of the implementation of this Convention⁴² has interpreted the principle of non-refoulement as follows: “the principle of non-refoulement applies to any conduct resulting in the removal, expulsion, deportation, return, extradition, rejection at the frontier or

²⁹ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32; and Joint GC No. 4 and 23, para. 13.

³⁰ *Ibid.*, para. 21.

³¹ CRC, GC No. 6, *op. cit.*, para. 26.

³² *Ibid.*, para. 27.

³³ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 45.

³⁴ *Ibid.*, para. 46.

³⁵ *Ibid.*, para. 33.

³⁶ Article 31 of the Vienna Convention on the law of treaties, 23 May 1969.

³⁷ UN General Assembly, Convention on the Rights of the Child, *op. cit.*, article 16; and UN Declaration on the Protection of all Persons from Enforced Disappearance, Resolution 47/133 of 18 December 1992, UN Doc. A/RES/47/133, article 8.

³⁸ *Zhakhongir Maksudov and Others v. Kyrgyzstan*, Human Rights Committee (HRC), Communication Nos. 1461, 1462, 1476 and 1477/2006, Views of 31 July 2008, UN Doc. CCPR/C/93/D/1461,1462,1476,1477/2006, para. 12.4; *Tebourski v. France*, Committee Against Torture (CAT), Communication No. 300/2006, Views of 11 May 2007, UN Doc. CAT/C/38/D/300/2006, paras. 8.2 and 8.3. The principle is upheld by Article 10 of the International Convention on the Rights of Migrants Workers (CRMW): “No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

³⁹ Committee against Torture, General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018, para. 10.

⁴⁰ CAT, GC No. 4, *op. cit.* para. 18.

⁴¹ Human Rights Council, Report on [Access to justice for children](#), UN Doc. A/HRC/25/35 (2013), para. 59.

⁴² UN General Assembly, Protocol Relating to the Status of Refugees, *op. cit.*, article 35.

non-admission, etc. that would place a refugee at risk.” The principle of non-*refoulement* is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.⁴³ By virtue of the declaratory nature of refugee status, the principle of *non-refoulement* under international refugee law applies to all refugees, including those who have not been formally recognized as such, and to asylum seekers whose status has not yet been determined.⁴⁴

According to UNHCR, this principle applies not only in respect of return to the country of origin, but also to any other country where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being exposed to such a risk. “As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.”⁴⁵ UNHCR explicitly recognized that asylum-seeking children benefit from all provisions under the Convention ‘notably the immunity from penalties for an irregular entry or presence (Article 31) and the principle of non-*refoulement*’.⁴⁶

When considering asylum claims from unaccompanied or separated children, and hence also for the purposes of determining whether there is a risk of *refoulement*, the CRC has pointed out that “the refugee definition in [the Geneva Convention] must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children.”⁴⁷

Under both the 1951 Convention and international human rights law, the principle also covers instances where there is a risk of indirect *refoulement*. States are prohibited from transferring a person to any country where there is a risk that the person concerned may then be subsequently sent to an unsafe country.

European Convention on Human Rights

Under the ECHR it is prohibited to refuse entry to, and/or to return or transfer an individual where there are substantial grounds to believe that she or he is at real risk of facing serious violations of human rights, including of the right to life, the prohibition of torture or inhuman or degrading treatment or punishment, or flagrant denial of justice, including in respect of the right to liberty, following transfer.⁴⁸

The European Court of Human Rights (ECtHR) has established that, in assessing whether an expulsion or other transfer amounts to *refoulement*, what matters are not the reasons for expulsion, but only the risk of serious violations of human rights in the country of destination.⁴⁹

The ECtHR has established that the principle of *non-refoulement* applies both to transfers to a State where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of further transfer to a third country where the person will be at risk (indirect *refoulement*).⁵⁰ The Grand Chamber of the ECtHR, in *Hirsi Jamaa and Others v. Italy*, clarified that the sending State must “ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.”⁵¹

EU law

The prohibition of *refoulement* and the prohibition of torture and inhuman or degrading treatment or punishment (Article 19 (2) and Article 4 of the Charter of Fundamental Rights of the European Union (CFR)), prevent the EU Member States from returning an individual to a situation where he or she would be at a real risk of torture, inhuman or degrading treatment or punishment. The prohibition applies to factual scenarios such as rejection at the border, interception and indirect *refoulement*. Member States’ obligations under the above mentioned provisions apply regardless of whether the person seeking protection at the border has explicitly applied for international protection, creating an obligation on Member States to proactively assess the risk of *refoulement* when read in conjunction with Article 52(3) CFR.⁵² The principle of *non-refoulement* interpreted in light of EU primary law is also widely reflected in EU secondary law,⁵³ including under Article 21 of the recast Qualification

⁴³ UNHCR, Statement on the right to asylum, UNHCR’s supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility. Issued in the context of a reference for a preliminary ruling addressed to Court of Justice of the European Union by the Administrative Court of Sofia lodged on 18 October 2011 – *Zuheyir Freyeh Halaf v. the Bulgarian State Agency for Refugees* (C-528/11).

⁴⁴ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1, para. 28.

⁴⁵ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-*Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 8.

⁴⁶ UN High Commissioner for Refugees (UNHCR), UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum, 1 June 2015.

⁴⁷ CRC, General Comment No. 6, treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6.

⁴⁸ *Ibid.*, para. 114.

⁴⁹ *Saadi v. Italy*, ECtHR, *op. cit.*, para. 138.

