



# PROFESSOR MARY CROCK

## Refugee Law in Australia: The Protection of Migrant Children



# Refugee Law in Australia

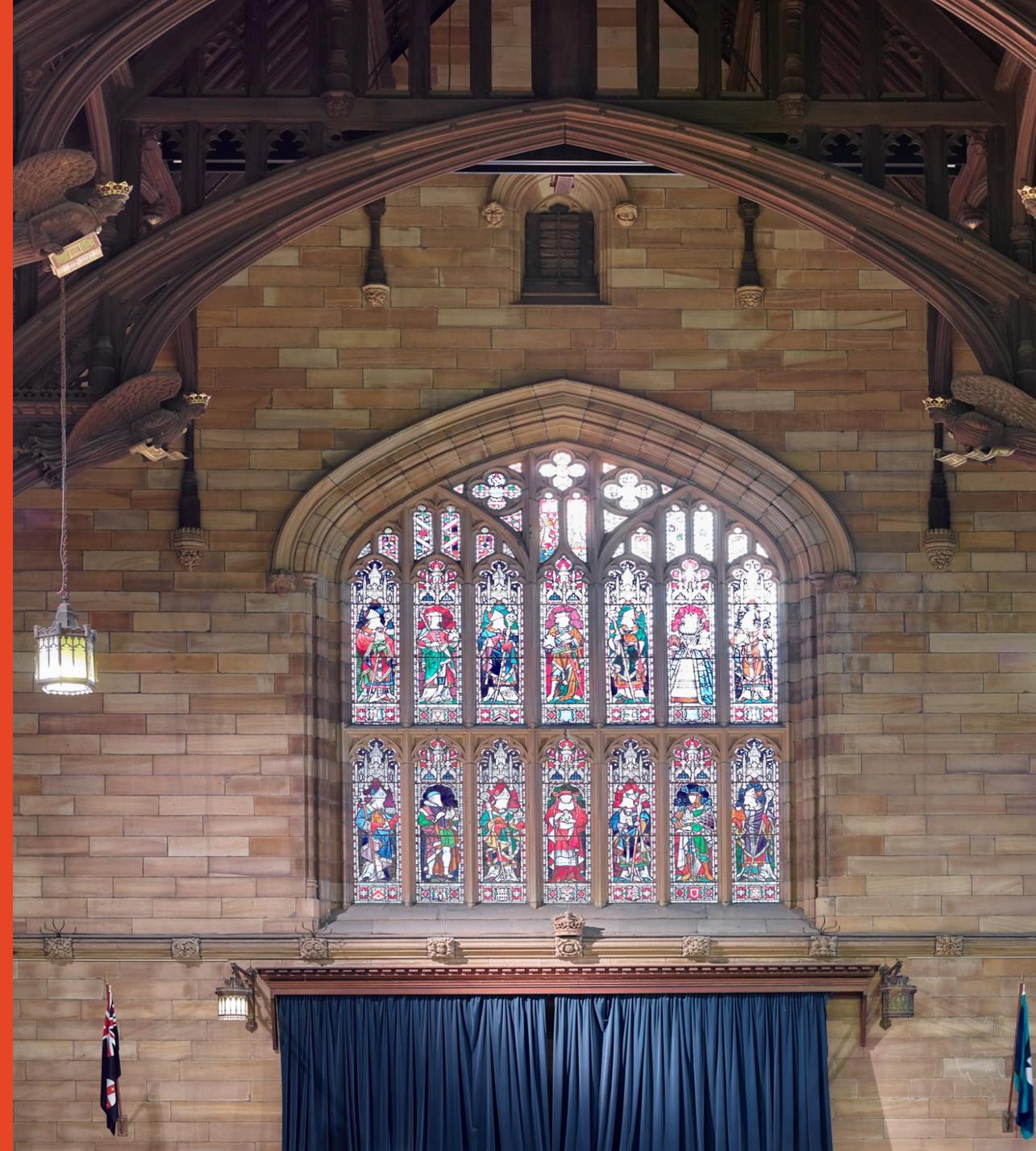
## The Protection of Migrant Children

Professor Mary Crock

Sydney Law School



THE UNIVERSITY OF  
**SYDNEY**



Edited by  