⁵⁰ CCPR, General Comment No. 31, *op. cit.*, para. 12; CAT, General Comment No. 1, Implementation of article 3 of the Convention in the context of article 22, UN Doc. A/53/44, para. 2; *Hamayak Korban v. Sweden*, CAT, Communication No. 88/1997, Views of 16 November 1998, para. 7; *Salah Sheekh v. the Netherlands*, ECtHR, Application no. 1948/04, Judgment of 11 January 2007, para. 141; and *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, para. 342.

⁵¹ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 147.

⁵² *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 157.

⁵³ EU Fundamental Rights Agency (FRA), Scope of the principle of non-*refoulement* in contemporary border management: evolving areas of law, Annex: Secondary EU law provisions referring to non-*refoulement*, December 2016. Available at: <http://fra.europa.eu/en/publication/2016/scope-principle-non-refoulement-contemporary-border-management-evolving-areas-law>.

Directive (rQD)⁵⁴ and the recast Asylum Procedures Directive (rAPD).⁵⁵ The rAPD is applicable at the borders of a Member State and provides for effective access to the asylum procedure, including the right to be informed of one's rights, the right to be heard and access to interpretation.⁵⁶ For its part, the Returns Directive⁵⁷ establishes respect for the principle of *non-refoulement* as a precondition for returning an irregularly staying migrant to the country of origin, transit or any other third country.⁵⁸

The EU Fundamental Rights Agency (FRA)⁵⁹ has acknowledged that the principle of *non-refoulement* applies to border surveillance activities regardless of whether they are carried out at sea or on land. FRA has stressed that border or coast guards exercise effective control when they stop migrants who have reached the land border or the territorial sea and officers exercising effective control are fully bound by the principle of *non-refoulement*.⁶⁰ The FRA also voiced concerns about the legal vacuum migrants find themselves in, due to various border procedures and fences built in the EU, in particular when migrants are at the outer side of fences, such as those established in the Spanish enclaves of Ceuta and Melilla, and in Bulgaria, Greece, Hungary and Slovenia.⁶¹

Other regional human rights protection systems

Under the American Convention on Human Rights, the prohibition of *refoulement* is both a stand-alone obligation⁶² and a necessary component for the observance of other rights,⁶³ including the right to seek and be granted asylum.⁶⁴ It imposes the obligation not to return, expel, deport, repatriate, reject at the border, or not to admit or in any way transfer or remove a person to a State where their liberty may be threatened directly or indirectly⁶⁵ as a result of persecution for specific reasons or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.⁶⁶ This prohibition also entails positive duties on the part of States,⁶⁷ *inter alia*, to grant individuals the possibility to present the reasons against their return; to ensure their access to legal assistance, including, if necessary, translation and interpretation; and to perform an individualized assessment to verify and evaluate the risk of *refoulement*.⁶⁸ In order to respect these minimum guarantees, States must at least interview the individual concerned and make a prior determination of the risk of *refoulement*.⁶⁹ The Inter-American Court of Human Rights (IACHR) has found that a flagrant violation of the basic guarantees of due process may result in the violation of the principle of *non-refoulement*.⁷⁰

The Inter-American Court has recognized that *non-refoulement* is applicable to any migrant regardless of their legal status and migratory situation.⁷¹ To ensure this right does not become illusory and without any value or effect, the IACHR highlighted that it also applies to those situations where migrants are either on the border or have crossed it without being admitted officially or legally into the territory of the country, and to all other situations where the State in question exercises authority or control over a migrant.⁷² The protection against *refoulement* is further enhanced in the case of children, where the individualized assessment entails the evaluation of personal circumstances such as age and gender, and the determination of the best interests of the child as a central aspect of any decision concerning the child.⁷³

The prohibition of *refoulement* is similar under the human rights framework of the African Union,⁷⁴ engaging any measure compelling an individual to return or remain in a territory where his/her life, physical integrity or liberty would be under threat, including rejections or summary returns at the border.⁷⁵ The African Commission on Human and Peoples' Rights has found that

⁵⁴ European Parliament and Council, Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 13 December 2011, article 21.

⁵⁵ European Parliament and Council, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), 26 June 2013.

⁵⁶ rAPD, *Ibid.*, Recital 25, 28, Article 3 and 12.

⁵⁷ European Parliament and Council, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008.

⁵⁸ Returns directive, *Ibid.*, Recital 8 and Articles 4(4)(b), 5 and 9.

⁵⁹ FRA is an independent EU body which, among other functions, provides EU Member States advice and expertise on the application of the EU Charter.

⁶⁰ FRA, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, December 2016, p. 39, scenario 9.

⁶¹ *Ibid.*, p. 40.

⁶² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, article 22(8).

⁶³ Such rights include the right to life, right to personal liberty, right to a fair trial and rights of the child. *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACtHR), para. 228.

⁶⁴ Organization of American States (OAS), *American Convention on Human Rights, op. cit.*, article 22(7); Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, article; *Advisory Opinion OC-21/14, op. cit.*, para. 209; and *Judgment of 25 November 2013*, IACtHR, Series C No. 272, Case of the Pacheco Tineo Family v. Bolivia, para. 152.

⁶⁵ *Judgment of 25 November 2013*, IACtHR, Series C No. 272, Case of the Pacheco Tineo Family v. Bolivia, para. 53; and *Report N. 78/11 of 21 July 2011*, IACHR, Case No. 12.586, John Doe et al v. Canada, para. 103.

⁶⁶ *Advisory Opinion OC-21/14, op. cit.*, para. 49 (m).

⁶⁷ *Advisory Opinion OC-21/14, op. cit.*, para 235.

⁶⁸ *Advisory Opinion OC-21/14, op. cit.*, para 221; *Report N. 78/11 of 21 July 2011*, IACHR, *op. cit.*, para. 107; and *Judgment of 25 November 2013*, IACtHR, *op. cit.*, paras. 132-136.

⁶⁹ *Judgment of 25 November 2013*, IACtHR, *op. cit.*, para. 136.

⁷⁰ *Advisory Opinion OC-21/14, op. cit.*, para 230.

⁷¹ *Advisory Opinion OC-21/14, op. cit.*, para 215.

⁷² *Advisory Opinion OC-21/14, op. cit.*, paras. 210 and 219.

⁷³ *Advisory Opinion OC-21/14, op. cit.*, paras 232-233.

⁷⁴ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3rev.5, articles 5 and 12 as interpreted by the African Commission on Human and Peoples' Rights. The prohibition of *refoulement* is further strengthened with the adoption of the Convention Governing the Specific Aspects of Refugee Problems in Africa.

⁷⁵ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, article II(3).

measures to remove migrants from a territory cannot be taken to the detriment of the enjoyment of their fundamental rights.⁷⁶ The African Charter requires removals, where lawful, to take place in a manner consistent with the due process of law,⁷⁷ and that the individuals concerned are given the possibility to be heard.⁷⁸ Article 23 of the African Charter on the Rights and Welfare of the Child sets out that states “shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.”

The interveners submit that the prohibition of *refoulement* is absolute under international human rights and EU law, and entails positive duties on the part of States to grant individuals the possibility to present the reasons against their return; to ensure their access to legal assistance, including translation and interpretation; and to perform an individualized assessment to verify and evaluate the risk of *refoulement*.

Where children are involved, the assessment of a risk of *refoulement* should be conducted in an age and gender-sensitive manner and in compliance with the child-specific guarantees under international and EU law. Under the CRC, children must be granted access to the territory as a prerequisite to the initial assessment process in order to comply with article 37 (freedom from torture and ill-treatment), article 6 (right to life and right to development), article 20 (special protection and assistance to be provided to children deprived of their family environment) and article 3 (best interest of the child principle).

3. Specific safeguards for children (CRC articles 3, 12 and 22)

Best interests of the child principle

The CRC as well as other international human rights treaties⁷⁹ oblige States to provide specific safeguards and guarantees for the protection and care of children and acknowledge that they often find themselves in vulnerable situations, which are typically even more acute for unaccompanied or separated children. In that connection, this Committee has stated that, in the case of a displaced child, the “best interest” principle must be respected during all stages of the displacement.⁸⁰

In order to comply with the obligations arising from the principle of the best interests of the child, State authorities must undertake, as an initial step, the prioritized identification and prompt registration of children, including unaccompanied and separated.⁸¹ Additionally, they must appoint a competent guardian or adviser as soon as the unaccompanied or separated child is identified⁸² and at the very latest prior to administrative or judicial proceedings.⁸³ They also must allow for the child’s free of charge access to a qualified legal representative.

The best interest principle requires that any decision-making process involving children includes an evaluation of the possible impact of the decision on the child’s best interests.⁸⁴ This assessment should be clearly reflected in any decisions affecting children. In the migration context, it requires a special regime in respect of asylum procedures and reception conditions, distinct from that applicable to adults, whereby an assessment of all elements of a child’s interests in a specific situation is undertaken.⁸⁵

The CRC and CMW in their Joint General Comments 23 (CRC) and 4 (CMW) recently reaffirmed that in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to: (a) Access to the territory, regardless of the documentation they have or lack, and to be referred to authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards; (b) Be notified of the existence of a proceeding and of the decision adopted in the context of the immigration and asylum proceedings, its implications and possibilities for appeal; (...) (d) Be heard and take part in all stages of the proceedings and be assisted without charge by a translator and/or interpreter (...) (i) For unaccompanied and separated children, have appointed a competent guardian, as expeditiously as possible, who serves as a key procedural safeguard to ensure respect for their best interests; (j) Be fully informed

⁷⁶ *Institute for Human Rights and Development in Africa v. Angola*, Communication 292/04, African Commission on Human and Peoples’ Rights (ACHR), 43rd Ordinary Session, May 2008, para. 63.

⁷⁷ *Ibid.*, paras. 62-64.

⁷⁸ *Union Inter Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation Nationale des Droits de l’Homme au Sénégal and Association Malienne des Droits de l’Homme v. Angola*, Communication 159/96, ACHR, 22nd Ordinary Session, November 1997, para. 20.

⁷⁹ UN General Assembly, Convention on the Rights of the Child, *op. cit.*, articles 2(1), 22(1) and 39; UN General Assembly, International Covenant on Civil and Political Rights, *op. cit.*, article 24; and UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series vol. 993, p. 3, article 10.

⁸⁰ CRC, GC No. 6, *op. cit.*, paras. 19 and 20. At any of these stages, a “best interest” determination must be documented in preparation of any decision fundamentally affecting the unaccompanied or separated child’s situation, and should include a comprehensive assessment of the child’s identity, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.

⁸¹ CRC, GC No. 6, *op. cit.*, para. 31. See further United Nations High Commissioner for Refugees (UNHCR), Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997, para. 5.

⁸² CRC, GC No. 6, *op. cit.*, paras. 21 and 33.

⁸³ The guardian should be consulted and informed regarding all actions taken in relation to the child. See: CRC, GC No. 6, *op. cit.*, paras. 21, 33 and 72; CRC, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, para. 96; and Parliamentary Assembly of the Council of Europe (PACE), Unaccompanied children in Europe: issues of arrival, stay and return, Resolution 1810 (2011), para. 5.7.

⁸⁴ CRC, GC No. 14, *op. cit.*, paras. 6(c) and 14(b).