Mary Crock  
Lenni B. Benson

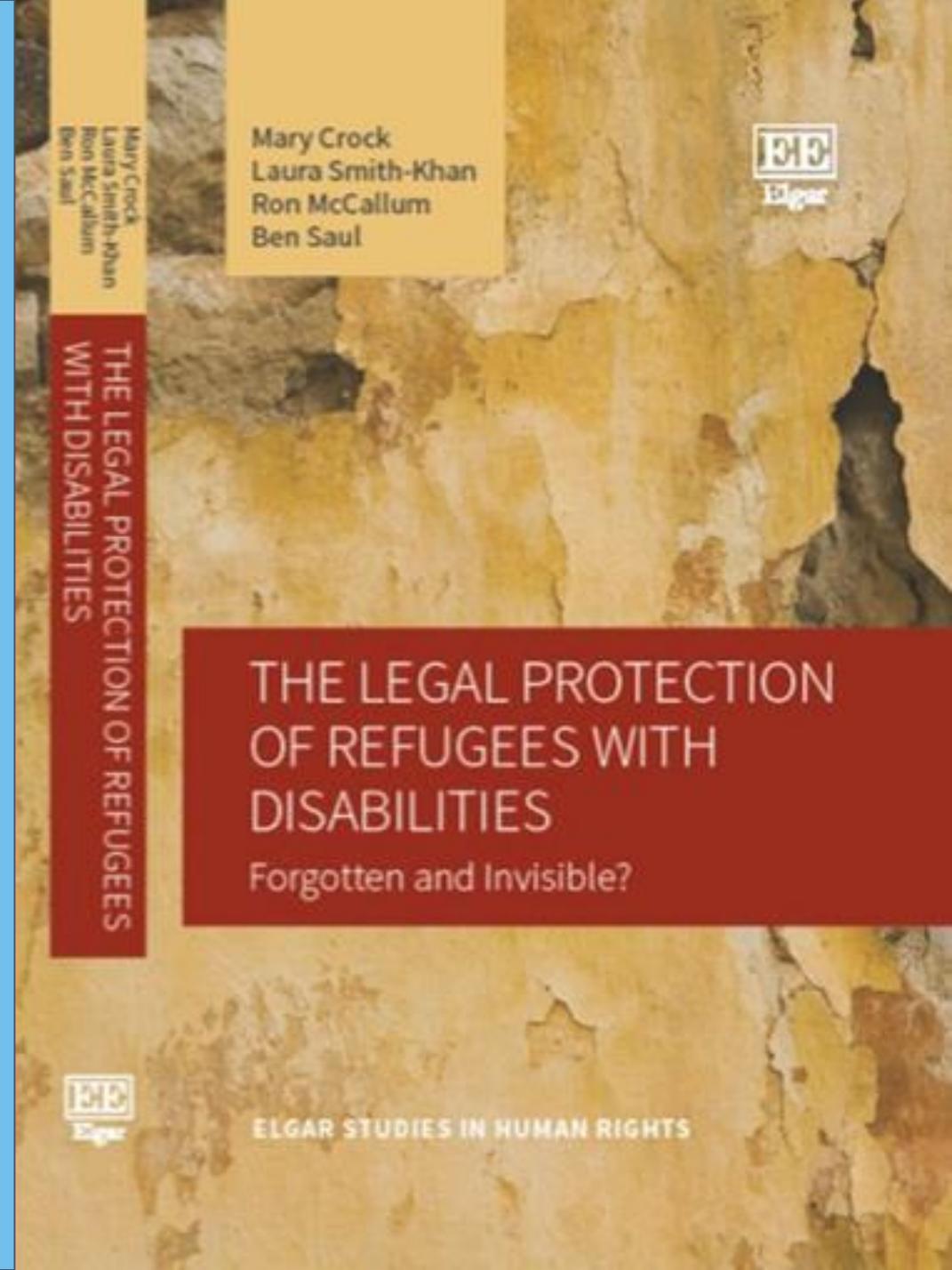


# PROTECTING MIGRANT CHILDREN

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THE LEGAL PROTECTION OF REFUGEES  
WITH DISABILITIES

THE LEGAL PROTECTION  
OF REFUGEES WITH  
DISABILITIES  
Forgotten and Invisible?