⁸⁵ CRC, GC No. 6, *op. cit.*, paras. 54, 75 and 76.

throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them.⁸⁶

Consonant with the views of the CRC, the ECtHR has recognized that the principle of the best interests of the child shall be a primary consideration in all actions concerning children and that it is a fundamental interpretive legal principle, a substantive right and a rule of procedure under international law on the rights of the child.⁸⁷ In *Rahimi v. Greece* it confirmed that in all actions relating to children an assessment of the child's best interests must be undertaken separately and prior to a decision that will affect that child's life.⁸⁸

Under EU law (Article 24 EU Charter on Fundamental Rights), the best interests of the child must also be a primary consideration in all decisions taken with regard to children⁸⁹ and respect for this obligation requires children to have access to legal procedures and conditions which enable them to express their views freely.⁹⁰ The EU asylum *acquis* envisages specific identification and tailored procedural and reception guarantees to children as a category of particularly vulnerable persons in accordance with their special needs.⁹¹ For instance, EU Member States must ensure that children receive competent representation and assistance as soon as possible.⁹²

The right to be heard

An assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to these views in all matters affecting the child,⁹³ including immigration or asylum proceedings in which they might be involved.

States Parties have an obligation under article 12 of the CRC to respect and protect a child's right to be heard. This means that a child is to be given the opportunity and means to present his or her views and have those views given due weight when decisions are being made which will have an effect on them.

The Committee in its General Comment No 12 emphasized the importance of a child-friendly environment and information provision for the effective realization of child's right to be heard.⁹⁴ The relevant and accessible information should include, inter alia, "information on their rights, the services available, means of communication, complaints mechanisms, the immigration and asylum processes and their outcomes. Information should be provided in the child's own language in a timely manner, in a child-sensitive and age-appropriate manner, in order to make their voice heard and to be given due weight in the proceedings."⁹⁵ The Committee has previously stressed that "[c]hildren who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. (...) In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim."⁹⁶ The UN High Commissioner for Human Rights has also repeatedly emphasized that the views of children must be given due consideration.⁹⁷

In the same vein, Article 24.1 of the EU Charter on Fundamental Rights provides that "[c]hildren shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity." This provision is of general applicability, and is not restricted to particular proceedings.⁹⁸

Article 22 of the UN CRC establishes that refugee children and children seeking refugee status should receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention and other applicable international human rights treaties. This Committee further clarified that "[r]efugee status applications filed by unaccompanied and separated children shall be given priority and every effort should be made to render a decision promptly and fairly."⁹⁹ The Committee further stated that: "[m]inimum procedural guarantees should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters. (...) The interviews should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child. The assessment process should comprise a case-by-case examination of the unique combination of factors presented by each child, including the

⁸⁶ CMW and CRC, Joint GC No. 4 and No. 23, *op. cit.*, para. 17.

⁸⁷ *Rahimi v. Greece*, ECtHR, Application No. 8687/080, Judgment of 5 July 2011, para. 108. It is established in Article 3(1) CRC and applies to public or private social welfare institutions, courts of law, administrative authorities or legislative bodies who must assess and be guided by the principle in all their acts. See also: CRC, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, pp. 7-9; and, *Neulinger and Shuruk v. Switzerland [GC]*, ECtHR, Application No. 41615/07, Judgment of 6 July 2010, para. 135.

⁸⁸ *Rahimi v. Greece*, ECtHR, *op. cit.*, para. 108.

⁸⁹ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, article 24; and European Commission, Communication from the Commission to the European Parliament and the Council: The Protection of Children in Migration, COM(2017) 211 final.

⁹⁰ *Judgment of 22 December 2010*, Court of Justice of the EU (CJEU), Joseba Andoni Aguirre Zarraga v. Simone Pelz, Case C-491/10, paras. 65 and 66.

⁹¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, Articles 11, 17, 18, 21-24.

⁹² rAPD, *op. cit.*, Article 25.

⁹³ CRC, GC No. 14, *op. cit.*, para. 43.

⁹⁴ CRC, GC No. 12, The right of the child to be heard, UN Doc. CRC/C/GC/12, para. 34.

⁹⁵ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 35.

⁹⁶ CRC, GC No. 12, *op. cit.*, para. 123.

⁹⁷ Human Rights Council, Report on [Access to justice for children](#), *op. cit.*, para. 59.

⁹⁸ FRA, [Handbook on European law relating to the rights of the child](#), p. 41.

⁹⁹ CRC, GC No. 6, *op. cit.*, para. 70.

child's personal, family and cultural background. The guardian and the legal representative should be present during all interviews."¹⁰⁰

Vulnerability identification, guardianship, age assessment and benefit of the doubt

The Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers, in their joint General Comments Nos. 3/22 and 4/23, have recognized that children are in vulnerable situations in the migration context. The Committees make clear that migrant children should be "treated first and foremost as children" and should be regarded as "individual rights holders", unaffected by their parents' or guardians' migration status. In the context of international migration, children may be in a situation of double vulnerability as children and as children affected by migration.¹⁰¹ As mentioned above, the Committees have stressed that it is important to identify children as soon as possible and as a key procedural safeguard to appoint a competent guardian as quickly as possible to ensure respect for the best interests of an unaccompanied or separated child.¹⁰² In order to secure proper representation of an unaccompanied or separated child's best interests, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified. The guardian should be consulted and informed regarding all actions taken in relation to the child.¹⁰³ In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.¹⁰⁴ Children should also be offered the possibility to be provided with an interpreter to allow them to express themselves fully in a language they understand and are able to communicate in and receive support from someone familiar with their ethnic, religious and cultural background.¹⁰⁵ Access to guardianship is also critical to ensure children's access to an effective remedy.¹⁰⁶

Similarly, the ECtHR has established that where children are also seeking asylum they are in a situation of enhanced and extreme vulnerability.¹⁰⁷ Respect for this enhanced situation of vulnerability of child asylum seekers,¹⁰⁸ *qua* child and *qua* asylum seeker, must be a primary consideration, taking precedence over their irregular migration status.¹⁰⁹

Given the definition of a child under Article 1 of the CRC and the entitlement of children to special care and protection, including specific safeguards during asylum procedures and adequate reception conditions suitable for their specific needs, it is important to ensure that individuals who are under 18 are protected as children. Unaccompanied non-national children wrongly treated as adults risk being subject to treatment contrary to their special status and best interests, resulting in a potential violation of the CRC and Articles 3 and 8 ECHR.

By virtue of the principle of the benefit of the doubt on a child's minor age, the individual should be treated as a child unless and until otherwise proven. Age assessment for the purpose of determining an individual's procedural and substantive rights should only be carried out when there is a substantiated doubt as to whether or not an individual is a child and only after the principle of the benefit of the doubt has been applied. Where the individual circumstances of a particular case require an age assessment, a holistic, safe and dignified procedure should be carried out by qualified experts with due respect to material and procedural safeguards under the CRC and ECHR.

In the context of migration, such assessment must be carried out in a positive, human and expeditious manner, in order to comply with article 10 of the CRC. The consent of the child to an age assessment procedure is required. Age assessment should be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity.¹¹⁰

Moreover, there must be an opportunity to effectively challenge an age assessment decision through judicial review. Children should be provided with legal and procedural information, including on how a decision can be challenged. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands.¹¹¹

Under the CRC, States Parties are required to undertake effective measures towards the realization of the rights of children within their jurisdiction, including the obligation under its article 19 to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence, with special attention to the most disadvantaged groups. This

¹⁰⁰ CRC, GC No. 6, *op. cit.*, paras. 71 and 72.

¹⁰¹ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 3.

¹⁰² CRC, GC No. 6, *op. cit.*, para. 21.

¹⁰³ CRC, GC No. 6, *op. cit.*, para. 33.

¹⁰⁴ CRC, GC No. 6, *op. cit.*, para. 36.

¹⁰⁵ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 36.

¹⁰⁶ CMW and CRC, Joint GC No. 4 and No. 23, *op. cit.*, paras. 15 and 16.

¹⁰⁷ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, Application No. 13178/03, Judgement of 12 October 2006, para. 55; *Popov v. France*, ECtHR, Application Nos. 39472/07 and 39474/07, Judgement of 19 April 2012, para. 91; *Tarakhel v. Switzerland*, ECtHR [GC], Application No. 29217/12, Judgement of 4 November 2014, para. 99.

¹⁰⁸ *M.S.S. v. Belgium and Greece [GC]*, ECtHR, *op. cit.*, para. 232.

¹⁰⁹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, *op. cit.*, para. 55.

¹¹⁰ CRC, GC No. 6, *op. cit.*, para. 31(i). Medical methods should be avoided due to their low evidential value, intrusiveness and a risk of a disproportionate interference in the child's private life that may lead to a violation of Article 8 ECHR.

¹¹¹ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 4.

Committee has previously stressed that implementation of article 19 is an immediate and unqualified obligation of States parties.¹¹²

Under the European Social Charter, children are individual rights holders and are afforded specific rights to take account of their vulnerability,¹¹³ and States have the obligation to take all appropriate measures to respect their right to social, legal and economic protection. The European Committee of Social Rights has reiterated that a child's "unlawful" migration status does not excuse States of their obligation to care for children living within its territory and to protect them from negligence, violence or exploitation.¹¹⁴ The Committee has held that children, regardless of their residence status, shall not be denied basic care¹¹⁵ and that States must provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction.¹¹⁶

The interveners submit that in order to comply with the best interest of the child principle (article 3 CRC and article 24 CFREU), children who are subject to the authority or effective control of a State, including on or at its land border, must have access to procedures (Article 22) that respect their fundamental rights, including the right to be heard (article 12 CRC). These procedures should guarantee access to child-friendly information regarding all relevant procedures involving children, the appointment of guardian and the provision of free legal assistance before the procedures affecting a child take place.

Age assessment procedures must only be ordered where truly necessary—if following the application of the principle of benefit of doubt, a serious doubt remains regarding the child's age. They should comply with a number of guarantees to ensure respect for the fundamental rights of children under international and EU law and should be conducted in a scientific, safe, child and gender-sensitive manner, avoiding any risk of violation of the physical integrity of the child.

4. The prohibition of collective expulsions and procedural guarantees (CRC articles 3.1, 20 and 22)

Collective expulsion of non-nationals is prohibited in absolute terms under general international law, including by human rights treaties and recognized by the different regional instruments and frameworks for human rights protection.¹¹⁷ This prohibition has assumed the status of customary international law¹¹⁸ and, therefore, is binding on all States, regardless of whether they are party to a treaty expressing such prohibition. It entails both obligations requiring compliance with a number of procedural safeguards.¹¹⁹

Similarly, this Committee has recalled that collective expulsion is forbidden and that States are required to examine and decide individually on each case that could eventually become an expulsion, ensuring the effective fulfillment of all due process guarantees and the right to access to justice. In addition, this Committee has identified States' specific obligation to adopt all measures necessary in order to prevent collective expulsions of migrant children and families.¹²⁰ Subjecting a child to a collective expulsion violates articles 3.1, articles 20 and 22 of the Convention. Each State Party must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.¹²¹

Article 2 CRC prohibits discrimination, "[i]n particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant."¹²² This Committee previously explained that this calls for differentiation on the basis of different protection needs such as those deriving from age and/or gender. The Committee has stressed that in relation to policing or other measures concerning unaccompanied or separated children relating to public order, these should entail individual rather than collective assessments and that "[i]n order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis."¹²³

General Comment No. 6 in its para 27 stressed that "[S]tates shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed."