ELGAR STUDIES IN HUMAN RIGHTS

# Children on the Move

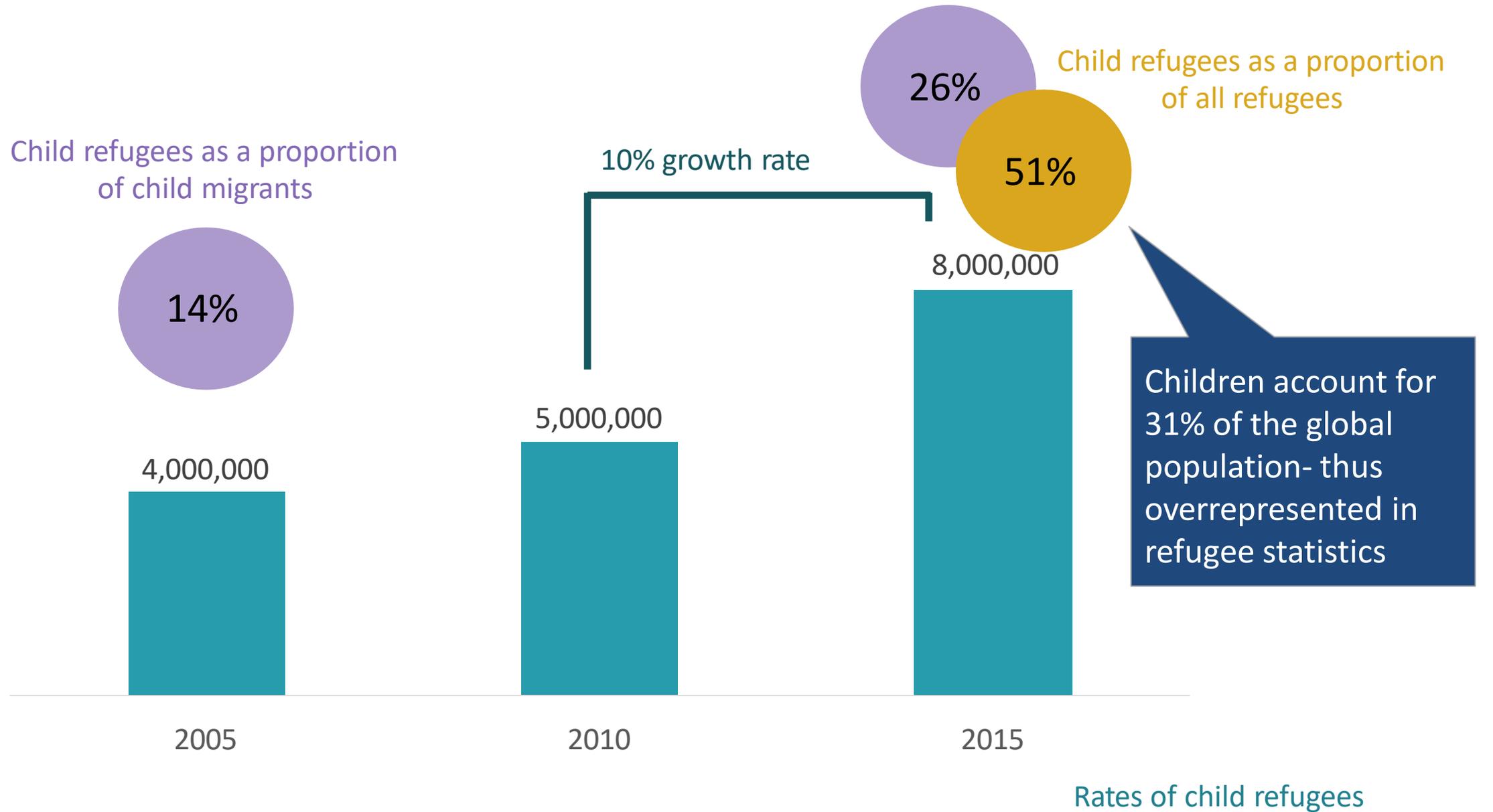
A Global Phenomenon



# Statistics on Child Migrants by Region

<https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children>





## CHILDREN AS FORCED MIRANTS > 1. RATES OF CHILD REFUGEES

The number of child refugees doubled between 2005-2015, with a particular increase since 2011.



This rise coincides with the start of the Syrian crisis.

Half of all child refugees came from just two countries in 2015: Syria and Afghanistan.

If Syrian children are excluded from the data, the proportion of the refugee population that is accounted for by children drops to 49% (from 51%).

The increase also reflects new/ renewed conflict in Burundi, Iraq, Libya, Niger, Nigeria, Central African Republic, DRC, South Sudan and Yemen.