¹¹² CRC, General Comment No. 13, The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, para. 65.

¹¹³ *Defence for Children International (DCI) v. the Netherlands*, European Committee of Social Rights, Complaint No. 47/2008, para. 25; and *Defence for Children International (DCI) v. Belgium*, European Committee of Social Rights, Collective Complaint No. 69/2011, para. 37.

¹¹⁴ *Defence for Children International (DCI) v. Belgium*, *op. cit.*, paras. 37 and 82.

¹¹⁵ *Defence for Children International (DCI) v. the Netherlands*, *op. cit.*, para. 44.

¹¹⁶ *Ibid.*, para. 64.

¹¹⁷ Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 13(d).

¹¹⁸ The ILC Special Rapporteur on the expulsion of aliens held that the prohibition of collective expulsion assumed the status of a general principle of international law "recognised by civilised nations". See UN General Assembly, *Third report on the expulsion of aliens by Maurice Kamto, Special Rapporteur*, 19 April 2007, A/CN.4/581, para. 115.

¹¹⁹ Treaty prohibitions on collective expulsions are contained Article 12.5 of the African Charter, Article 22.9 ACHR, Article 26.2 of the Arab Charter on Human Rights, Article 22.1 ICRMW and in Article 4 of Protocol 4 to the ECHR.

¹²⁰ CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 47.

¹²¹ CRC, GC No. 14, *op. cit.*, para. 13.

¹²² CRC, GC No. 6, *op. cit.*, para. 18.

¹²³ *Ibid.*

This Committee further stressed that: “[T]he assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.”¹²⁴

In its General Comment No 20, this Committee stressed that article 22 of the Convention recognizes that refugee and asylum-seeking children require special measures if they are to enjoy their rights and benefit from the additional safeguards given to them through the international refugee protection regime. Those adolescents should not be subjected to expedited removal procedures, but rather be considered for entry into the territory and should not be returned or refused entry before a determination of their best interests has been made and a need for international protection has been established. In line with the obligation under article 2 to respect and ensure the rights of every child within their jurisdiction, irrespective of status, States should introduce age and gender-sensitive legislation governing both unaccompanied and separated refugee and asylum-seeking adolescents, as well as migrants, underpinned by the best interests principle. In so doing, they should prioritize the assessment of protection needs over the determination of immigration status, while prohibiting immigration-related detention and taking account of to the recommendations in general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, addressing the particular vulnerability of those adolescents.¹²⁵

ICCPR, CAT, ICRMW, UN Special Rapporteur

Article 13 of the ICCPR provides that: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” Although the ICCPR does not expressly address collective expulsions, the Human Rights Committee has been clear that “laws or decisions providing for collective or mass expulsions” would entail a violation of Article 13 ICCPR.¹²⁶

Article 2.3 ICCPR requires that as component of effective protection of Covenant rights, States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children.¹²⁷ States must have in place and guarantee access to an effective remedy. To be effective, a remedy must offer independent and rigorous scrutiny before the competent authorities in the domestic procedures before the collective expulsion took place.¹²⁸

The Committee against Torture has underscored the close connection between *non-refoulement* and collective expulsion. It has held that collective deportations without an objective examination of the individual cases amount to a violation of the principle of *non-refoulement* enshrined in Article 3 of the Convention against Torture (CAT). This includes practices such as “fast-track” screenings carried out by non-specialist border officials at the point of interception on land or at sea and without the presence of legal counsel or the possibility of an effective appeal.¹²⁹ In its *General Comment No. 4*, the CAT reiterated the need for administrative, judicial and other preventive measures against possible violations of the principle of *non-refoulement* and the prohibition of collective expulsions.¹³⁰

In the same vein, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in its Article 22.1 explicitly prohibits collective expulsion and requires that each case of expulsion be examined and decided individually. The Committee on Migrant Workers stated that “[S]tates parties have an obligation to ensure that their expulsion procedures provide sufficient guarantees to ensure that the personal circumstances of each migrant worker are genuinely and individually taken into account. This obligation extends to all spaces over which a State party exercises effective control (...).”¹³¹

As the UN Special Rapporteur on torture has pointed out, “[b]oth “pushbacks” and border closures amount to collective measures that are designed, or of a nature, to deprive migrants of their right to seek international protection and to have their case assessed

¹²⁴ CRC, GC No. 6, *op. cit.*, para. 27.

¹²⁵ CRC, General Comment No. 20 on the implementation of the rights of the child during adolescence, UN Doc. CRC/C/GC/20, para. 77. See also CRC, GC No. 6, *op. cit.*

¹²⁶ HRC, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986. See also, Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005. Guideline 3. Prohibition of collective expulsion. A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.

¹²⁷ HRC, GC 31, *op. cit.*, para. 15.

¹²⁸ *De Souza Ribeiro v. France*, ECtHR, Application No. 22689/07, Judgment of 13 December 2012, para. 82; *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 206; *Mohammed v. Austria*, ECtHR, Application No. 2283/12, Judgment of 6 June 2013, para. 80.