Proportion of refugees accounted for by children, by region

14% of all arrivals on the Central Mediterranean route in 2016 were UASC, accounting for 88% of all child arrivals. Mainly Eritreans and Somalis

**WESTERN MEDITERRANEAN ROUTE**

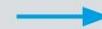
- 2012:** 3,558 arrivals
- 2013:** 2,609 arrivals
- 2014:** 4,755 arrivals
- 2015:** 3,592 arrivals
- 2016:** 14,558 arrivals
- 2017:** 28,707 arrivals
- 2018:** 65,383 arrivals

**CENTRAL MEDITERRANEAN ROUTE**

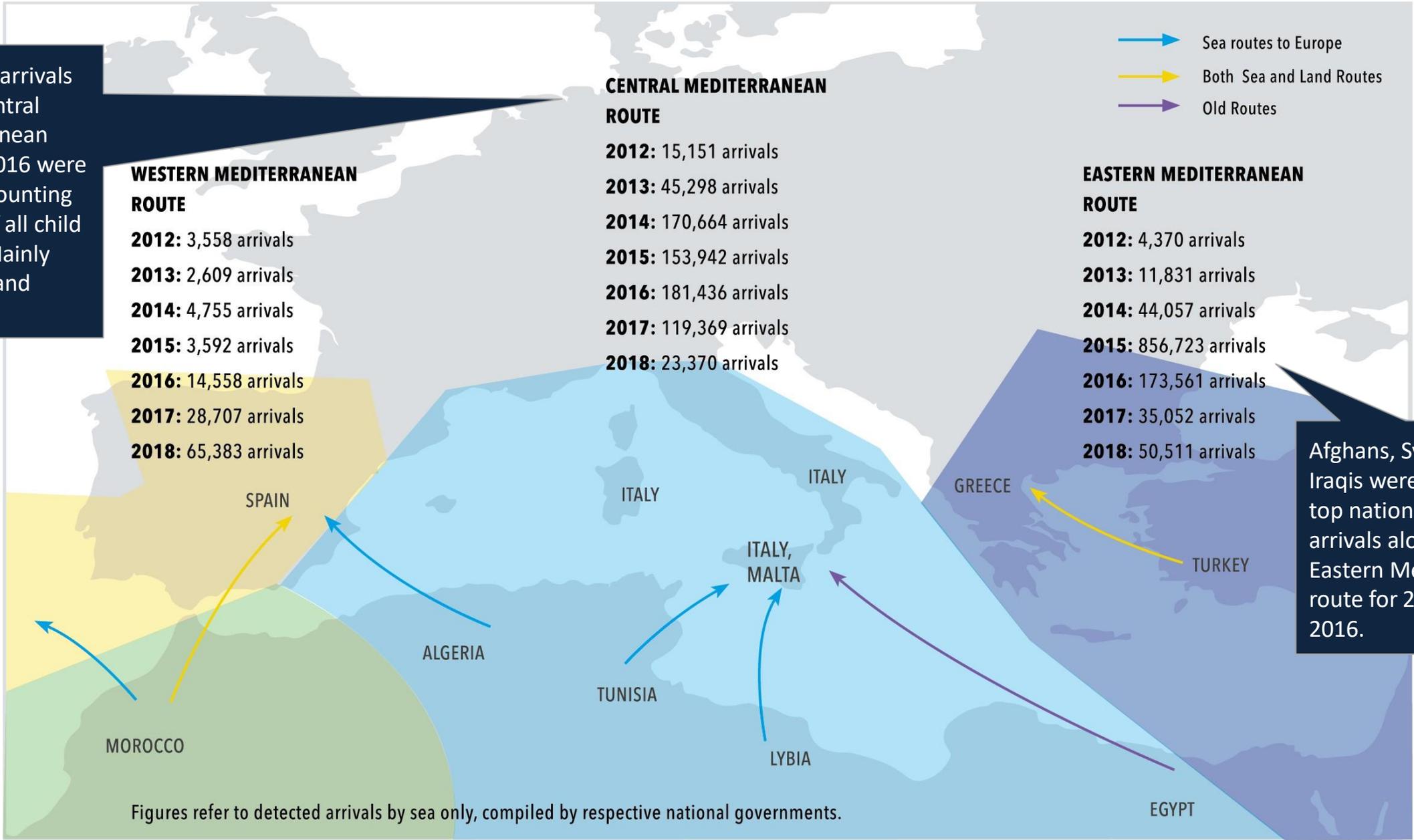
- 2012:** 15,151 arrivals
- 2013:** 45,298 arrivals
- 2014:** 170,664 arrivals
- 2015:** 153,942 arrivals
- 2016:** 181,436 arrivals
- 2017:** 119,369 arrivals
- 2018:** 23,370 arrivals