¹²⁹ CAT, GC No. 4, *op. cit.* paras. 13 and 14; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/37/50, 26 February 2018, paras. 40 and 54: “Both “pushbacks” and border closures amount to collective measures that are designed, or of a nature, to deprive migrants of their right to seek international protection and to have their case assessed in an individualized due process proceeding and, therefore, are incompatible with the prohibition of refoulement...”

¹³⁰ CAT, GC No. 4, *op. cit.* paras. 14, 18 and 49. In particular, the following safeguards were reiterated (a) an individual and not collective examination of each case with information on why a procedure is being applied to the applicant the consequences of said procedure as well as information on the rights legally available to appeal such decision; (b) access to a lawyer, including free legal aid when necessary; (c) interpretation and translation of the relevant information into a language that he/she understands; (e) the right of appeal by the person concerned against a deportation order to an independent administrative and/or judicial body within a reasonable period of time from the notification of that order and with the suspensive effect of its enforcement; (f) an effective training of all officials who deal with persons [...].

¹³¹ CMW, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, UN Doc. /CMW/C/GC/2, para. 51.

in an individualized due process proceeding and, therefore, are incompatible with the prohibition of *refoulement*.”¹³²

European Convention on Human Rights

Article 4 of Protocol 4 to the European Convention on Human Rights expressly prohibits collective expulsions. The ECtHR understood Article 4 of Protocol 4 as covering “any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”,¹³³ indirectly maintaining how procedural shortcomings are decisive to finding the measure to be of a collective nature.

In *Čonka v. Belgium*,¹³⁴ the Court established a violation of the prohibition of collective expulsions due to the fact that “at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account (emphasis added).”

In respect of whether there had been a collective expulsion in *Hirsi Jamaa v. Italy* regarding the operation of transferring applicants to Libya, the Court held that “(...) the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers. That is sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination (emphasis added).”¹³⁵

Accordingly, in a situation concerning the transfer of persons who were within the jurisdiction of a State Party to the ECHR, in circumstances where that jurisdiction was exercised extraterritorially, the Court maintained that the lack of or inadequacy of procedural guarantees and of an individualized assessment – providing for the identification of the individuals concerned and affording to them an opportunity to meaningfully raise any objections – constitute violations of Article 4 of Protocol No. 4.

The Court has made it clear that the key factor to determine the collective dimension of expulsions does not lie in the number of non-nationals expelled *per se* or in the existence of individualized decisions only, but in the effectiveness of the guarantees provided and in the material circumstances and context surrounding the expulsion.

In this context, the ECtHR has considered that the lack of access to information in a language a non-national understands is a major obstacle in making the access to relevant procedures effective and reiterated the importance of guaranteeing anyone subject to an expulsion measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.¹³⁶

In the same vein as with the principle of *non-refoulement*, the absolute nature of the prohibition of collective expulsions entails that any difficulty State Parties may experience, for example, due to enhanced migration flows, can never justify their recourse to practices incompatible with the Convention and its Protocols.¹³⁷

The ECtHR also stressed that States must have effective remedies in place and ensure that individuals can access them. A remedy must be effective in practice as well as in law, rather than theoretical and illusory and cannot be unjustifiably hindered by the acts or omissions of the authorities.¹³⁸ The Court’s jurisprudence highlighted a number of obstacles that may render the remedy against conduct or omissions prohibited under the Convention ineffective, *inter alia*, removing the individual before he or she had the practical possibility of accessing the remedy,¹³⁹ excessively short time limits in law for submitting the claim or an appeal,¹⁴⁰ insufficient information on how to gain effective access to the relevant procedures and remedies,¹⁴¹ obstacles in physical access to and/or communication with the responsible authority,¹⁴² lack of (free) legal assistance and access to a lawyer,¹⁴³ and lack of interpretation.¹⁴⁴

EU law

EU law equally prohibits collective expulsions under Article 19.1 Charter on Fundamental Rights of the EU. In the context of the EU asylum acquis, the provision attracts the EU law right to effective legal protection, which is buttressed by the EU right to be heard. The EU law right to an effective remedy under Article 47 CFR includes a right of access to such a remedy. Article 47 encompasses the general attributes of an effective remedy under international law, including that such remedies be prompt,

¹³² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Human Rights Council, UN Doc. A/HRC/37/50, para. 54. Available at: http://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf.

¹³³ *Andric v Sweden*, ECtHR, Application No. 45917/99, Judgment of 23 February 1999, para. 1.

¹³⁴ *Čonka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 63.

¹³⁵ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 185.

¹³⁶ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 204; and *Sharifi and Others v. Italy and Greece*, ECtHR, *op. cit.*, para. 217.

¹³⁷ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 179.

¹³⁸ *Čonka v. Belgium*, ECtHR, *op. cit.*, paras. 46 and 75.

¹³⁹ *Shamayev and Others v. Georgia and Russia*, ECtHR, Application No. 36378/02, Judgment of 12 April 2005, para. 460; and *Labsi v. Slovakia*, ECtHR, Application No. 33809/08, Judgment of 15 May 2012, para. 139.

¹⁴⁰ See *Mutatis mutandis: I.M. v. France*, ECtHR, Application No. 9152/09, Judgment of 14 December 2010, para. 144; and *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, para. 306.

¹⁴¹ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 204.

¹⁴² See *Mutatis mutandis: Gebremedhin v. France*, ECtHR, Application No. 25389/05, Judgment of 26 April 2007, para. 54; *I.M. v. France*, ECtHR, *op. cit.*, para. 130; *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, paras. 301-313.

¹⁴³ See *Mutatis mutandis: M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, para. 319.