**EASTERN MEDITERRANEAN ROUTE**

- 2012:** 4,370 arrivals
- 2013:** 11,831 arrivals
- 2014:** 44,057 arrivals
- 2015:** 856,723 arrivals
- 2016:** 173,561 arrivals
- 2017:** 35,052 arrivals
- 2018:** 50,511 arrivals

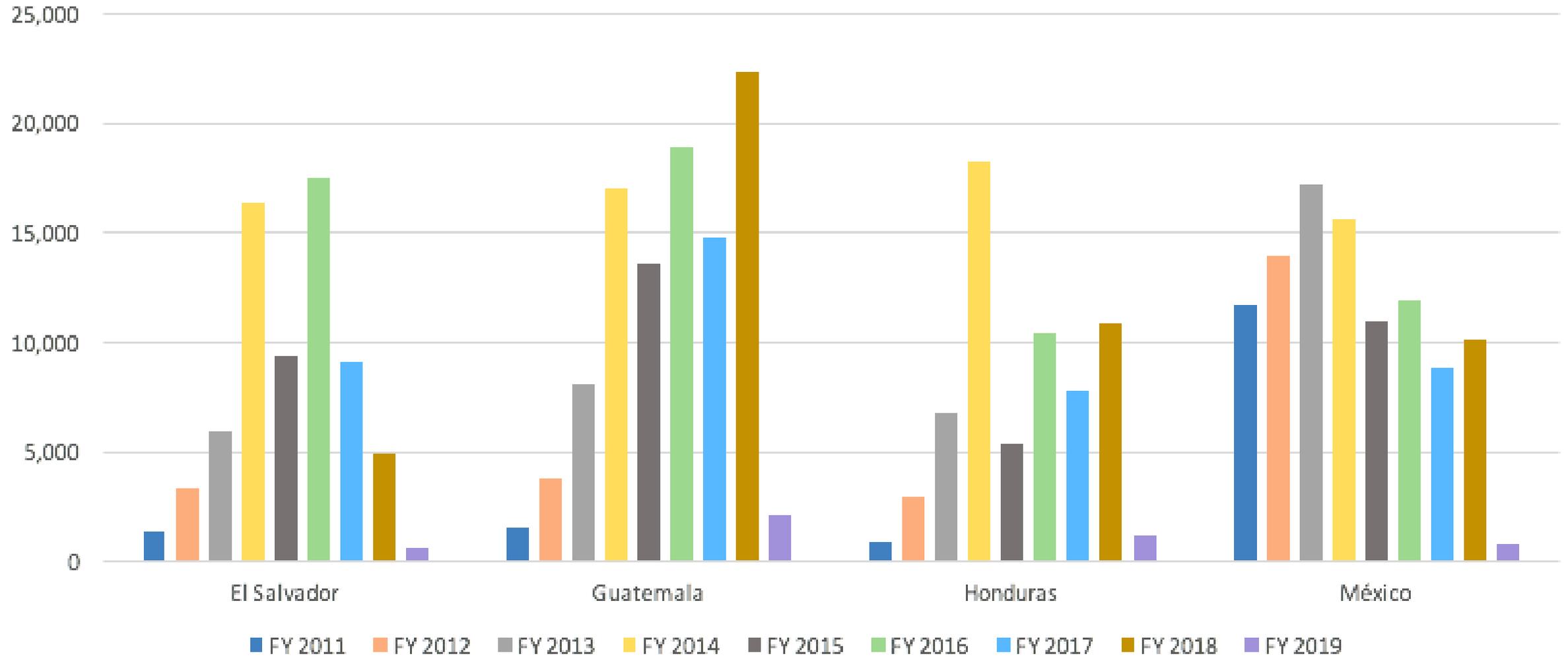
-  Sea routes to Europe
-  Both Sea and Land Routes
-  Old Routes

Afghans, Syrians and Iraqis were the three top nationalities of arrivals along the Eastern Mediterranean route for 2015 and 2016.



Figures refer to detected arrivals by sea only, compiled by respective national governments.

# Unaccompanied Children by the Numbers: apprehensions at the U.S.-Mexico border, October 1, 2011 - November 9, 2018



Children do not always cross international borders to seek safety; they also move to different locations within their own country

The challenges children face are the same, regardless off whether they cross a border.

Most refugees who cross international borders attempt an internal migration first and only leave when they cannot find safety within their country.

In 2015, 41 million individuals were recorded as 'internally displaced' by conflict and violence, up from 28 million in 2010.

Of the 41 million conflict-related IDPs in 2015, UNICEF estimates that 17 million were children (41%) -- could be higher

Children are prone to exploitation and abuse on migratory journeys, particularly UASC.

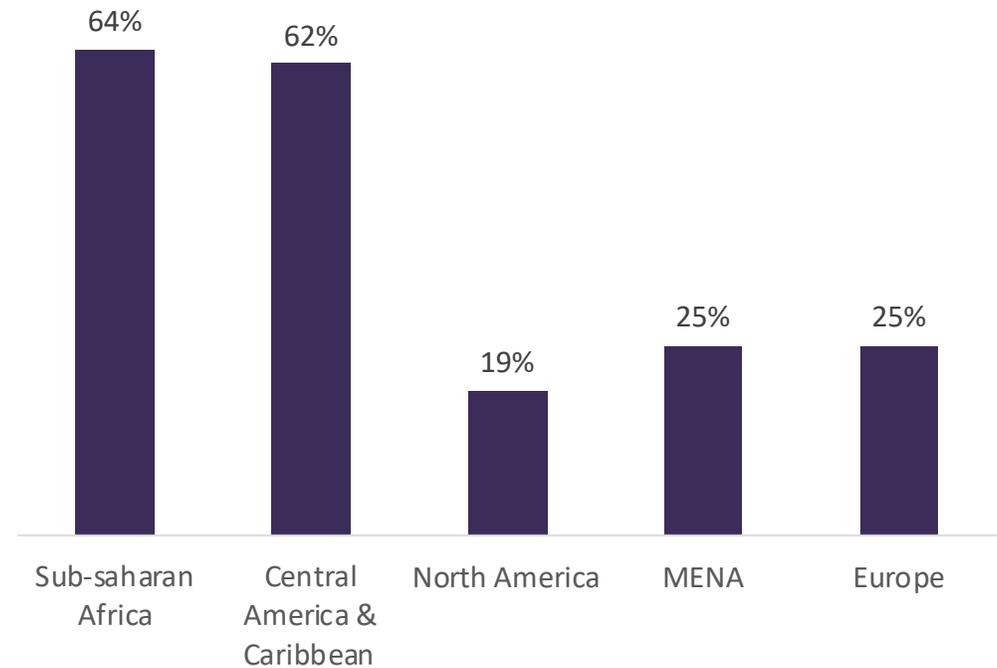


Research suggests that risks are higher along routes where children move with different smugglers for different legs of the journey and pay step-by step.

UNODC 2016 TIP Report: children were second most commonly detected VOTs after women, representing 25-30% of all victims globally.

Conflict can drive trafficking: refugees become particularly vulnerable to traffickers who leverage their desperation to deceive them into exploitation.

Proportion of VOTs that were children, per region



# International Law Relevant to Children on the Move



# *The International Human Right to Health*

- The International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines in Article 12:

“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

- This sets a baseline for minimum acceptable standards of living in the area of health which flows inevitably to other human rights essential to survival including:
  - The rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement

# Children: Convention on the Rights of the Child (CRC)

- CRC most subscribed of all human rights conventions
- The CRC now has three optional protocols covering:
  - Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2002);
  - Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002);
  - Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2014).
- Supplemented by the traditional human rights treaties + the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1995).

# What is a 'Capabilities' approach to human rights?

- Convention on the Rights of the Child:
  - Art 12: Recognition of child's right to participate in all matters of concern to them
- Convention on the Rights of Persons with Disabilities (CRPD):
  - Art 1: Disability = impairment + context/ failure or inability to accommodate so as to allow PWDs to participate fully in society