¹⁴⁴ *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 202.

accessible, and available before an independent authority and leading to cessation and reparation.¹⁴⁵ The accessibility element is made explicit in Article 47, which requires that free legal aid be provided when necessary to ensure effective access to justice. Furthermore, the CJEU has considered that Article 47 comprises the right of access to a court or tribunal.¹⁴⁶

Other regional human rights protection systems

Collective expulsion, defined as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual of the group, is expressly prohibited under the American Convention on Human Rights.¹⁴⁷ The IACHR has emphasized that the fundamental factor to determine the “collective” nature of an expulsion is not the number of migrants included in the expulsion order, but the lack of prior objective analysis of the individual circumstances of each person¹⁴⁸ that leads to arbitrariness.¹⁴⁹

The Inter-American Commission on Human Rights (the Commission) has stated that collective expulsion violates a number of human rights of the persons subjected to it. These include necessarily the right to residence and freedom of movement (Article VIII of the American Declaration), but expulsion may also place at risk the rights to: life, liberty, and personal security (Article I); seek and receive asylum and the principle of *non-refoulement* (Article XXVII); due process and fair trial (Articles XXVI and XXVIII); family life and protection of the family unit (Articles V and VI); private life (Article V); and the right of the child to special protection, care, and aid (Article VII).

In a 2016 report on refugee and migrant children and families in the United States, the Commission affirmed that the prohibition on collective expulsions applies to any measure which has the effect of preventing migrants from reaching the borders of States or to push them to another State. This would include interdiction measures taken by a State, even those carried out extraterritorially, to prevent persons from arriving at its borders when this means they are prevented from presenting a claim for asylum or *non-refoulement*.¹⁵⁰

The Inter-American Court of Human Rights has indicated that to comply with the prohibition of collective expulsions, the individualized assessment of the personal circumstances prior to proceedings that may result in the expulsion or deportation of a foreigner, requires, at least, the identification of the person and the clarification of the particular circumstances of their migratory situation. Such proceedings must not discriminate for reasons of nationality, color, race, sex, language, religion, political opinion, social origin or any other condition. In addition, basic procedural guarantees must be observed:¹⁵¹ (a) to be informed expressly and formally of the charges against them and the reasons for the expulsion or deportation; (b) if an unfavourable decision is taken, the right to request a review of their case before the competent authority and to appear before this authority in that regard, and (c) to receive formal legal notice of the eventual expulsion decision, which must be duly reasoned pursuant to the law.

That Court highlighted that, in expulsion proceedings involving children, the State must additionally observe the guarantees aiming to protect the best interests of the child, in the understanding that these interests are directly related to the child’s right to the protection of the family and, in particular, to the enjoyment of family life, maintaining family unity insofar as possible.¹⁵² Hence, any ruling of an administrative or judicial organ must take into consideration the particular circumstances of the specific case, thus ensuring an individual decision;¹⁵³ it must seek to achieve a legitimate purpose pursuant to the Convention; and it must be suitable, necessary and proportionate.¹⁵⁴

Similarly, under the African Charter on Human and Peoples’ Rights, “mass expulsions” are prohibited and cover expulsions “aimed at national, racial, ethnic or religious groups”.¹⁵⁵ The fact that those expelled are not part of a specific, homogenous group does not negate the collective nature of expulsions.¹⁵⁶ It also imposes the same obligations regarding due process as those arising from the prohibition of *refoulement*.¹⁵⁷

The interveners submit that the prohibition of and the right to protection from collective expulsions would be theoretical and illusory if it did not entail a thorough and rigorous assessment, including the examination of the particular circumstances of those forming part of the group of non-nationals concerned by the measure. This obligation also entails their effective identification and registration as well as information about, and access to applicable protection procedures and remedies, where relevant. These safeguards apply whenever the individuals concerned fall within State Parties’ jurisdiction, including in circumstances when jurisdiction is exercised extraterritorially and irrespective of their migration status.

¹⁴⁵ International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners’ Guide*, 2006, pp. 46-49.

¹⁴⁶ *Judgment of 6 November 2012*, CJEU, *Europese Gemeenschap v. Otis NV* Case C-199/11, para. 49; and *Judgment of 22 December 2010*, ECJ, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Case C-279/09, para. 60.

¹⁴⁷ Organization of American States (OAS), *American Convention on Human Rights*, *op. cit.*, article 22(9).

¹⁴⁸ *Judgment of 24 October 2012*, IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, paras. 171 and 172.

¹⁴⁹ *Ibid.*, para. 171.

¹⁵⁰ IACHR, *Report on Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, 24 July 2015, para. 105.

¹⁵¹ *Judgment of 24 October 2012*, IACtHR, *op. cit.*, para. 175; and *Judgment of 25 November 2013*, IACtHR, *op. cit.*, para. 133.

¹⁵² *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14, *op. cit.*, para. 275.

¹⁵³ *Ibid.*, para. 281.

¹⁵⁴ *Ibid.*, para. 153.

¹⁵⁵ Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights*, *op. cit.*, article 12(5).

¹⁵⁶ *Institute for Human Rights and Development in Africa v. Angola*, ACHR, *op. cit.*, para. 69.

¹⁵⁷ *Ibid.*, para. 64.

When children are involved, the prohibition of collective expulsion additionally requires compliance with child-specific rights and corresponding tailored procedural safeguards. Collective expulsion entails a violation of the primary obligation to assess the best interest of the child in each individual case, which must be carried out prior to any decision to return or refuse entry or any other decision affecting children.

Children who are subject to the authority or effective control of a state on or at its land border, must be afforded the opportunity to meaningfully raise objections to their transfer, as the principle of *non-refoulement* and the prohibition on collective expulsions require.