  - Art 11: PWDs have rights in ALL contexts, including humanitarian emergencies and natural disaster

# CRC

- No derogation clauses for emergencies
- Article 3: Best interests of the Child
- Article 7: Child's right to an identity and nationality in the form of birth registration
- Article 19: Obliges states parties to protect children against all forms of violence, abuse and neglect, negligent treatment, maltreatment or exploitation, including sexual abuse.
- Article 22: Protection of refugee children
- Article 38: requires states parties 'to respect and to ensure respect' for IHL applicable in armed conflicts which are relevant to children. States parties must ensure 'protection and care of children who are affected by an armed conflict', and avoid using children as soldiers

# Best interests in context

- **1 At Point of entry**
  - a) **Access to Asylum**
  - b) Identification of vulnerability
  - c) Interviewing and representation
- **2 Placement and care during asylum process**
- **3 Durable solutions**
  - a) Refugee protection
  - b) Family reunion
  - c) Returns

# Gaps in protection

In Australia, as in many countries, migration status trumps protection; or

Deterrence trumps need for protection – i.e. in the name of protecting the *putative* child, the embodied child is harmed by:

- Establishment of offshore detention centres
- Use of prolonged detention on shore
- Forced separation of children from their families
- Denial of family reunification

# Convention the Rights of the Child

## Article 22

1. States Parties shall take 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 and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or nongovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

# Convention the Rights of the Child

## Article 37

### **States Parties shall ensure 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;
- b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

# Convention on the Rights of Persons with Disabilities (2006) (CRPD)

## **Article 1 – Purpose**

“...to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which *in interaction with various barriers* may hinder their full and effective participation in society on an equal basis with others”

# CRPD

- No derogation clause for emergencies
- Article 11 of the CRPD requires that States Parties to:

Take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

# Caring for migrant children

- What are the risk factors?
  - Detention
  - Lethal hopelessness
- What services?
- What expertise is out there?

# Taking up the fight

- Strategic litigation vs Public advocacy
  - What is most effective?
- Migrant Children in our lives
  - The importance of education
  - Awareness of how children are affected by immigration processes

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# Contributions from Lenni Benson (Safe Passage Project)

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# Shifting Landscape





Community-run learning centre  
KL, Malaysia













